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The Fair Sentencing Act Meets the Tender Mercies of North Carolina Trial Judges

In 1979 the North Carolina General Assembly passed the Fair Sentencing Act.¹ The Act establishes a framework whereby each felony is assigned to a class of offenses.² Each class is assigned a maximum³ and a presumptive⁴ prison term. During the sentencing portion of a criminal trial, the judge, if he imposes a prison term, "must impose the presumptive term provided in [the statute] unless, after consideration of aggravating or mitigating factors, or both, he decides to impose a longer or shorter term."⁵ The Act enumerates several aggravating and mitigating circumstances that the judge *must* consider, but also allows the judge to consider any other factors he believes are related to the purposes of sentencing and are supported by a preponderance of the evidence.⁶

In the two and one-half years since the Fair Sentencing Act went into effect, distinct trends have developed in the judicial interpretation of the Act. Foremost among these trends is limited review of both the trial judge's definition of aggravating or mitigating circumstances and his factual determination that these circumstances exist. This note contends that such limited review defeats the Act's original purpose of providing greater certainty in the length of prison sentences and increases the danger of convicting a defendant of a crime with which he never was charged.

The Act had its genesis in several years of study by the General Assembly's Commission on Correctional Programs.⁷ The Commission found that broad disparities in sentences and actual prison terms were a primary cause of prison unrest,⁸ and concluded that sentences certain in length would be more effective deterrents to crime.⁹ The Commission observed that disparities in sentencing generally were caused by the broad discretion allowed to trial judges and parole authorities.¹⁰ Influenced by the report of the Twentieth Century Fund Task Force on Criminal Sentencing,¹¹ the Commission recom-

1. Fair Sentencing Act, ch. 760, 1979 N.C. Sess. Laws 850 (codified at N.C. GEN. STAT. §§ 15A-1340.1 to .7 (1983)). The Act applies to felonies committed on or after July 1, 1981. N.C. GEN. STAT. § 15A-1340.1(a) (1983).

2. N.C. GEN. STAT. § 15A-1340.1(a) (1983). Specific felony classifications are found in each felony subsection of the criminal law section of the North Carolina General Statutes.

3. *Id.* § 14-1.1(a) (1981).

4. *Id.* § 15A-1340.4(f) (1983).

5. *Id.* § 15A-1340.4(a).

6. *Id.*

7. Comment, *The North Carolina Fair Sentencing Act*, 60 N.C.L. REV. 631, 631 (1982).

8. *Id.*

9. *Id.*

10. NORTH CAROLINA ACADEMY OF TRIAL LAWYERS EDUCATION FOUNDATION, HISTORY OF PRESUMPTIVE SENTENCING AND PROVISIONS OF THE NORTH CAROLINA LAW, PRESUMPTIVE SENTENCING AND JURY TRIAL OF A DUI CASE 2 (1979) [hereinafter cited as HISTORY OF PRESUMPTIVE SENTENCING].

11. TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976).

mended the use of a presumptive sentencing system in North Carolina.¹² It theorized that greater uniformity in sentencing would be encouraged by a system that forced a judge wishing to deviate from the presumptive term both to make written findings and to risk reversal on appeal.¹³ In 1977 a bill based on the Commission's findings was introduced in both houses of the General Assembly. In both houses it died in committee.¹⁴ The bill's defeat was caused largely by trial judges and practicing attorneys who feared that the bill would curtail severely judges' sentencing discretion.¹⁵

After the 1977 defeat, the North Carolina Bar Association established a Committee on Sentencing.¹⁶ The bill was revised and renamed the Fair Sentencing Act.¹⁷ The Act contained four stated purposes. The most important purpose of the bill was "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."¹⁸ The next two purposes were "to protect the public by restraining offenders" and "to assist the offender toward rehabilitation and restoration to the community as a lawful citizen."¹⁹ The Act's final stated purpose was to deter crime by creating more uniform sentences.²⁰ The bill was enacted with only minor changes by the 1979 General Assembly.²¹ Because of postenactment controversy regarding the Act, its effective date was delayed,²² and, in response to concern over the length of prison terms,²³ the presumptive sentences for several classes of felonies were reduced by as much as one-fourth.²⁴

