

New Felony Defender Training: SENTENCING IN SUPERIOR COURT

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1. USE THE PROPER SENTENCING LAW

- a. **Structured Sentencing.** Applies to most crimes committed on or after October 1, 1994.
- b. **Old crimes.** Crimes are sentenced under the law in place on the offense date of the conviction being sentenced. Contact the School of Government if you ever need the superseded statutes applicable to an older crime.
 - i. *Fair Sentencing.* Crimes committed on or after July 1, 1981, and prior to Oct. 1, 1994.
 - ii. *Pre-Fair Sentencing.* Crimes committed before July 1, 1981.
- c. Some felonies are excluded from Structured Sentencing. Examples include first-degree murder, G.S. 15A-2000 through -2005; and drug trafficking, G.S. 90-95.

The sentencing grid was amended in 2009, effective for offenses committed on or after December 1, 2009. Be sure to use the proper grid.

2. THE BASIC STEPS FOR SENTENCING A FELONY CONVICTION UNDER STRUCTURED SENTENCING

- a. Determine the offense class of the conviction.
- b. Determine the offender's prior record level.
- c. Consider and weigh aggravating and mitigating factors; choose a sentencing range (Mitigated, Presumptive, or Aggravated)
- d. Select a minimum sentence (front of grid); determine the maximum (back of grid)
- e. Choose a sentence disposition (Active, Intermediate, or Community)
- f. Consider restitution.

3. PRIOR RECORD LEVEL

- a. Use AOC-CR-600, *Prior Record Level Worksheet*, to calculate defendant's record level. Use the proper version of the form (pre-/post-Dec. 1, 2009), based on the offense date of the crime being sentenced.
- b. General rules:
 - i. The State must prove prior convictions by a preponderance of the evidence
 - ii. Count only the most serious conviction from each calendar week of superior court, or session (generally, one day) of district court. 15A-1340.21(d).
 - iii. A defendant's prior record level is calculated at the time judgment is entered on the crime for which he or she is now being sentenced. G.S. 15A-1340.11(7).
 - iv. If a prior offense has been reclassified, use the offense class assigned to it now for prior record level determination purposes. G.S. 15A-1340.14(c).
 - v. Prior convictions count no matter how far back in time they occurred.
- c. When to count crimes on appeal:
 - i. District court convictions count when the defendant has not given notice of appeal and the time for appeal has expired.
 - ii. Superior court convictions count regardless of whether the conviction is on appeal to the appellate division. G.S. 15A-1340.11(7).

Avoid inadvertent stipulations to prior record. A failure by defense counsel to dispute portions of a worksheet to which it refers at sentencing may be deemed a stipulation to the entire worksheet. State v. Cromartie, 177 N.C. App. 73 (2006).

