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## A Second Look at the North Carolina Fair Sentencing Act

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## COMMENTS

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#### I. INTRODUCTION

The North Carolina Fair Sentencing Act<sup>1</sup> was the result of extensive debate and consideration.<sup>2</sup> It was designed as a measure to eliminate indeterminate sentencing<sup>3</sup> and to create uniformity in sentencing for felons punished for similar crimes, while allowing deviation from the legislatively-mandated presumptive sentence, based upon judicial find-

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\* The first look was taken in Comment, *Criminal Procedure—The North Carolina Fair Sentencing Act*, 60 N.C.L. REV. 631 (1982). The author thanks Michelle Rippon and Professor Fred Williams for their help with this Comment.

1. Codified in N.C. GEN. STAT. §§ 14, 15A, 18A, 20, 21, 53, 90, 105, 108, 130, 148, 163 (1983). This comment is concerned with that portion codified in N.C. GEN. STAT. § 15A-1340.4.

2. See generally Comment, *Criminal Procedure—The North Carolina Fair Sentencing Act*, 60 N.C.L. REV. 631 (1982).

3. This is accomplished by taking sentence length determinations out of the hands of the Parole Commission. See Cooke, *Purpose and Theory of Presumptive Sentencing*, in INSTITUTE ON THE FAIR SENTENCING ACT I-1 (1981).

ings, in those cases where aggravating and mitigating factors dictate a different result.<sup>4</sup>

In the more than two years since the Act's effective date,<sup>5</sup> courts and trial attorneys have worked to implement its provision. The Act itself provides abundant guidance as to how the legislature intended the concept of fair sentencing to be implemented. For instance, the Act does not apply to Class A or Class B felonies. It specifically makes the consideration of aggravating and mitigating factors unnecessary in cases involving plea agreements between prosecutor and defendant.<sup>6</sup> It allows a court to impose a legislatively-determined presumptive sentence without making specific findings of aggravating and mitigating factors.<sup>7</sup> It requires a court, however, to find by a preponderance of the evidence,<sup>8</sup> and to reduce to writing factors bearing upon sentence specifically enumerated in the Act<sup>9</sup> and other factors relevant to the purposes of sentencing.<sup>10</sup> In order to impose a sentence of confinement in excess of a presumptive sentence, a court must find that the aggravating factors outweigh the mitigating factors; to impose a sentence less than the presumptive, the mitigating factors must outweigh the aggravating factors.<sup>11</sup> Courts may not consider as evidence of an aggravating factor evidence which established one of the essential elements of the crime for which the defendant is being punished.<sup>12</sup> Nor may a court rely on the same evidence to establish more than one aggravating factor.<sup>13</sup>

Despite the extensive guidance in the Act, courts and trial attorneys have stumbled upon both procedural and substantive pitfalls in their application of the Act's provisions. Questions have arisen concerning the use of the same evidence to establish both an element of the crime and an aggravating factor; use of the same evidence to establish more than one aggravating factor; and the specific interpretation of some of the sixteen aggravating factors,<sup>14</sup> and fifteen mitigating factors<sup>15</sup> in the

4. N.C. GEN. STAT. § 15A-1340.4(b) (1983). The presumptive sentences are found in N.C. GEN. STAT. § 15A-1340.4(f) (1983).

5. July 1, 1981. N.C. GEN. STAT. § 15A-1340.1 (1983). The Act applies to only those felons who commit crimes after July 1, 1981. Those felons now punished for crimes committed before July 1, 1981 are punished under law in effect before July 1, 1981. See Comment, *supra* note 3, at 647.

6. N.C. GEN. STAT. §§ 15A-1340.4(a) & (b) (1983).

7. *Id.* § 15A-1340.4(b). State v. Bunn, 66 N.C. App. 187, 190, 310 S.E.2d 792, 795 (1984).

8. "More probably true than not." State v. Ahearn, 307 N.C. 584, 596, 300 S.E.2d 689, 697 (1983). The state bears the burden of persuasion as to aggravating factors, the defendant as to mitigating factors. State v. Jones, 309 N.C. 214, 219, 306 S.E.2d 451, 455 (1983).

9. N.C. GEN. STAT. §§ 15A-1340.4(a)(1)a-p (1983).

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

11. *Id.* § 15A-1340.4(b).

12. *Id.* § 15A-1340.4(a).

13. *Id.*

14. These problem areas have included aggravating factors dealing with: prior convictions,

Act. Questions have also arisen concerning the discretion of trial judges in weighing aggravating and mitigating factors, and the appropriate remedy for a trial judge's improper consideration of a factor.

This comment discusses these problem areas and the guidance which the North Carolina appellate courts have provided to trial courts and litigators in the interpretation of the Act. It will examine those areas where the appellate courts have failed to provide guidance and other problem areas.

## II. USE OF EVIDENCE FOR MORE THAN ONE PURPOSE

After its listing of aggravating factors, the Act provides: "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation."<sup>16</sup> These concepts are straightforward.<sup>17</sup> Nevertheless problem areas have arisen,<sup>18</sup> especially when the crime for which the defendant was sentenced involved

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including the method of proof and the burden with respect to whether the defendant was indigent, represented by counsel, or waived counsel at the time of the prior conviction; *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983); *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983); *State v. Green*, 309 N.C. 623, 308 S.E.2d 326 (1983); *State v. Massey*, 309 N.C. 625, 308 S.E.2d 332 (1983); and *State v. Callicutt*, 309 N.C. 626, 308 S.E.2d 333 (1983); especially heinous, atrocious, or cruel crime; *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983); *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); pecuniary gain; *State v. Abdullah*, 309 N.C. 63, 306 S.E.2d 100 (1983); *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983); *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); and use of a deadly weapon; *State v. Chatman*, 308 N.C. 169, 301 S.E.2d 71 (1983); *State v. Abdullah*, 309 N.C. 63, 306 S.E.2d 100 (1983).

15. Important mitigating factors construed include: voluntarily acknowledged wrongdoing; *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983); *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983); the defendant's good character or reputation in the community; *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983); and the defendant's mental condition or capacity reducing his culpability for his offense; *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983).

16. N.C. GEN. STAT. § 15A-1340.4(a)(1) (1983).

17. See, e.g., *State v. Massey*, 62 N.C. App. 66, 302 S.E.2d 262, *modified and aff'd*, 309 N.C. 625, 308 S.E.2d 332 (1983), a case involving both rules, wherein it was plain that the same evidence was used to find aggravating factors that "[t]he defendant conspired with others to commit the crime," and that "there was strong evidence of a conspiracy . . . with others, who were sentenced to life sentences for First Degree Murder [and who went to the victim's house] for the purpose of recovering drugs and money. . . ." *Massey* also held that evidence that the defendant went to the scene of the crime with a shotgun with revenge in mind was an essential part of the State's proof of first degree burglary. *Id.* at 68-69, 302 S.E.2d at 264. See also *State v. Goforth*, 59 N.C. App. 504, 297 S.E.2d 128 (1982) (holding in trial of attempted rape of defendant's ten-year-old stepchild that evidence of a familial relationship was improperly used to find two aggravating factors); *State v. Thobourne*, 59 N.C. App. 584, 297 S.E.2d 774 (1982) (holding that evidence used to prove aggravating factors of pecuniary gain and an offense involving an unusually large quantity of contraband was not evidence necessary to prove elements of possession with intent to sell and deliver marijuana). But see *State v. Coffey*, 65 N.C. App. 751, 760, 310 S.E.2d 123, 129 (1984) (holding that the trial court improperly found the aggravating factor of a large amount of contra-

use of a deadly weapon<sup>19</sup> from which the element of malice can be inferred,<sup>20</sup> or where the defendant pled guilty to fewer than all of the crimes charged.

The latter circumstance occurred in the case of *State v. Abee*.<sup>21</sup> Each of two defendants was charged with the first degree sexual offenses of fellatio and inserting an object into the victim's anus,<sup>22</sup> and kidnapping.<sup>23</sup> Each pled guilty to second degree sexual offense based on one act of fellatio.<sup>24</sup> It was for that act alone, pursuant to a plea bargain, that they were sentenced. There was evidence, however, that the ten-year-old victim was forced to perform fellatio on each of the defendants more than once, that Abee stuck his finger into the victim's anus, and that Jones attempted to insert his penis into the victim's anus, evidence which the trial court considered in aggravation. The court of appeals held that the consideration of this evidence violated the mandate of the Act that the same evidence used to establish an element of the offense not be used in aggravation, upon the theory that the evidence of all these acts was necessary to establish the element of a "sexual act."<sup>25</sup> The supreme court later modified that holding, finding that the criminal statute defining the crime<sup>26</sup> required only one "sexual act," and that the trial court properly considered the additional acts in aggravation.<sup>27</sup>

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band when the defendant was convicted of marijuana trafficking because the amount was an element of the offense).

18. See *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701-02 (1983) (holding that the trial court properly found in aggravation that the two-year-old victim was *very* young, when defendant was convicted of felonious child abuse, which includes as an element that the victim was less than sixteen years old; also holding that vulnerability of the victim is the essence of N.C. GEN. STAT. § 15A-1340.4(a)(1)j (1983)). See also *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983) (when deadly weapon is used to commit both the homicide for which the defendant is sentenced and another homicide, a trial court may find both the N.C. GEN. STAT. § 15A-1340.4(a)(1)i factor of use of a deadly weapon and the non-statutory factor that "each homicide was committed during a course of conduct in which defendant committed an act of violence against another person.")

19. N.C. GEN. STAT. § 15A-1340.4(a)(1)i (1983) establishes the aggravating factor that "[t]he defendant was armed with or used a deadly weapon at the time of the crime." This factor may not be established when the defendant is sentenced for discharging a firearm into occupied property, *State v. Brooks*, 61 N.C. App. 572, 301 S.E.2d 421 (1983); when evidence of the deadly weapon is used to establish that the crime was especially heinous, atrocious, or cruel, *State v. Hammonds*, 61 N.C. App. 615, 301 S.E.2d 457 (1983); when the defendant is sentenced for manslaughter when a gun is the instrument of the unlawful killing, *State v. Green*, 62 N.C. App. 1, 301 S.E.2d 920, *modified and aff'd*, 309 N.C. 623, 308 S.E.2d 326 (1983); or when the crime is armed robbery, *State v. Morris*, 59 N.C. App. 157, 296 S.E.2d 309 (1982).

20. See *infra* note 32 and accompanying text.

21. 60 N.C. App. 99, 298 S.E.2d 184 (1982), *modified and aff'd*, 308 N.C. 379, 302 S.E.2d 230 (1983).

22. Both crimes of first degree sexual offense violated N.C. GEN. STAT. § 14-27.4 (1978).

23. *Id.* § 14-39.

24. *Id.* § 14-27.5.

25. 60 N.C. App. at 103-04, 298 S.E.2d at 186.

26. N.C. GEN. STAT. § 14-27.5(a) (1978).

27. *State v. Abee*, 308 N.C. at 380-81, 302 S.E.2d at 231. The trial court could have consid-

Trial defense attorneys should take note. Even though a defendant may be sentenced for only the crime "of which [he] is convicted or to which he pleads guilty or no contest,"<sup>28</sup> evidence of other crimes,<sup>29</sup> or evidence of elements of greater crimes charged but to which the defendant did not plead,<sup>30</sup> may be used in aggravation to justify a sentence exceeding the presumptive. This should be a consideration in the plea bargaining process.<sup>31</sup>

The greatest amount of uncertainty as to the use of the same evidence has arisen in cases in which the use of a deadly weapon formed the basis of an inference of malice when malice was a necessary element of the crime.<sup>32</sup> The court of appeals first decided two conflicting cases, *State v. Gaynor*<sup>33</sup> and *State v. Hough*.<sup>34</sup> Each of the defendants pled guilty to second degree murder and in each case the trial court found the aggravating factor of use of a deadly weapon. Nevertheless, the court of appeals held that the *Hough* trial court finding was correct but that the *Gaynor* court finding was not.