The North Carolina Supreme Court first fully discussed the Act in 1983. In *State v. Ahearn*²⁵ defendant had battered his girlfriend's child to death.²⁶ At the guilt-determination phase of the trial, defendant entered pleas of guilty to felonious child abuse and voluntary manslaughter.²⁷ The trial judge found three aggravating factors and five mitigating factors.²⁸ He filled out only one

12. HISTORY OF PRESUMPTIVE SENTENCING, *supra* note 10, at 26.

13. Comment, *supra* note 7, at 649-50.

14. *Id.* at 631.

15. *Id.* at 631-32 & n.8.

16. *Id.* at 632.

17. Fair Sentencing Act, ch. 760, 1979 N.C. Sess. Laws 850 (codified at N.C. GEN. STAT. §§ 15A-1340.1 to .7 (1983)).

18. *Id.* at 851.

19. *Id.*

20. *Id.* The fourth purpose stated in the Act was to "provide a general deterrent to criminal behavior." *Id.*

21. Fair Sentencing Act, ch. 760, 1979 N.C. Sess. Laws 850 (codified at N.C. GEN. STAT. §§ 15A-1340.1 to .7 (1983)).

22. Comment, *supra* note 7, at 633. The Act originally was applicable to felonies committed on or after July 1, 1980, but enforcement was delayed until after July 1, 1981. N.C. GEN. STAT. § 15A-1340.1(a) (1983).

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

24. Comment, *supra* note 7, at 633.

25. 307 N.C. 584, 300 S.E.2d 689 (1983).

26. *Id.* at 586-87, 300 S.E.2d at 691-92.

27. *Id.* at 585, 300 S.E.2d at 690-91.

28. The aggravating factors were: (1) the especially heinous nature of the offense; (2) the age

sentencing form, however, thereby treating the aggravating and mitigating factors together for both child abuse and manslaughter sentencing purposes.²⁹ He then concluded that the aggravating factors outweighed the mitigating factors,³⁰ and sentenced defendant to five years on the child abuse charge and sixteen on the manslaughter charge.³¹ Because both sentences exceeded the presumptive term, defendant was entitled to appeal to the North Carolina Court of Appeals as a matter of right.³² Defendant argued that none of the aggravating factors were supported by the evidence.³³ The court of appeals, lacking any other indication of the trial judge's interpretation, assumed that all factors were relevant to both charges.³⁴ Although the court invalidated several of the factors,³⁵ it refused to find prejudice toward defendant because the trial judge could have determined that the remaining aggravating factors outweighed the mitigating.³⁶ Defendant appealed to the North Carolina Supreme Court, arguing that the court of appeals' refusal to find prejudice was error.³⁷

In reversing the court of appeals and remanding the case,³⁸ the supreme

of the victim; and (3) defendant's dangerousness to himself and others. The mitigating factors were: (1) defendant's lack of a criminal record; (2) defendant's mental and physical conditions; (3) defendant's immaturity or limited mental capacity; (4) defendant's voluntary acknowledgement of wrongdoing; and (5) defendant's good reputation. *State v. Ahearn*, 59 N.C. App. 44, 45-46, 295 S.E.2d 621, 622-23 (1982), *rev'd*, 307 N.C. 584, 300 S.E.2d 689 (1983).

29. *Ahearn*, 307 N.C. at 592, 300 S.E.2d at 694. Because only one sentencing form was completed, it was impossible to determine which aggravating and mitigating factors applied to each charge.

30. *Id.*

31. *Id.* at 585, 300 S.E.2d at 690-91.