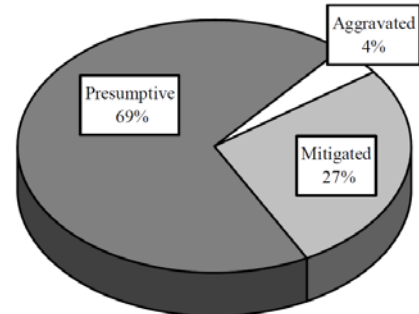
- d. The following COUNT for prior record determination purposes (G.S. 15A-1340.14(b)):
 - i. All felony convictions
 - ii. Class A1 and Class 1 nontraffic misdemeanors
 - iii. Convictions for DWI, commercial impaired driving, and misdemeanor death by vehicle.
 - iv. A prayer for judgment continued (PJC). *State v. Canellas*, 164 N.C. App. 775 (2004).
- e. The following DO NOT COUNT for prior record purposes:
 - i. Prior convictions for Class 2 and Class 3 misdemeanors
 - ii. Misdemeanor traffic offenses other than DWI, commercial DWI, and misd. death by vehicle
 - iii. Contempt. *State v. Reaves*, 142 N.C. App. 629 (2001).
 - iv. Probation revocations
 - v. Juvenile adjudications
 - vi. Infractions
 - vii. Prior convictions used to habitualize a defendant under the habitual felon law. G.S. 14-7.6.
 - 1. The State is free to use a defendant's least serious prior felonies in a habitual felon indictment, leaving more serious felonies available for prior record level purposes. *State v. Cates*, 154 N.C. App. 737, 739-40 (2002).
 - 2. When a previous felony conviction listed in a habitual felon indictment was consolidated with another conviction, the other conviction may count toward the defendant's prior record level. *State v. Truesdale*, 123 N.C. App. 639, 642 (1996).
 - viii. Prior DWIs, when sentencing a habitual DWI. *State v. Gentry*, 135 N.C. App. 107 (1999).
- f. Crimes from other jurisdictions:
 - i. Crimes from other jurisdictions count as convictions for prior record level purposes regardless of whether the offense would be a crime if it occurred in NC. G.S. 15A-1340.11(7).
 - ii. By default, felonies from other jurisdictions count as Class I felonies; misdemeanors are considered Class 3 misdemeanors (and thus do not count). G.S. 15A-1340.14(e).
 - iii. If the State or the defendant can make a preponderance-of-the-evidence showing that the out-of-state offense is substantially similar to a NC crime, the out-of-state crime may count for points equivalent to its NC counterpart.
 - 1. The court can base its determination on a comparison of the other state's criminal statutes to the criminal laws of North Carolina. *See State v. Rich*, 130 N.C. App. 113 (1998) (holding that photocopies of statutes from New York and New Jersey were sufficient proof that the defendant's crimes in those states were substantially similar to crimes in North Carolina)
 - 2. *But see State v. Cao*, 175 N.C. App. 434 (2006) (computerized printout of defendant's criminal history record from Texas, showing only the names of offenses committed there, was insufficient evidence of substantial similarity to North Carolina crimes)
 - iv. A defendant may validly stipulate to the bare fact that an out-of-state conviction exists, and may also stipulate that the crime is a felony or misdemeanor in the other state. *State v. Hinton*, 196 N.C. App. 750 (2009). Those stipulations alone are a sufficient basis for the State to treat an out-of-state felony at the default Class I level for prior record purposes. *Id.*; *State v. Bohler*, 681 S.E.2d 801 (2009).
 - v. A defendant may not, however, validly stipulate that an out-of-state felony is substantially similar to a more serious offense in North Carolina. Substantial similarity is a question of law that must be determined by the trial court, not by the jury and not by stipulation. *State v. Hanton*, 175 N.C. App. 250 (2006); *State v. Palmateer*, 179 N.C. App. 579 (2006).

If an out-of-state crime is substantially similar to multiple North Carolina offenses, the rule of lenity requires that the court assign record points corresponding to the less serious North Carolina offense. State v. Hanton, 175 N.C. App. 250 (2006).

- g. Prior record “bonus points”
 - i. One additional point may be added if all the elements of the present offense are included in any prior offense for which the offender was convicted. G.S. 15A-1340.14(b)(6).
 - 1. The point may apply whether regardless of whether the prior offense was used in determining prior record level.
 - 2. The existence of this point is a question of law to be determined by the court. The defendant may not validly stipulate to the existence of this factor. *State v. Prush*, 185 N.C. App. 472 (2007).
 - 3. A defendant qualifies for the additional point only when the most serious conviction in a consolidated judgment is included within the elements of a prior offense. *State v. Mack*, 188 N.C. App 365 (2008).
 - ii. One additional point may be added if the offense was committed while the offender was on probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape. G.S. 15A-1340.14(b)(7).
 - 1. The State need not allege in the indictment that intends to establish this point, but it must give 30 days’ notice of its intent. G.S. 15A-1340.16(a6).
 - 2. This factor must be found by the jury beyond a reasonable doubt or admitted to.

