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State v. Moore: Judicial Discretion versus Determinate Sentencing under the Fair Sentencing Act

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State v. Moore: Judicial Discretion Versus Determinate Sentencing Under the Fair Sentencing Act

In 1979 the North Carolina General Assembly responded to the national movement towards determinate sentencing laws[1] by enacting the Fair Sentencing Act (FSA).[2] A primary goal of the legislation is to eliminate the wide disparities in punishment for similar offenses which have become a growing concern to many criminal law reformers.[3] To effectuate this aim, the FSA attempts to reduce and regulate the exercise of judicial discretion in the sentencing of convicted felons.[4] Trial judges are now required to impose a presumptive term set by statute unless the judge finds there are aggravating or mitigating factors reasonably related to the purposes of sentencing.[5]

Despite the general assembly's attempt to reduce judicial discretion, ambiguities in the FSA and judicial interpretation of the act have provided trial courts with an opportunity to reassert broad discretionary powers during the sentencing process. A recent North Carolina Supreme Court decision, *State v. Moore*,[6] illustrates the movement in this direction.

In *Moore* the North Carolina Supreme Court held that a defendant's admission during trial of prior criminal activity, although not sufficient to prove the statutory aggravating factor of a "prior conviction,"[7] is credible evidence to show character and thus can be used to aggravate a defendant's sentence beyond

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1. Determinate sentencing has been heralded as the major correction reform of the 1980s. *See* Hepburn & Goldstein, *Organization Imperatives and Sentencing Reform Implementation*, 32 CRIME & DELINQ. 339, 341 (1986); Hussey & Lagoy, *The Impact of Determinate Sentencing Structures*, 17 CRIM. L. BULL. 197 (1981). "The central feature of determinate penalty reforms is the establishment of express standards on how much punishment should be imposed . . . upon persons convicted of various types of criminal conduct." von Hirsch & Hanrahan, *Determinate Penalty Systems in America: An Overview*, 27 CRIME & DELINQ. 289, 290 (1981). State legislatures have adopted a variety of determinate penalty schemes. *See id.* at 296-312 (citing and discussing various determinate penalty schemes).

2. Act of June 4, 1979, ch. 760, 1979 N.C. Sess. Laws 850 (codified as amended in scattered sections of Chapters 14, 15A, 18A, 20, 21, 53, 90, 105, 108, 130, 148, and 163 of North Carolina General Statutes). Several amendments were passed the following year. Act of June 25, 1980, ch. 1316, 1980 N.C. Sess. Laws 247 (codified as amended in scattered sections of Chapters 14, 15A, 20, 21, 105, 108, 148, and 163 of North Carolina General Statutes). The final amendments were passed in the 1981 session. Act of April 6, 1981, ch. 179, 1981 N.C. Sess. Laws 150 (codified in scattered sections of Chapters 14 and 15A of North Carolina General Statutes).

3. Sentencing disparity had grown to alarming proportions. *See* TWENTIETH CENTURY TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976) [hereinafter TASK FORCE]. *See also* Hussey & Lagoy, *supra* note 1, at 206 ("[C]hanges envisioned in the proposals of [determinate sentencing schemes] include reduction of disparity and discretion, increasing equity and proportionality, and decreasing the length of prison terms.").

4. For an overview of the provisions of the FSA, see S. CLARKE & E. RUBINSKY, NORTH CAROLINA'S FAIR SENTENCING ACT: EXPLANATION, TEXT AND FELONY CLASSIFICATION TABLE (1981); Comment, *The North Carolina Fair Sentencing Act*, 60 N.C.L. REV. 631 (1982); Comment, *North Carolina's Fair Sentencing Act: Is It Fair?*, 20 WAKE FOREST L. REV. 165 (1984). "In order to scale punishments to the seriousness of crimes, there need to be explicit guidelines . . . . Otherwise, individual judges having different moral outlooks could impose divergent sanctions for similar criminal acts." von Hirsch & Hanrahan, *supra* note 1, at 291.

5. N.C. GEN. STAT. § 15A-1340.4(a), (b) (1983).

6. 317 N.C. 275, 345 S.E.2d 217 (1986).

7. *See infra* note 14.

the presumptive term.[8] The court also held that age alone is not sufficient to require a trial court to find a " 'defendant's immaturity or his limited mental capacity' " to be a mitigating factor.[9]

This Note analyzes *Moore*, its background, and the implications it will have for the FSA. The Note concludes that the North Carolina Supreme Court was correct to reject the idea that age alone is a mitigating factor under the FSA. However, to allow an admission of prior criminal activity for which a defendant has never been prosecuted to be considered as an aggravating factor will subvert one of the original purposes behind the FSA: the elimination of disparity in criminal sentencing.

In April 1984 seventeen year old Terry Lee Moore was convicted of second degree murder,[10] a Class C felony that carried a presumptive term of fifteen years under the FSA.[11] During trial defendant produced evidence which showed that he had no prior criminal convictions. Witnesses also testified to defendant's good character and standing in the community. However, under cross-examination defendant admitted to having sold and used drugs and to having broken into various motel rooms to support his drug use.[12] He had never been prosecuted for these activities.