32. Appeals are authorized as a matter of right by N.C. GEN. STAT. § 15A-1444(a1) (1983).

33. *State v. Ahearn*, 59 N.C. App. 44, 48, 295 S.E.2d 621, 624 (1982), *rev'd*, 307 N.C. 584, 300 S.E.2d 689 (1983).

34. *Ahearn*, 307 N.C. at 592, 300 S.E.2d at 694 (describing court of appeals' analysis).

35. *State v. Ahearn*, 59 N.C. App. 44, 48-49, 295 S.E.2d 621, 623-25 (1982), *rev'd*, 307 N.C. 584, 300 S.E.2d 689 (1983). The court of appeals invalidated the first aggravating factor—the heinous nature of the offense—as to both charges because defendant's actions were no more heinous than those of others convicted of child abuse and voluntary manslaughter. *Id.* at 49, 295 S.E.2d at 624. The second aggravating factor—the age of the victim—was invalidated as to the child abuse charge because the victim's age was an essential element of the crime. *Id.* at 48-49, 295 S.E.2d at 624.

36. *Id.* at 49-50, 295 S.E.2d at 624-25. The court of appeals had applied more stringent criteria to refuse a finding of prejudice in *State v. Locklear*, 61 N.C. App. 594, 301 S.E.2d 437 (1983). The *Locklear* court held that even though an aggravating factor found by the trial court was improper, defendant had failed to show prejudice because the trial judge, in his discretion, could have ordered defendant to serve his multiple sentences consecutively for an even longer term. *Id.* at 596-97, 301 S.E.2d at 439.

37. *Ahearn*, 307 N.C. at 585-86, 300 S.E.2d at 690-91.

38. The supreme court concluded that the nature of the manslaughter offense was especially heinous, *Ahearn*, 307 N.C. at 606-07, 300 S.E.2d at 703, although it agreed with the court of appeals that the child abuse actions were not. *Id.* at 599, 300 S.E.2d at 698-99. The supreme court also disagreed with the court of appeals' determination that the victim's age could not be an aggravating factor as to the child abuse charge. Although the age of the victim is an essential element of the crime, the court found that the extreme youth of *Ahearn's* victim (24 months) supported the trial court's aggravation conclusion. *Id.* at 603, 300 S.E.2d at 701. Although defendant's dangerousness to others was upheld as an aggravating factor, defendant's dangerousness to himself was invalidated as an aggravating factor to both charges. *Id.* at 603-04, 300 S.E.2d at 701-02. Finally, the court invalidated defendant's plea of guilty of child abuse as a mitigating

court held that a separate sentencing form is required for each offense.³⁹ This requirement resembles that provided for special verdicts.⁴⁰ Separate listing of factors enables a reviewing court to determine precisely which factors have been found in aggravation or mitigation for each particular crime. Thus, if any factor later is invalidated, the case can be remanded on that count alone.⁴¹ Otherwise, as was the case in *Ahearn*, the case must be remanded for resentencing if any factor is invalidated.⁴²

The *Ahearn* court also held that since the trial judge did not enunciate the weight to be applied to each factor, a reviewing court that struck down an aggravating factor was required to find prejudice to defendant.⁴³ Because that particular violation may have prompted the trial judge to disregard the presumptive sentence, only a remand to the trial judge could result in a redetermination of the proper sentence.

The *Ahearn* court, however, was not satisfied with its settlement of the separate findings and prejudice questions. The court sent an important message to North Carolina trial judges. The court stated that "[t]he Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence which insures [sic] that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted . . . to the particular offender"⁴⁴ and reiterated the language of section 15A-1340.4(b). "The sentencing judge's discretion to impose a sentence . . . greater . . . than the presumptive term, is carefully guarded by the requirement that he make written findings in aggravation and mitigation, which findings must be proved by a preponderance of the evidence."⁴⁵

After these statements expressing strong support for the Act, the *Ahearn* court proceeded to undercut its requirements by announcing a narrow standard of appellate review; the Act "was not intended . . . to remove all discretion from our able trial judges."⁴⁶ The court concluded that, although trial

factor to the manslaughter charge because defendant denied wrongdoing in connection with the baby's death. *Id.* at 607-08, 300 S.E.2d at 704.

