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Structured Sentencing and the Puzzling Statutory Maximum Punishment: *Apprendi*'s Impact on North Carolina Sentencing Law

For centuries criminal law generally has required the government to prove each element of a crime to a jury¹ “beyond a reasonable doubt.”² For more than thirty years the Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to require the states to provide an accused the option of a jury trial in circumstances where one would be required in a federal prosecution³ and to adhere to the reasonable doubt standard.⁴ The Supreme Court expanded these protections in *Apprendi v. New Jersey*,⁵ holding that any fact other than recidivism must be proved beyond a reasonable doubt to a jury if it increases the maximum punishment for an offense.⁶ Thus, the protections of the jury trial and reasonable doubt standard are no longer limited to the substantive elements of a crime; they now extend to facts that increase the maximum punishment.⁷

In *State v. Lucas*,⁸ the North Carolina Supreme Court confronted the “maximum penalty” prong of the *Apprendi* rule. This task raised an interpretive difficulty because, as discussed below, the Structured

1. See, e.g., U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI; N.C. CONST. of 1776, Declaration of Rights, § 9; cf. MAGNA CHARTA ch. 29 (1225) (“Nor will we not pass upon him nor condemn him, but by lawful Judgment of his Peers . . .”). See generally THE FEDERALIST NO. 83 (Alexander Hamilton) (supporting the jury trial clause of U.S. CONST. art. III, § 2, cl. 3); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280–87 (Alfred A. Knopf ed., 1945) (1835) (describing the jury trial as a “mitigation of the tyranny of the majority”).

2. See 2 MCCORMICK ON EVIDENCE § 341, at 428–32 (John W. Strong ed., 4th ed. 1992); 9 WIGMORE ON EVIDENCE § 2497, at 404–19 (Chadbourn rev. 1981). Courts rarely instruct juries on the meaning of reasonable doubt. See *Victor v. Nebraska*, 511 U.S. 1, 14 (1994); 9 WIGMORE, *supra*, § 2497, at 405–09. For North Carolina’s definition of “reasonable doubt,” see *State v. Bryant*, 337 N.C. 298, 302, 446 S.E.2d 71, 73 (1994) (defining “reasonable doubt” as, among other things, “an honest and substantial misgiving generated by the insufficiency which fails to convince your judgment and confidence and satisfy your reasons as to the guilt of the defendant”).

3. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding “that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they tried in a federal court—could come within the Sixth Amendment’s guarantee”).

4. *In re Winship*, 397 U.S. 358, 364 (1970).

5. 530 U.S. 466 (2000).

6. *Id.* at 490.

7. See *id.*

8. 353 N.C. 568, 548 S.E.2d 712 (2001).

Sentencing Act⁹ creates an ambiguity in the maximum penalty for most felonies. The court clarified the ambiguity in the statute,¹⁰ yet applied the *Apprendi* rule in a manner inconsistent with cases from other states and all of the federal courts of appeals.¹¹

This Recent Development summarizes *Apprendi*¹² and briefly describes the procedures for sentencing a defendant under the Structured Sentencing Act.¹³ It then analyzes *Lucas* and the decision's implications for structured sentencing in North Carolina.¹⁴ These implications include: the calculation of the maximum punishment for an offense, whether aggravating factors can survive an *Apprendi* attack, *Lucas*'s divergence from other *Apprendi* case law, the new requirement that sentencing enhancements be pled in indictments, and whether certain sentencing enhancements must be modified procedurally.

An understanding of *Lucas*'s implications requires a brief analysis of the facts, holding, and reasoning of *Apprendi*. The controversy in *Apprendi* arose after the petitioner was arrested and indicted on several weapons-related offenses for firing shots into an African-American family's home.¹⁵ *Apprendi* pled guilty to two counts of a second-degree offense, which carried a five to ten year sentence,¹⁶ and one count of a third-degree offense, which carried a three to five year sentence.¹⁷ On the count relating to the shooting, the judge imposed a sentence of twelve years¹⁸ pursuant to New Jersey's hate crime law.¹⁹ This law authorized the judge to increase the maximum sentence up to ten years on a second-degree offense if he finds by a preponderance of the evidence that the defendant "acted with a purpose to intimidate an individual . . . because of race,

9. N.C. GEN. STAT. §§ 15A-1340.10 to 15A-1340.23 (1999); see *infra* notes 42-73 and accompanying text.

10. See *Lucas*, 353 N.C. at 596, 548 S.E.2d at 731 (holding that "the Statutory Maximum Sentence" is that which a defendant with the highest prior record level for the offense class would receive after a finding of aggravating circumstances and a decision to apply the highest possible minimum sentence).

11. See *infra* notes 109-10 and accompanying text.

12. See *infra* notes 15-37 and accompanying text.

13. See *infra* notes 38-68 and accompanying text.

14. See *infra* notes 69-135 and accompanying text.

15. *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000).

16. *Id.* at 469-70 (citing N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995)).

17. *Id.* at 470 (citing N.J. STAT. ANN. § 2C:43-6(a)(3)). Only one count of the second-degree offense related to the shooting. *Id.*

18. *Id.* at 471.

19. See N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000). The shorter sentences on the other counts ran concurrently. *Apprendi*, 530 U.S. at 470.

color, gender, handicap, religion, sexual orientation or ethnicity" in committing the crime.²⁰ The Court held this statute unconstitutional.

Although the Court provided several formulations of the ruling,²¹ its primary holding stated that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."²² *Apprendi*'s "watershed change in constitutional law"²³ is derived from the Due Process Clause of the Fourteenth Amendment and the right to a jury trial afforded by the Sixth Amendment.²⁴ New Jersey's sentencing scheme violated the Constitution because it allowed the judge to find facts that increased the sentence beyond the maximum penalty by a mere preponderance of the evidence.²⁵

The Court established constitutional justifications for the burden of proof beyond a reasonable doubt and the jury trial guarantee in criminal prosecutions in its prior cases.²⁶ The novelty of *Apprendi* is its expansion of these protections to facts that merely increase a

20. N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000). The fact that the statute was a "hate crime" enhancement did not affect the Court's decision. See *Apprendi*, 530 U.S. at 475. The Court previously held that hate crime sentencing enhancements are constitutional when the jury finds the existence of racial animus beyond a reasonable doubt. See *Wisconsin v. Mitchell*, 508 U.S. 476, 480-90 (1993).