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ered the additional acts either as an additional factor or as evidence that the crime was especially heinous, atrocious, or cruel. *State v. Blackwelder*, 309 N.C. 410, 413 n.1, 306 S.E.2d 783, 786 n.1 (1983). See also *State v. Isom*, 65 N.C. App. 223, 229, 309 S.E.2d 283, 287 (1983) (evidence of excessive bodily injury properly considered in aggravation).

28. *State v. Melton*, 307 N.C. 370, 374, 298 S.E.2d 673, 676 (1983).

29. *State v. Green*, 62 N.C. App. 1, 301 S.E.2d 920, modified and *aff'd*, 309 N.C. 623, 308 S.E.2d 326 (1983) (holding that evidence that defendant used a deadly weapon may not be considered in aggravation for the offense of manslaughter, but evidence that defendant concealed the weapon may be so considered because the latter act constituted a separate criminal offense under N.C. GEN. STAT. § 14-269 (1978)).

30. *State v. Melton*, 307 N.C. at 376, 298 S.E.2d at 678 (holding that where the defendant was properly indicted for first degree murder but pled guilty to second degree murder, the trial court properly considered as a factor in aggravation for sentencing that the defendant had committed the murder with premeditation and deliberation, when defendant had not bargained for a particular sentence); *State v. Gaynor*, 61 N.C. App. 128, 132, 300 S.E.2d 260, 262 (1983) (premeditation is reasonably related to the purposes of sentencing in the case of second degree murder).

31. As to plea bargaining under the Fair Sentencing Act see generally Horne, *A Defense Counsel's New Approach to Plea Bargaining and Extenuation & Mitigation*, in INSTITUTE ON THE NEW FAIR SENTENCING ACT VI-1 (1981). See also *State v. Melton*, 307 N.C. at 376-77, 298 S.E.2d at 678, where the court noted that the defendant had passed up his opportunity to bargain for a recommendation of sentence from the prosecutor while upholding the trial court's discretion to sentence, in effect, for the crime of first degree murder, of which the defendant was indicted, when he pled guilty to second degree murder.

32. See *State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982) as to the propriety of the inference. All of the cases where the defendant has been sentenced under the Fair Sentencing Act have involved the crime of second degree murder, which includes malice as one of its essential elements. *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981). Of course the crime of first degree murder requires the element of malice aforethought, but defendants sentenced for that crime are sentenced under the provisions of N.C. GEN. STAT. § 15A-2000 (1983). The capital act contains a provision similar to N.C. GEN. STAT. § 15A-1340.4(a)(1)i. It provides for the aggravating factor that "[t]he defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." N.C. GEN. STAT. § 15A-2000(e)(10) (1983).

33. 61 N.C. App. 128, 300 S.E.2d 260 (1983).

34. 61 N.C. App. 132, 300 S.E.2d 409, *disc. rev. denied*, 308 N.C. 193, 302 S.E.2d 246 (1983).

The facts of the two cases are similar. Each of the defendants intentionally used a deadly weapon, Gaynor a .22 calibre rifle and Hough a .22 calibre revolver, to kill another person, Gaynor her mother with whom she was living at the time of the murder, and Hough a man with whom he lived. Gaynor testified that she did not get along with her mother. Evidence showed that Hough had been ordered to move out of his victim's home. Gaynor had hidden the murder weapon a couple weeks before she killed her mother with one shot. Hough shot his victim four times.

The number of shots and the manner of killing seem to have made the difference.<sup>35</sup> In *Gaynor* the court held that the intentional use of the weapon was necessary to prove the element of malice; in *Hough* it was held not necessary. Nevertheless, the court in *Hough* did not rely solely on the number of shots and manner of killing. "Notwithstanding the lack of evidence of ill will, hatred or spite or the lack of presumptive malice arising from the use of a deadly weapon, *malice existed as a matter of law from the evidence presented that defendant, without excuse or mitigating circumstances, unlawfully and intentionally shot the deceased.*"<sup>36</sup> If that is so, the question arises why the use of the weapon was necessary to prove malice in *Gaynor*, thus preventing evidence of use of a deadly weapon as an aggravating factor.

Two weeks later the court followed *Gaynor* in *State v. Keaton*.<sup>37</sup> Keaton intentionally used a weapon to kill his victim, shooting him three times. The court said: "[a]s there were no facts and circumstances indicating that Hawks' death was unusually gruesome other than the fact that he died from gunshot wounds, the necessary element of malice must have been inferred by the jury from the evidence that defendant intentionally shot Hawks with a gun."<sup>38</sup> The court of appeals apparently has more insight into the workings of juries than most of us.

The supreme court noted the problem of second guessing juries when it made a definitive rule in *State v. Blackwelder*<sup>39</sup> for similar cases. Blackwelder shot his victim twice in the head, literally blowing out his brains. The trial court instructed the jury on the inference of malice which they could draw from the use of the deadly weapon. The supreme court held that "when, as in the case sub judice, the facts justify an instruction on the inference of malice arising as a matter of law from the use of a deadly weapon, evidence of the use of that deadly

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35. *Id.* at 134, 300 S.E.2d at 411.

36. *Id.* (emphasis added).

37. 61 N.C. App. 279, 283-84, 300 S.E.2d 471, 473 (1983).

38. *Id.*

39. 309 N.C. 410, 306 S.E.2d 783 (1983).

weapon may not be used as an aggravating factor at sentencing.”<sup>40</sup> The court further stated in dictum that this rule applies whether the instruction was actually given, or in the case of a guilty plea, could have been given.<sup>41</sup> The court later so held in *State v. Taylor*.<sup>42</sup>

This holding will impact upon trial courts and litigators. It places greater importance upon whether the trial court instructs on the presumption of malice. Prosecutors may not want to move as vigorously for the instruction on presumed malice in hope of the trial court finding in aggravation that the defendant used a deadly weapon. The impact is greater, however, in the larger number of cases involving guilty pleas. In these cases, defense counsel may raise the issue anticipating that the trial court will find, as a matter of law, that the instruction would be justified on the facts, a finding not likely to be disturbed on appeal. Trial courts finding the use of a deadly weapon as an aggravating factor when the defendant has pled guilty to second degree murder or other similar crimes, will better preserve the record if they also specifically find, as a matter of law, that the facts of the case would not justify an instruction on the inference of malice.

Despite the “bright-line” rule of *Blackwelder*, the issue raised in *Hough*<sup>43</sup> remains. Does malice exist as a matter of law when evidence shows that the “defendant, without excuse or mitigating circumstances, unlawfully and intentionally shot the deceased”? The supreme court has consistently held that it does.<sup>44</sup> Arguably then, the *Blackwelder* rule prevents a trial court’s finding of the aggravating factor of use of a deadly weapon in any case of second degree murder involving the use of a deadly weapon because the facts, as a matter of law, always justify an instruction on the malice that may be inferred. Courts should be reluctant to find the aggravating factor in such a second degree murder case.<sup>45</sup>

### III. SPECIFIC AGGRAVATING FACTORS

Most of the sixteen aggravating factors listed in the Act may be construed by considering their plain meaning.<sup>46</sup> A few, particularly those

40. *Id.* at 417, 306 S.E.2d at 788.

41. *Id.*

42. 309 N.C. 570, 573, 308 S.E.2d 302, 305 (1983).

43. See *supra* text accompanying note 36.

44. *State v. Jenkins*, 300 N.C. 578, 268 S.E.2d 458 (1980); *State v. Potter*, 295 N.C. 126, 244 S.E.2d 397 (1978); *State v. Patterson*, 288 N.C. 553, 559, 220 S.E.2d 600, 606 (1975), *death penalty vacated*, 428 U.S. 904 (1976); *State v. Moore*, 275 N.C. 198, 166 S.E.2d 652 (1969); *State v. Baldwin*, 152 N.C. 822, 829, 68 S.E. 148, 151 (1910).

45. The supreme court has had occasion to apply the *Blackwelder* rule in a case of second degree murder. *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983).

46. *E.g.* that “the defendant involved a person under the age of 16 in the commission of the crime.” N.C. GEN. STAT. § 15A-1340.4(a)(1) (1983).



dealing with prior convictions,<sup>47</sup> especially heinous, atrocious, or cruel crimes,<sup>48</sup> and pecuniary gain<sup>49</sup> have provided problems of interpretation. This comment will discuss how the appellate courts have interpreted these and other specific aggravating factors.

### A. *Prior Convictions and Their Proof*

Perhaps the most important aggravating factor and the one which any prosecutor can always use to his advantage is the one providing for consideration of the defendant's prior criminal record.<sup>50</sup> The law is well-established in allowing the State to use prior convictions to justify increased punishment for the recidivist.<sup>51</sup>

#### 1. Methods of Proof

The problems arise in the interpretation of the provisions of the Act which provide for the method of proving the defendant's prior conviction.

A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein. No prior conviction which occurred while the defendant was indigent may be considered in sentencing unless the defendant was represented by counsel or waived counsel with respect to that prior conviction. A defendant may make a motion to suppress evidence of a prior conviction pursuant to G.S. 15A-980. If the motion is made for the first time during the sentencing stage of the criminal action, either

47. *Id.* § 15A-1340.4(a)(1)o.

48. *Id.* § 15A-1340.4(a)(1)f.

49. *Id.* § 15A-1340.4(a)(1)c.

50. *Id.* § 15A-1340.4(a)(1)o, which provides that a trial court may consider in aggravation that

[t]he defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. Such convictions include those occurring in North Carolina courts and courts of other states, the District of Columbia, and the United States, provided that any crime for which the defendant was convicted in a jurisdiction other than North Carolina would have been a crime if committed in this State. Such prior convictions do not include any crime that is joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced.

No appellate court has considered the issue whether the crime for which the defendant was convicted in a court other than a North Carolina court is also a crime in North Carolina. The prior conviction or convictions do not have to be related to the crime for which the defendant is being sentenced, *State v. Hough*, 61 N.C. App. 132, 135, 300 S.E.2d 409, 411-12 (1983). A trial court must consider prior convictions, *State v. Teague*, 60 N.C. App. 755, 758, 300 S.E.2d 7, 9 (1983).

51. *State v. Hester*, 37 N.C. App. 448, 451, 246 S.E.2d 83, 85 (1978); *State v. Thompson*, 267 N.C. 653, 655, 148 S.E.2d 613, 615 (1966) (per curiam); *State v. Cooper*, 238 N.C. 241, 244, 77 S.E.2d 695, 698 (1953).

the State or the defendant is entitled to a continuance of the sentencing hearing.<sup>52</sup>

The first sentence of this subsection provides two ways the State may prove a defendant's prior criminal record, stipulation or certified copy of a court record. The question arises whether a prosecutor is limited to those two methods of proof. The court of appeals<sup>53</sup> and the supreme court<sup>54</sup> both have found that the legislature's use of the word "may" means that the statute allows methods of proof other than these two.<sup>55</sup> This interpretation allows district attorneys to use the convenient method of proving a defendant's prior criminal record with Federal Bureau of Investigation (FBI) records.<sup>56</sup>

The supreme court approved an additional method of proof in *State v. Thompson*<sup>57</sup> while disapproving of another. The court allowed the use of testimony elicited from the defendant on cross-examination during the guilt/innocence phase of the trial concerning his prior criminal convictions. The court opined, however, that the trial court should not have considered as evidence of conviction a statement made by the prosecutor that he remembered that the defendant had been previously convicted in another county.<sup>58</sup>

Since the rules of evidence are generally not applicable to sentencing hearings,<sup>59</sup> the court of appeals has approved, in *State v. Graham*<sup>60</sup> the use of hearsay evidence, otherwise inadmissible, to prove the defend-

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

53. *State v. Massey*, 59 N.C. App. 704, 705, 298 S.E.2d 63, 64-65 (1982), *modified and aff'd*, 309 N.C. 625, 308 S.E.2d 332 (1983). Massey failed to object at trial to the introduction into evidence of the record of his prior criminal convictions, and the appeals court held that he could therefore not complain on appeal of its admission at trial. Nevertheless, the court went on to interpret the statutory language as permissive and not mandatory. *Id.*

54. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

55. See also *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983) and *State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981), which interpret the capital punishment statute similarly.