In sentencing defendant the trial court found as mitigating factors that defendant was a person of good character and reputation, and that he had no prior convictions as defined by statute.[13] However, the trial court also found as a non-statutory aggravating factor that defendant had admitted to engaging in criminal offenses, "all of which carry sentences in excess of 60 days."[14] The trial court, after considering the evidence, found that the aggravating factors outweighed the mitigating factors and defendant was sentenced to forty-five years in prison, three times the presumptive term under the FSA.[15]

On appeal, the North Carolina Court of Appeals was presented with two

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8. *Moore*, 317 N.C. at 278-80, 345 S.E.2d at 220-21.

9. *Id.* at 280-81, 345 S.E.2d at 221 (quoting N.C. GEN. STAT. § 15A-1340.4(a)(2)(e) (1983)).

10. *Id.* at 277, 345 S.E.2d at 219.

11. *See* N.C. GEN. STAT. § 14-17 (1986) (second degree murder punishable as a Class C felony); *Id.* § 1340.4(f)(1) (1983) (presumptive term of 15 years for Class C felony).

12. *Moore*, 317 N.C. at 276-77, 345 S.E.2d at 219.

13. *Id.* at 277, 345 S.E.2d at 219. Good character and reputation and a history of no prior criminal convictions are statutory mitigating factors that the trial court must consider when determining punishment. N.C. GEN. STAT. § 15A-1340.4(a) (1983). The judge is required to "find" the factors only if they have been proved by a preponderance of the evidence. *Id.*

14. *Moore*, 317 N.C. at 276-77, 345 S.E.2d at 219. The FSA considers prior convictions punishable by more than 60 days' confinement as an aggravating factor that the judge must consider. N.C. GEN. STAT. § 15A-1340.4(a)(1)(o) (1983). Engaging in criminal activity punishable by more than 60 days' confinement is not an aggravating factor outlined by statute. *See id.* § 15A-1340.4(a)(1). The dissenting opinion in *Moore* argued that the trial judge treated the admissions of criminal activity as the equivalent of a prior conviction. *Moore*, 317 N.C. at 281-83, 345 S.E.2d at 222 (Exum, J., dissenting). *See infra* text accompanying notes 34-35, 109-12.

15. *Moore*, 317 N.C. at 277, 345 S.E.2d at 219. Before a judge may impose a sentence that exceeds the presumptive sentence, he must specifically find that the aggravating circumstances outweigh the mitigating factors. N.C. GEN. STAT. § 15A-1340.4(b) (1983). *See infra* text accompanying notes 84-97 (discussing how factors should be weighed).

issues regarding defendant's sentence.[16] First, defendant claimed the trial court had failed to consider his age as a mitigating factor, which is required by the "logic" and "purpose" of the FSA.[17] The court of appeals unanimously rejected this contention, holding that a "person at 17 years of age should be as well aware as any person of the wrong involved in the commission of murder."[18] Second, defendant claimed the trial court had considered improperly defendant's admission of prior criminal activity as an aggravating factor.[19] Defendant argued that using these admissions to aggravate the sentence contradicted the "legislature's evidenced intent that prior criminal acts be considered in aggravation only when they are properly supported by a judgment of conviction."[20] A divided court of appeals, citing *State v. Thompson*,[21] rejected this contention as well.[22] In *Thompson* the court of appeals considered a defendant's admission of a prior conviction as credible evidence to support a "finding" of a prior conviction.[23] The court of appeals in *Moore* held that if prior convictions were reasonably related to the purposes of sentencing, so too must admissions of criminal activity punishable by sixty days' confinement be related to the purposes of sentencing.[24] Judge Becton dissented, reasoning that the same procedural safeguards that made the admission of a prior conviction "presumably verifiable [and] . . . valid" in *Thompson* do not attach to the admission of activities for which the State has never sought punishment.[25]

The North Carolina Supreme Court, in a 4-3 decision, acknowledged Judge Becton's dissent, noting that admissions of prior criminal activity are not synonymous with prior convictions.[26] In affirming the decision of the court of appeals, however, Justice Martin reasoned that it is more "natural" to view the admissions as bearing on the defendant's character rather than "force them to fit the prior-conviction factor."[27] Because character is a proper item for a trial court to consider when weighing aggravating and mitigating factors,[28] the ma-

16. State v. Moore, 78 N.C. App. 77, 337 S.E.2d 66 (1985), *modified and aff'd*, 317 N.C. 275, 345 S.E.2d 217 (1986).

17. Defendant-Appellant's Brief at 17, *Moore* (No. 843SC1195).

18. *Moore*, 78 N.C. App. at 83, 337 S.E.2d at 69.