4. AGGRAVATING AND MITIGATING FACTORS

- a. Most felonies are sentenced in the presumptive range. The may, in its discretion, sentence in the aggravated range if it determines that aggravating factors outweigh mitigating factors, and may sentence in the mitigated range if mitigating factors outweigh aggravators. G.S. 15A-1340.16(b).
- b. The 25 statutory aggravating factors set out in G.S. 15A-1340.16(d) need not be included in an indictment or other charging instrument. Nonstatutory aggravating factors must, however, be set out in the charging document. G.S. 15A-1340.16(a4).
- a. The State must provide a defendant with written notice of the specific aggravating factors it intends to prove at least 30 days before trial or the entry of a plea. G.S. 15A-1340.16.
- b. Aggravating factors other than those based on prior convictions must be admitted to or proved to a jury beyond a reasonable doubt. G.S. 15A-1340.16; *Blakely v. Washington*, 542 U.S. 296 (2004).
 - i. By statute, the court may find the aggravating factors set out in G.S. 15A-1340.16(d)(12a) (that the defendant has been found in willful violation of the conditions of probation, parole, or post-release supervision in the past 10 years) and -1340.16(d)(18a) (that the defendant has previously been adjudicated delinquent for an offense that would be a Class A through E felony if committed by an adult).
 - ii. There is conflicting case law on whether the juvenile adjudications factor fits within the prior conviction exception to the *Blakely* rule. *Compare* *State v. Yarrell*, 172 N.C. App. 135 (2005) (holding that juvenile adjudications are not convictions and therefore must be presented to the jury and proved beyond a reasonable doubt to support an aggravating factor), *with* *State v. Boyce*, 175 N.C. App. 663 (2006) (referring to the defendant’s prior juvenile adjudication as a “prior conviction” and concluding that a finding by the trial court judge was sufficient to support the aggravating factor).
- c. Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation. G.S. 15A-1340.16.
- d. The defendant may present nonstatutory mitigating factors in addition to the 20 mitigating factors set out in G.S. 15A-1340.16(e). A sampling of nonstatutory factors that have been approved over the years is available at <http://sogweb.sog.unc.edu/blogs/nclaw/?p=666>.



5. ACTIVE SENTENCES FOR FELONS

- a. Felony sentences must be served in DOC unless the sheriff or the board of county commissioners approves confinement in the county jail. G.S. 15A-1352(b).
- b. Felons may earn Earned Time at rates established by DOC (2, 4, or 6 days per month, depending on the inmate’s participation in work and program activities). In no case may Earned Time reduce the time an inmate actually serves below the minimum sentence. G.S. 15A-1340.13(d).
- c. Class B1 through E felonies include a 9-month term of post-release supervision. The term of post-release supervision is 5 years for reportable sex crimes. G.S. 15A-1368.2.
- d. Consecutive sentences: When consecutive sentences are imposed, DOC must treat the defendant as though he or she has been committed for a single term of imprisonment. The minimum of that term is the sum of all the minimum sentences in the consecutive series; the maximum is the sum of all the maximums, less 9 months for each of the second or subsequent sentences imposed for Class B1 through E felonies (to avoid duplicate terms of post-release supervision). G.S. 15A-1354(b).
- e. There is no statutory limit on the court’s authority to run felony sentences consecutively. G.S. 15A-1340.15.

6. PROBATION FOR FELONS

- a. Most felons who get probation receive an Intermediate punishment.
- b. Intermediate punishment: Supervised probation plus at least one of the following six conditions:

- i. **Special probation** (split sentence) (G.S. 15A-1351):

- 1. Maximum active portion of the split is $\frac{1}{4}$ of the maximum sentence *imposed*. (By comparison, the rule for DWI is $\frac{1}{4}$ of the maximum *authorized* penalty.)
 - 2. Periods of special probation confinement may be non-continuous, but all incarceration must be complete within 2 years of conviction.

- ii. **Residential program** (avg. time varies)

- 1. E.g., DART-Cherry, TROSA, Delancey Street Foundation
 - 2. For a longer list of program options, see the annual Compendium of Community Corrections in North Carolina, prepared by the N.C. Sentencing and Policy Advisory Commission, available at <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/compendium08-09.pdf>.

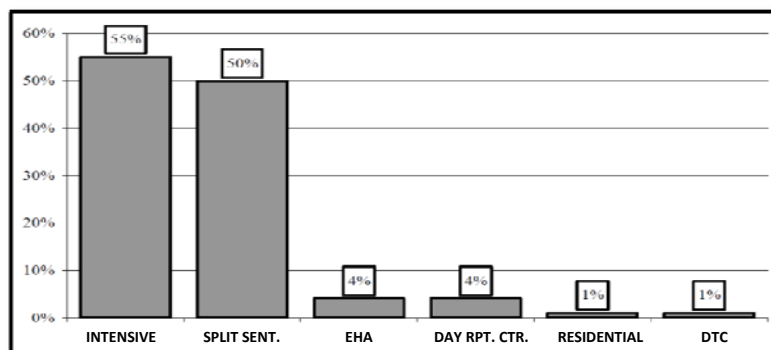
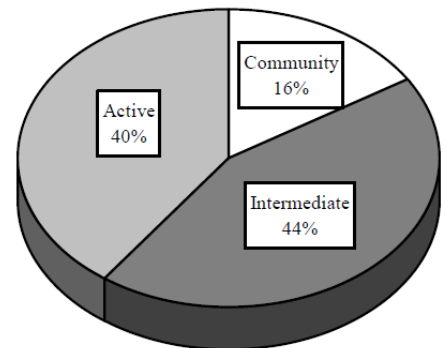
- iii. **Electronic house arrest** (avg. participation is 3.4 months).