21. *Apprendi*, 530 U.S. at 532-33 (O'Connor, J., dissenting). The formulations that the Court gave for impermissible sentencing procedures included: "a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83.

22. *Id.* at 490.

23. *Id.* at 524 (O'Connor, J., dissenting).

24. *Id.* at 476. The Due Process Clause encompasses the "beyond a reasonable doubt" standard, see *In re Winship*, 397 U.S. 358, 364 (1970), and incorporates the Sixth Amendment right to a jury trial in criminal cases. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

25. *Apprendi*, 530 U.S. at 491. The "preponderance of evidence" burden of proof requires the prosecuting party to prove that a fact is more likely than not in that party's favor. See 2 MCCORMICK, *supra* note 2, § 339, at 421-24; 9 WIGMORE, *supra* note 2, § 2498, at 419-33.

26. See *United States v. Gaudin*, 515 U.S. 506, 509-10 (1995); *In re Winship*, 397 U.S. at 364; *Duncan*, 391 U.S. at 149. The *Apprendi* Court gave further historical rationales for these protections. See *Apprendi*, 530 U.S. at 477 (noting that the purpose of trial by jury is "to guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties" (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873))); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *343 (1796) (stating that "[t]he truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours") (second alteration in original).

defendant's maximum sentence.²⁷ In light of historic common law practices in England and the United States, the Court rationalized the extension of these constitutional safeguards to the sentencing context.²⁸ Generally, common law judges had little discretion in sentencing, and sentencing factors were nonexistent.²⁹ The Court's foundation for requiring procedural safeguards as a matter of constitutional law was that exposure to punishment beyond the maximum term results in a heightened deprivation of liberty and, consequently, an increased stigma attaches to the crime.³⁰ In these circumstances, constitutional safeguards are no less important at the time of sentencing than they are during trial³¹ because a fact that gives a defendant a sentence beyond the maximum sentence for the crime is essentially an element of a greater offense.³²

Apprendi does not abolish the use of sentencing factors in all circumstances. Rather, as long as the sentence imposed is "*within the range* prescribed by statute," the judge is free to take into account any factors that relate to the crime and the criminal, provided the findings are based on a preponderance of the evidence.³³ In addition, recidivism remains a factor properly within the judge's discretion, whether or not established beyond a reasonable doubt.³⁴ *Apprendi*

27. See *Apprendi*, 530 U.S. at 524-25 (O'Connor, J., dissenting).

28. See *id.* at 476-87.

29. *Id.* at 479. As Blackstone stated, "the court must pronounce that judgment, which the law hath annexed to the crime." *Id.* (quoting 4 BLACKSTONE, *supra* note 26, at *369-70). Imprisonment was little known to the common law. The sentence for all felonies in England until the early part of the eighteenth century was death, and misdemeanants were often punished by hard labor or placement in a pillory. See ARTHUR W. CAMPBELL, *THE LAW OF SENTENCING* § 1:2, at 4-9 (2d ed. 1991). Reform was prompted in 1764 by the publication of CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* 29 (Henry Paolucci trans., 1963) (1764) ("*In order for punishment not to be, in every instance, an act of violence of one or many against a private citizen, it must be essentially public, prompt, necessary, the least possible in the given circumstances, proportionate to the crimes, dictated by the laws.*").

30. See *Apprendi*, 530 U.S. at 484. The stigma of a criminal conviction is society's negative response to that conviction. For example, many employers will not hire persons convicted of property crimes, and many people would rather not associate with bank robbers. When the Court discussed stigma in *Apprendi*, it reasoned that a higher maximum sentence for a particular crime increases the social stigma attached to that crime. See *id.*

31. See *id.*

32. *Id.* at 494 n.19.

33. *Id.* at 481.

34. See *id.* at 488-90. The Court previously allowed the use of prior convictions to increase a sentence beyond the statutory maximum in *Almendarez-Torrez v. United States*, 523 U.S. 224, 244 (1998). Defendants need not receive procedural protections in a subsequent trial so long as they were received in a previous one. *Id.* The Court acknowledged that the *Apprendi* reasoning should apply with equal force to recidivism,

prohibits, without the procedural safeguards mentioned previously, the use of facts, regardless of whether they are traditional elements of an offense, to increase a defendant's sentence beyond the statutory maximum.³⁵ The Court rejected New Jersey's argument that the hate crime enhancement was based on motive rather than intent.³⁶ The Court was concerned with the effect rather than the form of the sentencing factor—whether the additional fact produced a greater sentence than the verdict standing alone allowed.³⁷ As discussed below, North Carolina sentencing law is different in form from New Jersey's, however, in some cases the effect is the same.

On October 1, 1994, in North Carolina, the Structured Sentencing Act³⁸ replaced the Fair Sentencing Act.³⁹ While both acts contained the same penological justifications,⁴⁰ their implementation

but the issue was neither raised in nor essential to the decision. *Apprendi*, 530 U.S. at 490. The Court hinted that it might overrule *Almendarez-Torrez* in a proper case. *See id.* The Court also questioned whether sentencing factors that increase the sentence beyond the statutory maximum must be charged in an indictment, but did not decide the issue. *See id.* at 477 n.3. In *Jones v. United States*, 526 U.S. 227 (1999), the Court noted in dicta that such a factor in a federal prosecution "must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6.

35. *Apprendi*, 530 U.S. at 477–78.

36. Generally, the prosecution does not have the burden of proving the defendant's motive. Although conceivably relevant to whether the defendant committed the offense, motive is distinguished from intent, which normally is an essential element of a crime. Motive refers to why the defendant acted; intent refers to whether the defendant meant to act. *See* Martin R. Gardner, *The Mens Rea Enigma: Observation on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 688.

37. *Apprendi*, 530 U.S. at 493–94 (recognizing that "labels do not afford an acceptable answer" to whether a fact is considered motive or intent, rather the relevant inquiry is whether "the required finding expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict") (quoting *State v. Apprendi*, 731 A.2d 485, 492 (N.J. 1999)).