39. *Id.* at 598, 300 S.E.2d at 698.

40. N.C.R. Civ. P. 49(a). Special verdicts require a specific finding with respect to each element. This process enables a reviewing court to determine exactly what the fact-finder decided and whether any overruled aspect of the case would have affected the holding.

41. The policy of favoring the special verdict is reflected by N.C.R. Civ. P. 40(d), which states: "Where a special finding of facts is inconsistent with the general verdict, the former controls, and the judge shall give judgment accordingly."

42. *Ahearn*, 307 N.C. at 594, 300 S.E.2d at 696. For example, in *Ahearn* the supreme court agreed with the court of appeals that the nature of the child abuse was not especially heinous. *Ahearn*, 307 N.C. at 599, 300 S.E.2d at 698. It is possible that the trial judge meant only for this aggravating factor to apply to the manslaughter charge, a determination which was upheld. *Id.* at 606-07, 300 S.E.2d at 703-04. The lower court's failure to specify the charge to which the aggravating factor applied forced the appellate courts to examine the factor's relevance to all charges, and to remand for resentencing any charge that was not aggravated by that factor.

43. *Id.* at 601, 300 S.E.2d at 701. See also *State v. Chatman*, 308 N.C. 169, 301 S.E.2d 71 (1983).

44. *Ahearn*, 307 N.C. at 596, 300 S.E.2d at 696.

45. *Id.*

46. *Id.* at 596, 300 S.E.2d at 697.

judges were required to make written findings about the existence of aggravating and mitigating factors, they "should be permitted wide latitude in arriving at the truth as to [their] existence . . . for it is only [the trial judge] who observes the demeanor of the witnesses and hears the testimony."⁴⁷

The *Ahearn* court confused the trial judge's ability to weigh the credibility of the witnesses—and thereby determine whether or not the factors exist on the evidence—with the trial judge's ability to define the factors that should be considered. Although reviewing courts usually do, and indeed should, defer to trial courts' findings on witness credibility,⁴⁸ there is no reason for them to do so on the definition of aggravating and mitigating circumstances. Determining whether an established fact is "reasonably related to the purposes of sentencing" is a matter of statutory interpretation, and therefore a matter of law, not fact.⁴⁹ After making it clear that the trial court's written findings regarding the existence of aggravating and mitigating circumstances would be reviewed narrowly, the court stated that the trial judge, in determining whether and to what degree the aggravating circumstances outweigh the mitigating, "need not justify the weight he attaches to any factor."⁵⁰

The court should not have reached this conclusion; the statutory language on which the court was relying is subject to a different interpretation. After requiring the trial judge to list specifically the aggravating and mitigating circumstances,⁵¹ the statute states only that in imposing a sentence longer than the presumptive sentence the judge "must find that the factors in aggravation outweigh the factors in mitigation."⁵² This statute could be interpreted either as requiring the judge to state the weight attached to each factor, or as requiring that the balance tips in favor of the aggravating factors. The supreme court, by choosing the latter interpretation, effectively foreclosed judicial review of the weight attached to each factor.⁵³

Trial and appellate judges have taken the *Ahearn* court's narrow review standard to heart. Appellate courts have upheld determinations of the following as aggravating circumstances: lying on the witness stand,⁵⁴ prior offenses bearing no relation to the crime charged,⁵⁵ and premeditation in a second-

47. *Id.*

48. *See* *General Specialties Co. v. Nello L. Teer Co.*, 41 N.C. App. 273, 254 S.E.2d 658 (1979).