19. *Id.*

20. Defendant-Appellant's Brief at 15, *Moore*.

21. 60 N.C. App. 679, 300 S.E.2d 29, *modified on other grounds*, 309 N.C. 421, 307 S.E.2d 156 (1983).

22. *Moore*, 78 N.C. App. at 83, 337 S.E.2d at 69.

23. *Thompson*, 60 N.C. App. at 684, 300 S.E.2d at 32. In analyzing the mandate of the FSA it is imperative to draw a distinction between "consider" and "find" as set out in the statute. N.C. GEN. STAT. § 15A-1340.4(a) (1983). *See* State v. Spears, 314 N.C. 319, 321-22, 333 S.E.2d 242, 244 (1985) (discussing differences between "must" and "may" consider).

24. *Moore*, 78 N.C. App. at 83, 337 S.E.2d at 69.

25. *Id.* at 84, 337 S.E.2d at 70 (Becton, J., dissenting in part & concurring in part). Judge Becton was concerned about equating the admissions of criminal activity with a criminal conviction. *See infra* text accompanying notes 108-11.

26. *Moore*, 317 N.C. at 278, 345 S.E.2d at 220.

27. *Id.* This analysis was a critical step in fashioning the rule that the court set out in *Moore*. The dissenting opinion in *Moore* did not challenge this reasoning. *See id.* at 281-83, 345 S.E.2d at 222 (Exum, J., dissenting). For a discussion of the use of character in aggravating sentences, see *infra* notes 67-83 and accompanying text.

28. This Note argues that a trial court's use of character in the pre-FSA period should not be

jority held that admissions on the stand of felonious activity satisfied the statutory requisites for proving character.[29] Therefore, the admissions could be used by the trial court to aggravate defendant's sentence.[30] The majority also agreed with the court of appeals' conclusions on the issue of age by refusing to apply a "hard and fast rule" to the definition of "immaturity" in the statute.[31]

Justice Exum, writing for the dissent, took issue with the majority's conclusions regarding the admissions. Although he did not quarrel with the rule enunciated by the court, Justice Exum disagreed with the application of the rule to the facts in *Moore*.[32] Conceding that defendant's admissions should go to the question of character,[33] the dissent suggested that the acknowledgements of past criminal activity could just as easily be viewed as a positive reflection on character as a negative one.[34] However, regardless of how the admissions should be viewed, according to the dissent the trial court did not weigh the admissions as proof of character. Rather, the trial court regarded them as the essential equivalent of a prior conviction. The dissent, therefore, would have remanded the case for resentencing in light of the rule set out by the court.[35]

Trial courts traditionally have exercised broad discretion in imposing punishment.[36] In the view of many reformers this power has led to serious problems within the criminal justice system.[37] Significant disparities in sentences among blacks and whites, and males and females often have been cited as symptoms of a system gone astray.[38]

The FSA attempts to reduce sentencing disparities by setting a presumptive and a maximum prison term for each felony.[39] If a judge decides to depart from the presumptive term he or she is required to find and to specify that either statutory and nonstatutory aggravating or mitigating factors—reasonably re-

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synonymous with the use of character under the FSA. *See infra* notes 78-80, 100-105 and accompanying text. This analysis questions a critical underpinning in the majority's reasoning.

29. *Moore*, 317 N.C. at 279, 345 S.E.2d at 220.

30. *Id.* at 279-80, 345 S.E.2d at 221.

31. *Id.* at 280-81, 345 S.E.2d at 221 (quoting State v. Oliver, 309 N.C. 326, 372, 307 S.E.2d 304, 333 (1983)).

32. *Id.* at 281-83, 345 S.E.2d at 222 (Exum, J., dissenting).

33. *Id.* at 282, 345 S.E.2d at 222 (Exum, J., dissenting).

34. *Id.*

35. *Id.* at 281-83, 345 S.E.2d at 222 (Exum, J., dissenting).

36. *See, e.g.*, United States v. Tucker, 404 U.S. 443, 446-47 (1972) ("sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review"); United States v. Bernard, 757 F.2d 1439, 1444 (4th Cir. 1985) (sentencing judge has discretion to consider matters that would not be admissible at trial). *See also* State v. Smith, 300 N.C. 71, 81-82, 265 S.E.2d 164, 171 (1980) (trial judge should look to several characteristics in assessing punishment). *See infra* text accompanying notes 66-69.

37. TASK FORCE, *supra* note 3, at 3 (noting that a major flaw is "capricious and arbitrary nature of criminal sentencing").

38. TASK FORCE, *supra* note 3, at 4-9. Recent statistical analysis of sentences in North Carolina from 1976 to 1986 shows that the FSA has been a major force in reducing sentencing disparity. S. CLARKE, FELONY SENTENCING IN NORTH CAROLINA, 1976-1986: EFFECTS OF PRESUMPTIVE SENTENCING LEGISLATION 9-22 (May 1987). However, the report suggests that the FSA had no effect on male/female sentencing differences but may have had some effect in black/white sentencing differences where these existed. *Id.* at 319-20.

