

3-1-1982

Criminal Procedure--The North Carolina Fair Sentencing Act

Susan Kelly Nichols

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

Susan K. Nichols, *Criminal Procedure--The North Carolina Fair Sentencing Act*, 60 N.C. L. REV. 631 (1982).Available at: <http://scholarship.law.unc.edu/nclr/vol60/iss3/4>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

COMMENTS

Criminal Procedure—The North Carolina Fair Sentencing Act†

I. LEGISLATIVE HISTORY OF THE FAIR SENTENCING ACT

North Carolina's presumptive sentencing bill, the Fair Sentencing Act,¹ capped several years' examination of the State criminal justice system conducted by the General Assembly's Commission on Correctional Programs.² The Commission examined correctional programs in North Carolina and determined that disparities in sentences and time served in prison were primary causes of prison unrest.³ The Commission concluded that certain sentences are more effective at deterring crime than uncertain ones,⁴ and unbridled discretion afforded judges and the parole authorities were major factors in the wide variation among sentences imposed for similar offenses.⁵ Influenced in part by the report of the Twentieth Century Fund Task Force on Criminal Sentencing,⁶ the Commission recommended adoption of a presumptive sentencing system in North Carolina.⁷ The Commission's bill was introduced in the legislature in 1977 but died in committee in both the House and the Senate, in part because of time pressures caused by consideration of other proposed legislation and in part because of opposition from the legal community

† The author wishes to thank Stevens H. Clarke and Elizabeth W. Rubinsky of the Institute of Government, University of North Carolina at Chapel Hill, for their assistance in gathering information and for their critical guidance in the preparation of this Comment.

1. The Fair Sentencing Act was originally enacted in 1979 as "An Act to Establish a Fair Sentencing System in North Carolina Criminal Courts." Law of June 4, 1979, ch. 760, 1979 N.C. Sess. Laws, 1st Sess. 850. Technical amendments to the Act were passed in the next legislative session. Law of June 25, 1980, ch. 1316, 1979 N.C. Sess. Laws, 2d Sess. 247. The final amendments discussed in this Comment were passed in the 1981 session. Law of Apr. 6, 1981, ch. 179, [1981] 2 N.C. Adv. Legis. Serv. 84 (codified in scattered sections of N.C. Gen. Stat. §§ 14, 15A, 18A, 20, 21, 53, 90, 105, 108, 130, 148, 163 (Cum. Supp. 1981)). For an excellent summary and text of the Act, see S. Clarke and E. Rubinsky, *North Carolina's Fair Sentencing Act: Explanation, Text, and Felony Classification Table*, No. 81.7 (rev. ed. 1981) (available through the Institute of Government, University of North Carolina at Chapel Hill).

2. The legislature originally designated this group as the Commission on Sentencing, Criminal Punishment and Rehabilitation but renamed it when the Commission's life was extended in 1975. North Carolina Academy of Trial Lawyers Education Foundation, *History of Presumptive Sentencing and Provisions of the N.C. Law, Presumptive Sentencing and Jury Trial of a DUI Case 1* (1979) [hereinafter cited as *Presumptive Sentencing*].

3. Interview with the Honorable Frank W. Snapp, Jr., Resident Superior Court Judge for Mecklenburg County, in Charlotte, N.C. (Feb. 21, 1980).

4. North Carolina has the third longest average time served for felonies in the United States. Nat'l L.J., Feb. 23, 1981, at 21, col. 1, and at 28, col. 3.

5. *Presumptive Sentencing*, supra note 2, at 2.

6. Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* (1976). Other influential books on this topic include American Friends Service Committee, *Struggle for Justice* (1971); D. Fogel, *We Are the Living Proof* (1975); M. Frankel, *Criminal Sentences* (1973); A. Von Hirsh, *Doing Justice* (1976); J. Wilson, *Thinking About Crime* (1975).

7. Letter from Stevens H. Clarke to Rep. James Ezzell (Sept. 20, 1979) (copy available in the N.C.L. Rev. office).

to the Act itself.⁸

At the suggestion of Governor James B. Hunt, Jr., the North Carolina Bar Association established a special Committee on Sentencing to revise the original bill to make it more palatable to judges and lawyers.⁹ Critics of the original and subsequent versions of the bill "[had] argued that the Law could lengthen the time it takes to try a case, increase the number of cases, add to the number of appeals before the burdened North Carolina Court of Appeals and the North Carolina Supreme Court and increase the state's prison population,"¹⁰ and some judges had opposed the bill because it attempted to structure their sentencing discretion.¹¹ The bill as finally introduced to the legislature reflected minor changes by the bar association and the governor and was renamed the Fair Sentencing Act.¹² The 1979 General Assembly passed the Act, effective for felonies occurring on or after July 1, 1980.¹³

Prior to the effective date, however, a Sentencing Procedures Committee was appointed by Governor Hunt and Chief Justice Branch to "provide for the planning, implementation and review of The Fair Sentencing Act."¹⁴ Because the Act had engendered considerable debate in the legislature and in the legal community, and because procedures for its implementation were not complete, its effective date was delayed.¹⁵ Some technical amendments suggested by the Committee were approved along with the extension of the Act's effective date, but the more substantive changes were delayed until the 1981

8. *Id.* It was Governor Hunt's view that the Knox bill failed because of opposition from judges and practicing attorneys. *Id.*

9. *Id.*

10. Legal Community Set at Last for Sentencing Act, *News & Observer* (Raleigh), June 29, 1981, at 1, 6, col. 1.

11. Fair Sentencing Act Faces New Delay, *News & Observer* (Raleigh), Feb. 25, 1981, at 17, col. 3.

12. Letter, *supra* note 7.

13. Law of June 4, 1979, ch. 760, 1979 N.C. Sess. Laws, 1st Sess. 850.

14. The Committee, which is still active, was given the following mandate:

a. Review the Fair Sentencing Act to ensure that the legislation is technically correct and draft legislation to make technical changes if they are needed;

b. Develop for Supreme Court approval new sentencing procedures, which may include such items as superior court rules of procedure and procedures governing presentence reporting, to be used by Superior Court judges in applying the provisions of the Act;

c. Develop guidelines for sentencing convicted felons that harmonize with the Act's provisions;

d. Review the impact of the Act upon the criminal justice system and, if needed, recommend modifications to the Law which may be needed to alleviate anticipated problems;

e. Monitor the Courts' experience with the Act, including the overseeing of studies made of the Act after its implementation date.

Institute of Government Legislative Bulletin Services, *The Fair Sentencing Act*, Weekly Summary (Apr. 3, 1981) [hereinafter cited as *Weekly Summary*].

15. The effective date was postponed from July 1, 1980, to March 1, 1981. Law of June 25, 1980, ch. 1316, 1979 N.C. Sess. Laws, 2d Sess. 247. Its effective date was once again postponed by amendment from March 1, 1981, to April 15, 1981. Law of Feb. 27, 1981, ch. 63, [1981] 1 N.C. Adv. Legis. Serv. 82.

session of the legislature.¹⁶

The 1981 General Assembly removed entry of a negotiated plea from the list of mitigating factors and provided that the judge need make no findings of aggravating and mitigating factors if an active prison term is imposed pursuant to a "plea arrangement as to sentence under Article 58 of [Chapter 15A]."¹⁷ It also revised and increased the number of aggravating and mitigating factors that the trial court must consider before sentencing and reduced the presumptive prison term approximately twenty-five percent for several classes of felonies. Finally the effective date was again extended, this time to July 1, 1981.¹⁸ In response to legislative concern about the prison population, the Governor agreed to appoint a study commission to review the severity of sentences in North Carolina.¹⁹

II. SENTENCING UNDER THE FAIR SENTENCING ACT

The Fair Sentencing Act, as finally passed, revamps much of the sentencing procedure in North Carolina and specifies four purposes of sentencing. The first purpose is "to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability."²⁰ Additional purposes are "to protect the public by restraining offenders," to assist in rehabilitation of offenders, and to deter criminal behavior.²¹ Thus, the starting point in sentencing must be the actual offense of which the defendant was convicted, followed by consideration of special circumstances surrounding the crime and special characteristics of the individual offender.

The sentencing procedures in the Act apply only to *felonies* committed on or after July 1, 1981.²² Every felony is assigned to a category of offenses,²³ ranging from Class A, which includes first-degree murder,²⁴ to Class J, which includes various financial offenses such as credit card theft²⁵ as well as all offenses not assigned to another category.²⁶

Every class is assigned a maximum prison term²⁷ and a presumptive

16. S. Clarke, An Update on the Fair Sentencing Act, Administration of Justice Memoranda No. 80/06 (Nov. 1980).

17. N.C. Gen. Stat. § 15A-1340.4(a) (Cum. Supp. 1981). See notes 94-99 and accompanying text *infra*.

18. N.C. Gen. Stat. § 15A-1340.1(a) (Cum. Supp. 1981).

19. Weekly Summary, *supra* note 14.

20. N.C. Gen. Stat. § 15A-1340.3 (Cum. Supp. 1981).

21. *Id.*

22. *Id.* § 15A-1340.1(a). See text accompanying note 18 *supra*.