- iv. **Intensive probation** (avg. participation is 5.2 months).

- v. **Day-reporting center** (avg. participation is 5.5 months).

- vi. **Drug treatment court** (avg. participation is 10 months).

- c. Intensive probation and special probation are the most commonly used intermediate conditions.



- d. For offenses committed on or after December 1, 2009, any defendant subject to intermediate punishment is, under G.S. 15A-1343(b4), subject to the following conditions unless the court specifically exempts the defendant from one or more of them:
 - i. If required in the discretion of the defendant’s probation officer, perform community service and pay the community service fee
 - ii. Not use, possess, or control alcohol
 - iii. Remain within the county of residence unless granted written permission to leave by the court or by the defendant’s probation officer
 - iv. Participate in any evaluation, counseling, treatment, or educational program as directed by the probation officer.
- e. Length of the term of probation.
 - i. Unless the court makes specific findings that a longer or shorter period of probation is necessary, the original period of probation must be as follows:
 - 1. Felons/community punishment: not less than 12 nor more than 30 months
 - 2. Felons/intermediate punishment: not less than 18 nor more than 36 months
 - ii. If the court finds at sentencing that a longer period of probation is necessary, that period may not exceed a maximum of 5 years. G.S. 15A-1343.2(d).
- f. Periods of probation must run concurrently with one another, but a period of probation may be set to run at the expiration of an active sentence. G.S. 15A-1346.

The court must check the box on the judgment form finding that a longer period of probation is necessary to exceed the default probation periods set out in G.S. 15A-1343.2(d).

7. DEFERRALS AND MITIGATED SENTENCES

- a. *Deferred prosecution.* Class H and I felonies are eligible for deferred prosecution (if the defendant is otherwise qualified). G.S. 15A-1341(a1)
- b. *“90-96” probation.* G.S. 90-96 allows the court to put certain first-time drug offenders on probation without entering a judgment of guilt. If the defendant succeeds on 90-96 probation, the case gets discharged and dismissed. Successful defendants under age 22 then have an opportunity to get records of the charge expunged. Use AOC-CR-619.
 - i. Under G.S. 90-96(a), defendants who plead guilty to or are found guilty of a felony under G.S. 90-95(a)(3) by possessing less than 1 gram of cocaine are eligible for discharge and dismissal under G.S. 90-96.
 - ii. Under G.S. 90-96(a1), defendants convicted of any possession of controlled substances offense—felony or misdemeanor—under G.S. 90-95(a)(3) are eligible for discharge and dismissal under G.S. 90-96. Under G.S. 90-96(a1), for the purposes of determining whether the conviction is a first conviction or whether a person has already had discharge and dismissal, no prior offense occurring more than seven years before the date of the current offense will be considered.
- c. *Extraordinary mitigation.* Under G.S. 15A-1340.13(g), a sentencing court may impose an intermediate punishment for a class of offense and prior record level that ordinarily requires an active sentence.
 - i. To apply extraordinary mitigation the court must find in writing (using AOC-CR-606) that:
 - 1. Extraordinary mitigating factors of a kind significantly greater than in the normal case are present;
 - 2. Those factors substantially outweigh any factors in aggravation; and
 - 3. It would be a manifest injustice to impose an active punishment in the case.
 - ii. Extraordinary mitigation is unavailable if:
 - 1. The offense is a Class A or Class B1 felony;
 - 2. The offense is a drug trafficking offense or a drug trafficking conspiracy; or
 - 3. The defendant has five or more prior record points. G.S. 15A-1340.13(h).