49. *See* *Young v. AAA Realty Co.*, 350 F. Supp. 1382 (M.D.N.C. 1972) (statutory interpretation is duty of higher courts).

50. *Ahearn*, 307 N.C. at 597, 300 S.E.2d at 697.

51. N.C. GEN. STAT. § 15A-1340.1(a) (1983).

52. *Id.* § 15A-1340.4(a).

53. *Ahearn* concluded that the trial judge could assign the same factor a different weight in different cases. Thus, the court did not require him to state the weight given. *Ahearn*, 307 N.C. at 597, 300 S.E.2d at 697. The two concepts, however, are not synonymous. The trial judge need not be required to give the same factor equal weight in all cases and yet could be required to make a written finding as to the weight given the factor in each case. The reviewing court then could ensure that undue weight was not placed on any single factor to avoid the intent of the legislature.

54. *See* *State v. Thompson*, 62 N.C. App. 38, 302 S.E.2d 310 (1983). *See infra* text accompanying notes 83-93.

55. *See* *State v. Teague*, 60 N.C. App. 755, 300 S.E.2d 6 (1983) (minor financial crimes considered by judge during a trial on attempted sodomy charges).

degree murder case.⁵⁶ All findings of aggravating circumstances that have been invalidated, except one,⁵⁷ involved factors that were essential elements of the crime for which the defendant was convicted⁵⁸—a result mandated by statute.⁵⁹ Narrow review seriously undermines one of the theoretical bases for presumptive sentencing—that the trial judge will be reluctant to sentence for longer than the presumptive term when by so doing he runs a significant risk of reversal.⁶⁰

There are more difficulties raised by the developing trend of narrow review than simply the defeat of the Act's attempts to limit the trial judge's discretion. To the extent that unbridled judicial discretion exists, past disparate sentencing is perpetuated. When narrow review of the definition of aggravating factors is coupled with the Act's preponderance of the evidence standard, possibilities of new abuse arise.

An example of such abuse occurred in *State v. Melton*.⁶¹ In *Melton* defendant borrowed a pistol, purchased bullets, and test-fired the gun in a remote area.⁶² Defendant then drove to the victim's home, had a beer with the victim, presumably to quell the victim's suspicions, and shot the victim through the heart.⁶³ He then drove to a police station and turned himself in.⁶⁴ In exchange for the State's promise not to prosecute for first-degree murder, defendant entered a plea of guilty to second-degree murder.⁶⁵ A Class C felony, second-degree murder carries a presumptive sentence of fifteen years.⁶⁶ At the sentencing hearing, the trial judge found only one aggravating factor—that the killing had been committed with premeditation⁶⁷—and sentenced defendant to life in prison.⁶⁸ Defendant appealed to the North Carolina Supreme Court. He argued that facts supporting a charge that has been dismissed pursuant to a plea bargain may not be considered as aggravating factors of the lesser admitted charge⁶⁹ and that the judge could have found premeditation only by relying on the evidence presented at trial. This

56. See *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983). See *infra* text accompanying notes 61-82.

57. See *State v. Setzer*, 61 N.C. App. 500, 301 S.E.2d 107 (factor that defendant had lied on *voir dire* invalid), *disc. rev. denied*, 308 N.C. 680, 304 S.E.2d 760 (1983). See *infra* text accompanying notes 94-99.

58. See, e.g., *State v. Thompson*, 62 N.C. App. 38, 302 S.E.2d 310 (1983) (facts that defendant armed and seeking pecuniary gain disallowed as aggravating factors in an armed robbery case); *State v. Massey*, 62 N.C. App. 66, 302 S.E.2d 262 (1983) (fact that defendant travelled to apartment with a shotgun to seek revenge disallowed as an aggravating factor in attempted burglary case).

59. N.C. GEN. STAT. § 15A-1340.4(a)(1) (1983) (“[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation”).

60. See *supra* text accompanying note 13.

61. 307 N.C. 370, 298 S.E.2d 673 (1983).