56. See *State v. Edwards*, 49 N.C. App. 547, 556, 272 S.E.2d 384, 391 (1980) (approving the admission at a sentencing hearing of a FBI record of the defendant's prior crimes); *State v. Smith*, 300 N.C. 71, 81-82, 265 S.E.2d 164, 171 (1980), (approving the admission into evidence of a FBI fingerprint study indicating that the defendant had a prior criminal conviction). See also *State v. Massey*, 59 N.C. App. 704, 298 S.E.2d 63 (1982), and *State v. Bynum*, 65 N.C. App. 813, 310 S.E.2d 388 (1984), cases decided after the 1 July 1981 effective date of the Act.

57. 309 N.C. 421, 307 S.E.2d 156 (1983).

58. The defendant, charged with the crimes of felonious breaking or entering and felonious larceny, admitted to previous convictions for forgery and driving under the influence. The district attorney's trial folder indicated to him that the defendant also had a prior conviction for larceny, and because he had no other record of the conviction, the district attorney relied on his memory.

Statements by defendants' counsel are a different matter. They may be construed as a stipulation or otherwise as sufficient evidence of a prior conviction. See *State v. Cook*, 65 N.C. App. 703, 309 S.E.2d 737 (1983).

59. N.C. GEN. STAT. § 15A-1334(b) (1983); *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980); *State v. Jackson*, 302 N.C. 101, 273 S.E.2d 666 (1981).

60. 61 N.C. App. 271, 274, 300 S.E.2d 716, 718, *modified and aff'd*, 309 N.C. 587, 308 S.E.2d 311 (1983).

ant's prior criminal record. In *Graham* a deputy sheriff testified about what other people had told him concerning the defendant's criminal record; he did not testify with any reference to or use of court records. *State v. Smith*<sup>61</sup> would have been helpful precedent in *Graham* on the issue of hearsay evidence. In *Smith* the court found proper the trial court's admission into evidence of a FBI fingerprint study which indicated that the defendant had a prior criminal conviction. The trial court had found that the evidence was reliable hearsay. The evidence of the deputy sheriff in *Graham* was not as reliable as the FBI fingerprint study in *Smith*. The deputy sheriff in *Graham* repeated out-of-court statements made to him. The notation on the FBI fingerprint study in *Smith* was the result of an administrative practice regularly performed by the same agency which maintains criminal records.

Proof of a defendant's prior criminal record for the purpose of establishing an aggravating factor in order to raise the defendant's sentence above the presumptive should be based on reliable evidence, even if the rules of evidence are relaxed at the sentencing hearings. It is not too great a burden on the State to produce court records to establish this aggravating factor even if other acceptable methods of proof are not available. Reliance on out-of-court statements related by police officers should be avoided, especially in light of most courts' inclination to find such witnesses credible.

In *Graham* the supreme court did not reach the question whether the deputy's testimony alone would have been sufficient to prove the prior convictions. While characterizing the deputy's testimony as hearsay, the court held that the defendant's admission of the prior convictions while a witness not only cured any defect caused by the deputy's hearsay evidence but also alone constituted a proper means of proof.<sup>62</sup>

Methods of proof other than use of court records or stipulation of the parties sometimes create problems, when more than one conviction is at issue, concerning which conviction or convictions the trial judge has found as an aggravating factor. The supreme court has asked that trial courts indicate which convictions they have found in order to facilitate appellate review.<sup>63</sup>

## 2. Burden of Proof as to Constitutionality

The legislature was no doubt mindful of the mandate of *United States v. Tucker*<sup>64</sup> when it drafted the portion of the Act requiring, before a record of conviction may be used to establish a factor in aggra-

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61. 300 N.C. 71, 81-82, 265 S.E.2d 164, 171 (1980).

62. *State v. Graham*, 309 N.C. 587, 593, 308 S.E.2d 311, 316 (1983).

63. *State v. Thompson*, 309 N.C. 421, 425 n.2, 307 S.E.2d 156, 159 n.2 (1983).

64. 404 U.S. 443 (1972).

vation, a showing that the defendant was not indigent, was represented by counsel, or waived counsel rights at the time of the prior conviction. The provision is designed to prevent the use of a constitutionally infirm conviction as a means of imprisoning the defendant beyond the presumptive sentence. This provision, however, has been subject to differing interpretations. The question asked, and now answered, is whether the legislature intended the burden on the issue of the defendant's indigency, representation, or waiver of representation at the prior proceeding to be upon the State or the defendant.

The court of appeals first intimated, in an opinion filed in December, 1982, that the provision placed the onus upon the defendant to move to exclude a record of prior conviction because of its constitutional infirmity.<sup>65</sup> In February, 1983, in *State v. Farmer*<sup>66</sup> the court of appeals made clear that the provision required a finding by the trial court concerning the representation of the defendant at the prior proceeding from which the conviction resulted. Unfortunately, the court did not address the question of the burden of proof. The court implied that the burden was on the State, but did not expressly say so.

However, in *State v. Thompson*<sup>67</sup> decided the same day as *Farmer* Judge Webb wrote for the court:

We do not believe the burden should be on the defendant to prove he was indigent and did not have counsel or waived counsel. The statute provides for a presumptive sentence unless the aggravating factors outweigh the mitigating factors. The burden should be on the State to prove the aggravating factors if the presumptive sentence is not to be imposed.<sup>68</sup>

The court of appeals thereafter invoked the *Thompson* precedent when the State, dissatisfied with the need to prove the constitutionality of a defendant's conviction, again argued cases<sup>69</sup> before that court.

Advocates for the State argued that the requirement of proving the defendant was not indigent, was represented by counsel, or waived counsel was unjustified for a number of reasons. First, they pointed to the language of the statute providing that the defendant may move to suppress the evidence. This language, they argued, showed that the legislature intended for the burden to be on the defendant. Secondly, they contended that the burden on the State to in effect show the constitutionality of the prior conviction required a retrial of the prior case,

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65. *State v. Massey*, 59 N.C. App. 704, 705, 298 S.E.2d 63, 65 (1982).

66. 60 N.C. App. 779, 299 S.E.2d 842 (1983).

67. 60 N.C. App. 679, 300 S.E.2d 29 (1983).

68. *Id.* at 685, 300 S.E.2d at 33.

69. *State v. Locklear*, 61 N.C. App. 594, 301 S.E.2d 437, *disc. rev. denied*, 308 N.C. 679, 304 S.E.2d 759 (1983); *State v. Green*, 62 N.C. App. 1, 301 S.E.2d 920, *modified and aff'd*, 309 N.C. 623, 308 S.E.2d 326 (1983); *State v. Callicutt*, 62 N.C. App. 296, 302 S.E.2d 460, *rev'd and remanded*, 309 N.C. 626, 308 S.E.2d 333 (1983).

and raised other issues such as whether the defendant had received the effective assistance of counsel. Instead, State's attorneys wanted to rely on the presumed validity of prior judgments.<sup>70</sup> Their argument was well taken that the burden should be on the defendant because the knowledge of whether he was indigent, represented by counsel, or waived counsel is a matter peculiarly within the knowledge of any defendant. State's advocates did not want the burden of searching through court records in multiple jurisdictions in order to meet their burden. Lastly, they argued that the burden was a matter for legislative determination.

Though the court of appeals adhered to the *Thompson* holding, the arguments of the State were not unheard.<sup>71</sup> Of particular importance is the legislative reaction, codified in a bill ratified on June 13, 1983, and effective October 1, 1983.<sup>72</sup> The bill deleted from paragraph (e) of the Act the words "pursuant to Article 53 of this Chapter," and substituted the words "pursuant to G.S.15A-980," a new statutory provision indicating the legislature's intent to place the burden on the defendant during a sentencing hearing.<sup>73</sup>

At the time of the bill's ratification the supreme court had not decided those cases tried under the old language of the Act concerning the burden of proof. In an opinion filed just prior to the October 1, 1983 effective date of the new Act, the court modified the *Thompson* holding and placed the burden on the defendant.<sup>74</sup> The court gave trial courts and counsel guidance concerning how to proceed.

If the defendant elects to challenge the admissibility of his prior convictions, he must do so by a method which informs the court of the specific reason for his objection, i.e., that he was indigent and unrepresented by counsel at the time of the prior conviction or convictions. A mere objection to the evidence alone will not be sufficient. The defendant may challenge the evidence of prior convictions prior to trial by motion to suppress or he may challenge the evidence in the first instance at the time of the offer of proof by the State. The challenge may be in the form of objection, motion to strike, motion to suppress or other acceptable means. The onus is on the defendant to inform the court that he is prepared on voir dire to offer proof that he was indigent and unrepresented by counsel at the time of the prior convictions.

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70. *State v. Pope*, 257 N.C. 326, 126 S.E.2d 126 (1962).

71. *See, e.g., State v. Green*, 62 N.C. App. at 5, 301 S.E.2d at 922-23 n.1, wherein Judge Wichard, the author of the *Massey* opinion, noted that he was reluctantly applying the *Thompson* precedent and explained why he thought the burden should be on defendants.

72. An Act to Set Forth the Procedure to Suppress a Prior Conviction Obtained in Violation of the Right to Counsel, Ch. 513, 1983 N.C. Adv. Legis. Serv. 172.

73. Under the provisions of N.C. GEN. STAT. § 15A-980 (1983), the defendant would have to make a formal motion, supported by affidavit, prior to trial.

74. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

If the defendant challenges the evidence by motion to suppress, the proceedings on the motion are governed by Article 53 of Chapter 15A of the General Statutes. When the challenge is made otherwise than by a motion to suppress, the defendant has the burden of going forward with the evidence of his indigency and lack of representation, or waiver thereof, on his prior convictions. If the defendant establishes a prima facie showing, the burden shifts to the State to prove by a preponderance of the evidence that the challenged evidence is admissible.<sup>75</sup>

This rule makes the procedure plain. The burden of raising the issue is always on the defendant. He may choose to make a motion to suppress before trial. Of course defendant's counsel may make such a motion only if he knows about the defendant's conviction record. While it is now almost imperative that defense counsel inquire of their clients concerning matters in aggravation and mitigation,<sup>76</sup> including prior convictions, some clients will continue to keep information about prior convictions from their counsel. Defense counsel will know about the prior convictions if they make a discovery request pursuant to N.C. Gen. Stat. § 15A-903(c) or if diligent State attorneys inform them in time to allow appropriate pre-trial motions.<sup>77</sup> At least one trial court judge has recommended the latter procedure.<sup>78</sup> It is an advisable procedure in light of the provision, still in the Act and unaffected by the October 1, 1983 amendment, that either the State or the defendant may be entitled to a continuance if a motion to suppress is made for the first time during the sentencing hearing.

If a motion to suppress is not made prior to trial, for whatever reason, the defendant may challenge the use of his conviction by way of objection or motion to strike at the time the State offers the evidence. Just as the burden of going forward is on the defendant who makes a motion to suppress prior to trial,<sup>79</sup> the burden is likewise on the defendant who objects or moves to strike. The burden of persuasion, by a preponderance of the evidence, remains with the State.

This is a satisfactory solution to the problem. In order to move to suppress the evidence of conviction before trial, defendants are required to submit an affidavit in support of the motion.<sup>80</sup> This affidavit will most likely be that of the defendant, but this does not raise signifi-

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75. *Id.* at 428, 307 S.E.2d at 161.

76. See Horne, *supra* note 31.

77. State attorneys should do this even though they do not have a general duty to disclose information in their possession to the defendant. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (holding that the State need not reveal before trial the names of all witnesses who will testify against the defendant).

78. *Snepp, Changes Required of and by the Trial Bench Under the New Act*, INSTITUTE ON THE NEW FAIR SENTENCING ACT IV-4 (1981).