23. See generally N.C. Gen. Stat. § 14 (1981).

24. *Id.* § 14-17.

25. *Id.* § 14-113.9 to -113.15. Class J also includes transporting a child outside the state with the intent to violate a custody order, *id.* § 14-320.1, and two escape offenses, *id.* § 148-45(b) & (c) (1978 and Cum. Supp. 1981).

26. *Id.* § 14-1.1(b) (1981). For a complete listing of felony classifications, see S. Clarke & E. Rubinsky, *supra* note 1, at 40-62.

27. N.C. Gen. Stat. § 14-1.1(a) (1981).

prison term.²⁸ The Act does away with former law that allowed judges to set both a minimum and a maximum term; only a single prison term is set. The presumptive term reflects the legislature's determination of the appropriate sentence for every felony within the class when no extenuating circumstances are present; however, the Act left unchanged the wide range of possible sentences for each class. For example, a Class C felon could receive a prison term as long as fifty years²⁹ or a suspended sentence with no imprisonment at all. The maximum terms range from a possible death sentence for a Class A offense³⁰ to three years imprisonment for a Class J offense.³¹ A prisoner may reduce the time he actually serves through statutorily provided "good time" and "gain time" as well as through reentry parole.³² The following table lists examples of offenses in each class, the applicable maximum punishment, the average time served for the indicated offenses by felons released from prison in 1980, the statutory presumptive, and the projected time a prisoner actually will serve if one assumes that he has received the presumptive term and will receive all possible good time and reentry parole but no gain time after entering prison.

TABLE 1

Class	Sample Offense/ Statute	Maximum Punishment	Average Time Served Under Former Law ³³ [S.S.=Sample Size] (in years)	Presumptive Term/Projected Term Served ³⁴ (in years)
A	Murder in the First Degree (G.S. 14-17)	Death/Life ³⁵ Imprisonment	—	

28. Id. § 15A-1340.4(f) (Cum. Supp. 1981).

29. Id. § 14-1.1(a) (1981).

30. Id. § 14-1.1(a)(1).

31. Id. § 14-1.1(a)(10).

32. See notes 103-29 and accompanying text *infra*.

33. These figures were obtained from a statistical study conducted by the Institute of Government (copy available in the N.C.L. Rev. office). The number listed is the average time served by felons who (1) were not committed youthful offenders, (2) were serving sentences for only one crime and (3) were released from prison for the first time during fiscal year 1980. It includes those released on parole as well as those who were unconditionally released.

A similar study was conducted by the National Law Journal. That study used release data on prisoners paroled in either 1976 or 1977 and determined that North Carolina's felons served an average time in prison of 35 months. Time served for specific types of felonies ranged from 109 months for forcible rape to 17 months for car theft. Nat'l L.J., Feb. 23, 1981, at 1, col. 1, and at 28, col. 3.

34. The second figure is the projected time each felon will serve in prison. It is determined by subtracting from the presumptive term the good time available to each felon, which is one-half of the presumptive term in the absence of serious misconduct. Also subtracted is the ninety day automatic parole available to every felon sentenced to more than eighteen months imprisonment except those convicted of offenses for which there is a statutory minimum term of imprisonment. The amount of gain time that a particular felon will receive is difficult to predict; thus that time has not been subtracted from the projected time although many prisoners may reduce significantly, through gain time, the actual time served. See notes 103-29 and accompanying text *infra*.

35. Persons convicted of the Class A offense, murder in the first degree, are excluded from the ambit of the Fair Sentencing Act. N.C. Gen. Stat. § 15A-1340.1(a) (Cum. Supp. 1981). These

B	Rape in the First Degree (G.S. 14-21(1))	Life Imprisonment ³⁶	—	—
C	Arson of occupied dwelling (G.S. 14-58)	50 years or life imprisonment and/or fine	Unavailable	15/7.25
D	Second Degree Murder (G.S. 14-17)	40 years and/or fine	5.54 [S.S. 60]	12/5.75
	Robbery with Dangerous Weapon (G.S. 14-87)		Unavailable ³⁷	14/7 ³⁸
E	Embezzlement of bank funds (G.S. 53-129)	30 years and/or fine	1.11 [S.S. 13]	9/4.25
F	Voluntary Manslaughter (G.S. 14-18; 14-19)	20 years and/or fine	3.21 [S.S. 63]	6/2.75
G	Assault with Intent to Rape (G.S. 14-22)	15 years and/or fine	3.28 [S.S. 22]	[4.5/2] ³⁹
H	Felonious Larceny (G.S. 14-72(a); G.S. 14-71)	10 years and/or fine	1.30 [S.S. 99]	3/1.25
	Common Law Robbery Without Dangerous Weapons (G.S. 14-2; 14-3(b); 14-87.1)		2.07 [S.S. 91]	
I	Forgery (G.S. 14-119; 14-120; 14-122; 14-123; 14-124)	5 years and/or fine	1.43 [S.S. 35]	2/.75

felons will be sentenced according to the procedure detailed in section 15A-2000. See *id.* § 15A-2000.

36. Class B offenses, first-degree sexual offenses, are also excluded from the Act. *Id.* § 15A-1340.1(a). After *State v. Montgomery*, 291 N.C. 91, 104, 229 S.E.2d 572, 581 (1976), the maximum permissible sentence for a Class B offense is life imprisonment. A person sentenced to life imprisonment, under previous and current law, is eligible for parole after twenty years if no minimum term was set by the judge. N.C. Gen. Stat. § 15A-1371(a) (Cum. Supp. 1981).

37. Accurate figures are unavailable because of changes in the Act not reflected in the study. In 1977 the statutory minimum term for armed robbery was changed from five to seven years. Law of July 1, 1977, ch. 871, 1977 N.C. Sess. Laws, 1st Sess. 1190 (codified at N.C. Gen. Stat. § 14-87(c) (1981)). All prisoners released during this study were sentenced prior to 1977.

38. There are several offenses for which there is a statutorily prescribed minimum prison term under prior law and under the Act. See, e.g., N.C. Gen. Stat. § 14-52, -87 & § 90-95(h) (1981). Despite reclassification under the Fair Sentencing Act, a term may not be imposed that will result in less time served than statutorily mandated. Thus, a person convicted of armed robbery must be sentenced to at least fourteen years imprisonment so he will not serve less than the statutory mandate of seven years. He presumably would not be eligible for the normal re-entry parole of ninety days until he had served the seven years. *Id.* § 14-87.

39. The statute establishing the crime of assault with intent to rape has been repealed. The applicable crime would now be either attempted first-degree rape or sexual offense, Class F offenses, or attempted second-degree rape or sexual offense, Class H offenses. *Id.* § 14-27.6. For Class G offenses, such as incest with certain near relatives, see *id.* § 14-178, the presumptive term is 4.5 years and the projected term served is two years.

J	Financial Transaction Card Theft (G.S. 14- 113.9)	3 years and/or fine	Unavailable	1/5 ⁴⁰
---	--	------------------------	-------------	-------------------

The sentencing judge may elect to suspend the sentence and place the offender on supervised or unsupervised probation unless he is convicted of a Class A or B offense or an offense such as armed robbery, burglary or a repeat felony using a deadly weapon, for which specified active imprisonment is mandatory.⁴¹ If the offender is less than twenty-one at the time of conviction and is not convicted of a capital or mandatory life offense, the trial judge must determine whether to sentence him as a committed youthful offender,⁴² which makes him eligible for parole at any time under preexisting law,⁴³ or as a regular felon after making a finding that he "should not obtain the benefit of release."⁴⁴ But in both cases the Act is still applicable. Even if the sentencing judge chooses to suspend the time of imprisonment entirely or chooses to sentence the felon as a committed youthful offender, he must comply with the procedure detailed in G.S. 15A-1340.4(a) for setting the prison term.⁴⁵ The judge may also decide whether terms are to run consecutively or concurrently for multiple offenses.⁴⁶ Sentencing decisions on suspension, committed youthful offender commitment and consecutive terms do not require any statement of reasons by the judge; thus he maintains areas of unregulated discretion.

Several groups are exempted from the findings requirement of the Act. G.S. 15A-1340.4(a) exempts Class A and B felons from its coverage.⁴⁷ More important, the judge is not required to impose the presumptive sentence or make a statement of reasons for variance from the presumptive term when "he imposes a prison term pursuant to any plea arrangement as to sentence under Article 58 [of Chapter 15A]."⁴⁸ It is unclear exactly what is meant by "plea arrangement as to sentence pursuant to Article 58" under the Act. It may mean that the prosecutor has agreed to recommend a particular sentence and the sentencing judge has ratified that decision or that the prosecutor has simply agreed to recommend no more than a particular term or not to oppose a term. G.S. 15A-1023 makes judicial approval of a sentence arrangement a prerequisite to its imposition;⁴⁹ thus judges must be careful to specify that the

40. Reentry parole is not available for persons sentenced to less than eighteen months imprisonment. *Id.* § 15A-1380.2 (Cum. Supp. 1981).

41. *Id.* §§ 15A-1340.4(a), -1341(b).