38. Act of July 24, 1993, ch. 538, 1993 N.C. Sess. Laws 2298–2370 (codified as amended at N.C. GEN. STAT. §§ 15A-1340.10 to 15A-1340.23 (1999)); *see* N.C. GEN. STAT. § 15A-1340.10 (1999). The act applies to crimes occurring on or after October 1, 1994. *Id.* Because North Carolina does not have a statute of limitations for felonies, *see* *State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279 (1969), the Fair Sentencing Act could remain legally effective for decades to sentence defendants convicted of felonies occurring between 1981 and October 1994.

39. Act of June 4, 1979, ch. 760, 1979 N.C. Sess. Laws 850–71.

40. *See* N.C. GEN. STAT. § 15A-1340.12 (1999); N.C. GEN. STAT. § 15A-1340.3 (Cum. Supp. 1979). Both acts deal with proportional punishment, incapacitation, rehabilitation, and general deterrence. *Id.* §§ 15A-1340.12, 15A-1340.3 (repealed by Act of July 24, 1993, ch. 538, 1993 N.C. Sess. Laws 2318). The first purpose of the acts is generally considered a retributive, or deontological, justification—punishment as an end in itself. *See, e.g.*, IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 99–107 (J. Ladd. Trans., 1965) (1797); JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 88–110 (1988). The other purposes are considered utilitarian, or teleological, justifications—

differs markedly.⁴¹ Under North Carolina's current structured sentencing scheme, a judge must take several steps to determine the appropriate punishment of a felony offender.⁴² After a felony conviction, the judge determines the offense class for the crime according to statute.⁴³ Next, the judge determines the offender's prior record level.⁴⁴ The offense class and prior record level constitute the "presumptive" range according to the punishment chart.⁴⁵ As discussed below, however, the presumptive range is not the statutory maximum penalty.⁴⁶ From the presumptive range, the judge must take into account any aggravating⁴⁷ or mitigating⁴⁸ factors. The

punishment as a means to an end. *See, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1-5, 178 (London, McMillan 1876).

41. For example, under the Fair Sentencing Act, a judge could sentence a defendant convicted of a Class D felony with no prior criminal record to up to forty years in prison, *see* N.C. GEN. STAT. § 14-1.1(a)(4) (repealed by Act of July 24, 1993, ch. 538, 1993 N.C. Sess. Laws 2318), if any of several aggravating factors existed. *See id.* § 15A-1340.4 (repealed by 1993 N.C. Sess. Laws ch. 538). Under the Structured Sentencing Act, the maximum term a judge could impose on an identical defendant is 105 months (eight years and nine months), *see id.* § 15A-1340.17, but the defendant will actually serve more time than under the Fair Sentencing Act because structured sentencing eliminates parole. *Id.* § 15A-1340.13(d).

42. *See generally* STEVENS H. CLARKE, LAW OF SENTENCING PROBATION AND PAROLE IN NORTH CAROLINA 41-119 (2d ed. 1997) (describing North Carolina's sentencing procedure in considerable detail); NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, STRUCTURED SENTENCING TRAINING AND REFERENCE MANUAL 1-32 (1994) (describing the substance and application of the structured sentencing laws for felonies).

43. The offense classification is set out in the relevant statute that either defines the elements of the offense, *see, e.g.*, N.C. GEN. STAT. § 14-39 (1999) (defining the elements of first and second degree kidnapping and providing that these offenses are Class C and Class E felonies respectively), or simply provides the offense classification for a common law crime. *See, e.g., id.* § 14-87.1 (providing that common law robbery is a Class G felony). The felony offense classes are A through I (including B1 and B2). *See id.* § 15A-1430.17 (c). Some common law felonies are omitted from the general statutes, *see, e.g.*, *State v. England*, 278 N.C. 42, 50, 178 S.E.2d 577, 582 (1971) (holding that the common law with respect to false imprisonment is the law of North Carolina even though no statute exists making false imprisonment a crime).

44. *See* § 15A-1340.14. Prior record levels range from level I to level VI. *Id.* The prior record level is determined by assigning points to each prior conviction and tallying up the score. *Id.* For example, a defendant with a prior Class E conviction and a prior class H conviction is assigned four points for the Class E conviction and two points for the Class H conviction. *Id.* The resulting total of six points gives the defendant a prior record level of III. The State must prove prior offenses to the judge by a preponderance of the evidence. *Id.*

45. § 15A-1340.17(c).

46. *See State v. Lucas*, 353 N.C. 568, 596, 548 S.E.2d 712, 731 (2001).

47. § 15A-1340.16(a). Examples of aggravating factors are: association with a "street gang," *id.* § 15A-1340.16(d)(2a); preventing arrest or aiding escape, *id.* § 15A-1340.16(d)(3); being hired to commit the crime, *id.* § 15A-1340.16(d)(4); the heinous or cruel nature of the offense, *id.* § 15A-1340.16(d)(7); causing risk of death to several

prosecution must prove aggravating factors by a preponderance of the evidence.⁴⁹ One might pause at this point in light of *Apprendi*. Both judge as fact finder and using the preponderance of evidence standard violate the *Apprendi* rule.

With the felony classification, prior record level, and aggravating and mitigating factors in hand, the judge must consult the punishment chart to determine the minimum sentence.⁵⁰ The punishment chart is divided into cells, which contain several components.⁵¹ To find the correct cell, the judge traces the chart along the top to find the prior record level, and then traces down to find the felony classification. The corresponding cell also contains the possible ranges of aggravated, presumptive, and mitigated sentences.⁵² If the judge finds by a preponderance of the evidence that the aggravating factors outweigh the mitigating factors, she may select a minimum sentence from within the aggravated range;⁵³ however, if the judge finds no aggravating or mitigating factors, she must select a minimum sentence from the presumptive range.⁵⁴

persons by a means of a weapon, *id.* § 15A-1340.16(d)(8); the age or infirmity of the victim, *id.* § 15A-1340.16(d)(11); racial or ethnic animus, *id.* § 15A-1340.16(d)(17); the defendant's non-support of his family, *id.* § 15A-1340.16(d)(18); and "[a]ny other aggravating factor reasonably related to the purposes of sentencing." *Id.* § 15A-1340.16(d)(20).