79. See *State v. Gibson*, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

80. At least as to Superior Court practice. N.C. GEN. STAT. § 15A-977 (1983).

cant self-incrimination problems.<sup>81</sup> Counsel for defendants may not wish to move for suppression prior to trial in hope that the prosecution is unaware of the conviction. If the prosecutor attempts to elicit evidence of the conviction through cross-examination<sup>82</sup> of the defendant, as a witness during the guilt/innocence phase of the trial, defense counsel may at that time object or make a motion to strike, so long as he is prepared to make an offer of proof that the defendant was previously indigent and unrepresented. This requirement is helpful to defense counsel when deciding whether clients should testify.<sup>83</sup> A defender knows, if he has evidence of the defendant's indigency or lack of representation at the prior proceeding, that he may offer it and shift the burden to the State to show that the conviction may properly be used for sentencing purposes. It is unlikely that the State will readily have evidence showing that the defendant was not previously indigent, was represented by counsel, or waived his counsel rights.<sup>84</sup>

The question arises how the *Thompson* procedure will affect, if at all, the admissibility of evidence of prior convictions elicited from the defendant in cross-examination for the purpose of impeachment. There is no general requirement that the prosecutor, before questioning a defendant as a witness, show that the prior conviction or convictions were constitutionally obtained,<sup>85</sup> but only that the prosecutor have a good faith basis for asking the defendant, while on the witness stand, about his criminal record.<sup>86</sup> *Thompson* requires the defendant to object at the time of the State's offer of proof. It is clear that evidence elicited during the guilt/innocence phase of the trial may be considered by the court to establish aggravating and mitigating factors for sentencing.<sup>87</sup>

81. *State v. Gibson*, 32 N.C. App. 584, 233 S.E.2d 84 (1977).

82. See *supra* notes 57 & 62 and accompanying text.

83. In *State v. Thompson* the defendant testified during the guilt/innocence phase of the trial, and it was while the defendant was testifying upon cross-examination that the district attorney elicited testimony concerning the defendant's prior convictions.

84. District attorneys could ensure the availability of such evidence by requiring the annotation on court records, after each conviction, of the fact that the defendant was represented at trial or waived counsel. With respect to waiver, the State may rely on evidence that the defendant, at either the preliminary hearing or first appearance of the prior proceeding, waived his right to counsel.

85. But see *State v. Mayhand*, 298 N.C. 418, 427, 259 S.E.2d 231, 238 (1979) (trial judge allowed district attorney to question the defendant about only those prior convictions at the time of which the defendant was represented by counsel); *State v. Vincent*, 35 N.C. App. 369, 373, 241 S.E.2d 390, 393 (1978) (trial court erred in permitting cross-examination of the defendant concerning his prior conviction after the defendant had shown that he was indigent and unrepresented at the prior proceeding).

86. *State v. Pilkington*, 302 N.C. 505, 510, 276 S.E.2d 389, 393, cert. denied, 454 U.S. 850 (1981).

87. See N.C. GEN. STAT. § 15A-1444(al) (1983); *State v. Teague*, 60 N.C. App. 755, 300 S.E.2d 7 (1983). But see *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983) (it is improper for a trial court to rely on evidence from the trial of others convicted of the same crime because of the need to sentence a defendant upon only his individual culpability).

It is likely, then, that the State will elicit evidence of the prior conviction or convictions only once during cross-examination of the defendant while he is testifying during the guilt/innocence phase of the trial. If defense counsel successfully objects to the introduction of the evidence on the ground that the defendant was indigent and unrepresented at the time of the prior conviction or convictions, the court should not receive the evidence for the purpose of impeaching the defendant as a witness.<sup>88</sup> Neither should the court receive the evidence for the purpose of establishing the aggravating factor of prior convictions, if the defendant is found guilty.

The legislature, like the supreme court, has expressed its opinion about the suppression of constitutionally infirm prior convictions. First, paragraph (a) of the new General Statute § 15A-980 allows a defendant to suppress a constitutionally infirm conviction if the State's use of it will be for purposes of impeachment *or* sentencing.<sup>89</sup> This provision solves the problem of when defense counsel should object on the ground of indigency and non-representation when the State elicits evidence of prior conviction from the defendant upon cross-examination. Under the statutory provision, it is clear that the defendant may object to the introduction into evidence of the conviction for the purpose of preventing its use both for impeachment and to establish the prior conviction aggravating factor. Secondly, the Act provides only one method of challenging the State's use of a prior conviction. The defendant must move to suppress the evidence before trial, and if he does not he waives his right to suppress.<sup>90</sup> Thirdly, the Act places the burden on the defendant to prove by a preponderance of the evidence not only that he was indigent and had no counsel but also that he did not waive his right to counsel at the prior proceeding.<sup>91</sup>

It is noteworthy that the supreme court was aware of the Act when it reached its decision in *Thompson*, which was decided just prior to the Act's effective date.<sup>92</sup> This fact gives rise to some reasonable inferences from a comparison of the Act's procedure and the *Thompson* procedure.

The clear intent of paragraph (b) of the Act is to provide only one method by which a defendant may "suppress" the use of a prior con-

88. See *State v. Mayhand*, 298 N.C. at 427, 259 S.E.2d at 238, and cases cited therein. While North Carolina courts have consistently held that a defendant's due process rights are not violated when he is impeached as a witness upon cross-examination by the use of a prior conviction, at least one court has held to the contrary. *State v. Santiago*, 53 Hawaii, 254, 492 P.2d 657 (1971).

89. Paragraph (a) also allows suppression of evidence of prior convictions if used to "increase the degree of crime of which the defendant would be guilty;" or would "result in a sentence of imprisonment that otherwise would not be imposed;" N.C. GEN. STAT. § 15A-980(a) (1983).

90. *Id.* § 15A-980(b).

91. *Id.* § 15A-980(c).

92. 309 N.C. at 425, 307 S.E.2d at 160.



viction. Assuming that the legislature's intent was not to include within the meaning of "suppress" an objection or motion to strike, the supreme court nevertheless provided for the latter two means to "suppress" a prior conviction. The court chose to ignore the legislature's intent to establish only one "suppression" procedure when it held that "the challenge [of a prior conviction or convictions] may be in the form of objection, motion to strike, motion to suppress or other acceptable means."<sup>93</sup> The Act's drafters seem to have assumed that prosecutors would provide to defense counsel evidence of the defendant's criminal record in so timely a fashion that defense counsel would move to suppress prior to trial,<sup>94</sup> but they did not require prosecutors to do so. The court's *Thompson* procedure, on the other hand, provides for the possibility that neither party may know about the defendant's criminal record before trial. It allows the State to elicit evidence from the defendant on cross-examination if the State's attorney has learned of a conviction or convictions since the beginning of trial, and allows defense counsel to challenge the use of the evidence if he learns about it for the first time during trial. The *Thompson* procedure requires defense counsel to make an offer of proof as to the defendant's indigency and lack of representation at the former proceeding. In the typical case, however, where the proof will come from the defendant's testimony, defense counsel need do no more than ask for a recess to prepare the evidence.

It is much clearer that the court chose to ignore the legislative placing of the burden of proof entirely upon the defendant. Under *Thompson* the burden of persuasion remains with the State to show the evidence is admissible, but arises only after the defendant has made a prima facie showing. This procedure is in sharp contrast to that established by the Act, which places the burden of persuasion entirely on the defendant. The State has no burden at all under the Act. The defendant must prove, by a preponderance of the evidence, that at the time of the prior proceeding he (1) was indigent, (2) had no counsel, and (3) did not waive his right to counsel.

The Act raises serious due process questions by placing the burden of persuasion on the defendant. The Act's provisions are in conflict with the general mandate of *Mullaney v. Wilbur*<sup>95</sup> that the burden of persua-

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93. *Id.* 427-28, 307 S.E.2d at 161 (emphasis added).

94. Prosecutors are not required to disclose to defense counsel evidence of the defendant's prior convictions which they have in their possession unless the defendant has made a motion for discovery pursuant to N.C. GEN. STAT. § 15A-903(c) (1983). See *supra* note 77.

95. 421 U.S. 684 (1975). The State of Maine required the defendant, in order not to be convicted of homicide, to prove that he acted in the heat of passion. The Court held that this requirement violated due process in light of the requirement that the State prove every element of a crime beyond a reasonable doubt. The State must prove absence of heat of passion beyond a reasonable doubt.

sion remain with the State in criminal cases. The North Carolina Supreme Court has recognized and applied this principle.<sup>96</sup> That the court was cognizant of the due process considerations in the distribution of burdens of proof is evidenced by the court's citation, in *Thompson*,<sup>97</sup> of two recent cases which hold that the burden of proving admissibility of evidence remains with the State.<sup>98</sup> It appears as though the North Carolina court had good reason to ignore the decision of the legislature, soon to become effective, to place the burden of proof entirely on the defendant.

Trial courts now face a dilemma in certain situations. They can choose to follow the Act and allow suppression only before trial or they may follow the *Thompson* procedure. The supreme court has already held in *Thompson* that a defendant may challenge a prior conviction or convictions at the sentencing hearing in more ways than just a suppression motion. The court is likely to hold to that precedent in light of the practical problems already discussed. The court may interpret "suppress" as used in the language of the new statute to not include objections or motions to strike. Then a defendant's waiver of his right to suppress by failure to make a pre-trial motion will not deny him of his right to object, move to strike, or use other acceptable means. This is a reasonable interpretation in light of the provision of G.S. § 15A-1340.4(e) contemplating a motion "made for the first time during the sentencing stage of the criminal action." The court can not as easily get around the due process problem. It appears as though the court, at the time of the *Thompson* decision, was cognizant of the problems the new provisions would create, and thus set a precedent for courts to follow. The court is likely to follow its own precedent rather than the Act's procedure. Trial courts should follow the court and not the legislature.

### B. *Especially Heinous, Atrocious, or Cruel Crime*

Trial courts and litigators who have worked with the Capital Sentencing statute<sup>99</sup> are familiar with the language of the Fair Sentencing

96. See, e.g., *State v. Williams*, 288 N.C. 680, 220 S.E.2d 558 (1975) (an evidentiary presumption that a killing is unlawful and done with malice when intentionally committed with a deadly weapon shifts the burden of going forward to the defendant but does not shift the burden of persuasion from the State).

97. 309 N.C. at 428, 307 S.E.2d at 161.

98. *State v. Breeden*, 306 N.C. 533, 293 S.E.2d 788 (1982) (defendant's compliance with the affidavit requirement of N.C. GEN. STAT. § 15A-977, pursuant to a motion to suppress an in-court identification, satisfied the burden of going forward so as to shift the burden of proof to the State); *State v. Cheek*, 307 N.C. 552, 299 S.E.2d 633 (1983) (denial of motion to suppress defendant's inculpatory statement to the police proper when the trial court placed the burden of production on the defendant but also left the burden of proof with the State).

99. N.C. GEN. STAT. § 15A-2000 (1983).

Act factor<sup>100</sup> dealing with especially heinous, atrocious, or cruel crime. Since it is appropriate to look to the application of the capital statute's provisions for definitional purposes,<sup>101</sup> courts and trial attorneys have had some idea about the definition of this factor. In applying the language of the capital statute, the supreme court has relied on an interpretation best expressed in *State v. Pinch*.<sup>102</sup>

[The] aggravating circumstance of G.S. 15A-2000(e)(9) "does not arise in cases in which death was immediate and in which there was no unusual infliction of suffering upon the victim." . . . Instead . . . the submission of G.S. 15-2000(e)(9) is appropriate only when there is evidence of excessive brutality, beyond that normally present in any killing, or when the facts as a whole portray the commission of a crime which was conscienceless, pitiless or unnecessarily tortuous to the victim.<sup>103</sup>

This definition becomes especially instructive in non-capital homicide cases.

It is apparent that this factor is really one factor with three prongs, as indicated by the legislature's use of the disjunctive "or" in the statute's provision providing for this factor.<sup>104</sup> In one of its first cases interpreting this factor, the court of appeals held that the trial court had improperly found only that the crime was atrocious.<sup>105</sup> The trial court's error, however, was not in finding simply that the crime was atrocious, but in

100. *Id.* § 15A-1340.4(a)(1)f (1983) provides as an aggravating factor that "The offense was especially heinous, atrocious, or cruel," while N.C. GEN. STAT. § 15A-2000(e)(9) (1983) provides that "the capital felony was especially heinous, atrocious, or cruel."