42. *Id.* § 148-49.14 (1978).

43. If an offender is sentenced as a committed youthful offender he is eligible for parole at any time. *Id.* § 148-49.15. See notes 124-25 and accompanying text *infra*.

44. N.C. Gen. Stat. § 148-49.14 (1978).

45. *Id.* § 15A-1340.4(a) (Cum. Supp. 1981).

46. *Id.* § 15A-1354(a).

47. Class A offenders may be sentenced to death or life imprisonment while Class B offenders only may receive life imprisonment. *Id.* § 14-1.1(1), (2) (1981). For the procedure for sentencing Class A offenders, see *id.* § 15A-2000 (Cum. Supp. 1981). See notes 35 & 36 *supra*.

48. N.C. Gen. Stat. § 15A-1340.4(a) (Cum. Supp. 1981).

49. *Id.* § 15A-1023.

sentence given was pursuant to a plea arrangement as to sentence⁵⁰ because the judge need not follow the Act's procedures if he adopts a sentence agreed upon by the defendant and the prosecutor. Furthermore, the defendant may not appeal as of right a term greater than the presumptive term if it was imposed pursuant to a sentence arrangement. Because of the large number of felons who plead guilty pursuant to "plea arrangements as to sentence" this provision significantly reduces the number of cases in which specific findings must be made.⁵¹

For defendants convicted of Class C through J felonies, the judge must impose the presumptive term for the offense unless he determines that there are sufficient aggravating or mitigating circumstances to justify a longer or shorter term. Prior to imposing a prison term, he must consider all the statutory aggravating and mitigating factors present in the case, and he may consider any additional aggravating and mitigating factors reasonably related to sentencing purposes.⁵² All factors considered must be proved by a preponderance of the evidence. If he ultimately decides to impose the presumptive term he need not make any specific findings for the record;⁵³ however, if he chooses to impose a term other than the presumptive term, after considering the aggravating and mitigating factors, he must "specifically list in the record" the relevant aggravating and mitigating circumstances.⁵⁴ These factors must be individually proved by a preponderance of the evidence and must be reasonably related to the sentencing purposes listed earlier.⁵⁵ In order to justify a term longer than the presumptive, the factors in aggravation must be found to outweigh the factors in mitigation; for a sentence shorter than the presumptive term the factors in mitigation must outweigh those in aggravation.⁵⁶

The Act contains detailed lists of both aggravating and mitigating fac-

50. The form devised by the Administrative Office of the Courts for the implementation of the Act provides a box to be checked if the prison term is imposed pursuant to a plea arrangement as to sentence. Form AOC-CR 301 (copy available in the N.C.L. Rev. office).

51. According to preliminary results of a sentencing study conducted by the Institute of Government of the University of North Carolina, 58.6% of persons charged with one or more felonies pleaded guilty; 33.2% entered formal guilty pleas on the record, with 27% of the pleas resulting from a prosecutorial recommendation on sentence. Some of these guilty pleas were to misdemeanors and not the felony for which the individual was originally charged; 34% of those charged either had their case dismissed or received a prayer for judgment continued (PJC). Only 6.8% went to trial and 75.3% of those who went to trial were convicted. In absolute numbers, 80% of the 1378 individuals in the study who were charged with felonies pleaded guilty. Another 474 were not convicted and did not go to trial. Ninety-three persons went to trial, with only twenty-three of those receiving acquittals. S. Clarke, S. Kurtz, D. Schleicher & E. Rubinsky, *Felony Prosecution and Sentencing in North Carolina, 1979-1980*, at 14-16 & Table 3 (Institute of Government, University of North Carolina at Chapel Hill, 1981) (preliminary draft) [hereinafter cited as Clarke & Kurtz].

For an excellent article on plea bargaining in North Carolina, see Lefstein, *Plea Bargaining and the Trial Judge, The New ABA Standards, and the Need to Control Judicial Discretion*, 59 N.C.L. Rev. 477 (1981).

52. N.C. Gen. Stat. § 15A-1340.4(a) (Cum. Supp. 1981).

53. *Id.* § 15A-1340.4(b).

54. *Id.*

55. *Id.* § 15A-1340.4(a). See notes 20-21 and accompanying text *supra*.

56. N.C. Gen. Stat. § 15A-1340.4(b) (Cum. Supp. 1981).

tors.⁵⁷ It does not state the weight each factor must be given when balancing them. This task is left to the discretion of the sentencing judge.

The Act prohibits the use of certain kinds of evidence in sentencing. First, any evidence "necessary to prove an element of the offense" for which the felon was convicted may not also be used to prove an aggravating factor.⁵⁸ For example, the use of a deadly weapon is listed as an aggravating factor but is also an element of armed robbery.⁵⁹ Second, the same evidence may not be used to prove more than one aggravating factor.⁶⁰ Finally, the judge is specifically prohibited from considering the defendant's request for a jury trial as an aggravating factor.⁶¹ These prohibitions apparently are intended to eliminate possible constitutional challenges to the Act.⁶²

G.S. 15A-1340.4(a) lists numerous aggravating and mitigating factors. These include:

1. Aggravating factors:

- a. The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.
- b. The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- c. The offense was committed for hire or pecuniary gain.
- d. The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- e. The offense was committed against a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duties.
- f. The offense was especially heinous, atrocious, or cruel.

57. Id. § 15A-1340.4(a).

58. Id. § 15A-1340.4(a)(1).

59. Id. § 14-87 (1981).

60. Id. § 15A-1340.4(a) (Cum. Supp. 1981).

61. Id.

62. The listed aggravating and mitigating circumstances are broadly worded, thus the potential exists for overlapping. Because judges must ultimately weigh the aggravating factors against the mitigating factors in a given case, they must be careful to avoid unwarranted overlapping. The same evidence may not be used to constitute two or more factors, or to prove the underlying felony and various factors. For a more complete discussion of the constitutionality of vague or overlapping factors in a different context, see Comment, *Evolving Standards of Decency: The Constitutionality of North Carolina's Capital Punishment Statute*, 16 Wake Forest L. Rev. 737 (1980); Comment, *Vague and Overlapping Guidelines: A Study of North Carolina's Capital Sentencing Statute*, 16 Wake Forest L. Rev. 765 (1980).

- g. The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.
 - h. The defendant held public office at the time of the offense and the offense related to the conduct of the office.
 - i. The defendant was armed with or used a deadly weapon at the time of the crime.
 - j. The victim was very young, or very old, or mentally or physically infirm.
 - k. The defendant committed the offense while on pretrial release on another felony charge.
 - l. The defendant involved a person under the age of 16 in the commission of the crime.
 - m. The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.
 - n. The defendant took advantage of a position of trust or confidence to commit the offense.
 - o. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. Such convictions include those occurring in North Carolina courts and courts of other states, the District of Columbia, and the United States, provided that any crime for which the defendant was convicted in a jurisdiction other than North Carolina would have been a crime if committed in this State. Such prior convictions do not include any crime that is joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced.
 - p. The offense involved the sale or delivery of a controlled substance to a minor.
2. Mitigating factors:
- a. The defendant has no record of criminal convictions or a record consisting solely of misdemeanors punishable by not more than 60 days' imprisonment.
 - b. The defendant committed the offense under duress, coercion, threat, or compulsion which was insufficient to constitute a defense but significantly reduced his culpability.
 - c. The defendant was a passive participant or played a minor role in the commission of the offense.
 - d. The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense.
 - e. The defendant's immaturity or his limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense.
 - f. The defendant has made substantial or full restitution to the victim.

- g. The victim was more than 16 years of age and was a voluntary participant in the defendant's conduct or consented to it.
- h. The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of felony.
- i. The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.
- j. The defendant could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.
- k. The defendant reasonably believed that his conduct was legal.
- l. Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.
- m. The defendant has been a person of good character or has had a reputation in the community in which he lives.
- n. The defendant is a minor and has reliable supervision available.⁶³

Many of these factors are similar to ones that may arise in a capital punishment sentencing proceeding;⁶⁴ thus, some guidance may be found in several cases that have dealt with permissible interpretations of these factors. The North Carolina Supreme Court has found prejudicial duplication of aggravating factors,⁶⁵ and has indicated that pecuniary gain is properly a separate aggravating circumstance even in a felony-murder prosecution in which the underlying felony is armed robbery.⁶⁶ The court has considered what aggravating circumstances may be taken into account in a rehearing on sentencing in light of double jeopardy limitations⁶⁷ and has interpreted the proper application of the "heinous, atrocious, or cruel" aggravating circumstance.⁶⁸ It has also addressed the question of the proper instruction on impaired capacity,⁶⁹ a question that may be relevant to the mitigating factor that "defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense."⁷⁰

Factors that appear on the Fair Sentencing Act's list of aggravating and mitigating circumstances call for varying degrees of interpretation. For example, determining whether the "defendant held public office at the time of the

63. N.C. Gen. Stat. § 15A-1340.4(a) (Cum. Supp. 1981).

64. See id. § 15A-2000(e), (f).

65. *State v. Goodman*, 298 N.C. 1, 28-30, 257 S.E.2d 569, 587-88 (1979).