48. § 15A-1340.16(a). Examples of mitigating factors are: culpability reducing duress, coercion, threat, or compulsion insufficient to constitute a defense, *id.* § 15A-1340.16(e)(1); the defendant's mental defect insufficient to constitute a defense, *id.* § 15A-1340.16(e)(3); restitution to the victim, *id.* § 15A-1340.16(e)(5); voluntary participation of the victim, *id.* § 15A-1340.16(e)(6); defendant's cooperation with law enforcement or prosecution of another felony, *id.* § 15A-1340.16(e)(7); the defendant's reasonable belief in the legality of his conduct, *id.* § 15A-1340.16(e)(10); the good character and reputation of the defendant, *id.* § 15A-1340.16(e)(12); honorable discharge from the military, *id.* § 15A-1340.16(e)(14); the defendant's acceptance of responsibility, *id.* § 15A-1340.16(e)(15); support of his or her family, *id.* § 15A-1340.16(e)(17); positive employment history, *id.* § 15A-1340.16(e)(19); and "any other mitigating factor reasonably related to the purposes of sentences." *Id.* § 15A-1340.16(e)(21).

49. § 15A-1340.16(a). The defendant must prove mitigating factors by a preponderance of the evidence. *Id.*

50. *Id.* § 15A-1340.17(c).

51. *Id.*

52. *Id.*

53. *Id.* § 15A-1640.16. During the years 1995 to 1997, approximately seven to ten percent of all defendants received presumptive sentences in the aggravated range. See RONALD F. WRIGHT, *Flexibility in North Carolina Structured Sentencing, 1995-1997*, OVERCROWDED TIMES, Dec. 1998, at 1, 15.

54. § 15A-1340.17(c)(2). If mitigating factors exist and outweigh any aggravating factors that may exist, the judge may choose a minimum sentence from the mitigated range. *Id.* § 15A-1340.16(b).

After selecting the minimum sentence from within the proper range in the cell, the judge identifies the defendant's maximum sentence.⁵⁵ The minimum sentence fixes the maximum sentence; the judge simply locates the maximum term that corresponds to the minimum term in the relevant table.⁵⁶ The "truth in sentencing"⁵⁷ under this scheme is that once the judge decides the term, a defendant must serve the entire minimum sentence, without exception.⁵⁸

A hypothetical example clarifies the preceding description. Suppose a defendant, with prior convictions for train robbery⁵⁹ and larceny of a dog,⁶⁰ is convicted of malicious maiming, a class C felony.⁶¹ The defendant's prior record level is III.⁶² The judge then finds by a preponderance of the evidence that the defendant maliciously maimed the victim because of race,⁶³ and, because of the absence of any mitigating factors, elects to sentence the defendant to the aggravated minimum term. The judge selects a minimum term of 139 months from the aggravated range of 116 to 145 months.⁶⁴ The

55. *Id.* § 15A-1340.17(d)-(e1).

56. *See id.*

57. "Truth in sentencing" is a penal reform movement closely tied to determinate sentencing, if not the same thing. *See* PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEPT OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 1 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tssp.pdf>. The main premise is that offenders actually serve their term of imprisonment rather than having their sentences reduced by parole and other factors. *Id.* Such sentencing laws have been prompted by federal funding of correctional facilities for states that require violent offenders to serve at least eighty-five percent of their sentence. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 42 U.S.C. §§ 13703, 13704, 13706 (Supp. V 1999)). A majority of states have enacted these sentencing laws in recent years. *See* DITTON & WILSON, *supra*, at 3. Truth in sentencing was also an integral part of the 1992 governor's race in North Carolina. CLARKE, *supra* note 42, at 48. Preliminary statistics show that structured sentencing accomplishes truth in sentencing. *See* DITTON & WILSON, *supra*, at 9 (noting that the percentage of the sentence that offenders actually served increased from twenty-four percent in 1993 to forty percent in 1997, which includes a substantial number of offenders released under the Fair Sentencing Act).

58. N.C. GEN. STAT. § 15A-1340.13(d). A prisoner may reduce the maximum term of incarceration by "earned time credits" while in prison. *Id.*

59. *See id.* § 14-88. This offense is a Class D felony. *Id.*

60. *See id.* § 14-81(a1). This offense is a Class I felony. *Id.*

61. *See id.* § 14-30.

62. A Class D felony is assigned six points, *id.* § 15A-1340.14(b)(2), and a Class I felony is assigned two points. *Id.* § 15A-1340.14(b)(4). The resulting total, eight points, gives the offender a prior record level of III. *Id.* § 15A-1340.14(c)(3).

63. *See id.* § 15A-1340.16(d)(17).

64. *Id.* § 15A-1340.17(c).

maximum term corresponding to 139 months is 176 months.⁶⁵ Thus, the defendant's sentence is 139 to 176 months of active punishment.⁶⁶

Structured sentencing includes additional provisions that require a judge to increase the defendant's sentence. One such provision is the sentence enhancement for using or displaying a firearm while committing a felony.⁶⁷ Under the terms of this statute, if the judge finds that the defendant used or displayed a firearm during the offense, he must increase the defendant's minimum sentence by sixty months unless display or use of a firearm is an element of the offense.⁶⁸ The North Carolina Supreme Court, however, modified the procedures under this statute in *State v. Lucas*.⁶⁹ Due to *Apprendi*, the court held that, in all circumstances, the State must charge the use of a firearm in the bill of the indictment, and the trial judge must submit this fact to the jury subject to a reasonable doubt standard.⁷⁰

The jury found the defendant in *Lucas* guilty of first-degree burglary, a class D felony, and second-degree kidnapping, a class E felony.⁷¹ The trial court found a prior record level of I and no aggravating factors, and thereafter imposed a sentence at the high end of the presumptive range for each offense:⁷² sixty-four to eighty-six months for the burglary conviction and twenty-five to thirty-nine months for the kidnapping charge.⁷³ Subsequently, the trial court added sixty months to each of the defendant's sentences after finding that he displayed a firearm during the commission of the offenses.⁷⁴ After this addition, the court imposed sentences of 124 to 146 months

65. *Id.* § 15A-1340.17(e).

66. "Active punishment" means imprisonment in a state correctional facility. *Id.* § 15A-1340.11(1).