62. *Id.* at 371, 298 S.E.2d at 675.

63. *Id.*

64. *Id.*

65. *Id.* at 372-73, 298 S.E.2d at 676.

66. *Id.* at 373, 298 S.E.2d at 676.

67. *Id.* at 372, 298 S.E.2d at 675.

68. *Id.*

69. *Id.* at 373, 298 S.E.2d at 676.

"amounted to the use of the same evidence to prove the elements of murder in the second degree as well as the aggravating factor of premeditation and deliberation."⁷⁰ Defendant argued that the trial judge effectively had convicted him of the higher crime.⁷¹

Although the Act specifically exempts sentences to which both sides agree pursuant to a plea arrangement,⁷² there had been confusion about whether bargained-for guilty pleas implicitly included an agreement to the presumptive term for the crime.⁷³ The supreme court ended this confusion and rejected defendant's assertion that he had bargained for a fifteen-year sentence by agreeing to plead guilty to second-degree murder.⁷⁴ Thus, after *Melton* defense attorneys should be careful in agreeing to have their clients plead guilty to specific sentences.

More importantly, *Melton* rejected defendant's argument that the trial court incorrectly had included an essential element of the crime of first-degree murder as an aggravating circumstance to the charge of second-degree murder.⁷⁵ The court grounded its decision on the fact that premeditation is not an essential element of second-degree murder and, therefore, its inclusion is not prohibited by the Act.⁷⁶ The court asserted that such a factor is reasonably related to the stated purposes of the Act.⁷⁷ Although *Melton* noted that some difficulties might arise, the court stated that the bargained plea situation differed from the situation in which a jury acquitted defendant of first-degree murder but convicted him of second-degree murder.⁷⁸ The court, however, refused to conclude that premeditation could not constitute an aggravating circumstance even in that situation,⁷⁹ despite the fact that the court seemingly would be invading the province of the jury.

A more subtle problem than invading the province of the jury arises with allowing the essential elements of a higher crime to be used in aggravation of the lower one. Ordinarily, each essential element of the crime must be proved beyond a reasonable doubt.⁸⁰ In finding the existence of an aggravating factor, however, the trial judge is held only to a preponderance of the evidence standard.⁸¹ Under *Melton*, it is not difficult to envision a situation in which a prosecutor, uncertain of his ability to sway a jury to find all the elements of the higher crime beyond a reasonable doubt, could charge defendant with the lower crime and hope that, at the sentencing hearing, he could convince the trial judge of any remaining elements of the higher crime under the lower

70. *Id.* at 373-74, 298 S.E.2d at 676.

71. *Id.*

72. N.C. GEN. STAT. § 15A-1340.4(b) (1983).

73. Comment, *supra* note 7, at 637.

74. *Id.*

75. *Melton*, 307 N.C. at 373-74, 298 S.E.2d at 676.

76. *Id.* at 375, 298 S.E.2d at 677. See N.C. GEN. STAT. § 15A-1340.4(a) (1983).

77. *Melton*, 307 N.C. at 376, 298 S.E.2d at 678.

78. *Id.* at 375 n.2, 298 S.E.2d at 677 n.2.

79. *Id.*

80. See, e.g., *State v. Batts*, 269 N.C. 694, 153 S.E.2d 379 (1967).

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

standard of proof. Such presentation to the judge during sentencing could result in surprise to defense counsel, with the end result being inadequate defense to the additional essential elements.⁸²

*State v. Thompson*⁸³ is illustrative of the worst scenario that has occurred under the Act. In *Thompson* defendant was convicted of armed robbery.⁸⁴ The trial judge found four aggravating factors.⁸⁵ The fourth factor was that "defendant deliberately presented, during the course of the trial, evidence which he knew to be false about his presence on the day in question and deliberately presented false evidence concerning the statement attributed to him and *obviously found* by the jury to be false."⁸⁶ After finding that the aggravating circumstances outweighed the mitigating, the trial judge sentenced defendant to twenty years in prison.⁸⁷