66. *State v. Oliver*, 302 N.C. 28, 62-63, 274 S.E.2d 183, 204-05 (1981).

67. *State v. Silhan*, 302 N.C. 223, 261-72, 275 S.E.2d 450, 477-84 (1981).

68. *State v. Martin*, 303 N.C. 246, 253-56, 278 S.E.2d 214, 219-20 (1981); *State v. Hamelette*, 302 N.C. 490, 504, 276 S.E.2d 338, 347 (1981); *State v. Silhan*, 302 N.C. 223, 264, 275 S.E.2d 450, 479 (1981).

69. *State v. Johnson*, 298 N.C. 355, 373-75, 259 S.E.2d 752, 763-65 (1979); *State v. Johnson*, 298 N.C. 47, 63-70, 257 S.E.2d 597, 610-14 (1979).

70. N.C. Gen. Stat. § 15A-1340.4(a)(2)(d) (Cum. Supp. 1981).

offense and [whether] the offense related to the conduct of [that] office"⁷¹ is relatively unambiguous. Determining whether "(t)he defendant took advantage of a position of trust or confidence to commit the offense,"⁷² however, is less clear-cut.

The Act provides little guidance on the procedures and standards for proving aggravating and mitigating factors. It only states that the judge "may consider any aggravating and mitigating circumstances that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating or mitigating factors are set forth herein."⁷³ Second, the Act states that "[a] prior conviction may be proved by stipulation of the parties or by the original or certified copy of the court record of the prior conviction."⁷⁴ A court record with the same name as the one by which the defendant is charged is *prima facie* evidence of the facts in the record. No conviction obtained while the defendant was indigent may be used unless the defendant had access to counsel or waived that right at the prior proceeding, and a defendant may move to suppress the evidence of the prior conviction.⁷⁵

The previous approach to sentencing allowed the judge to set both minimum and maximum terms, which the Parole Commission used as starting points in determining release dates. In contrast, The Fair Sentencing Act precludes imposition of minimum terms⁷⁶ and allows only a single term to be imposed for any one conviction. There are several specific statutes, however, that impose a mandatory minimum period which the felon must actually spend in prison.

First, a person prosecuted as a habitual felon must be sentenced as a Class C offender unless the death penalty or life imprisonment is imposed. A habitual felon is any person who has been convicted of, or who pleaded guilty to, three felony offenses in any federal or state court in the United States. Several types of felonies are statutorily exempted: those occurring prior to July 6, 1967; those for which the felon received a pardon; and certain federal liquor offenses. Furthermore, all felonies committed before the offender was eighteen will only count as one felony.⁷⁷ The Fair Sentencing Act requires that the

71. Id. § 15A-1340.4(a)(1)(n).

72. Id.

73. Id. § 15A-1340.4(a).

74. Id.

75. Id.

76. Id. § 15A-1351(b).

77. This provision was repealed by the General Assembly in the original version of the Fair Sentencing Act, Law of June 4, 1979, ch. 760, § 4, 1979 N.C. Sess. Laws 1st Sess. 850, and then reinstated in the final version. Law of Apr. 6, 1981, ch. 179, [1981] 2 N.C. Adv. Legis. Serv. 84 (codified at N.C. Gen. Stat. § 14-7.1 (1981)).

According to a study conducted by the Institute of Government of the University of North Carolina at Chapel Hill, only a handful of offenders are prosecuted as habitual felons each year. Clarke & Kurtz, *supra* note 51, Table 10. It is entirely within the prosecutor's discretion to determine whether to prosecute an individual as a habitual felon. N.C. Gen. Stat. § 14-7.3 (1981). An effective tool for reducing crime may be incapacitation of the repeat offender. James Q. Wilson argues that because most serious crime is committed by repeat offenders, putting them in prison would at least incapacitate them temporarily if it did nothing to deter them from future crime.

habitual felon receive at least a fourteen year term although the presumptive sentence for Class C is fifteen years.⁷⁸ Thus, the judge has discretion to reduce the Class C presumption by only one year. Like other felons sentenced under the Act, the prisoner may receive day-for-day good time credit. But the statutory requirement that a habitual felon serve not less than seven years in prison probably means he is not eligible for normal reentry parole if he receives only a fourteen-year sentence.⁷⁹ It is less clear whether "gain time" may be used to reduce a felon's actual term of imprisonment to less than seven years. Under the provisions of G.S. 14-7.6, a habitual felon "shall serve a term of not less than seven years in prison excluding gain time granted under G.S. 148-13."⁸⁰ This phrase is patently ambiguous; it is unclear whether the legislature intended gain time to be excluded to the extent it caused the prisoner to serve less than seven years, or whether only gain time may be used to reduce the sentence below seven years. Finally, the habitual felon's sentence may not be suspended, nor may he be placed on probation. The sentence must be imposed to run consecutively to any prior sentence.⁸¹

A second provision similarly directed at the repeat offender is G.S. 14-2.2.⁸² A statutory minimum prison stay of seven years is required for any person convicted of using a deadly weapon to commit a felony if he was previously convicted of committing a felony in which a deadly weapon was used in North Carolina in the past seven years. Neither felonies committed before the defendant was eighteen years old⁸³ nor those committed prior to September 1, 1977, for which the defendant pleaded guilty or no contest may be considered. Although there is no requirement that the defendant be sentenced as a Class C

Wilson, "Lock 'em Up," N.Y. Times, Mar. 9, 1975, § 6 (Magazine), at 11. For example, of the 12,500 defendants appearing in a Baltimore, Maryland district court, eighty percent had been there before. Rosenblatt, *Why the Justice System Fails*, Time, Mar. 23, 1981, at 22, 24. Although statutes designed to deal with recidivist felons may be one of the more effective means of combating crime, they can lead to harsh results in some cases. In *Rummel v. Estelle*, 445 U.S. 263 (1980), the United States Supreme Court upheld a mandatory life sentence upon commission of a third felony. The challenged Texas law did not violate the prohibition against cruel and unusual punishment even though the three offenses were minor fraudulent financial transactions. The defendant had managed to obtain property worth only a total of \$229.11 in his three felonies.

78. N.C. Gen. Stat. § 14-7.6 (1981).

79. Good-time credits may reduce a sentence by one-half. See *id.* § 15A-1340.7(b) (Cum. Supp. 1981). Therefore, awarding reentry parole could result in less than the mandatory seven years. To the extent it reduces the actual time served below seven years, good-time credits appear statutorily impermissible.

80. *Id.* § 14-7.6 (1981).

81. *Id.*

82. *Id.* § 14-2.2.

83. Although the criminal justice system has traditionally provided more protective procedures for juveniles, recidivist juveniles are frequently hard core criminals by the time they reach majority. One Pennsylvania study tracked the criminal careers of 10,000 males born in 1945. About one third committed some offense by age sixteen, but most of this group had no further contact with the law. However, a small number, 627, were arrested five times before they reached majority, and were responsible for two-thirds of the violent crimes committed by the group. Rosenblatt, *supra* note 77, at 23-24. The problem of violent juveniles is complicated by the large percentage of our population that is currently in the crime prone years of sixteen to twenty-six. Wilson, *supra* note 77, at 45. Therefore, only allowing the consideration of one felony committed while the offender is under 18 may not adequately deal with the person in his late teens or early twenties who has repeatedly committed serious offenses.

felon, he must receive at least a fourteen-year term because a lesser sentence could result in less than seven years actually served when cut in half by receipt of day-for-day good-time credit.⁸⁴ He may not be sentenced as a committed youthful offender, his sentence may not be suspended, and his sentence must run consecutively to any other sentence currently being served. Unlike the habitual felon provision, the repeat offender statute refers only to sentencing after conviction and does not require separate indictment and prosecution for the felon to be sentenced as a repeat offender.

In addition to these two statutes there are various other offenses for which there is a mandatory minimum term of imprisonment. These crimes are first and second degree burglary,⁸⁵ armed robbery,⁸⁶ and several drug trafficking offenses.⁸⁷ These felonies have been assigned to classes, but the statutory minimum imprisonment presumably overrides the presumptive term for the assigned class.

When the offender is convicted of more than one felony, the sentencing judge must either apply the presumptive term for each offense or make specific findings justifying aggravation or mitigation of each term. Subject to the restrictions previously discussed, he may choose whether to suspend one or more of the offenses⁸⁸ and whether to make them run concurrently or consecutively.⁸⁹ No findings are required to explain these choices, nor are guidelines established that must be followed in making them. Because many felons are convicted of more than one offense, such decisions continue a broad area of discretion.

III. APPELLATE AND POST-CONVICTION REVIEW UNDER THE FAIR SENTENCING ACT

Appellate review of sentences imposed under the Act will be affected in two ways. First, a defendant may appeal his sentence as a matter of right on "the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing only if the prison term of the sentence exceeds the presumptive term set by G.S. 15A-1340.4," and if the judge was required to make findings as to aggravating or mitigating factors.⁹⁰ Consequently, felons may not appeal as of right sentences imposed pursuant to a "plea arrangement as to sentence under Article 58 of this Chapter," because no findings are required for such sentences.⁹¹ Current law distinguishes between a plea ar-

84. See notes 103-29 and accompanying text *infra*.

85. N.C. Gen. Stat. § 14-52(a) (1981).

86. *Id.* § 14-87(a).