67. *Id.* § 15A-1340.16A; see also *id.* § 15A-1340.16B (enhancing sentence to life imprisonment for a class B1 felony committed against a victim under fourteen years old); *id.* § 15A-1430.16C (enhancing felony class one level if felony is committed while wearing a bullet proof vest).

68. *Id.* § 15A-1340.16A(b)(2).

69. 353 N.C. 568, 548 S.E.2d 712 (2001).

70. *Id.* at 597-98, 548 S.E.2d at 731.

71. *Id.* at 593, 548 S.E.2d at 729; see N.C. GEN. STAT. § 14-52 (1999); *id.* § 14-39(b). The defendant was also found guilty of possession of a weapon of mass death and destruction, a sawed-off shotgun. *Lucas*, 353 N.C. at 571-72, 548 S.E.2d at 716. This offense is a class F felony. § 14-288.8(d).

72. *Lucas*, 353 N.C. at 593, 548 S.E.2d at 729.

73. *Id.* The defendant received a sentence of sixteen to twenty months for possession of a weapon of mass death and destruction. *Id.* at 571, 548 S.E.2d at 715. All three sentences ran consecutively. *Id.*

74. *Id.* at 593, 548 S.E.2d at 729.

and eighty-five to ninety-nine months, respectively, for the burglary and kidnapping convictions.⁷⁵

The defendant argued that the imposition of the sixty month enhancement was unconstitutional both facially and as applied by the trial court.⁷⁶ To evaluate this argument, the court, after discussing *Jones v. United States*⁷⁷ and *Apprendi*, had to determine “ ‘the prescribed statutory maximum’ ” penalty.⁷⁸ This task proved difficult because the North Carolina General Statutes do not explicitly prescribe a statutory maximum sentence for most common law and statutory crimes.⁷⁹ As mentioned above,⁸⁰ ascertaining the maximum sentence for an individual offender requires several steps on the sentencing chart.⁸¹ The court determined, however, that the prescribed statutory maximum sentence for a particular felony class is the maximum sentence in section 15A-1340.17(e), which corresponds to the highest minimum aggravated sentence for the highest prior record level of VI in section 15A-1340.17(c).⁸² From this premise, the court ultimately held that any time the State seeks to enhance the sentence under section 15A-1340.16A, it must allege the use of a firearm in an indictment, and the fact of firearm use must be submitted to a jury and proved beyond a reasonable doubt.⁸³

75. *Id.* The supreme court noted that the trial court incorrectly calculated the sentence under section 15A-1340.16A. *Lucas*, 353 N.C. at 598–99, 548 S.E.2d at 732. Rather than adding the sixty month enhancement to both the minimum and maximum terms, the trial court should have added the sixty month enhancement only to the minimum term, then applied the corresponding maximum term to the enhanced minimum. *Id.* This approach would yield correct sentences of 124 to 158 and 85 to 111 months for the respective convictions. *Id.*; N.C. GEN. STAT. § 15A-1340.17(e). The defendant could not receive an enhancement for possession of a weapon of mass death and destruction because the use of a firearm is an element of that offense. *See id.* § 14-288.8; §15A-1340.16A.

76. *Lucas*, 353 N.C. at 592, 548 S.E.2d at 728.

77. 526 U.S. 227, 252 (1999) (construing 18 U.S.C. § 2119 (1994) (authorizing an enhanced penalty if the court finds the offense resulted in death or serious bodily injury) “as establishing three separate offenses by the specification of distinct elements” that “must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict”).

78. *Lucas*, 353 N.C. at 595, 548 S.E.2d at 730 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

79. *See id.*; *infra* notes 84–95 and accompanying text. One exception is North Carolina General Statute section 14-17 which prescribes a maximum punishment of death for first-degree murder.

80. *See supra* notes 42–58 and accompanying text.

81. *Lucas*, 353 N.C. at 595–96, 548 S.E.2d at 730; N.C. GEN. STAT. § 15A-1340.17(c) (1999).

82. *Lucas*, 353 N.C. at 596–97, 548 S.E.2d at 731. The court declared this holding by *ipse dixit*. *See infra* notes 87–88 and accompanying text.

83. *Lucas*, 353 N.C. at 597–98, 548 S.E.2d at 731.

Although *Lucas* is significant for its procedural modification of the firearm enhancement, several other aspects of the court's holding warrant discussion. First, the court failed to explain fully the rationale of the maximum sentence.⁸⁴ The court noted that, at arraignment and after a sentence bargain, most trial judges inform defendants of the maximum sentence using the theoretical maximum sentence possible for the offense class.⁸⁵ After discussing this procedure, the court merely stated that it believed this approach was proper for determining the maximum sentence.⁸⁶ Whether the court based its holding on legislative intent or on an interpretation of *Apprendi* is not clear, but it was not the only possible holding.⁸⁷ The Court could have taken several approaches, as illustrated in *State v. Guice*.⁸⁸

In *Guice*, the defendant argued that the maximum punishment should be determined with reference to the defendant's actual prior record level and the trial court's aggravating and mitigating factor determination.⁸⁹ For the defendant in *Guice* this meant the maximum sentence was forty-four months for a Class E felony.⁹⁰ This method has serious flaws because it essentially eliminates the "prescribed" maximum punishment for any crime. The maximum sentence could only be determined after the trial and sentence of a particular defendant. Such a lack of an ascertainable maximum punishment not only would pose difficulty in construing structured sentencing with regard to *Apprendi*,⁹¹ but also would undermine the Act's general goal of deterrence.⁹²

84. *Id.* at 596, 548 S.E.2d at 730-31.

85. *Id.* at 596, 548 S.E.2d at 730.

86. *Id.* at 596, 548 S.E.2d at 730-31.

87. See *infra* notes 88-94 and accompanying text.

88. 141 N.C. App. 177, 541 S.E.2d 474 (2000).

89. *Id.* at 193, 541 S.E.2d at 484.

90. *Id.* Because he was sentenced to the presumptive range and had only a level II prior conviction level, the highest possible minimum sentence was twenty-nine months. See *id.*; N.C. GEN. STAT. § 15A-1340.17(c) (1999). The corresponding maximum sentence was forty-four months. See *id.* § 15A-1340.17(e).