39. N.C. GEN. STAT. § 15A-1340.4(f) (1983) (presumptive terms set for each class felony); *Id.* § 14-1.1 (1986) (maximum terms set for each class felony).

lated to the purposes of sentencing—have been proved by a preponderance of evidence.[40] No findings are required if the term is imposed pursuant to a plea arrangement or, in certain circumstances, if two or more convictions have been consolidated for judgment.[41]

The issue of what constitutes an aggravating or mitigating factor has been litigated heavily in North Carolina.[42] The FSA provides that the trial judge must consider the aggravating and mitigating factors listed in the statute.[43] The North Carolina Supreme Court has held that defendant carries the burden of persuasion for proving statutory mitigating factors.[44] The trial judge, although obligated to consider a statutory factor, is required to find a factor as mitigating only if the evidence supporting it is "uncontradicted, substantial, and manifestly credible."[45]

Prior to *Moore* North Carolina courts had never addressed whether age alone was to be regarded as a mitigating factor.[46] The FSA requires the trial judge to consider the defendant's "immaturity or limited mental capacity" as mitigating.[47] In *State v. Taylor*[48] the supreme court held that limited mental capacity means "limited intelligence or low I.Q."[49] Defendant in *Moore*, however, contended that "immaturity" meant "tender years."[50] Because Moore was seventeen years old when he committed the crime, he argued that his "tender years" required a finding of mitigation.[51] The supreme court properly rejected this claim, stating the general assembly's use of "immaturity" clearly intended an "inquiry broader than mere chronological age."[52] The court identified specific references to age in the capital sentencing provisions and in other sections of the FSA to support its conclusion that age was not synonymous with "imma-

40. *Id.* § 15A-1340.4(a) (1983). The statutory purposes of sentencing are set out in N.C. GEN. STAT. § 15A-1340.3 (1983).

41. *Id.* § 15A-1340.4(a), (b) (1983).

42. *See, e.g.*, State v. Lattimore, 310 N.C. 295, 311 S.E.2d 876 (1984) (defendant induced others or was a leader; armed robbery and second degree murder); State v. Edwards, 310 N.C. 142, 310 S.E.2d 610 (1984) (pecuniary gain may not be considered in theft cases because pecuniary gain will always be present; breaking or entering); State v. Ahearn, 307 N.C. 84, 300 S.E.2d 689 (1983) (trial court's finding in aggravation that the offense of child abuse was especially heinous, atrocious, or cruel was prejudicial error); State v. Bethea, 71 N.C. App. 125, 321 S.E.2d 520 (1984) (court may not aggravate assault on law enforcement officer by use of deadly weapon when such evidence was necessary to prove element of the offense).

43. N.C. GEN. STAT. § 15A-1340.4 (a) (1983).

44. *See* State v. Spears, 314 N.C. 319, 321, 333 S.E.2d 242, 244 (1985) (evidence must be "uncontradicted, substantial and manifestly credible") (citing State v. Jones, 309 N.C. 214, 218-19, 306 S.E.2d 451, 454 (1983)); State v. Freeman, 313 N.C. 539, 551, 330 S.E.2d 465, 475 (1985) ("[w]hen a defendant argues that his evidence is sufficient to compel the finding of a mitigating factor, he bears the same burden of persuasion of a party seeking a directed verdict") (citing State v. Jones, 309 N.C. 214, 219, 306 S.E.2d 451, 455 (1983)).

45. State v. Spears, 314 N.C. 319, 321, 333 S.E.2d 242, 244 (1985).

46. *Moore*, 317 N.C. at 280, 345 S.E.2d at 221 ("[c]ase law from this and other jurisdictions sheds no light on significance of 'immaturity' in regard to adult sentencing").

47. N.C. GEN. STAT. § 15A-1340.4(a)(2)(e) (1983).

48. 309 N.C. 570, 308 S.E.2d 302 (1983).

49. *Id.* at 579, 308 S.E.2d at 308.

50. Defendant-Appellant's Brief at 15-17, *Moore*.

51. *Id.*

52. *Moore*, 317 N.C. at 280-81, 345 S.E.2d at 221.

turity."[53] There was no dissent on this issue by either the court of appeals or the supreme court.

The more significant issue presented by *Moore* concerns the use of a defendant's admission of prior criminal activity to aggravate a sentence beyond the presumptive term. The FSA requires the trial judge to consider as an aggravating factor a "prior conviction or convictions for criminal offenses punishable by more than 60 days confinement."[54] The North Carolina Supreme Court has held that the state has the burden of proving a prior conviction.[55] The FSA indicates that the conviction "may be proved by a stipulation of the parties or by the original or certified copy of the court record of the prior conviction."[56] The supreme court has interpreted this language to be permissive rather than exclusive, and has held that a prior conviction can be proved in a number of ways.[57] In *Thompson* the court held that a "defendant's [admission of a prior conviction] under oath constitute[s] an acceptable alternative method of proof."[58] In *Moore*, however, defendant admitted only to engaging in criminal activity for which he had never been convicted.[59]