87. *Id.* § 90-95(h).

88. *Id.* § 15A-1351(a) (Cum. Supp. 1981).

89. *Id.* § 15A-1354(a).

90. *Id.* § 15A-1444(al). This supplements the provision that a defendant who pleads not guilty and is convicted may appeal as a matter of right. *Id.* § 15A-1444. The right of a convicted felon who receives less than the presumptive term to petition the appellate division for review of this issue by writ of certiorari is not affected. *Id.*

91. *Id.* § 15A-1340.4(b).

rangement concerning charges, which does not require judicial approval, and an arrangement concerning sentence, which does require judicial ratification.⁹² Any court discussion of a plea arrangement, or an arrangement reduced to writing, must be part of the record if the defendant pleads guilty to the charges.⁹³ The difficult question is what constitutes a "plea arrangement as to sentence."⁹⁴ It may be an agreement to recommend a particular sentence, or it may be simply an agreement not to oppose a particular sentence. This broader interpretation of a "plea arrangement as to sentence" would result in fewer cases in which the trial court was required to impose the presumptive prison term or to make specific findings.⁹⁵ It also would reduce the number of defendants with an automatic right of appeal because the right of appeal is contingent on the requirement that findings be made. Ultimately, North Carolina's appellate courts must resolve what the legislature intended to encompass under the phrase "plea bargain as to sentence."

Second, the existence of a record of findings on which a sentence other than the presumptive term is based should facilitate appellate review.⁹⁶ Although most sentences in the past have been appealable only if they went beyond the statutory minimum or maximum for the offense,⁹⁷ several cases have resulted in a remand for resentencing when trial courts have stated in the record egregiously improper reasons for the sentence imposed.⁹⁸ The record required by the Act provides an appellate court with a means of determining if there was sufficient evidence to support the sentence and if the judge abused his discretion in weighing aggravating and mitigating factors.⁹⁹

92. *Id.* § 15A-1023(c) (1978).

93. *Id.* § 15A-1023.

94. *Id.* § 15A-1340.4(b) (Cum. Supp. 1981).

95. Some judges are reluctant, however, to surrender their sentencing discretion to prosecutors. Interview, *supra* note 3.

96. Although the Act facilitates appellate review, a defendant who does appeal his sentence faces the possibility of an increased sentence. *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969). His sentence may not be increased, however, merely because he exercises his right to appeal. *Id.* at 725; *State v. Patton*, 221 N.C. 117, 119, 19 S.E.2d 142, 144 (1942); *State v. Lowry*, 10 N.C. App. 717, 719, 179 S.E.2d 888, 889 (1971).

If the state chooses to grant a right to appeal, the prosecutor as well as the defendant may appeal a sentence. The United States Supreme Court recently held that it does not violate the double jeopardy clause to allow prosecutorial appeal of a sentence imposed under a special federal statute dealing with the dangerous offender. Even though the defendant ultimately receives a greater sentence, it does not constitute multiple punishment because there is no expectation of sentence finality under the circumstances. *United States v. DiFrancesco*, 101 S. Ct. 426, 438 (1981); see Note, *United States v. DiFrancesco: Continuing Jeopardy—An Old Concept Gains New Life*, 60 N.C.L. Rev. 425 (1982). See generally *Bozza v. United States*, 330 U.S. 160 (1947) (imposition of fines subsequent to sentencing upheld); *Robinson v. Warden*, 455 F.2d 1172 (4th Cir. 1972) (increased sentence after inmate's appeal upheld).

97. *State v. Garis*, 265 N.C. 711, 144 S.E.2d 901 (1965).

98. At least three North Carolina cases have resulted in sentence reversals when the trial judge stated in the record impermissible reasons for the sentence imposed. See *State v. Boone*, 293 N.C. 702, 239 S.E.2d 459 (1977) (defendant given active sentence because he would not plead guilty to lesser offense); *State v. Swinney*, 271 N.C. 130, 155 S.E.2d 545 (1967) (trial judge stated sentence imposed because of defendant's participation in drunken party); *State v. Snowden*, 26 N.C. App. 45, 215 S.E.2d 157, cert. denied, 288 N.C. 251, 217 S.E.2d 675 (1975) (trial judge attempted to usurp Parole Commission's discretion in setting sentence). See also S. Clarke, *Sentencing Criminals: Issues in Recent Court Decisions*, *Popular Gov't.*, Winter 1979, at 7.

99. N.C. Gen. Stat. § 15A-1442(5a) (Cum. Supp. 1981). The court in *State v. Lewis*, 281 N.C.

Post-conviction review is largely unaffected by the Act. It does require, however, that motions for appropriate relief based on the claim that the sentence is not supported by the evidence be made to the sentencing judge. The Act inconsistently lists challenges to sentencing alleging insufficiency of evidence with motions that must be made within ten days of the verdict¹⁰⁰ and with motions permissible at any time.¹⁰¹ Thus, it appears that such a sentencing challenge may be raised at any time.

IV. REENTRY PAROLE, GOOD TIME, GAIN TIME AND PROBATION UNDER THE FAIR SENTENCING ACT

The expiration date of a prisoner's sentence under the Act is determined by three variables other than the term of imprisonment imposed by the sentencing judge—reentry parole, good time and gain time. All three are determined by the behavior of the prisoner and the discretion of prison officials.¹⁰²

Every felon sentenced to a term of eighteen months or more who was not a Class A or Class B offender, and who was not sentenced as a committed youthful offender,¹⁰³ must now be paroled, and can only be paroled, at a time ninety days before the expiration of his term,¹⁰⁴ less credit for time served in pretrial detention, for good time and for gain time. The purpose of this parole is to aid the felon in his reentry to society.¹⁰⁵ If the parolee complies with certain conditions of parole,¹⁰⁶ he will be unconditionally discharged at the end of the ninety days;¹⁰⁷ however, if he violates the conditions so that his parole is revoked he will be returned to prison to serve ninety days. He will continue to accumulate good time and gain time and will be unconditionally discharged at the expiration of no more than ninety days.¹⁰⁸

Every prisoner¹⁰⁹ is entitled to "good time," or the subtraction of one day

564, 189 S.E.2d 216 (1972), intimated one reason why appellate courts have traditionally deferred to the sentencing discretion of the trial judge. "The trial judge in this, as in other criminal cases, has the opportunity to observe the defendant and to consider his former record of criminal convictions, if any, which the appellate court, being limited to the printed record before it, does not have." *Id.* at 570, 189 S.E.2d at 220. Thus, the creation of a record of specific findings should aid appellate review. See also *State v. Pope*, 257 N.C. 326, 126 S.E.2d 126 (1962). For a due process basis for this appellate deference to sentencing judges, see Freeman and Early, *United States v. DiFrancesco*, Government Appeal of Sentences, 18 Am. Crim. L. Rev. 91, 118-121 (1980).

100. N.C. Gen. Stat. § 15A-1414(b)(4) (Cum. Supp. 1981).

101. *Id.* § 15A-1415(b)(8).

102. Such rewards are a necessary means of maintaining control over prisoners. N.C. Justice Academy, N.C. Dep't of Justice, Fair Sentencing Symposium Proceedings 10 (1980). Prison officials must provide, however, certain constitutionally-mandated procedures in awarding or revoking good time and gain time. See note 114 and accompanying text *infra*.

103. A committed youthful offender is under twenty-one years of age and is sentenced under N.C. Gen. Stat. §§ 148-49.10 to -49.16 (1978 & Cum. Supp. 1981).

104. *Id.* § 15A-1380.2(a) (Cum. Supp. 1981).

105. *Id.* § 15A-1380.2(b).

106. *Id.* § 15A-1374(b)(6)-(10).

107. *Id.* § 15A-1380.2(d), (e).

108. *Id.* § 15A-1380.2(f).

109. Although every prisoner may receive good time, some prisoners serving time for offenses such as armed robbery may not receive all "day for day" good time since they must stay in prison for a mandatory minimum term. See notes 77-87 and accompanying text *supra*.

from his term for each day he serves without a major infraction of prison rules.¹¹⁰ This credit includes time he spends in local jails, as well as time spent in the Department of Corrections facilities. The Department of Corrections must promulgate conduct rules, and give notice of them to every felon serving a prison or jail term within thirty days of entry into the facility.¹¹¹ The Act specifies that there will be major and minor infractions, each subject to possible penalties, but does not state what constitutes a major infraction. Current regulations list behavior such as participation in a riot, holding a person hostage, intentionally inflicting self-injury, and selling prescribed medication as major infractions, absent mitigating factors.¹¹² Minor infractions include failing to keep living quarters clean, bartering, gambling, and feigning illness, as well as other offenses.¹¹³ The Act provides that "[a] prisoner charged with an infraction shall receive notice of the charge and be afforded a hearing."¹¹⁴

A prisoner may further reduce the time he must serve by earning "gain time." This credit may be earned by work and by meritorious conduct; misconduct will not cause it to be forfeited.¹¹⁵ The Secretary of Corrections must promulgate regulations for awarding gain time, but the Act specifies certain award rates. A prisoner who works four hours each day will be credited with two days for every month of work. A prisoner who works six hours per day will receive four days credit per month; and if these jobs require special skills or responsibilities or are part of a full-time work release program the prisoner will be credited with six days per month. The Secretary has further discretion to award extra days—as many as thirty days per month for emergency work or a single meritorious act.¹¹⁶

Thus, every non-committed youthful offender felon sentenced to a prison term under the Act, subject to limitations discussed previously, has the potential to reduce the term he must actually serve by one-half through good time credit. Reentry parole will further reduce his term by one-fourth of a year, and gain time may result in additional reductions.