- d. *Substantial assistance.* In drug trafficking cases only, the court may depart from the mandatory drug trafficking punishment and reduce the fine, impose a prison term less than the ordinarily applicable minimum term, or suspend the prison term and place the defendant on probation if the person has provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals. The court must record a finding that the defendant has rendered substantial assistance. G.S. 90-95(h)(5).

8. RESTITUTION

- a. The sentencing judge shall determine whether the defendant will be required to pay restitution. G.S. 15A-1340.34. Restitution can be ordered “in addition to any penalty authorized by law” — including an active sentence. G.S. 15A-1340.34(c).
- b. A prosecutor's unsworn statement, standing alone, is insufficient to support an award of restitution. 340 N.C. 720 (1995). There must either be a stipulation to the amount or evidence introduced at the sentencing hearing to support the calculation of the amount recommended.
- c. The court must take into consideration the resources of the defendant, including all real and personal property, ability to earn, and obligation to support dependants. The burden is on the defendant to show that he lacks the financial resources to comply with a restitution order. *State v. Tate*, 187 N.C. App. 593 (2007).
- d. For offenses covered under the Crime Victims’ Rights Act (CVRA) (G.S. 15A-830), restitution is mandatory. The following felonies are covered under the CVRA:
- i. Any Class A through E felony
 - ii. Assault on exec/legis/ ct off. w/ deadly weapon/inflicting serious injury (G.S. 14-16.6(b)–(c))
 - iii. Involuntary manslaughter (G.S. 14-18)
 - iv. Assault on a handicapped person (G.S. 14-32.1(e))
 - v. Patient abuse/neglect causing serious bodily injury (G.S. 14-32.2(b)(3))
 - vi. Domestic abuse or neglect of a disabled or elder adult causing injury or serious injury (G.S. 14-32.3(a)-(b))
 - vii. Assault inflicting serious bodily injury (G.S. 14-32.4)
 - viii. Habitual misdemeanor assault (G.S. 14-33.2)
 - ix. Assault with a firearm or deadly weapon on a government officer/employee or campus/company police officer (G.S. 14-34.2)
 - x. Assault with a firearm, deadly weapon, or inflicting serious bodily injury on a firefighter, emergency medical technician, or emergency room nurse or physician (G.S. 14-34.6(b)–(c))
 - xi. Abduction of children (G.S. 14-41)
 - xii. Felonious restraint (G.S. 14-43.3)
 - xiii. Human trafficking of adults (G.S. 14-43.11)
 - xiv. Second degree burglary (G.S. 14-51)
 - xv. Second degree arson (G.S. 14-58)
 - xvi. Common-law robbery (G.S. 14-87.1)
 - xvii. Third degree sexual exploitation of a minor (G.S. 14-190.17A)
 - xviii. Participating in the prostitution of a minor (G.S. 14-190.19)
 - xix. Taking indecent liberties with children (G.S. 14-202.1)
 - xx. Stalking, second or subsequent offense or when a court order is in effect (G.S. 14-277.3A)
 - xxi. Assault on emergency personnel with a dangerous weapon or substance (G.S. 14-288.9)
 - xxii. Habitual impaired driving (G.S. 20-138.5)
 - xxiii. Felony death by vehicle (G.S. 20-141.4)
 - xxiv. Any attempt of the felonies listed above if the attempt is punishable as a felony.

In CVRA cases (and CVRA cases only), restitution orders exceeding \$250 may be docketed, indexed, and enforced in the same manner as a civil judgment. G.S. 15A-1340.38(b).