The FSA does not preclude the trial judge from finding a nonstatutory aggravating factor so long as it is reasonably related to the purposes of sentencing and proved by a preponderance of the evidence.[60] The North Carolina courts have approved several nonstatutory factors ranging from a defendant's dangerousness[61] to a defendant's bad driving record.[62] However, these same courts have rejected a significant number of nonstatutory factors. In *State v. Blackwelder*[63] the trial judge found as an aggravating factor that the "presumptive sentence of 15 years [did] not do justification to the seriousness of the [the] crime."[64] The supreme court held that "factors such as deterrence or seriousness of a crime were presumably considered [by the general assembly] in determining the presumptive sentence for the offense."[65] Therefore, those factors

53. *Id.*

54. N.C. GEN. STAT. § 1340.4(a)(1)(o) (1983).

55. *See, e.g.*, State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983) (state has burden of proving prior conviction but does not have burden of proving that defendant was not indigent and uncounselled).

56. N.C. GEN. STAT. § 15A-1340.4(e) (1983).

57. *See* State v. Thompson, 309 N.C. 421, 307 S.E.2d 156 (1983) (defendant's admission of prior conviction acceptable proof).

58. *Id.* at 424, 307 S.E.2d at 159.

59. *Moore*, 317 N.C. at 276-79, 345 S.E.2d at 219-21.

60. N.C. GEN. STAT. § 15A-1340.4(a) (1983). *See* State v. Spears, 314 N.C. 319, 321-22, 333 S.E.2d 242, 244 (1985) (discussing which factors must be considered under the FSA).

61. State v. Jerrett, 309 N.C. 239, 272, 307 S.E.2d 339, 357 (1983) (bizarre manner of murder and kidnapping reasonably related to the purposes of sentencing); State v. Chatman, 308 N.C. 169, 180, 301 S.E.2d 71, 78 (1983) (finding that defendant is dangerous sex offender reasonably related to purposes of sentencing); State v. Ahearn, 307 N.C. 584, 603-04, 300 S.E.2d 689, 702 (1983) (finding that defendant's dangerous propensity caused by social and emotional problems reasonably related to purposes of sentencing).

62. *See, e.g.*, State v. Mitchell, 62 N.C. App. 21, 28-30, 302 S.E.2d 265, 270-71 (1983) (bad driving record proper to consider for aggravating DUI, manslaughter sentence).

63. 309 N.C. 410, 306 S.E.2d 783 (1983).

64. *Id.* at 418, 306 S.E.2d at 788.

65. *Id.* at 418, 306 S.E.2d at 789.

could not be used to aggravate the sentence.

The broad discretion accorded trial courts[66] has usually included the power to consider evidence of character and past criminal behavior for purposes of sentencing.[67] In *United States v. Cusenza*[68] the United States Court of Appeals for the Seventh Circuit permitted a trial judge to consider evidence of prior criminal activity even though the defendant had pleaded not guilty to related charges. Moreover, the United States Court of Appeals for the Fourth Circuit in commenting on a proper judicial role during sentencing has emphasized its approval when trial judges administer individualized sentences.[69] Because sentences that are within the statutory limits generally are not subject to review, judges are encouraged under such a policy to use broad discretion in sentencing. However, this broad discretionary power vested in the district judge reflects an attitude toward the sentencing process that the FSA does not embrace. Although one of the stated purposes of the FSA is to impose a punishment commensurate with the injury the offense has caused,[70] the FSA intentionally disfavors broad judicial discretion to accomplish that goal.[71]

Prior to enactment of the FSA trial judges in North Carolina were encouraged to inquire into a number of factors, including character, in determining a proper sentence. In *State v. Smith*[72] the trial court, despite defendant's objection, admitted into evidence a fingerprint study that indicated defendant had a prior conviction in South Carolina.[73] Defendant denied the conviction, but the trial court found it reliable hearsay and considered the alleged conviction as a factor during sentencing.[74] The supreme court concluded that the fingerprint study was hearsay, and had it been introduced at trial rather than at sentencing it may not have been admissible.[75] However, the supreme court affirmed

66. *See supra* note 36 and accompanying text.

67. *See* United States v. Fulbright, 804 F.2d 847, 853 (5th Cir. 1986) ("sentencing judge has wide discretion to consider all relevant matters of a defendant's past conduct and character in arriving at and imposing appropriate punishment"); United States v. Roland, 748 F.2d 1321, 1327 (2d Cir. 1984) (sentencing judge may rely on assessment of defendant's truthfulness) (citing United States v. Grayson, 438 U.S. 41, 50-52 (1978)); U.S. v. Madison, 689 F.2d 1300, 1315 (7th Cir. 1982) (trial court has discretion to rely upon presentence reports containing references to prior criminal records establishing propensity towards crime), *cert. denied*, 459 U.S. 1117 (1983); People v. Brewster, 184 Cal. App. 3d 921, 229 Cal. Rptr. 352 (1986) (evidence connecting defendant with prior murder which was suppressed in earlier prosecutions was properly considered in aggravating sentencing); People v. Robinson, 147 Mich. App. 509, 510, 382 N.W.2d 809, 810 (1985) (per curium) ("sentencing court may consider other criminal activities in which defendant was involved even though they did not result in . . . convictions"); State v. Harris, 119 Wis. 2d 612, 350 N.W.2d 633 (1984) (primary factors trial court could consider in sentencing are seriousness of offense, character, and protection of public).