101. *State v. Ahearn*, 307 N.C. 584, 599, 300 S.E.2d 689, 698 (1983); *State v. Blackwelder*, 309 N.C. 410, 413, 306 S.E.2d 783, 786 (1983).

102. 306 N.C. 1, 292 S.E.2d 203 (1982).

103. 306 N.C. at 34, 292 S.E.2d at 227-28. It is instructive to see how far the court has stretched this definition to uphold a finding that a crime is especially heinous, atrocious, or cruel. In *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983), death was immediate, there was no unusual infliction of suffering, nor was there any torture of either of two victims. Yet as to one victim, an attendant in a convenience store, the court upheld the trial court's finding of this aggravating factor upon evidence, elicited from a fellow prisoner of one of the defendants, that the victim begged for his life seconds before the defendant shot him. The court relied on a new expanded definition of the factor which allows consideration of all the circumstances of the crime. In the context of the Fair Sentencing Act, this expanded definition potentially conflicts with the requirement that evidence used to prove an element of the offense may not be used to prove an aggravating factor. N.C. GEN. STAT. § 15A-1340.4(a)(1) (1983). See *State v. Abee*, 60 N.C. App. 99, 298 S.E.2d 184 (1982), *modified and aff'd*, 308 N.C. 379, 302 S.E.2d 230 (1983). The capital sentencing act does not contain an express provision against use of the same evidence to establish both an element of a crime and an aggravating factor. But see *State v. Cherry*, 298 N.C. 86, 113, 257 S.E.2d 551, 567-68 (1979) (holding that the underlying felony of a felony murder may not be used as evidence in aggravation).

104. The instruction given to juries in capital cases defines each of the terms. "In this context heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others." North Carolina Pattern Jury Instruction for Criminal Cases, § 150.10 (Replacement May 1980).

105. *State v. Goforth*, 59 N.C. App. 504, 297 S.E.2d 128 (1982).

using the same evidence to establish that aggravating factor along with another.<sup>106</sup> Despite this implicit approval of the idea that a trial court may find that the crime was either heinous, atrocious, or cruel, most trial courts find that the crime was "especially heinous, atrocious, or cruel."<sup>107</sup> The supreme court has asked trial courts to indicate which specific adjective they have found applicable to the crime.<sup>108</sup> Such a requirement causes trial courts to be more specific about what evidence they have relied on to find this aggravating factor. In light of the difficulty courts have encountered in defining this factor,<sup>109</sup> such a requirement facilitates consideration of this factor both at trial and in the appellate courts. Unfortunately, few courts fulfill the requirement when considering whether a crime is heinous, atrocious, or cruel.

In drafting this factor, the legislature indicated its belief that many crimes by their very nature are heinous, atrocious, or cruel<sup>110</sup> and, absent evidence of other aggravating and mitigating factors, merit the presumptive sentence. This is evidenced by the use of the word "especially." It has been difficult for courts at all levels to decide which crimes are "especially" heinous, atrocious, or cruel.

In the early case of *State v. Ahearn*<sup>111</sup> the court of appeals considered whether two crimes, one involving a homicide, were specially heinous, atrocious, or cruel. The defendant was convicted of voluntary manslaughter and felonious child abuse upon evidence that showed that prior to his death the two-year-old victim had been hit at least three times, had his skull crushed and a cast on his leg shattered, was tied to a crib, and was put under a mattress. The court, in holding that the defendant was not prejudiced by any incorrect findings of the trial court, assumed that the lower court's finding that each crime was especially heinous, atrocious, or cruel was not supported by the evidence. The court indicated that the defendant's crime of felonious child abuse, evidenced by the hitting, tying up, and placing of the child under a mattress was no more heinous, atrocious, or cruel than any other crime of felonious child abuse.<sup>112</sup>

106. See *supra* note 17.

107. Some courts find instead that all three adjectives are applicable, i.e., that the crime was "especially heinous, atrocious, and cruel." *E.g.* *State v. Ahearn*, 59 N.C. App. 44, 45, 295 S.E.2d 621, 622 (1982), *rev'd and remanded*, 307 N.C. 584, 300 S.E.2d 589 (1983).

108. *State v. Ahearn*, 307 N.C. at 599, 300 S.E.2d at 698 ("Where factors are listed in the disjunctive . . . trial judges are cautioned to eliminate those portions inapplicable to the particular case").

109. See *infra* text accompanying notes 111-119.

110. See *State v. Goodman*, 298 N.C. 1, 24-25, 257 S.E.2d 569, 585 (1979) (holding that every murder may be heinous, atrocious, or cruel, but that a finding that a murder is *especially* heinous, atrocious, or cruel must be based on evidence that the murder was more brutal than most). See also *State v. Medlin*, 62 N.C. App., 251, 253, 302 S.E.2d 483, 485 (1983).

111. 59 N.C. App. 44, 49, 295 S.E.2d 621, 624 (1982).

112. *Id.* The court had trouble with the finding as to the crime of manslaughter because it

On appeal,<sup>113</sup> the supreme court was much clearer regarding the question of the propriety of the trial court's findings. The court agreed with the court of appeals that the crime of felonious child abuse was not out of the ordinary. As to the crime of manslaughter, however, the court applied the *Pinch* standard and concluded that the homicide was especially heinous, atrocious, or cruel because the victim had received multiple wounds and because he lingered in pain before he died.<sup>114</sup>

After *Ahearn*, there was still no clear guidance for considering when a crime, other than homicide, was especially heinous, atrocious, or cruel. Shortly after *Ahearn* the court of appeals again had the occasion to consider the aggravating factor in two non-homicide cases.<sup>115</sup> The defendant in *State v. Medlin* shot his girlfriend five times, wounding her head, ear, neck, chest, and hand. The victim's face was partially paralyzed, and her hearing was impaired. She was unable to drive a car. In *State v. Massey* the defendant was one of a group who went to the victim's apartment with a sawed-off shotgun and a baseball bat to recover money and drugs. In sentencing the defendant in *Massey* for attempted burglary the trial court found that crime especially heinous, atrocious, or cruel based upon evidence that the defendant had knocked in the victim's door at 11:30 p.m.<sup>116</sup> In both *Medlin* and *Massey* the appellate court relied on the *Pinch* standard in finding that the crime was not more brutal than ordinary crimes of that type,<sup>117</sup> and in the case of *Massey*, not "conscienceless, pitiless, or unnecessarily tortuous conduct."<sup>118</sup> It is easy to see that Massey's crime of attempted burglary was no more egregious than any other attempted burglary. In light of the many injuries to Medlin's girlfriend, it is hard to see how the assault with intent to kill inflicting serious injury was not more egregious than the typical assault of that variety. The court implied that injury as severe as that sustained by Medlin's victim is the natural consequence of an assault with intent to kill. It seems that her injuries may

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found that the same evidence had been used to find the especially heinous, atrocious, and cruel factor as had been used to find that the victim was young. *Id.*

113. 307 N.C. 584, 300 S.E.2d 689 (1983).

114. *Id.* at 606-07, 300 S.E.2d at 703.

115. *State v. Medlin*, 62 N.C. App. 251, 302 S.E.2d 483 (1983) (assault with a deadly weapon with intent to kill inflicting serious injury); *State v. Massey*, 62 N.C. App. 66, 302 S.E.2d 262, modified and *aff'd*, 309 N.C. 625, 308 S.E.2d 332 (1983) (attempted burglary). After *Ahearn* and before *Medlin* and *Massey*, the court of appeals considered the factor in two other cases; *State v. Sandlin*, 61 N.C. App. 421, 300 S.E.2d 893, cert. denied, 308 N.C. 679, 304 S.E.2d 760 (1983) (upholding the trial court's finding that a homicide by strangulation was especially heinous, atrocious, or cruel); *State v. Hammonds*, 61 N.C. App. 615, 301 S.E.2d 457 (1983) (finding error in the trial court's finding of especially heinous, atrocious, or cruel crime based on evidence of use of a deadly weapon when that evidence was used to prove an element of the crime).

116. 62 N.C. App. at 68, 302 S.E.2d at 264.

117. *State v. Medlin*, 62 N.C. App. at 254, 302 S.E.2d at 485; *State v. Massey*, 62 N.C. App. at 68, 302 S.E.2d at 264.

118. 62 N.C. App. at 68, 302 S.E.2d at 264.

have been more severe than those of other victims of such assault. Perhaps *Medlin* was a good case for splitting the adjectives. It would not be difficult to find that Medlin's acts in shooting his girlfriend five times were especially cruel since they were especially designed to inflict a high degree of pain with utter indifference to the suffering of his victim.<sup>119</sup> The design could be found in the firing of five non-fatal shots.

On the other hand, the *Medlin* victim's injuries may have been no more severe than those of other victims of the same crime. Assaults with intent to kill often inflict serious injury short of death, injury which is contemplated by the nature of the offense. Medlin's real intent was not to be cruel to or cause pain to his victim; his intent was to kill her.

Nevertheless, the supreme court, in *State v. Blackwelder*,<sup>120</sup> noted that the multiple shots and multiple wounds in *Medlin* could form the basis for a finding that the crime was especially heinous, atrocious, or cruel. Though dictum, this is some guidance as to a standard in non-homicide cases. Blackwelder, however, was convicted of second degree murder. The court amended the *Pinch* standard for non-capital crimes.

While it is instructive to turn to our capital cases for a *definition* of an especially heinous, atrocious, or cruel offense, we decline to measure the facts of those capital cases against the facts of cases decided under G.S. 15A-1340.4(a)(1)f. Rather the focus should be on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense*.<sup>121</sup>

In upholding the trial court's finding that the murder of the victim was especially heinous, atrocious, or cruel, the court found both excessive brutality by Blackwelder and an unusual degree of suffering by his victim. Blackwelder shot his victim in the back and in the head, literally blowing out his brains. Evidence showed that the victim had been shot first in the back, that the victim could have lived for hours after that shot, and that there was blood on many parts of the mobile home where the victim's body was found. The court emphasized that its finding of excessive brutality was based on the extensive mutilation of the victim's body as a result of the firing of a shotgun no more than an inch from the victim's head.<sup>122</sup> This was evidence not normally present in

119. See *supra* note 104.

120. 309 N.C. 410, 413 n.1, 306 S.E.2d 783, 786 n.1 (1983).

121. *Id.* at 413-14, 306 S.E.2d at 786 (emphasis in original).

122. *Id.* at 415, 306 S.E.2d at 787. See also *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983) (approval of trial court's finding of the factor based on evidence that the victim was repeatedly struck on the head, that the orb of one of the victim's eyes was driven into his brain, and that the victim lingered for over twelve hours). But see *State v. Higson*, 310 N.C. 418, 312 S.E.2d 437 (1984) (*Blackwelder* test not met when evidence showed only that victim was stabbed in the heart and died the same day).

second degree murder cases.

At least in the case of homicides, *Blackwelder* instructs trial courts and litigators, when considering the heinous, atrocious, or cruel aggravating factor, to look for (1) excessive brutality (2) excessive physical pain (3) excessive psychological suffering, or (4) especially dehumanizing aspects. All need not be present. Prosecutors may argue that the presence of one of the criteria is enough. Defense counsel may point out that the *Blackwelder* court found two of the four indicia. Trial courts may want to bolster their findings of this factor by listing which of the indicia they have found. It is easy to see that the indicia overlap and that a court, if it finds one of the indicia, may find several.

The lesson of *Blackwelder* as it applies to crimes other than homicides is that the crime must differ from the normal crime of that type in order to be especially heinous, atrocious, or cruel.<sup>123</sup> The court seemed to indicate, in its note on *Medlin*, that multiple injuries and multiple acts can justify a finding of an especially heinous, atrocious, or cruel crime.