91. In *United States v. Jones*, 195 F.3d 205 (4th Cir. 1999), the Fourth Circuit rejected a similar formulation because it would essentially exempt all defendants sentenced under Structured Sentencing from 18 U.S.C. § 922(g)(1) which declares it unlawful for a person "who has been convicted of a crime punishable by imprisonment for a term exceeding one year," *inter alia*, to possess a firearm in interstate commerce. The court rejected the formulation because under it maximum sentences would not exist in North Carolina, something the court could not believe Congress intended. *Jones*, 195 F.3d at 207. Conversely, this formulation would seem to exempt the state from any *Apprendi* claim. Because the maximum punishment could not be determined until the sentence was imposed, no fact, established by any standard of proof, would ever increase the maximum

In *Guice*, the State offered a formulation identical to that which the *Lucas* court adopted—the highest theoretical sentence.⁹³ Using this calculation, *Apprendi* permits a judge to find aggravating factors by a preponderance of the evidence. A sentence in the aggravated range would never exceed the “prescribed maximum sentence.”⁹⁴ The judge would merely be exercising discretion in sentencing a defendant “*within the range* prescribed by statute,” which *Apprendi* expressly permits.⁹⁵

Under the court’s holding in *Lucas*, however, aggravating factors will survive any attack within the North Carolina courts. Given that the maximum sentence for an offense rests at the high end of the aggravated range, any sentence within the sentencing chart logically cannot exceed the “prescribed statutory maximum.”⁹⁶ Nonetheless, given the court’s omission of a legislative intent foundation in *Lucas*, aggravating factors might be open to collateral attack in federal habeas corpus proceedings⁹⁷ or on direct review to the United States Supreme Court. A federal court may view the *Lucas* opinion as resting primarily on an interpretation of *Apprendi*, rather than on state law.⁹⁸

One solution to this problem is a law amending the North Carolina General Statutes by adding a description of each class of felony and prescribing the maximum punishment. For example: *A Class C felony shall be punishable by imprisonment for 261 months.* The description of each felony class should be in the same manner,

sentence. The Supreme Court most likely did not intend this result in *Apprendi*. See *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000).

92. See N.C. GEN. STAT. § 15A-1340.12. The dual goals of general deterrence are to prevent people from committing any crime and also to persuade them to chose a less serious crime over a more serious crime. See BENTHAM, *supra* note 40, at 178, 181. Under a purely individualized formulation, a person convicted of second-degree rape, section 14-27.3, might have a higher “maximum” punishment than a person convicted of first-degree rape. § 14-27.2; see *id.* § 15A-1340.17(c). This phenomenon could send the message to potential rapists that there is little difference in the consequences of committing a more serious offense.

93. *Guice*, 141 N.C. App. at 193–94, 541 S.E.2d at 485.

94. *Apprendi*, 530 U.S. at 490.

95. *Id.* at 481. The same result would be reached if the court takes the defendant’s prior record level into account because the highest aggravated sentence would essentially be the maximum.

96. *Id.* at 490.

97. See 28 U.S.C.A. § 2254 (West 2001). Whether *Apprendi* applies retroactively in § 2254 proceedings is beyond the scope of this Recent Development.

98. The federal court would have to determine whether the state defendant’s claim “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” *Id.* § 2254(d)(1).

deriving the maximum sentence from the current punishment chart and corresponding maximum sentence. Such a statute would shield aggravating factors from any *Apprendi* claims.

This solution is by no means a novel concept. An overwhelming majority of jurisdictions specifically define a maximum punishment for criminal offenses. These jurisdictions either set out the maximum alongside the definition of the substantive offense,⁹⁹ or group all offenses into particular classes and set out the maximum punishment for the class.¹⁰⁰ North Carolina, in fact, fell into the latter category under the Fair Sentencing Act.¹⁰¹

Although its holding with respect to the maximum sentence is understandable, another part of the holding in *Lucas* is rather confusing and warrants discussion. According to the court's calculation, the maximum punishment for a class D felony is 229 months.¹⁰² The defendant's actual sentence for the burglary count,

99. See, e.g., 21 U.S.C. § 841(b)(1) (2000); CAL. PENAL CODE § 213 (West 1999); D.C. CODE ANN. § 22-406 (2001); GA. CODE ANN. § 16-9-2 (1999); HAW. REV. STAT. ANN. § 706-660 (Michie 1993); IDAHO CODE § 18-5002 (Michie 1997); LA. REV. STAT. ANN. § 14:60 (West 1997); MD. ANN. CODE art. 27, § 29 (1996); MASS. GEN. LAWS ANN. ch. 265, § 24 (West Supp. 2000); MICH. COMP. LAWS ANN. § 750.110 (2001); MINN. STAT. ANN. § 609.221 (West Supp. 2001); MISS. CODE ANN. § 97-17-37 (1999); MONT. CODE ANN. § 45-5-213 (1999); NEV. REV. STAT. ANN. 200.460 (Michie 1997); OKLA. STAT. ANN. tit. 21, § 381 (West Supp. 2000); R.I. GEN. LAWS § 11-4-3 (2000); VT. STAT. ANN. tit. 13, § 608 (1974); W. VA. CODE ANN. § 61-3-11 (Michie 1997); WYO. STAT. ANN. § 6-2-502 (Michie 1999).