9. SENTENCING HABITUAL OFFENDERS

- a. Habitual felon
 - i. A defendant can attain the status of being a habitual felon when he or she has three prior felony convictions. G.S. 14-7.1. Once a person attains habitual felon status, subsequent felonies may be sentenced as Class C felonies under the habitual felon law. G.S. 14-7.6.
 - ii. A sentence imposed under the habitual felon law “shall run consecutively with and shall commence at the expiration of any sentence being served” by the defendant. However, when a habitualized felony is sentenced at the same time as another conviction (including another habitualized conviction) the court may run them concurrently or consolidate them into a single judgment, as none of the sentences are yet “being served” at the time the habitual felon sentence is entered. *State v. Haymond*, ___ N.C. App. ___ (Apr. 6, 2010).
- b. Habitual DWI
 - i. A person who drives while impaired who has 3 or more prior DWI convictions in the past 10 years can be charged with habitual DWI. G.S. 20-138.5.
 - ii. A person convicted of habitual impaired driving shall be punished as a Class F felon and shall be sentenced to a minimum active term of not less than 12 months of imprisonment, which shall not be suspended. Sentences imposed under this subsection shall run consecutively with and shall commence at the expiration of any sentence being served.
 - iii. It is unclear whether G.S. 20-138.5(b) means that habitual DWI sentences cannot be suspended at all, or whether the law allows a split sentence if at least 12 months of the sentence are served as active time. The clearer reading of the law is that habitual DWI sentences may not be suspended at all. That reading avoids a conflict with G.S. 15A-1351(a), which caps the active portion of a split sentence at $\frac{1}{4}$ the maximum sentence imposed.

When two convictions are sentenced at the same time, neither is yet “being served” for the purposes of a mandatory consecutive sentence provision (e.g., habitual felon, drug trafficking, and habitual impaired driving). Concurrent or consolidated sentences are permissible for convictions sentenced simultaneously.

10. GETTING MORE INFORMATION FOR SENTENCING

- a. Presentence reports. The court may order a probation officer to conduct a presentence investigation in *any* case. G.S. 15A-1332(b).
- b. Presentence commitment for study. More detailed information can be obtained through a presentence commitment to DOC for study. G.S. 15A-1332(c).
 - i. Can be ordered for any felony (Use AOC-CR-232).
 - ii. Generally requires defendant’s consent.
 - iii. Must end when the study is complete and may not exceed 90 days.
- c. Sentencing plan through Sentencing Services. G.S. 7A-771

11. DRUG TRAFFICKING

- a. Defendants convicted of the drug trafficking crimes set out below must be sentenced according to the table on the following page, regardless of their prior record level. G.S. 90-95(h).
- b. Sentences for trafficking offenses must run consecutively with any other sentences being served by the defendant. However, when trafficking offenses are disposed of at the same time, the court may impose concurrent sentences. *State v. Walston*, 193 N.C. App. 134 (2008).
- c. Conspiracies to commit trafficking offenses are sentenced just as the target offense. G.S. 90-95(i).
- d. Attempts to commit trafficking are the same offense class as the target offense, but they are sentenced under the ordinary felony sentencing grid. G.S. 90-98.
- e. The court can depart from the trafficking sentencing regime if it finds substantial assistance (see *Mitigated Sentences* above).

Tabular Summary of the Drug Trafficking Law

Class	Minimum	Maximum
Class C	225 months	279
Class D	175	219
Class E	90	117
Class F	70	84
Class G	35	42
Class H	25	30

Drug	Amount	Class	Fine (not less than)
Marijuana	10-49 lbs.	Class H	\$5,000
	50-1,999	Class G	\$25,000
	2,000-9,999	Class F	\$50,000
	10,000 or more	Class D	\$200,000
Methaqualone	1,000-4,999 units	Class G	\$25,000
	5,000-9,999	Class F	\$50,000
	10,000 or more	Class D	\$200,000
Cocaine	28-199 grams	Class G	\$50,000
	200-399	Class F	\$100,000
	400 or more	Class D	\$250,000
Methamphetamine	28-199 grams	Class F	\$50,000
	200-399	Class E	\$100,000
	400 or more	Class C	\$250,000
Amphetamine	28-199 grams	Class H	\$5,000
	200-399	Class G	\$25,000
	400 or more	Class E	\$100,000
Opium or Heroin	4-13 grams	Class F	\$50,000
	14-27	Class E	\$100,000
	28 or more	Class C	\$500,000
LSD	100-499 units	Class G	\$25,000
	500-999	Class F	\$50,000
	1,000 or more	Class D	\$200,000
MDA/MDMA	100-499 units/28-199 grams	Class G	\$25,000
	500-999 units/200-399 grams	Class F	\$50,000
	1,000 units/400 grams, or more	Class D	\$250,000

12. SEX OFFENDER REGISTRATION AND SATELLITE-BASED MONITORING

- a. Be aware of sex offender registration and monitoring as a collateral consequence
- b. Use the attached chart to determine whether an offense is a reportable conviction