### C. For Hire or Pecuniary Gain

When it became effective, the Fair Sentencing Act contained an aggravating factor that "the offense was committed for hire *or* pecuniary gain."<sup>124</sup> The Capital Sentencing Statute, effective in 1977, contains a similar provision, that "[t]he capital felony was committed for pecuniary gain."<sup>125</sup> It should be noted that the Fair Sentencing Act, when it became effective, allowed consideration in aggravation of evidence that the defendant had been hired to commit the crime *or* that he did it for pecuniary gain. On the other hand, the Capital Sentencing Statute does not expressly allow consideration of evidence that the defendant was hired to commit a capital felony but only that he committed it for pecuniary gain. It is because of this difference that the courts' interpretations of the pecuniary gain factor for capital sentencing purposes had real significance with respect to the legislature's use of the same phraseology in the Fair Sentencing Act.

At the time of the enactment of the Fair Sentencing Act, the supreme court had established a clear definition of "for pecuniary gain" in capital cases. In *State v. Oliver*<sup>126</sup> the trial court found the pecuniary gain factor in each of four murders, two by each defendant. Defendant Moore shot and killed a convenience store operator, Allen Watts. De-

123. See *State v. Atkins*, 66 N.C. App. 67, 71, 310 S.E.2d 629, 632 (1984) for a non-homicide case in which the finding of the factor was approved.

124. N.C. GEN. STAT. § 15A-1340.4(a)(1)c (1983) (emphasis added).

125. *Id.* § 15A-2000(e)(6).

126. 302 N.C. 28, 62, 274 S.E.2d 183, 204 (1981).

fendant Oliver killed Dayton Hodge, a customer outside putting gas in his truck. Moore stole money from the store's cash register at the time of the murders. The court said:

The hope of pecuniary gain provided the impetus for the murder of both Watts and Hodge. This hope and the murders were inextricably intertwined. The murder of Hodge was apparently committed in an effort to eliminate a witness to the robbery; and the murder of Watts, in the hope that defendants could successfully escape, avoid prosecution, and enjoy the fruits of their sordid endeavor. The evidence is such that the jury could find that both murders were committed for the purpose of permitting defendants to enjoy pecuniary gain.<sup>127</sup>

The appellate courts adopted the *Oliver* rationale and applied it to the cases governed by the Fair Sentencing Act.<sup>128</sup>

The legislature amended the Act on March 15, 1983. Effective October 1, 1983, the pecuniary gain provision of the Fair Sentencing Act was rewritten to read, "[t]he defendant was hired or paid to commit the offense."<sup>129</sup> The effect of the amendment is clear. It eliminates altogether that prong of the prior provision relating only to "pecuniary gain."

The supreme court was conscious of this amendment when it decided *State v. Abdullah*<sup>130</sup> under the provisions of the Fair Sentencing Act. In that case the defendant, sentenced for second degree murder, was one of several men involved in the robbery of a convenience store which resulted in the murder of a Charlotte police officer. Money was taken from the store and from the store clerk and divided among the participants in the crime. Relying on the intent of the legislature as expressed in the amendment to the Act, even though not then effective,<sup>131</sup> the court held that the trial court had erred in finding that the offense had been committed for pecuniary gain because the defendant had been neither hired nor paid to kill the victim.<sup>132</sup> It is now clear that under the Fair Sentencing Act a trial court may find the factor only if there is evidence that the defendant was hired or paid to commit

127. *Id.* The court rejected the argument that submission to the jury of the pecuniary gain factor violated the mandate of *State v. Cherry*, 298 N.C. 86, 113, 257 S.E.2d 551, 567-68 (1979) that the underlying felony of robbery cannot be submitted as evidence in aggravation in a felony murder case. See *supra* note 103.

128. E.g., *State v. Thobourne*, 59 N.C. App. 584, 297 S.E.2d 774 (1982) (holding that the trial court properly found that the offense of possession of forty-five pounds of marijuana with intent to sell and deliver was committed for pecuniary gain). But see *State v. Morris*, 59 N.C. App. 157, 161-62, 296 S.E.2d 309, 313 (1982) ("if the pecuniary gain at issue in a case is inherent in the offense, then that 'pecuniary gain' should not be considered an aggravating factor").

129. An Act to Clarify the Aggravating Factor Regarding Pecuniary Gain Under The Fair Sentencing Act, Ch. 70, 1983 N.C. Adv. Legis. Serv. 61.

130. 309 N.C. 63, 306 S.E.2d 100 (1983).

131. *Abdullah* was handed down on August 9, 1983, before the October 1, 1983 effective date of the amendment.

132. 309 N.C. at 77, 306 S.E.2d at 108.



the crime.<sup>133</sup>

The legislative amendment is perplexing. It leaves intact the provision of the Capital Sentencing Act providing for the aggravating factor of a crime committed *for pecuniary gain*, but takes it away in those cases controlled by the provisions of the Fair Sentencing Act. The factor seems equally applicable in either setting, especially in light of the *Oliver* interpretation. Even more puzzling, though, is the result that it is now an express aggravating factor that a defendant has committed the crime because he was *paid or hired* to do it in a non-capital case but not in a capital one. The question arises as to what the capital aggravating factor means. It may have only the meaning given it in *Oliver*. On the other hand, it may be interpreted to apply only when the defendant has been hired or paid to commit the crime. Perhaps it is now subject to both interpretations.<sup>134</sup>

Presumably more non-capital crimes than capital crimes will be committed for pecuniary gain within the meaning of *Oliver*. There are simply more non-capital crimes which can be committed for pecuniary gain. The factor rarely arises in capital cases, and usually then only when the State is relying on an underlying felony such as robbery or burglary to prove a felony murder.<sup>135</sup> Finally, under the Fair Sentencing Act a trial court may nonetheless find an aggravating factor of pecuniary gain within the meaning of *Oliver* if that factor is reasonably related to the purposes of sentencing.<sup>136</sup> Perhaps the legislature amended the wrong act, intending instead to amend the Capital Sentencing Act.

The legislature at best has created an ambiguity. For instance, a defendant who was paid to murder and who is to be sentenced under the Capital Sentencing Act may argue that the legislature knew how to say that such a fact is an appropriate consideration for sentencing, but that it failed to do so under the Capital Act. He need only point to the Fair Sentencing Act provision to make a convincing argument that the absence of the "hired or paid" language in the capital act prevents the

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133. See *State v. Thompson*, 309 N.C. at 422, 307 S.E.2d at 158; *State v. Benbow*, 309 N.C. at 544, 308 S.E.2d at 651.

134. Subparagraph e of N.C. GEN. STAT. § 15A-2000 (1983), before the listing of aggravating factors, begins by saying that "Aggravating circumstances which may be considered shall be limited to the following:" This provision is no doubt the Legislature's act of compliance with the mandate of *Furman v. Georgia*, 408 U.S. 238 (1972) and its progeny that capital punishments be based on clearly delineated objective factors. This statute, then, is clearly different from the Fair Sentencing Act, which allows consideration of sentencing factors other than those specifically listed in the statute. N.C. GEN. STAT. § 15A-1340.4(a) (1983). See *infra* note 140 for the text of the provision.

135. See *supra* text accompanying notes 126-27.

136. N.C. GEN. STAT. § 15A-1340.4(a) (1983). See *infra* note 140.

trial court from considering in aggravation the fact that he was hired or paid to murder.

#### D. *Other Aggravating Factors*

Of the statutory aggravating factors, appellate courts have approved of trial courts' findings that the victim was very young or physically infirm,<sup>137</sup> but have disapproved of findings that the victim was very old<sup>138</sup> or that the offense involved an attempted taking of property of great monetary value.<sup>139</sup> Trial courts are not limited to finding only those aggravating factors specifically listed in the statute. They may also find any other factor proved by a preponderance of the evidence and reasonably related to the purposes of sentencing.<sup>140</sup> The purposes of sentencing under the Act include retribution, restraint, rehabilitation, and deterrence.<sup>141</sup> Not only must any non-statutory factor be reasonably related to one of these purposes of sentencing, it must also evidence character or conduct peculiar to the particular offender to be sentenced.<sup>142</sup>

Non-statutory aggravating factors which appellate courts have approved or have held are reasonably related to the purposes of sentencing include that the defendant presented perjured evidence;<sup>143</sup> that the defendant was dangerous to others;<sup>144</sup> that the defendant committed the crime with premeditation and deliberation;<sup>145</sup> that the offense was

137. N.C. GEN. STAT. § 15A-1340.4(a)(1)j (1983); *State v. Ahearn*, 307 N.C. at 603, 300 S.E.2d at 701 (1983).

138. N.C. GEN. STAT. § 15A-1340.4(a)(1)j (1983); *State v. Gaynor*, 61 N.C. App. at 131, 300 S.E.2d at 262.

139. N.C. GEN. STAT. § 15A-1340.4(a)(1)m (1983); *State v. Thompson*, 309 N.C. at 422, 307 S.E.2d at 158.

140. N.C. GEN. STAT. § 15A-1340.4(a) (1983) provides that a trial court judge "may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating or mitigating factors are set forth herein, . . ."

141. N.C. GEN. STAT. § 15A-1340.3 (1983) provides:

[t]he primary purposes of sentencing a person convicted of a crime are 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; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

See *Cooke*, *supra* note 3, at 1-1 (noting the purpose of the Act was to move away from a great emphasis on rehabilitation as a purpose of punishment toward a philosophy of retribution and deterrence).

142. *State v. Chatman*, 308 N.C. 169, 180, 301 S.E.2d 71, 78 (1983); *State v. Ahearn*, 307 N.C. 584, 596, 300 S.E.2d 689, 696 (1983); *State v. Medlin*, 62 N.C. App. 251, 256, 302 S.E.2d 483, 486 (1983).

143. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984). The supreme court has cautioned trial judges to find this factor only in the most extreme cases of perjury. *Id.*

144. *State v. Ahearn*, 307 N.C. at 604, 300 S.E.2d at 702 (reasonably related to purpose of protecting the public through restraint of offenders).

145. *State v. Melton*, 307 N.C. 370, 376, 298 S.E.2d 673, 678 (1983).

planned;<sup>146</sup> that the defendant is a dangerous sex offender;<sup>147</sup> that the defendant committed repeated acts of fellatio and forced his finger or penis into the victim's anus;<sup>148</sup> that each of two homicides was committed during a course of conduct in which the defendant committed an act of violence against another person;<sup>149</sup> that the defendant was under a suspended sentence at the time of the offense;<sup>150</sup> and that the defendant used stolen property in committing his offense.<sup>151</sup> Non-statutory factors which the appellate courts have determined are not reasonably related to the purposes of sentencing or have rejected for other reasons include that the defendant was dangerous to himself;<sup>152</sup> that the presumptive sentence "does not do justice;"<sup>153</sup> that the defendant did not assist the arresting officer or District Attorney or aid in the apprehension of other felons;<sup>154</sup> that the defendant "associated with members of a motorcycle gang who dealt in drugs;"<sup>155</sup> that the victim suffered severe physical disability;<sup>156</sup> that the sentence was necessary to deter others;<sup>157</sup> that a lesser sentence "would unduly depreciate the seriousness of the crime";<sup>158</sup> and that the defendant served a prior prison term.<sup>159</sup> Trial courts should be reluctant to find non-statutory aggravating factors. This is especially true in light of the discretion trial courts have in assigning weight to the sentencing factors they have found.<sup>160</sup>

#### IV. SPECIFIC MITIGATING FACTORS

The controversies surrounding aggravating factors arise when defendants complain that trial courts have found factors which they should not have found. Controversies are not as numerous in situations where

146. *State v. Chatman*, 308 N.C. 169, 180, 301 S.E.2d 71, 77 (1983). *See State v. Isom*, 65 N.C. App. 223, 230-31, 309 S.E.2d 283, 288 (1983) (planning not an essential element of burglary).

147. 308 N.C. at 180, 301 S.E.2d at 78.

148. *State v. Abec*, 308 N.C. 379, 381, 302 S.E.2d 230, 231 (1983).

149. *State v. Taylor*, 309 N.C. at 574, 308 S.E.2d at 305-06.

150. *State v. Stinson*, 65 N.C. App. 570, 309 S.E.2d 528 (1983).

151. *State v. Farrow*, 66 N.C. App. 147, 150, 310 S.E.2d 418, 420 (1984).