100. See, e.g., ALA. CODE § 13A-5-6 (1994); ALASKA STAT. § 12.55.125 (Michie 2000); ARIZ. REV. STAT. § 13-702 (Supp. 2000); ARK. CODE ANN. § 5-4-401 (Michie 1997); COLO. REV. STAT. ANN. § 18-1-105 (West 2000); CONN. GEN. STAT. § 53a-35a (1994); DEL. CODE ANN. tit. 11, § 4205 (1995 & Supp. 2000); FLA. STAT. ANN. § 775.082 (West Supp. 2001); 730 ILL. COMP. STAT. 5/5-8-1 (1993 & Supp. 2000); IND. CODE § 35-50-2-4 (2000); IOWA CODE ANN. § 902.9 (West Supp. 2000); KAN. STAT. ANN. § 21-4501 (1993); KY. REV. STAT. ANN. § 532.060 (Michie 1999); ME. REV. STAT. ANN. tit. 17A, § 1252 (West Supp. 2000); MO. ANN. STAT. § 557.021 (West 1999); NEB. REV. STAT. ANN. § 28-105 (Michie Supp. 2000); N.H. REV. STAT. ANN. § 651:2 (Supp. 2000); N.J. STAT. ANN. § 2C:43-6 (West 1995); N.M. STAT. ANN. §§ 31-18-15 to 15.1 (Michie 1996); N.Y. PENAL LAW § 70.00 (McKinney 1998); N.D. CENT. CODE § 12.1-32-01 (1997); OR. REV. STAT. § 161.605 (1997); 18 PA. CONS. STAT. § 1103 (1998); S.C. CODE ANN. § 16-1-20 (Law. Co-op. Supp. 2000); S.D. CODIFIED LAWS § 22-6-1 (Michie 1998); TENN. CODE ANN. § 40-35-111 (1997); TEX. PENAL CODE ANN. § 12.32-12.34 (Vernon 1997); UTAH CODE ANN. § 76-3-203 (1999 & Supp. 2001); VA. CODE ANN. § 18.2-10 (Michie Supp. 2000); WASH. REV. CODE ANN. § 9A.20.021 (West 1999); WIS. STAT. ANN. § 939.50 (West 1996 & Supp. 2000); cf. MODEL PENAL CODE § 6.06 (1980) (defining maximum punishments for each class of offense).

101. See N.C. GEN. STAT. § 14-1.1 (Supp. 1980) (effective March 1, 1981) (repealed by Act of July 24, 1993, ch. 538, 1993 N.C. Sess. Laws 2313). The language of the proposed maximum punishment is nearly identical to this section. See *id.*

102. State v. Lucas, 353 N.C. 568, 596-97, 548 S.E.2d 712, 731 (2001).

including the firearm enhancement, was 124 to 146 months,¹⁰³ but should have been 124 to 158 months.¹⁰⁴ Thus, one could conclude that the defendant's penalty was not increased "beyond the prescribed statutory maximum."¹⁰⁵ The court, however, considered the effect of the firearm enhancement as though the defendant had received the highest theoretically possible maximum sentence of 229 months.¹⁰⁶ The firearm enhancement would then theoretically result in a maximum sentence of 301 months, which exceeds the statutory maximum of 229 months.¹⁰⁷ Therefore, the court held, because the fact that the defendant used a firearm during the commission of the offense was neither alleged in the bill of indictment, nor submitted to the jury, the sixty month enhanced sentence was imposed improperly.¹⁰⁸

This portion of the court's holding departs from a substantial amount of analogous case law. For example, every federal court of appeals with criminal jurisdiction holds that *Apprendi* does not apply to upward departures or adjustments under the United States Sentencing Guidelines when the resulting actual sentence does not exceed the statutory maximum.¹⁰⁹ Many state courts have reached the same conclusion under their own sentencing provisions.¹¹⁰ The North

103. *Id.* at 593, 548 S.E.2d at 729.

104. *Id.* at 598-99, 548 S.E.2d at 732. The trial court added sixty months to the minimum and the maximum sentences separately. The supreme court stated that this calculation was incorrect. The court should have added sixty months to the minimum and then found the maximum that corresponded to that enhanced minimum sentence. *Id.*

105. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

106. *Lucas*, 353 N.C. at 596-97, 548 S.E.2d at 731.

107. *Id.* 301 months is the maximum corresponding to the enhanced minimum of 243 months. See N.C. GEN. STAT. § 15A-1340.17(e)(1999).

108. *Lucas*, 353 N.C. at 598, 548 S.E.2d at 732.

109. See, e.g., *United States v. Fields*, 251 F.3d 1041, 1043-44 (D.C. Cir. 2001); *United States v. Robinson*, 241 F.3d 115, 121 (1st Cir. 2001); *United States v. Garcia*, 240 F.3d 180, 183 (2d Cir. 2001); *United States v. Angle*, 254 F.3d 514, 518 (4th Cir. 2001); *United States v. Heckard*, 238 F.3d 1222, 1235-36 (10th Cir. 2001); *United States v. Williams*, 235 F.3d 858, 863-64 (3d Cir. 2000); *United States v. Doggett*, 230 F.3d 160, 164-65 (5th Cir. 2000); *United States v. Corrado*, 227 F.3d 528, 542 (6th Cir. 2000); *United States v. Nance*, 236 F.3d 820, 825 (7th Cir. 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926, 933 (8th Cir. 2000); *United States v. Hernandez-Guardado*, 228 F.3d 1017, 1026-27 (9th Cir. 2000); *United States v. Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000). Upward departures from the sentence range established under the U.S. sentencing guidelines occur where a court finds an aggravating circumstance that is not listed under the guidelines. See U.S. Sentencing Guidelines Manual §§ 5K2.0-5K2.21 (2001). Adjustments refer to increases in the base offense level upon a finding of particular circumstances. See *id.* §§ 3A1.1-3E1.1.

110. See, e.g., *Pearson v. State*, 794 So. 2d 448, 449 (Ala. Crim. App. 2001); *People v. Cleveland*, 104 Cal. Rptr. 2d 641, 646 (Cal. Ct. App. 2001); *Caraballo v. State*, 26 Fla. L. Weekly D2317 (Fla. Dist. Ct. App. 2001) (per curiam); *People v. Ford*, No. 90083, 2001

Carolina Supreme Court easily could have held that the defendant's actual sentence on the burglary count was proper, because it did not exceed 229 months. But, the court chose not to take this path. Therefore, the section 15A-1340.16A sentencing enhancement must in all circumstances be alleged in an indictment and submitted to the jury for proof beyond a reasonable doubt.