Defendant sought relief in the North Carolina Court of Appeals on the ground that all four aggravating factors were improper.⁸⁸ The court concluded that two of the factors were essential elements of the armed robbery charge,⁸⁹ and that defendant had waived his objection to the third.⁹⁰ Finally, the court, emphasizing the stated purpose of the Act, held that the fourth aggravating factor was:

[a]cceptable as an aggravating factor because it is reasonably related to the purposes of the statute and the rehabilitation of the offender and provides a general deterrent to criminal behavior. A defendant's truthfulness under oath is probative of his attitudes toward society and his prospects for rehabilitation and is therefore relevant to sentencing.⁹¹

Although defendant contended that by allowing lying on the stand to be an aggravating circumstance the court had enabled the trial judge to convict defendant of perjury, a crime with which he was not charged,⁹² the court concluded that, "[t]he fact that defendant could be tried for perjury at another trial before another judge and jury pales in the face of the immediate need for truth at the initial trial."⁹³ This conclusion, however, ignores the significance of defendant effectively having been convicted of perjury without the benefit of a jury or any of the other safeguards of a criminal trial, such as cross-examination of the witnesses. The court attempted to distinguish *State v.*

82. In addition, when a crime lower than a Class A or B felony is charged, such action may avoid the additional safeguards reserved for these felonies by N.C. GEN. STAT. § 15A-2000 (1983). These safeguards include jury determination of aggravating and mitigating circumstances and stricter appellate review. *See infra* note 106.

83. 62 N.C. App. 38, 302 S.E.2d 310 (1983).

84. *Id.* at 39, 302 S.E.2d at 311.

85. *Id.* at 42, 302 S.E.2d at 313.

86. *Id.* (emphasis added).

87. *See id.* at 39, 43, 302 S.E.2d at 311, 313.

88. *See id.* at 42, 302 S.E.2d at 313.

89. *Id.* at 42-43, 302 S.E.2d at 313.

90. *Id.* at 43, 302 S.E.2d at 313.

91. *Id.*

92. *Id.* at 43, 302 S.E.2d at 314.

93. *Id.*

Setzer,⁹⁴ a case that the court of appeals remanded because of an improper finding that lying on *voir dire* was aggravating, by stating that *Setzer* "involved contradicted testimony at a *voir dire* hearing which is a far cry from a finding of perjured testimony before a judge and jury."⁹⁵ In *Thompson*, however, no finding of perjury ever was made by a jury, nor was the issue debated in open court.

Sound objections to this reasoning in *Thompson* were raised by Judge Becton, who concurred in the result.⁹⁶ Judge Becton first noted that *Setzer* held that "a judge cannot find as an aggravating factor that the defendant did not testify truthfully when the only evidence of his untruthfulness is his contradicted testimony at a *voir dire* hearing or during trial."⁹⁷ Any other holding would increase defendant's sentence based on an alleged crime with which he was not charged.⁹⁸ Judge Becton noted:

In adopting the Fair Sentencing Act, our legislature rejected the prevalent sentencing philosophy of fitting the punishment to the offender through long statutory maximum terms and broad judicial discretion and adopted a sentencing philosophy of fitting punishment to the crime by application of presumptive sentences. Therefore, as suggested by defendant, if the Fair Sentencing Act is to achieve its goal of eliminating disparate sentencing, it must be read to limit the myriad of factors that were considered appropriate when fitting the punishment to the offender was the watchword.⁹⁹