Two forms of probation are available under the Act. Special probation is carried over from the previous procedure and is available for persons convicted of Classes H, I and J offenses when there is no statutory prohibition against suspension of the sentence.¹¹⁷ This allows the court to tailor an alternative to incarceration to meet the needs of the defendant. The probationer

110. N.C. Gen. Stat. § 15A-1340.7(b) (Cum. Supp. 1981).

111. *Id.* Prisoners must also be notified at time of entry of their projected release date, with and without good time. *Id.* § 15A-1340.7(c).

112. 5 N.C. Admin. Code, § 2B.0302(16), (17), (29) & (37) (Aug. 11, 1981).

113. *Id.* § 2B.0302(1), (3), (7) & (9).

114. N.C. Gen. Stat. § 15A-1340.7(b) (Cum. Supp. 1981). Such a hearing for revocation of good time already received is constitutionally required after the United States Supreme Court holding in *Wolff v. McDonnell*, 418 U.S. 539 (1974). By affording a hearing for any felon charged with an infraction, the Act apparently assumes "good time" will ordinarily be accumulated, and will only be revoked after adequate notice and proof of a major infraction. Thus, the Act goes beyond the *Wolff* requirements.

115. N.C. Gen. Stat. § 148-13(d) (Cum. Supp. 1981).

116. *Id.*

117. *Id.* § 15A-1351(a).

may be required to serve a short period in either the custody of the Department of Corrections, local authorities, or a treatment facility as a condition of probation.¹¹⁸ The probationary period may not exceed five years under this provision. Alternatively, the judge may suspend any sentence for any offense other than a Class A or Class B offense, except those offenses for which suspension is prohibited, such as burglary¹¹⁹ or armed robbery.¹²⁰ Even though a sentence is suspended, however, the judge must make specific findings if the suspended prison term differs from the presumptive term.¹²¹

The Act does not affect many of the felons who are in or who will enter the prison system; preexisting law will apply to those felons. Felons who committed offenses before July 1, 1981,¹²² will continue to be paroled under provisions in effect at the time they committed the felony for which they are serving time.¹²³ Similarly, committed youthful offenders will continue to be sentenced under previous statutory provisions.¹²⁴ These provisions permit parole of committed youthful offenders at any time.¹²⁵ Persons sentenced to life as Class A and Class B offenders will continue to be subject to previously established parole proceedings,¹²⁶ and will be eligible for parole after twenty years of imprisonment.¹²⁷ Class C offenders who receive a term of life imprisonment may be paroled in twenty years.¹²⁸ Finally, persons convicted of some offenses for which there is a statutorily required minimum imprisonment, such as the seven-year requirement for armed robbery, may not be paroled before they have served at least seven years.¹²⁹ Thus, it is unclear whether they will be eligible for reentry parole if they have not yet served the full seven years.

V. HYPOTHETICAL CASE UNDER THE FAIR SENTENCING ACT— FELON SMITH

Application of the Fair Sentencing Act procedures to a hypothetical defendant may be instructive for those unfamiliar with its provisions. Felon Smith, a twenty-three-year-old man from Orange County, North Carolina,

118. *Id.* This period of imprisonment may not exceed six months or one-fourth the maximum term allowed by law, whichever is less.

119. *Id.* §§ 14-51, -52 (1981).

120. *Id.* § 14-87. Other provisions prohibiting suspension are the habitual felon provisions, *id.* §§ 14-7.1, 7.6; the repeat offender section, *id.* § 14-2.2; and various drug trafficking provisions, *id.* § 90.

121. *Id.* § 15A-1340.4(b) (Cum. Supp. 1981).

122. *Id.* § 14-7.6 (1981).

123. Handling prisoners sentenced under different statutory schemes creates administrative difficulties for prison officials and may exacerbate prison unrest. See notes 154-57 and accompanying text *infra*.

124. N.C. Gen. Stat. §§ 15A-1370.1 to -1377, 148-49.10 to -49.16, -51.1 to -64 (1978 & Cum. Supp. 1981).

125. *Id.* § 15A-1371(a) (Cum. Supp. 1981).

126. *Id.* §§ 15A-1370.1 to -1377 (1978 & Cum. Supp. 1981).

127. *Id.* § 15A-1370.1 (Cum. Supp. 1981).

128. *Id.* § 15A-1371(a). Class C offenders who receive a life sentence are not eligible for "day for day" good time. *Id.* § 148-13(c). They are eligible, however, for good time granted within the discretion of the Secretary of Correction. *Id.* § 148-13(b).

129. See notes 77-87 and accompanying text *supra*.

was charged with first-degree arson,¹³⁰ a Class C offense. Because he was unable to reach a plea agreement with the prosecutor, he requested a jury trial.¹³¹ The jury convicted him of second-degree arson (arson of an unoccupied dwelling),¹³² a Class D offense. Evidence at trial and at the sentencing hearing showed that he set fire to a house owned by his ex-wife after a bitter argument over his right to visit his three-year-old son. The jury found that the dwelling was unoccupied at the time of the fire; however, extensive damage was caused to the home. The defendant attended high school through the eleventh grade, and was employed at the time of his arrest as a machine operator in a local factory, earning \$12,000 a year. He had been convicted previously at the age of eighteen of breaking and entering.

What sentence should Felon Smith receive assuming all the data listed above has been proved by a preponderance of the evidence? Because no plea agreement on sentence was reached, the judge must impose the presumptive term, whether or not he suspends it, unless aggravating or mitigating factors dictate otherwise.

Possible factors in aggravation in this case are (1) that "[t]he offense involved an attempted or actual taking of property of great value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband"¹³³ and (2) that the defendant had a prior conviction punishable by more than sixty days imprisonment.¹³⁴ The judge may not consider Smith's decision to request a jury trial as an aggravating factor.

Relevant mitigating factors are (1) that the defendant has a generally good reputation in the community and a good work performance¹³⁵ and (2) that "[t]he defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating."¹³⁶

The judge then weighs these factors and determines that in light of the standard set by the legislature, and the counterbalancing circumstances, he will impose the presumptive term. For a Class D offense that term is twelve years imprisonment.¹³⁷ Because he chooses not to vary the presumptive term, the judge need not make any specific findings for the record.

How much time, considering both pretrial detention and posttrial imprisonment, will Smith actually serve? If he commits no major breaches of the conduct rules he must receive reentry parole in 5¾ years. If prison or work

130. N.C. Gen. Stat. § 14-58 (1981).

131. It is unusual for a case actually to go to trial. According to a recent study, only seven percent of the persons charged with committing a felony exercise their right to a jury trial. Clarke & Kurtz, *supra* note 51.

132. N.C. Gen. Stat. § 14-58 (1981).

133. *Id.* § 15A-1340.4(a)(1)(m) (Cum. Supp. 1981).

134. *Id.* § 15A-1340.4(a)(1)(o).

135. *Id.* § 15A-1340.4(a)(2)(m).

136. *Id.* § 15A-1340.4(a)(2)(i). The sentencing judge may consider any factors "reasonably related to the purposes of sentencing," whether or not they are specifically listed in the statute. Any factor considered, however, must be proved by a preponderance of the evidence. *Id.* § 15A-1340.4(a).

137. *Id.* § 15A-1340.4(f).

release employment is available he may further reduce his sentence through gain time by more than one year. Thus, Smith can expect to serve no less than 4 to 4½ years for his offense.

VI. THE IMPACT OF THE FAIR SENTENCING ACT

The Fair Sentencing Act began as an attempt to revamp the basic approach to sentencing in North Carolina. It is unlikely, however, that the Act as finally passed will have dramatic effect. But it still may have a significant psychological impact on those who are involved in the correctional system—legislators, judges, prosecutors, defense attorneys, prison officials and defendants. It may also focus debate about needed improvements in the criminal justice system.

In establishing a presumptive prison term for each offense, the legislature was, in theory, stating its view of the appropriate prison term for a given crime. It also was stating its view that the fairness of the system would be manifested by the equality of sentences imposed on similarly situated felons. But the legislature continued its practice of giving sentencing discretion to trial judges by allowing them to choose the appropriate sentence in a given case. The judge may choose to suspend the sentence altogether without giving any reasons, and there are wide ranges for each class of offenses from which a trial judge may choose if he believes there are sufficient aggravating or mitigating factors proved.