The enhancement factor allegation requirement¹¹¹ is another interesting aspect of *Lucas*. *Apprendi* does not require states to allege sentencing factors that increase the sentence beyond the statutory maximum in an indictment.¹¹² Indeed, the Supreme Court has never held that the grand jury clause of the Fifth Amendment¹¹³ applies to the states through the Fourteenth Amendment.¹¹⁴ The *Lucas* court apparently relied in part on *Jones v. United States*¹¹⁵ to include the indictment requirement.¹¹⁶ In *Jones*, the Court, due in part to constitutional concerns, construed an ambiguous federal statute as setting out three separate offenses, requiring allegations in an indictment and submission to a jury, rather than as a single offense with two sentencing enhancements.¹¹⁷

Although the *Jones* holding does not bind the states, *Lucas* appears to have resolved *sub silentio* any state law sentencing issues with respect to indictments.¹¹⁸ The North Carolina State Constitution requires an indictment to initiate all felony prosecutions, unless waived with counsel.¹¹⁹ At a minimum, every indictment must allege facts supporting each element of a criminal offense.¹²⁰ Because *Apprendi* treats sentencing factors that increase the penalty beyond the statutory maximum as though they are elements of an underlying

WL 1243651, at *3 (Ill. Oct. 18, 2001); *State v. McCoy*, 631 N.W.2d 446, 451 (Minn. Ct. App. 2001); *State v. Gore*, 21 P.3d 262, 276-77 (Wash. 2001).

111. *Lucas*, 353 N.C. at 597-98, 548 S.E.2d at 731.

112. *Apprendi v. New Jersey*, 530 U.S. 466, 477 n.3 (2000).

113. U.S. CONST. amend. V ("No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ."). Elements of a federal offense must be charged in an indictment. *Jones v. United States*, 526 U.S. 227, 232 (1999).

114. *Apprendi*, 530 U.S. at 477 n.3; see *Hurtado v. California*, 110 U.S. 516, 538 (1884) (holding that the Grand Jury Clause does not apply to the states).

115. 526 U.S. 227 (1999).

116. See *Lucas*, 353 N.C. at 593-94, 548 S.E.2d 729 (discussing *Jones*).

117. *Jones*, 526 U.S. at 229.

118. *Lucas*, 353 N.C. at 597-98, 548 S.E.2d at 731.

119. N.C. CONST. art. I, § 22 ("Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment."). A presentment, an independent accusation by the grand jury, cannot initiate a charge. N.C. GEN. STAT. § 15A-641(c) (1999).

120. N.C. GEN. STAT. § 15A-924(a)(5).

offense,¹²¹ the sentencing enhancement factor in section 15A-1340.16A must be charged in the indictment.

The indictment requirement has serious consequences. The formality of an indictment is considered jurisdictional.¹²² A court has no power to render a valid judgment without a proper indictment.¹²³ *State v. McNair*¹²⁴ illustrates the significance of this requirement. The defendant's sentence in *McNair* was enhanced under the same statute at issue in *Lucas*.¹²⁵ However, the defendant failed to object to the fact that the enhancement factor was not submitted to the jury.¹²⁶ Due to this failure, the defendant's assignment of error became subject to "plain error" analysis.¹²⁷ The state court of appeals held that the jury would have determined that the defendant possessed a firearm and overruled his assignment of error.¹²⁸ Nevertheless, the court arrested the judgment on its own motion because the enhancement factor was not alleged in the indictment and therefore the trial court lacked jurisdiction to impose the sixty month enhancement.¹²⁹

Considering *Lucas*'s indictment requirement and *Apprendi*'s burden of proof and fact finder requirements, North Carolina's other two sentencing enhancement provisions should be examined. First, section 15A-1340.16B requires a life sentence without parole if a defendant with a prior class B1 felony conviction commits another Class B1 felony against a victim thirteen years old or younger.¹³⁰ Calculated according to the court's holding in *Lucas*,¹³¹ the maximum punishment for a Class B1 felony is life imprisonment without parole.¹³² This statute is valid regardless of the standard of proof on the victim's age or the identity of the fact finder because the enhanced term will not go beyond the statutory maximum.

Second, section 15A-1340.16C, which increases the defendant's felony class if the defendant possessed a bullet proof vest during the

121. *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000).

122. See *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966); *State v. Neville*, 108 N.C. App. 330, 332, 423 S.E.2d 496, 497 (1992).

123. *McClure*, 267 N.C. at 215, 148 S.E.2d at 17-18; *Neville*, 108 N.C. App. at 332, 423 S.E.2d at 497.

124. 554 S.E.2d 665 (N.C. App. 2001).

125. *Id.* at 670; *State v. Lucas*, 353 N.C. 568, 597-98, 548 S.E.2d 712, 731 (2001).

126. *McNair*, 554 S.E.2d at 670.

127. *Id.*

128. *Id.* at 671-72.

129. *Id.* at 672-73.

130. N.C. GEN. STAT. § 15A-1340.16B (1999).

131. 353 N.C. 568, 596, 548 S.E.2d 712, 731 (2001).

132. § 15A-1340.17(c).

felony, should also be examined.¹³³ Sentences under this statute will pass constitutional muster if, and only if, the fact of possession of the bullet proof vest is charged in an indictment, submitted to the jury, and proved beyond a reasonable doubt. This statute necessarily increases a defendant's penalty beyond the prescribed statutory maximum. For example, if a person robs a convenience store with a revolver, he commits a Class D felony. The maximum penalty for that class felony is 229 months.¹³⁴ If the robber wore a bullet proof vest during the robbery, he may be sentenced in the Class C felony range, with a possible sentence of up to 261 months. Thus, the penalty is increased beyond the prescribed statutory maximum, so the procedural safeguards of *Apprendi* and *Lucas* must attach.

The indictment requirement likely will lead to more sentence vacations than the jury requirement in the near future. The new rule of *Lucas* applies retroactively only to cases on direct review or cases that are not final as of August 9, 2001,¹³⁵ but a significant number of defendants who were not indicted properly may fall into this category. Given that the indictment issue is jurisdictional, failure to charge an enhancement factor may lead to many automatic reversals. The other aspects of the *Lucas* holding appear less consequential. The maximum sentence formulation likely saves aggravated sentences from *Apprendi* attacks, and compliance with the requirement that all firearm enhancements be pled in an indictment and submitted to a jury is easy. This clarity notwithstanding, the General Assembly should codify the changes *Lucas* makes, at least regarding the maximum sentence. For the time being, however, the wisest course of action is for North Carolina prosecutors to plead all the facts under all three sentencing enhancement statutes in an indictment and submit those facts to a jury to determine if the state has proved them beyond a reasonable doubt.

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133. *Id.* § 15A-1340.16C.

134. *Id.* § 15A-1340.17(c), (e).

135. *State v. McNair*, 554 S.E.2d 665, 670 (N.C. App. 2001).