152. *State v. Ahearn*, 307 N.C. at 604, 300 S.E.2d at 702.

153. *State v. Blackwelder*, 309 N.C. at 418, 306 S.E.2d at 788-89. *See also State v. Chatman*, 308 N.C. 169, 301 S.E.2d 71 (1983).

154. *State v. Thobourne*, 59 N.C. App. 584, 297 S.E.2d 774 (1982) (potential infringement on right to plead not guilty).

155. *State v. Massey*, 62 N.C. App. 66, 69, 302 S.E.2d 262, 264, *modified and aff'd*, 309 N.C. 625, 308 S.E.2d 332 (1983).

156. *State v. Medlin*, 62 N.C. App. 251, 256, 302 S.E.2d 483, 486 (1983).

157. *State v. Chatman*, 308 N.C. 169, 180, 301 S.E.2d 71, 78 (1983).

158. *Id.* *See also State v. Blackwelder*, 309 N.C. 538, 306 S.E.2d 783 (1983) (presumptive sentence does not do justification to the seriousness of the crime).

159. *State v. Isom*, 65 N.C. App. 223, 230, 309 S.E.2d 283, 287-88 (1983).

160. *See infra* text accompanying notes 215-18. *See also State v. Higson*, 310 N.C. 418, 312 S.E.2d 437 (1984) (trial court improperly found non-statutory aggravating factors).

the trial courts have failed to find mitigating factors. Most, but not all, trial courts readily find mitigating factors supported by the evidence.<sup>161</sup> Some courts are obstinate<sup>162</sup> or reluctant<sup>163</sup> when it comes to finding mitigating factors. Controversies, though few, have arisen. They involve the mitigating factors of voluntarily acknowledged wrongdoing,<sup>164</sup> the defendant's good character or reputation in the community,<sup>165</sup> and others.

### A. *Voluntarily Acknowledged Wrongdoing*

Proof of voluntarily acknowledged wrongdoing<sup>166</sup> is some evidence that the defendant is on the road toward rehabilitation.<sup>167</sup> Clearly, the defendant must acknowledge that he has done something wrong.<sup>168</sup> Nevertheless, the legislative language relating to this factor is subject to differing interpretations. The acknowledgment of the wrongdoing must be either before arrest or "at an early stage of the criminal process." A time before arrest is easy to pinpoint, but reasonable men may differ on where to draw the line beyond this point. The acknowledgment must also be "voluntary," an ambiguous term. These problems of interpretation evoked commentary even before the effective date of the Act.<sup>169</sup>

161. This willingness to find mitigating factors is the result produced by the appellate courts' holdings that trial courts retain a good deal of discretion in sentencing under the Fair Sentencing Act. See *infra* notes 216-21 and accompanying text.

162. *E.g.*, State v. Graham, 61 N.C. App. 271, 274, 300 S.E.2d 716, 718 (1983) (trial court either misconstrued the statute or failed to consider the mitigating factor in the face of the State's own evidence clearly establishing the mitigating factor).

163. *E.g.*, State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983) (trial court refused to find that defendant could not reasonably foresee that his conduct would cause harm, N.C. GEN. STAT. § 15A-1340.4(1)(2)j (1983), or that he was suffering from a mental condition which significantly reduced his culpability for the crime, N.C. GEN. STAT. § 15A-1340.4(a)(2)d (1983), when those two mitigating factors were supported by substantial, un rebutted evidence; but the trial court was upheld by the supreme court, 309 N.C. at 546, 308 S.E.2d at 652. See also State v. Teague, 60 N.C. App. 755, 300 S.E.2d 7 (1983) (trial court refused to consider that the defendant readily submitted to arrest, that the defendant had trouble adapting to a non-prison society, that imprisonment without treatment would not benefit the homosexual defendant, and that the defendant would have a supportive family environment if not imprisoned).

164. N.C. GEN. STAT. § 15A-1340.4(a)(2)l (1983).

165. *Id.* § 15A-1340.4(a)(2)m.

166. *Id.* § 15A-1340.4(a)(2)l provides for mitigation if "[p]rior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer."

167. One of the express purposes of sentencing under the Fair Sentencing Act is "to assist the offender toward rehabilitation and restoration to the community as a lawful citizen." *Id.* § 15A-1340.3.

168. State v. Simmons, 65 N.C. App. 804, 807, 310 S.E.2d 139, 141 (1984) (the defendant's turning himself in alone not enough to establish the factor). A defendant may use the mitigating factor that he admitted his crime even though he has raised an exculpatory defense. State v. Puckett, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

169. Snepp, *supra* note 79, at IV-10. Judge Snepp, a superior court judge, urged his fellow trial judges to find the factor only when the defendant "made an inculpatory statement which was

The supreme court dealt with the issue in one of its first decisions involving the Act, *State v. Ahearn*.<sup>170</sup> The trial court found the factor for both of the crimes for which the defendant was sentenced, felonious child abuse and voluntary manslaughter. During police interrogation the defendant admitted acts amounting to child abuse but not acts of manslaughter. The court held a plea of guilty at trial was not evidence upon which the factor could be established. More importantly, the court stated that the policy behind the factor was to find mitigation in the defendant having shown remorse for his acts.<sup>171</sup>

From *Ahearn*, therefore, it appeared that although the time of trial is too late a time for the acknowledgment of wrongdoing, during police interrogation after arrest is not. The issue did not arise in *Ahearn* whether the statement the defendant made during custodial interrogation was voluntary—that is, whether it was made without police threats or promises.<sup>172</sup> Nor did the *Ahearn* facts involve pre-arrest spontaneous statements.<sup>173</sup> It appears possible that statements made by defendants prior to arrest, even though they are voluntary, may not show remorse so as to bring them within the statutory provision as interpreted in *Ahearn*. The *Ahearn* requirement of remorse may prevent a trial court from finding that a spontaneous utterance is a factor in mitigation because it is not remorseful.

In *State v. Graham*<sup>174</sup> the defendant denied any wrongdoing prior to

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not responsive to custodial interrogation.” *Id.* Judge Snapp was concerned that this mitigating factor might cause defendants to waive *Miranda* rights and confess when they otherwise would not. Judge Snapp ignored, however, the evil which *Miranda* was designed to prevent. A defendant must be afforded his *Miranda* rights to prevent the defendant’s making of statements as a result of the inherently coercive nature of the custodial interrogation setting. 384 U.S. 436, 445-58 (1966). The legislature’s encouragement of early acknowledgment of wrongdoing by way of the statute no more adds to the coercive nature of the custodial setting than any other consideration which might influence the defendant to make an inculpatory statement. Perhaps Judge Snapp’s concern is that police will use the mitigating factor as a means to persuade suspects to talk. Such a police practice would no doubt affect the competency of statements thereby obtained, and district attorneys should ensure that the police are aware of this potential problem area.

170. 307 N.C. at 607-08, 300 S.E.2d at 704. For a discussion of the facts of the case, see *supra* text accompanying notes 111-14. The court of appeals had discussed the factor twice before *Ahearn*. In *State v. Massey*, 59 N.C. App. at 707, 298 S.E.2d at 65-66, the court held that there was no error in the trial court’s refusal to find the factor when the defendant had failed to ask for such a finding or object to the trial court’s failure to make such a finding. In *State v. Melton*, 307 N.C. at 380, 298 S.E.2d at 680, the court approved the trial court’s finding of the factor when the evidence showed that the defendant returned the borrowed murder weapon and confessed to police immediately after killing his girlfriend’s new lover.

171. 307 N.C. at 607, 300 S.E.2d at 704.

172. *State v. Fox*, 274 N.C. 277, 292, 163 S.E.2d 492, 502 (1968) (holding incompetent as evidence a confession of the defendant made after police told him that telling the truth would make things better in court and reduce the charges).

173. *State v. Harrelson*, 265 N.C. 589, 590, 144 S.E.2d 650, 651 (1965) (per curiam opinion holding that admissions were competent when the defendant blurted out inculpatory statements over the telephone).

174. 61 N.C. App. 271, 300 S.E.2d 716 (1983).

his arrest, but acknowledged his culpability immediately after he was arrested. The timing of the acknowledgment would seem to be well within the language "at an early stage of the criminal process." Yet, court of appeals Chief Justice Vaughn dissented from such a holding on the ground that "criminal process" began when the criminal investigation began.<sup>175</sup> Notwithstanding Justice Vaughn's interpretation, the statute's use of the disjunctive in saying "prior to arrest *or* an early stage of the criminal process" is indicative of a legislative intent to place an "early stage" of the criminal process after arrest. The supreme court had no trouble with the timing of Graham's acknowledgment of wrongdoing. For purposes of the mitigating factor, the court held that the criminal process begins "upon either the issuance of a warrant or information, or upon the return of a true bill of indictment or presentment, or upon arrest, whichever comes first."<sup>176</sup>

In *Ahearn* the supreme court read into the statute a requirement of remorsefulness not made explicit by the legislature. The remorsefulness of the defendant should be a factor affecting the weight to be given this factor, after a trial court has found it, in the balancing of aggravating and mitigating factors, especially in light of the discretion trial courts have in assigning weight to factors.<sup>177</sup> Remorsefulness should not be a consideration in the finding of the factor. The supreme court so held in *State v. Graham*.<sup>178</sup> Trial courts should find this factor when the preponderance of the evidence has proven that the acknowledgment was voluntarily made at the proper time. This should include spontaneous statements made prior to arrest and acknowledgments made in a custodial interrogation setting.<sup>179</sup> Evidence showing that the acknowledgment was spontaneous or self-serving, though voluntary, should affect the factor's weight in the balancing process and not prevent the trial court from finding it.

## B. *Good Character or Reputation in the Community*

A criminal defendant's character and reputation have long been con-

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175. *Id.* at 274-75, 300 S.E.2d at 718-19. The majority had said:

For purposes of the statute, 'the criminal process' is not commenced until the defendant either is arrested, is served with criminal process, waives indictment or is both indicted and has actual notice of the fact of his indictment. We find support for this conclusion in G.S. 15A-701 *et seq.*, the Speedy Trial Act, and G.S. 15A-932 which allows pending proceedings to be dismissed with leave when the defendant fails to appear and cannot be readily found.

*Id.* at 274, 300 S.E.2d at 718.

176. *State v. Graham*, 309 N.C. at 589-90, 308 S.E.2d at 314.

177. *See infra* notes 207-218 and accompanying text.

178. 309 N.C. at 591, 308 S.E.2d at 315.

179. *See State v. Chatman*, 308 N.C. 169, 301 S.E.2d 71 (1983) wherein there was no challenge to a finding of a voluntary acknowledgment of wrongdoing which was made during custodial interrogation. *Supra* note 169.

sidered relevant in his sentencing.<sup>180</sup> Trial courts want to know what type of person they are sentencing. The Fair Sentencing Act allows a trial court to consider the character and reputation of the defendant.<sup>181</sup> This factor, like all others, is subject to the requirement that it be proved by a preponderance of the evidence.<sup>182</sup> However, because character is a direct issue in this context, it may be proved not only by evidence of reputation, but also by evidence of opinion and specific acts.<sup>183</sup> The trial court may reject evidence of those factors which it does not find by a preponderance of the evidence.<sup>184</sup> Technically this means that in sentencing a trial court may not consider a defendant's evidence of good character or reputation when it is probative but fails to tip the scales by the greater weight.