In addition, in finding that lying on the stand was an acceptable aggravating circumstance, the majority relied heavily upon the United States Supreme Court decision in *United States v. Grayson*.¹⁰⁰ In *Grayson* the Court refused to overturn the use of a finding of false testimony as an aggravating circumstance. Argument, however, centered on the constitutionality of sentencing a criminal defendant for false testimony—to do so arguably "chills" defendants' first amendment rights to testify on their own behalf.¹⁰¹ The lack of a charge and a jury finding was addressed directly only in the dissent.¹⁰² Justice Stewart, refusing to join the majority, stated:

The Court begins its consideration of this case . . . with the assumption that the respondent gave false testimony at his trial. But there was no determination that his testimony was false. This respondent was given a greater sentence than he would otherwise have re-

94. 61 N.C. App. 500, 301 S.E.2d 107, *disc. rev. denied*, 308 N.C. 680, 304 S.E.2d 760 (1983).

95. *Thompson*, 62 N.C. App. at 44, 302 S.E.2d at 314.

96. *Id.* at 44, 302 S.E.2d at 314 (Becton, J., concurring). Judge Becton concurred in the remand to resentence defendant, naming the incorrect use of untruthfulness as an additional aggravating factor.

97. *Id.* (Becton, J., concurring) (quoting *State v. Setzer*, 61 N.C. App. 500, 505, 301 S.E.2d 107, 110, *disc. rev. denied*, 308 N.C. 680, 304 S.E.2d 760 (1983)).

98. *Id.* at 45, 302 S.E.2d at 314 (Becton, J., concurring).

99. *Id.* (Becton, J., concurring).

100. 438 U.S. 41 (1978).

101. *Id.* at 52-53. The Court held that the right guaranteed defendant was the right to testify truthfully; therefore, punishment for lying under oath was not a first amendment violation. *Id.*

102. *Id.* at 55-56 (Stewart, J., dissenting).

ceived—how much greater we have no way of knowing—solely because a single judge thought that he had not testified truthfully.¹⁰³

Thus, the *Grayson* case is inadequate support for the *Thompson* court's holding that separate crimes should be considered aggravating factors.¹⁰⁴

The Fair Sentencing Act is in danger of being "interpreted away." Judicial emasculation of the Act's effectiveness would represent a loss to North Carolina. To the extent that judges' discretion is upheld uniformly, the problems sought to be remedied by the General Assembly's Commission on Correctional Programs¹⁰⁵ will be perpetuated. The Act's deterrent effect will be lost as the certainty of sentence terms erodes. Finally, as trial judges have shown themselves more willing to find aggravating than mitigating factors, North Carolina's burdensome prison population will not be reduced. There is, however, more at stake than the General Assembly's stated goals. All too often the criminal justice system focuses on the individual rather than the crime. This focus raises the possibility of personal prejudice. Since the physical freedom of the defendant is dependent on the expansive exercise of the trial judge's discretion, outside safeguards are necessary to protect both the defendant and the integrity of the criminal justice system. Such safeguards are in place for North Carolina capital defendants,¹⁰⁶ but also are necessary to protect noncapital defendants' rights. The Fair Sentencing Act erected safeguards by shifting the focus away from the individual and by requiring a reviewable trial record. Unless these safeguards are defended, trial judges will continue to focus on individual defendants rather than on the crimes with which they were charged.

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103. *Id.*

104. The North Carolina courts probably will not abandon this position on their own, but will continue to construe the Act with the same hostility demonstrated by the General Assembly's first attempt at passage. Legislative clarification would be helpful.

105. *See supra* notes 7-10 and accompanying text.

106. *See* N.C. GEN. STAT. § 15A-2000 (1983). These protections include jury determination of aggravating and mitigating factors. *Id.* § 15A-2000(b). Section 15A-2000(c)(2) requires that the jury make a written finding that the aggravating factors themselves are substantial enough for imposition of the death penalty, not merely that they outweigh the mitigating factors. Section 15A-2000(d) provides for automatic review of the jury's written findings, including a review of whether the findings were made as a result of passion or prejudice. Finally, § 15A-2000(e) limits aggravating factors to eleven enumerated areas.