68. 749 F.2d 473 (7th Cir. 1984).

69. United States v. Ingram, 530 F.2d 602 (4th Cir. 1976).

70. *See* N.C. GEN. STAT. § 15A-1340.3 (1983).

71. The North Carolina General Assembly incorporated many of the factors used in sentencing into the FSA. *See Blackwelder*, 309 N.C. at 418, 306 S.E.2d at 789 ("factors such as deterrence or the seriousness of a crime were presumably considered [by the General Assembly] in determining the presumptive sentence for the offense"). *See infra* text accompanying notes 78-83, 104-105.

72. 300 N.C. 71, 265 S.E.2d 164 (1980).

73. *Id.* at 81, 265 S.E.2d at 171.

74. *Id.*

75. *See id.*

the trial court's actions and reiterated what had been the traditional rule of permitting wide latitude to the trial court during a sentencing hearing.[76] The court emphasized that in "determining [a] proper sentence . . . it is appropriate for the trial judge to inquire into such matters as the age, character, education, environment, habits, mentality, propensities, and record of the defendant."[77]

Many of the factors outlined in *Smith* were incorporated into the FSA's list of statutory mitigating and aggravating factors. A defendant's "good character" and "reputation" are mitigating factors under the statute;[78] the fact that a defendant took advantage of a position of trust and confidence to commit the offense is considered to be an aggravating factor.[79] Arguably, some of the broad judicial discretion outlined in *Smith* was taken from the courts and limited by the FSA. This would be consistent with the thrust behind determinate sentencing schemes.[80] However, the general assembly clearly reserved some discretion for the trial court because the FSA expressly permits the judge to find any factor "reasonably related to the purposes of sentencing."[81] In *Moore* the court reasoned that defendant's admission of prior criminal activity was evidence of character, a factor related to the purposes of sentencing.[82] Therefore, the court concluded the acts "were appropriately considered an aggravating factor in the determination of [Moore's] sentence."[83]

The final issue facing the court in *Moore* concerned the proper weight that should be accorded to a particular mitigating or aggravating factor.[84] The FSA is silent as to how particular factors are to be weighed against one another. There is no suggestion that statutory factors should be given more weight than nonstatutory factors. The judge is required to show only that a factor is "proved by the preponderance of the evidence."[85]

Following enactment of the FSA, it was clear that trial courts were wary of using one factor in aggravation to outweigh several mitigating factors.[86] Consequently, trial courts began to search for nonstatutory factors that would support an aggravation of the sentence.[87] A typical case is *State v. Massey*.[88] In *Massey* the trial court found as an aggravating factor defendant's association with mem-

76. *Id.*

77. *Id.* at 81-82, 265 S.E.2d at 171.

78. *See* N.C. GEN. STAT. § 15A-1340.4(a)(2)(m) (1983).

79. *See id.* § 15A-1340.4(a)(1)(n).

80. *See supra* note 4 and accompanying text.

81. N.C. GEN. STAT. § 15A-1340.4(a) (1983). Arguably, an overly broad reading of this power will make other components of the FSA meaningless.

82. *Moore*, 317 N.C. at 278, 345 S.E.2d at 220.

83. *Id.* at 279-80, 345 S.E.2d at 220-21.

84. *Id.* at 276-77, 345 S.E.2d at 219. The trial court in *Moore* found that the admissions of criminal activity, a nonstatutory aggravating factor, outweighed the two statutory mitigating factors of defendant's good character and no prior criminal convictions. *Id.*

85. N.C. GEN. STAT. § 15A-1340.4(a) (1983).

86. *See infra* text accompanying notes 94-97.

87. *See* State v. Baucom, 66 N.C. App. 298, 301-02, 311 S.E.2d 73, 75 (1984) (dicta expressing concern over the number of cases being remanded for nonstatutory aggravating factors).