Although the Act actually has done little to inhibit the exercise of judicial discretion, judges may be hesitant to deviate from this legislative expression of the public will. There are several disincentives for imposing other than the presumptive term. First, it is possible that the deference some judges believe is owed to the will of the public as contained in the legislative enactments may discourage variation from the presumptive term. Judges may regard the presumptive term as the normal term that the legislature has prescribed for a person who commits a felony, absent unusual circumstances. Thus, judges may believe that in the majority of cases the presumptive term should be imposed.

Second, a disincentive may be found in the requirement of a record of findings to support any variation from the presumptive term that is not the result of a "plea arrangement as to sentence pursuant to Article 58 of Chapter 15A." Although the Administrative Office of the Courts has provided a sentencing form,¹³⁸ some judges may consider it an undue burden to specify the relevant aggravating and mitigating factors.

Third, judges may be reluctant to subject their decision to automatic appellate review by imposing a sentence greater than the presumptive term.¹³⁹

138. The Administrative Office of the Court has devised a form for use after the Act goes into effect. Because it involves little more than checking boxes and completing blanks, the form should not take the sentencing judge more than a few minutes to complete. See note 50 *supra*.

139. One commentator has cited two reasons for judicial opposition to sentencing on the record: (1) it provides a means for appellate review and reversal; and (2) it subjects sentencing deci-

Given the traditional deference appellate courts accord trial court sentencing decisions, it is unlikely that many sentences will be reversed. The requirement of a record of findings, however, at least affords a basis for examining the decision against the evidence presented at trial or at the sentencing hearing.

The Act may achieve to some extent its primary goal of structuring judicial discretion. Because the rationale for variations from the presumptive prison term must be on the record, legally irrelevant factors may have less influence on the sentence. The Act's documentation requirement may aid in eliminating, for example, the sub silentio use of sex as a mitigating factor and race as an aggravating factor in sentencing.

But the promise of equal punishment for equally grave offenses will not be achieved until a substantive redefinition of offenses is undertaken.¹⁴⁰ The Act inherits all the inconsistencies present in substantive criminal law. The legislature has attempted to corral old, imprecise definitions of crimes into a new structure resulting in some irrational allocations. For example, possession of counterfeiting tools and assault with a deadly weapon inflicting serious injury are both Class H felonies with a three-year presumptive term.¹⁴¹ Furthermore, there are still wide ranges in permissible prison terms for each class of offenses. A Class C felon may receive a prison term of any length between zero and fifty years if the trial judge finds the relevant factors warrant variation from the presumptive term.

Another problem with the classification system and the assigned presumptive sentence is the harshness of the prescribed terms. A basic premise of those who first proposed presumptive sentencing is that the effectiveness of punishment is in its certainty, rather than in its severity. It was the view of the Twentieth Century Fund Task Force that "*presumptive sentencing be accompanied by a considerable reduction in the length of sentence authorized by legislatures, imposed by courts, and served by prisoners.*"¹⁴² The duration of confinement in North Carolina in recent years has been one of the highest in the country.¹⁴³ Although the legislature made significant reductions in the presumptive term in its last revision of the Act,¹⁴⁴ it failed to alter potential maximum terms, consequently, the average term of imprisonment may not change dramatically.¹⁴⁵ Further reductions are necessary even if the Act

sions to political attacks or public criticism. Both of these effects would jeopardize judicial discretion. G. Robin, *Judicial Resistance to Sentencing Accountability*, 21 *Crime & Delinquency* 201, 206 (1975).

140. The entire criminal code is currently under study by the Criminal Code Commission. A new code should be introduced to the legislature by 1983.

141. See N.C. Gen. Stat. §§ 14-13, -32(b) (1981); id. § 15A-1340.4(f) (Cum. Supp. 1981).

142. Twentieth Century Fund Task Force on Criminal Sentencing, *supra* note 6, at 32 (emphasis in original).

143. Nat'l L.J., *supra* note 4.

144. Law of Apr. 6, 1981, ch. 179, § 5, [1981] 2 N.C. Adv. Legis. Serv. 84 (codified at N.C. Gen. Stat. § 15A-1340.4(f) (Cum. Supp. 1981)).

145. The original version of the Fair Sentencing Act caused the Department of Correction to predict that presumptive sentencing could result in an initial increase of the prison population, with a subsequent tapering off. N.C. Justice Academy, *supra* note 102, at 10. Glenn G. Williams of the Department of Correction has predicted that the final form of the Act should have little

slightly reduces the length of actual terms of imprisonment. Throughout the 1970s, the prison population was growing¹⁴⁶ in North Carolina to the point that currently it has more prisoners per capita serving more than one year than any other state.¹⁴⁷ The cost of maintaining adequate correctional facilities and the scarcity of government resources mandate a reduction of the prison population, and one means of accomplishing this goal is by imposing shorter sentences.

Although certainty of punishment may be a more effective deterrent to crime than severe sentences, the Act does little to increase certainty. Since so many felons are exempted from the Act, most significantly those who reach a plea bargain on their sentence, overall certainty of sentence may not be affected. The Act will make more certain the sentence of a felon who comes within the ambit of the statute *if* judges seldom depart from the presumptive prison term—but a mechanical adherence to the presumptive term is neither to be desired nor expected. The Act is further emasculated as a means of ensuring certainty in sentencing by the provisions allowing suspension of sentences, imposition of consecutive sentences, and parole at any time of committed youthful offenders.¹⁴⁸

A major impact of the Act is the shift of discretion from the Parole Commission to other points in the punishment system. The legislature has assumed a greater role by establishing presumptive terms and mandatory prison terms for certain offenders.¹⁴⁹ Prosecutors may have increased bargaining discretion after the Act goes into effect because judges may be more willing to ratify a

effect on the prison population. To Study The Needs of Additional Prison Facilities and Courtroom Personnel in North Carolina: Public Hearing on S.B. 281 (Mar. 26, 1981) (personal notes of author) (statement of Glenn G. Williams) [hereinafter cited as Public Hearing on S.B. 281].

146. In part because of the impact of the baby boom, the 1970s saw a dramatic increase in the prison population. Wilson, *supra* note 77, at 45. Statistics from the North Carolina Department of Correction indicate that the average number of felon inmates increased from 5,952 in 1970 to 12,660 in 1980. As of March 1981 there were over 16,000 inmates in North Carolina prisons alone, without counting those in local jails. The prisons were seeing a long-term increase of 100 inmates per month. Public Hearing on S.B. 281, *supra* note 145 (statements of William F. Naegel & Jeff Williams). For a discussion of the problem of prison crowding in North Carolina see Austin, N.C. Prison System Feeling Space Squeeze, *News & Observer* (Raleigh), Apr. 12, 1981, § 4, at 1, col. 4.

Paralleling the rise in prison populations has been a rise in suits by prisoners challenging the constitutionality of prison conditions. Several states have been ordered to remedy the conditions in their jails and prisons. See, e.g., *Hutto v. Finney*, 437 U.S. 678 (1978); *Adams v. Mathis*, 614 F.2d 42 (5th Cir. 1980); *Smith v. Sullivan*, 611 F.2d 1039 (5th Cir. 1980); *Burks v. Teasdale*, 603 F.2d 59 (8th Cir. 1979); *Newman v. Alabama*, 466 F. Supp. 628 (M.D. Ala. 1979); *Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977), *aff'd*, 624 F.2d 1099 (6th Cir. 1980), *rev'd*, 101 S. Ct. 2292 (1981).

The high costs of prisons have caused some states to look for alternatives to incarceration. Minnesota, for example, has provided an opportunity for counties to obtain state funding for community development and operation of correctional programs. Minn. Stat. §§ 401.01 to .16 (Supp. 1980).

147. Prisoners in State and Federal Institutions, U.S. Dep't of Justice (1980).

148. See N.C. Gen. Stat. 15A-1340.4(a) (Cum. Supp. 1981) (suspension of sentences); *id.* § 15A-1354(a) (consecutive sentences); *id.* § 148-49.15 (parole of committed youthful offenders). For example, forty-nine percent of felons under twenty-one who were sentenced in 1979 received committed youthful offender status. See S. Clarke, S. Kurtz, E. Rubinsky & D. Schleicher, *Felony Prosecution and Sentencing in North Carolina Before Determinate Sentencing Legislation* (Institute of Government, University of North Carolina at Chapel Hill, 1982) (unpublished manuscript).

149. See notes 77-87 and accompanying text *supra*.

sentence bargain since it relieves them of the necessity of making findings. Defendants may be more willing to bargain if they know it is likely they will get at least the presumptive sentence at trial, or if the prosecutor is willing to reduce the charges from one class to another.