88. 62 N.C. App. 66, 302 S.E.2d 262 (1983).

bers of a motorcycle gang that dealt in drugs.[89] The court of appeals remanded for resentencing, reasoning that "this finding of 'culpability by association' bears no relation to the stated purposes of the [FSA]."[90]

The court of appeals was quick to recognize what the trial courts were attempting to do. In *State v. Baucom*[91] the court of appeals reminded judges that "only one factor in aggravation is necessary to support a sentence greater than the presumptive term."[92] The court suggested that once a statutory aggravating factor is found it would be prudent for courts to "exercise restraint" when considering nonstatutory factors, because they were not necessary ingredients to an aggravated sentence.[93]

In *State v. Parker*[94] the supreme court commented on the dicta in *Baucom* by noting that the weighing process lies within the sole discretion of the trial court and should not be overturned "unless it is 'manifestly unsupported by reason.' "[95] However, the court in *Parker* emphasized that "[i]n some cases a single, relatively minor aggravating circumstance simply will not reasonably outweigh a number of highly significant mitigating factors."[96] Relying on this precedent, Justice Martin in *Moore* concluded that the trial court properly exercised its discretion in weighing the aggravating and mitigating factors.[97]

Although the issue of how various factors are to be weighed under the FSA is critical during the sentencing process,[98] the issue of admissions of criminal activity in *Moore* is more noteworthy. The rule allowing admissions of prior criminal activity to bear on character garnished support from all seven justices.[99] Despite the apparent unanimity on that point this Note argues that such a result is not a foregone conclusion under the FSA.

The formulation of the rule hinges on defining admissions of criminal activity as a character trait. The court in *Moore* suggests it has consistently approved the use of character for purposes of sentencing both before and after the FSA was enacted.[100] However, the authority cited by the court to support its propo-

89. *Id.* at 69, 302 S.E.2d at 264.

90. *Id.*

91. 66 N.C. App. 298, 311 S.E.2d 73 (1984).

92. *Id.* at 301-02, 311 S.E.2d at 75.

93. *Id.*

94. 315 N.C. 249, 337 S.E.2d 497 (1985).

95. *Id.* at 258, 337 S.E.2d at 503 (quoting White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

96. *Id.* at 260, 337 S.E.2d at 503-04.

97. *Moore*, 317 N.C. at 279-80, 345 S.E.2d at 221.

98. Weighing becomes even more critical once the trial judge is permitted to consider admissions of criminal activity as bearing on character. Although the supreme court has said that the length of a sentence and its relation to the seriousness of the crime were factors that were presumably considered by the general assembly when setting the presumptive term, *Blackwelder*, 309 N.C. at 418, 306 S.E.2d at 789, allowing the trial judge wide discretion to weigh an admission of prior criminal activity will result in trial judges preempting the mandate of the FSA.

99. *Moore*, 317 N.C. at 275-76, 345 S.E.2d at 217-18. The three dissenters in *Moore* agreed that character could be influenced by past criminal activity and therefore could be considered during the sentencing process. *See supra* text accompanying notes 32-35.

100. *Moore*, 317 N.C. at 278-79, 345 S.E.2d at 220 ("this Court has consistently approved . . . assessment of character evidence for purposes of sentencing").

sition predates enactment of the FSA.[101] There is no doubt that the FSA reserved to trial judges some discretion to consider character during sentencing.[102] However, the majority opinion in *Moore* suggests that the broad discretion outlined by the dicta in *Smith*[103] continues to govern under the FSA. This suggestion ignores the fact that the FSA incorporated many of the factors that *Smith* deemed appropriate for sentencing.[104] The court in *Moore* failed to recognize that the expansive definition of "character" might need to be pruned in light of the FSA. If the thrust of the FSA is to reduce judicial discretion, allowing judges the wide latitude to assess character as permitted in *Smith* is inconsistent with one of the purposes behind the Act.[105]

The court's inattention to these competing interests is illustrated by its silence as to why the FSA puts such a heavy emphasis on prior convictions. The reasoning employed by the majority suggests that any criminal activity proved by a preponderance of the evidence can be used to aggravate the sentence regardless of whether the defendant was convicted of the crime. Although this is the practice in most jurisdictions,[106] such a rule in North Carolina would considerably moot the "prior convictions" component of the FSA. If *Moore* accurately gauges the intention of the general assembly, then the inclusion of the prior convictions component in the FSA was unnecessary.[107]

Finally, even if the rule in *Moore* is accepted as proper analysis, the majority misapplied the rule to the facts. The trial judge equated the criminal activity

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101. The FSA was enacted in final form in 1981. *See supra* note 2. The majority cited *Smith*, which was decided in 1980. For a discussion of *Smith*, see *supra* text accompanying notes 72-77.

102. N.C. GEN. STAT. § 15A-1340.4(a) (1983), allows trial judges to consider nonstatutory factors reasonably related to purposes of sentencing. *See* State v. Ahearn, 307 N.C. 584, 597, 300 S.E.2d 689, 697 (1983) (" 'The fair sentencing act did not remove, nor did it intend to remove, all discretion from the sentencing judge.' ") (quoting State v. Davis, 58 N.C. App. 330, 333-34, 293 S.E.2d 658, 661 (1982)).

103. *Smith*, 300 N.C. at 81-82, 265 S.E.2d at 171. *See supra* text accompanying note 77 (noting it is proper for trial court to inquire into age, character, education, habits, mentality and propensities).

104. *See supra* text accompanying notes 78-80.