An individual defendant may have greater bargaining power if prosecutors refuse to plea bargain in a large number of cases. An accused without significant aggravating factors associated with his offense may count on receiving no more than the presumptive sentence if he goes to trial. There would be little reason not to go to trial if the prosecutor refused to reduce the charges or to agree to recommend a sentence less than the presumptive term. Even a small increase in the number of defendants who exercise their jury trial rights could exacerbate the problem of crowded dockets and overworked prosecutorial staffs.¹⁵⁰

A basic rationale for presumptive sentencing is the regulation of the sentencing discretion of individual judges. Under the Act little actual limitation has been achieved. Judges still may sentence within wide ranges, suspend sentences, and choose to impose terms to run concurrently or consecutively in most cases. For felons under twenty-one, they still may decide who will be sentenced as a committed youthful offender with eligibility for parole at any time. Judges still have the option of ratifying sentence plea bargains. But the *psychological* effect of the Act may be to inhibit the exercise of discretion. As previously discussed, judges may be unwilling to deviate from the presumptive term for a variety of reasons.¹⁵¹

One beneficial impact of the Act may be increased emphasis on the sentencing hearing by judges, prosecutors, and defense attorneys. Although the Act imposes no presentence report requirements,¹⁵² judges may wish more complete presentations because of the mandate that they consider all mitigating and aggravating factors listed in the Act before sentencing. They can do so only if the competing attorneys introduce all relevant information, a practice infrequently used today. The prosecutor seeking a severe sentence should attempt to introduce all possible aggravating information, just as defense attorneys should bring forth mitigating information.¹⁵³ Although the old system

150. Wade Barber of the North Carolina District Attorney's Association believes the Act will increase the demand for court personnel because it will significantly increase trial time. He argues that the Act will formalize sentencing procedures, require more court time in making findings of fact, and require more preparation by both prosecutors and court-appointed counsel for the sentencing hearing. Even an increase of a small percentage of defendants going to trial could dramatically increase the amount of court time spent in trial. Additional court time will be tied up with motions filed by defense attorneys to determine what the state considers to be aggravating factors and in learning the new procedures. Public Hearing on S.B. 281, *supra* note 145 (statement by Wade Barber).

151. See notes 138-39 and accompanying text *supra*.

152. The American Bar Association Standards on Sentencing suggest that all courts should be provided "with the resources and supporting staff to permit a verified presentence investigation and a written report of its results in every case." ABA Standards Relating to the Administration of Criminal Justice, Sentencing Alternatives and Procedures, Standard 18-5.1(a) (tent. draft 2d ed. 1979).

153. Howard Twiggs of the N.C. Academy of Trial Lawyers advocates several actions a defense attorney may take to best represent his client at the sentencing hearing. Presumptive Sen-

also had these incentives, the requirement of written findings to support sentences may provide greater impetus for thorough sentencing preparation by all parties.

The Act may have a dramatic effect on the administration of the prisons. One goal of determinate sentencing in general is to reduce discontent among prisoners.¹⁵⁴ Wide ranges in sentences among prisoners and uncertain terms upon entering prison are two major causes of prison unrest.¹⁵⁵ The Act may alleviate disparities in sentences to some extent; it allows determination of the time a prisoner will serve at the start of his term much more reliably than present North Carolina law permits. The Act requires that every prisoner be told his projected release date, with and without good time, when he enters prison.¹⁵⁶ He also must be notified at entry of the rules of conduct he must observe. "Good time" and "gain time" are much more important under the Act because prisoners are no longer paroled before they receive any benefit from their accumulated good time. Under the old parole procedure, accumulated time served only to reduce the maximum term a prisoner might serve; generally, his release date was keyed to his minimum term. Under the Act the minimum-maximum system is abolished and "good time" and "gain time" are used to determine release date.

The addition of prisoners sentenced under a new procedure may cause two problems for prison officials. First, there will be the administrative chore of tracking inmates as they serve their sentences. The appropriate procedures

tencing, *supra* note 2, at Twiggs-22-26. No presentence reports are required under North Carolina law but they may be ordered by the court. N.C. Gen. Stat. § 15A-1332 (Cum. Supp. 1981). A defense attorney, however, may make a motion for a presentence investigation before trial or for a presentence commitment study after conviction. These latter reports are available only to the defendant, his counsel, the prosecutor and the court. *Id.* § 15A-1333.

The individual defense attorney should obtain background information about the client from the first interview. The sentencing brief should be prepared before trial, and letters or testimony from character witnesses should be solicited. The client should be encouraged to make restitution or at least develop an appropriate plan for compensating the victim.

If there is no agreement with the prosecutor on a plea, the defense attorney should strive for agreement on possible mitigating and aggravating factors. At the very least defense attorneys should request through discovery a list of the aggravating and mitigating factors the prosecutor intends to present at trial. Imagination should be used in suggesting mitigating factors in addition to those used in the statute. The probable cause hearing may be used to cross-examine the state's witnesses about potential aggravating factors.

Because the sentencing hearing should require more preparation, attorneys must adjust their fees to allow for their additional time. The legislature should allocate sufficient funds to allow counsel for indigent defendants adequately to prepare. Attorneys should use their office support personnel to aid in collecting relevant data so that attorney time may be most effectively used. Presumptive Sentencing, *supra* note 2, at Twiggs-9-19.

In short, the defense attorney should recognize that he can often most realistically provide the greatest help for his client at the sentencing hearing rather than at the guilt determination phase. Interview, *supra* note 3.

154. Unfortunately, if determinate sentencing increases the overcrowding in prisons, as has happened in Indiana since it abolished parole, prison unrest will probably increase. For a discussion of problems caused by the growth of prison populations, see Lieber, *The American Prison: A Tinderbox*, N.Y. Times, Mar. 8, 1981, § 6 (Magazine), at 26.

155. See notes 2-4 and accompanying text *supra*.

156. N.C. Gen. Stat. § 15A-1340.7(c) (Cum. Supp. 1981).

must be correlated with each prisoner and any significant change in applicable law will complicate that task.

A more significant problem may arise from the mingling of inmates sentenced under the Act with those serving time under the old system. If the theory is correct that prison unrest is fostered by disparate treatment, then a whole new sentencing program will greatly increase the possibility for comparison. Although two individuals may actually serve the same time, they may consider the different procedures unfair. For example, one prisoner will be earning good time and have a definite release date, while his neighbor is still subject to the whim of the Parole Commission. It will take years before all persons serving time have been sentenced under the same procedures. This argument should not be given undue weight, however, because it cuts against any change in the sentencing system no matter how necessary. Furthermore, the Parole Commission may equalize some disparities because it will still determine the release date for felons sentenced under the old system.¹⁵⁷

VII. CONCLUSION

Most predictions about the effect of the Act are currently little more than speculation. It will most certainly fail to meet the high hopes of its most ardent proponents or the fears of its opponents. A systematic assessment of the Act's effects will be provided by the statistical study undertaken by the Governor's Crime Commission in its study of felony prosecution and sentencing. Carried out by the Institute of Government in Chapel Hill, this study will be completed in 1982.

One immediate effect of the Act is apparent to even the most casual observer of the criminal justice system and the legal community. The Act has generated extraordinarily heated debate in North Carolina among legislators, judges, lawyers, and editorialists. At one point it seemed that only Governor Hunt supported the bill. Judges objected to restrictions on their discretion, prison officials projected tremendous overcrowding, defense attorneys predicted draconian sentences, and prosecutors projected a flooding of the courts. After amendments that reduced presumptive terms and exempted sentence agreements, however, the differing factions either accepted or resigned themselves to the bill.

But the debate begun by the Act about desirable changes in the North Carolina criminal justice system has not ended. Legislators are meeting to learn about the cost of prisons and overcrowding in North Carolina.¹⁵⁸ A committee appointed by the Governor is studying the relative severity of punishments in North Carolina.¹⁵⁹ A private citizens' commission is studying al-

157. For example, the Parole Commission could speed up release dates to equalize sentences or relieve overcrowding. This would not be possible for prisoners sentenced under the Act.

158. See, e.g., Public Hearing on S.B. 281, *supra* note 145.

159. Governor's Study Commission on Length of Sentences, chaired by Judge Willis Whichard of the North Carolina Court of Appeals.

ternatives to incarceration.¹⁶⁰ The Institute of Government has held seminars on sentencing approaches of other states.¹⁶¹ The press is investigating the problems plaguing the prison system and is evaluating the Act.¹⁶² Finally, the entire criminal code is scheduled for revision in 1983,¹⁶³ which may again put in issue the whole sentencing structure.

The debate it has engendered may be the most positive effect of the Fair Sentencing Act. If it stimulates rational, informed discussion by a large portion of the legislative and legal communities about criminal justice problems in North Carolina, desirable changes should occur. The state may develop a system that no longer results in some of the highest rates of confinement and average time served in the country. Whether it also develops a more equitable system depends upon the actions taken in response to this debate.

SUSAN KELLY NICHOLS

160. Citizens' Commission on Alternatives to Incarceration, also chaired by Judge Whichard.

161. Seminar on Determinate Sentencing, Jan. 30, 1981 (Institute of Government, University of North Carolina at Chapel Hill) (personal notes by author).

162. See, e.g., *News & Observer* (Raleigh), Apr. 1, 1981, at 18, col. 1; id., Apr. 5, 1981, § 1, at 26, col. 1.

163. This revision is being undertaken by the Criminal Code Commission, chaired by Allan Bailey.