105. The problem is defining what the trial court should be able to consider under the heading of character. The court in *Moore* held that because defendant put his character in issue "specific wrongful acts . . . may be brought out to show his character." *Moore*, 317 N.C. at 278, 345 S.E.2d at 220 (citing 1 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE § 108 (1982)). If defendant admitted on the stand that he had a history of violent activity, then the trial court should find this dangerous propensity as bearing on character. *See* State v. Ahearn, 307 N.C. 584, 603-04, 300 S.E.2d 689, 701-02 (1983) (finding that defendant is dangerous is reasonably related to purposes of sentencing). However, how do we reconcile evidence of prior criminal activity in which there has not been a conviction with a statute that puts a heavy emphasis on prior convictions?

106. *See supra* note 67 and accompanying text.

107. If all evidence of prior criminal activity bears on character, will the court permit evidence of crime for which the defendant has been acquitted to aggravate a sentence? *See, e.g.*, United States v. Sweig, 454 F.2d 181, 184 (2d Cir. 1972) (sentencing judge may properly refer to evidence of crimes for which defendant has been acquitted); People v. Robinson, 147 Mich. App. 509, 382 N.W.2d 809 (1985) (per curiam) (trial court may consider other criminal activity even though there was no charge or conviction). Prior convictions do "bear on an offender's deserts." von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591, 592 (1981). The general assembly presumably considered this when they enacted the FSA. Should prior criminal activity be accorded the same status as a prior conviction? If the weighing of aggravating factors and mitigating factors lies within the sole discretion of the trial judge, then treating the admissions as an aggravating factor is the de facto equivalent of treating the admissions as a prior conviction.

with the standard for prior convictions by setting out each offense and its proper classification.[108] The dissent argued that the trial court did not consider the admissions as bearing on character as required by the rule set out by the majority.[109] Moreover, the dissent suggested that even if the admissions had been considered as to character they would have been mitigating in part rather than completely aggravating.[110] Regardless of how the factors should have been weighed the dissent was justified in concluding that the sentencing judge "determined to aggravate the sentence as if defendant had been criminally convicted in the past."[111] That is not the rule set out by the court in *Moore*.[112]

The decision in *Moore* is a significant development in the law of sentencing because of its potential impact on the FSA. Recent statistical analysis has shown that contrary to many of the dire forecasts that accompanied adoption of the FSA,[113] active sentences varied considerably less and became more accurately predictable as a result of the FSA presumptive-term provisions. This analysis suggests that the goal of reducing sentencing disparity is being achieved.

As the variations have declined, however, judicial dissatisfaction with the FSA has increased. Although the FSA has removed a considerable amount of judicial discretion, frustration among judges has set in as they have learned that a felon's behavior in prison routinely shortens the sentences they impose by about sixty percent.[114]

Judicial reaction, however, should not be attributed solely to restrictions on judicial discretion in the Act. Ambiguities and loopholes created by an atmosphere of political compromise also contribute to the misapplication of various components of the Act. The "prior convictions" provision and the power to consider any factors reasonably related to the purposes of sentencing illustrate inconsistency in the statute. One commentator has suggested that judicial discontent is partly a by-product of an unsupervised system in which appellate review only corrects egregious errors.[115]

Moore illustrates the inherent conflict in any approach that attempts to reduce sentencing disparity. Judges charged with enforcing the provisions of the legislation are grappling with a reduction in their discretionary powers. It is inevitable that, if unchecked, erosions of the restraints on discretion will occur and will pare back any successes in reducing disparity in criminal sentencing.

More than a decade has passed since the Twentieth Century Task Force on Criminal Sentencing recognized that "we [had] become a nation of extremes

108. *Moore*, 317 N.C. at 277, 345 S.E.2d. at 219.

109. *Id.* at 281-83, 345 S.E.2d at 222 (Exum, J., dissenting).

110. *Id.* at 282, 345 S.E.2d at 222 (Exum, J., dissenting).

111. *Id.* at 283, 345 S.E.2d at 222 (Exum, J., dissenting).

112. The majority's application of the rule illustrates that despite the court's acknowledgement of Judge Becton's concerns, in effect the admission of criminal activity is now synonymous with a prior conviction. *See supra* text accompanying note 25.

113. S. CLARKE, *supra* note 38, at 9-22.

114. S. CLARKE, *supra* note 38, at 14-15, 24-25. The shortening occurs as a result of the good time/gain time provisions of the FSA. *Id.*

115. S. CLARKE, *supra* note 38, at 5-6, 23-24.

when it comes to sentences."[116] Sentencing disparities were charged with undermining the entire criminal justice structure. North Carolina's adoption of a determinate sentencing model has gone a long way towards correcting some of the imbalances. Judicial authorities would do well to take notice of this short-lived success. Rethinking the underpinnings of the decision in *Moore* would be a step in the right direction.

TERRENCE J. TRUAX

116. *See* TASK FORCE, *supra* note 3, at 6.