The supreme court, in *State v. Blackwelder*,<sup>185</sup> pointed out that it is the quality and not the quantity of evidence which matters. A defendant may put on the witness stand a large number of witnesses who will testify as to traits of good character or reputation. However, if they do not say enough good things about the defendant the trial court may not consider any of the defendant's proffered evidence. In *Blackwelder* many witnesses testified that the defendant paid his bills and was not violent when drunk. The court found that this evidence was not of sufficient quality to be considered in sentencing the defendant.<sup>186</sup>

In *State v. Taylor*<sup>187</sup> the evidence was more substantial. Four witnesses testified that the defendant had a non-violent reputation. Yet

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180. See cases cited in note 51 *supra*. One of W. Somerset Maugham's characters describes well the difference between character, what a person really is, and reputation, what others say he is by observing his actions:

It's my business to prevent crime and to catch the culprit when crime is committed, but I've known far too many criminals to think that on the whole they're worse than anybody else. A perfectly decent fellow may be driven by circumstances to commit a crime and if he's found out he's punished; but he may very well remain a perfectly decent fellow. Of course society punishes him if he breaks its laws, and it's quite right, but it's not always his actions that indicate the essential man. If you'd been a policeman as long as I have, you'd know it's not what people do that really matters, it's what they are. Luckily a policeman has nothing to do with their thoughts, only with their deeds; if he had, it would be a very different, a much more difficult matter.

W. MAUGHAM, *Footprints in the Jungle*, in 65 *SHORT STORIES* 639 (1976). The Fair Sentencing Act, in allowing a trial court to consider a defendant's character, permits consideration of what kind of person the defendant is and the more difficult matter of how he thinks.

181. N.C. GEN. STAT. § 15A-1340.4(a)(2)m (1983) provides for the mitigating factor that "the defendant has been a person of good character or has had a good reputation in the community in which he lives."

182. *Id.* § 15A-1340.4(a).

183. *State v. Taylor*, 309 N.C. 570, 576, 308 S.E.2d 302, 307 (1983); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983).

184. *State v. Teague*, 60 N.C. App. 755, 758, 300 S.E.2d 7, 9 (1983); *State v. Davis*, 58 N.C. App. 330, 333, 293 S.E.2d 658, 661 (1982).

185. 309 N.C. 410, 306 S.E.2d 783 (1983).

186. *Id.*

187. 309 N.C. 570, 308 S.E.2d 302 (1983).

this was not sufficient evidence to show that the defendant had a good reputation "in the community in which he lived," because the witnesses knew Taylor only socially. The evidence was substantial, un rebutted, and proven by a preponderance<sup>188</sup> that the defendant had a good reputation as to a specific character trait of non-violence. The court held, however, that the evidence was neither manifestly credible nor "overwhelmingly persuasive." In reaching these conclusions the court relied in part on the fact that all four witnesses were long-time or social friends of the defendant.

The *Taylor* interpretation of the statute is strict. The court seems to have increased the burden of persuasion for the defendant on this particular mitigating factor beyond a preponderance of the evidence to a standard of overwhelming persuasiveness. At the same time, *Taylor* now makes it more difficult for defendants to use as character or reputation witnesses those people who know defendants best, their friends. Finally, *Taylor* is especially onerous because it equates the good character of a defendant within the meaning of the Act's provision for a mitigating factor to the quality of character required of an applicant for the bar exam.<sup>189</sup> Surely a criminal defendant, about to be sentenced for a crime, should not be held to the same standard of character as he who desires to embark upon a legal career.

Taylor had "a good reputation in the community" with respect to the peculiar character trait of non-violence. Admittedly a non-violent reputation is but one ingredient of Taylor's overall reputation. Yet, where there is no evidence showing a bad overall reputation and evidence of good reputation as to one trait, as in *Taylor*, trial courts ought to consider the good reputation evidence in sentencing. The trial court may afford the evidence the appropriate weight in the balancing process.<sup>190</sup>

A different situation occurred in *State v. Benbow*.<sup>191</sup> There was substantial evidence of the defendant's good character and reputation in the community. The trial court properly found as a factor in aggravation that the defendant had a prior conviction. At the same time the trial court did not find in mitigation that the defendant had a good character and a good reputation. The supreme court relied on the *Tay-*

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188. The court said in *State v. Jones*, 309 N.C. 214, 218-19, 306 S.E.2d 451, 454 (1983) that "when evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate the Fair Sentencing Act."

189. The court relied on language from *In re Applicants for License*, 191 N.C. 235, 238, 131 S.E. 661, 663 (1926), to the effect that good character "is something more than an absence of bad character . . . . Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing if it is wrong."

190. See *infra* text accompanying notes 216-21.

191. 309 N.C. 538, 308 S.E.2d 647 (1983).



lor rationale and found that the trial court had not abused its discretion in failing to find the mitigating factor.

The *Benbow* facts raise an interesting question. The evidence of the defendant's good character and reputation in no way affected the finding as to the defendant's prior conviction, but evidence of the prior conviction probably prevented the trial court from finding that the defendant's character and reputation were good. This appears as a form of balancing prior to the finding of both aggravating and mitigating factors. Under a proper application of the balancing process the trial court should have found, without consideration of the prior convictions which it found to be a factor in aggravation, that the defendant had a good character and reputation, if it were proved by a preponderance of the evidence. Only then should the trial court have weighed those two factors, along with all other factors in aggravation and mitigation proved by a preponderance of the evidence, in deciding whether to deviate from the presumptive sentence. The finding of factors in aggravation and mitigation should not involve the weighing of one factor against another.

### C. *Mental Condition Reducing Culpability*

Two of the mitigating factors deal with the mental condition or capacity of the individual defendant as it evidences the defendant's culpability for the crime for which he is to be sentenced. The first provides for mitigation if "the defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense;"<sup>192</sup> the second if "the defendant's immaturity or his limited mental capacity at the time of the commission of the offense significantly reduced his culpability for the offense."<sup>193</sup> A third related factor is that the defendant "could not reasonably foresee his conduct would cause or threaten serious bodily harm or fear."<sup>194</sup> It is clear that the two factors involving the state of the defendant's mind can not be established without an expert opinion in the transcript or the record.<sup>195</sup> Defendants face considerable difficulty, in any event, in establishing either factor.

Two opinions of the supreme court have produced inconsistent results. In *State v. Taylor*<sup>196</sup> expert evidence established that the defendant suffered from chronic brain syndrome, and upon this evidence the trial court found as a mitigating factor that the defendant suffered from

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192. N.C. GEN. STAT. § 15A-1340.4(a)(2)d (1983).

193. *Id.* § 15A-1340.4(a)(2)e.

194. *Id.* § 15A-1340.4(a)(2)j.

195. *State v. Jones*, 309 N.C. at 221, 306 S.E.2d at 456.

196. 309 N.C. 570, 308 S.E.2d 302 (1983).

a mental condition which reduced his culpability but did not constitute a defense. The supreme court upheld that finding. At the same time, it upheld the trial court's decision not to find the factor that the defendant had a limited mental capacity, based upon the same evidence. The supreme court construed the latter factor as one involving "limited intelligence or low I.Q."<sup>197</sup> In *State v. Benbow*<sup>198</sup> there was un rebutted and manifestly credible expert testimony that the defendant "would be unable, because of a borderline range of mental retardation and low general intellectual function, to comprehend what consequences the actions of [others] would have on his life." Consideration of that testimony leads to the conclusion that the defendant, who wielded no deadly instrument, did not comprehend that the actions of his co-defendants in killing the victim were also legally his actions. The court determined that his ignorance alone was not evidence of a mental condition sufficient to reduce his culpability.

It seems as though the defendant in *Benbow* asked the trial court to find the wrong mitigating factor. In light of *Taylor* the defendant should have been successful if he had asked the trial court to find the factor of limited mental capacity based on the expert evidence of Benbow's "borderline range of mental retardation and low general intellectual function." Neither the trial court nor the supreme court applied the statute to the evidence to produce the fair result. This is surprising in light of the mandate of the Act that the trial court *must* consider each of the Act's aggravating and mitigating factors.<sup>199</sup> Trial defense counsel should note the necessity to ask the court for a finding of all the mitigating factors supported by the evidence.

Even if defenders ask for all possible findings in mitigation supported by the evidence, both trial courts and appellate courts are reluctant to find mitigating factors involving the defendant's mental state. Even with the un rebutted expert testimony in *Benbow*, the trial court refused to find that Benbow "could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear." It remained uncontradicted that Benbow could not foresee what would happen. The supreme court, however, held that Benbow's subjective beliefs were not controlling, and that in spite of his mental state he could have reasonably foreseen that his participation in an armed robbery could produce harm, even though his role was only that of a lookout.<sup>200</sup>

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197. *Id.*

198. 309 N.C. 538, 545, 308 S.E.2d 647, 651 (1983).

199. N.C. GEN. STAT. § 15A-1340.4(a) (1983); *State v. Jones*, 309 N.C. at 219, 306 S.E.2d at 454-55.

200. *Benbow*, 309 N.C. at 545-46, 308 S.E.2d at 652. Nor is it likely that a court will readily find that a defendant "exercised caution" to avoid serious bodily injury. In *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983), the defendant had tried to convince his co-defendant not to

D. *Other Mitigating Factors*

The courts have construed mitigating factors dealing with: whether the defendant "was a passive participant or played a minor role in the commission of the offense;"<sup>201</sup> whether the defendant "aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony;"<sup>202</sup> whether the defendant "acted under strong provocation, or the relationship between the defendant and victim was otherwise extenuating;"<sup>203</sup> and whether the defendant "was suffering from a physical condition reducing his culpability."<sup>204</sup> The legislature amended the Act, effective October 1, 1983, to include honorable military service as a mitigating factor.<sup>205</sup> A trial court may also include as a consideration in mitigation any factor reasonably related to the purposes of sentencing and proven by a preponderance of the evidence.<sup>206</sup> Appellate courts have not approved of non-statutory mitigating factors found by trial courts. Non-statutory factors of which they have disapproved include: that the defendant readily submitted to arrest;<sup>207</sup> that the defendant had trouble adapting to a non-prison society;<sup>208</sup> that imprisonment without treatment would not benefit the homosexual defendant;<sup>209</sup> and that the defendant would have a supportive family environment if not imprisoned.<sup>210</sup>

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commit an act of murder. Yet the supreme court upheld the trial court's refusal to find this mitigating factor because of the defendant's other participation in the crimes of larceny and robbery. *Id.* at 221-22, 306 S.E.2d at 456.

201. *State v. Benbow*, 309 N.C. 538, 546, 308 S.E.2d 647, 652 (1983) (proper to consider during sentencing the defendant's actual participation in the crime as opposed to his legal liability for the acts of others); *State v. Jones*, 309 N.C. 214, 221, 306 S.E.2d 451, 456 (1983) (trial court improperly failed to find that the defendant played a passive role in a murder when the evidence, both uncontradicted and manifestly credible, showed that the defendant urged the actual killer not to kill the victim).

202. *State v. Jones*, 309 N.C. 214, 222, 306 S.E.2d 451, 456-57 (1983) (defendant who agreed to testify against co-defendant as part of plea bargain could not avail himself of the mitigating factor of having "testified truthfully" because at the time of his own sentencing hearing he had not yet testified in the prosecution of another felony). *Accord* *State v. Salters*, 65 N.C. App. 31, 35, 308 S.E.2d 512, 515-16 (1983).

203. *State v. Taylor*, 309 N.C. 570, 579, 308 S.E.2d 302, 308 (1983) (factor of action under strong provocation properly found as to defendant's wife but not proved as to defendant's sister-in-law).

204. *State v. Salters*, 65 N.C. App. 31, 36, 308 S.E.2d 512, 516 (1983) (defendant must show a link between his condition and his culpability).

205. N.C. GEN. STAT. § 15A-1340.4(a)(2)o (1983).

206. *Id.* § 15A-1340.4(a). *See* *State v. Medlin*, 62 N.C. App. 251, 302 S.E.2d 483 (1983); *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983). *See supra* note 141 for the statutory provision setting out the purposes of sentencing.

207. *State v. Teague*, 60 N.C. App. 755, 758, 300 S.E.2d 7, 9 (1983).

208. *Id.*

209. *Id.*

210. *Id.*

## V. WEIGHING OF AGGRAVATING AND MITIGATING FACTORS

In the absence of any aggravating or mitigating factors, a trial judge must impose the legislatively-mandated presumptive sentence and need not make any findings if he imposes the presumptive sentence.<sup>211</sup> If the trial court makes any findings of sentencing factors, he must balance the aggravating factors against the mitigating factors.<sup>212</sup> He need consider only those factors found by a preponderance of the evidence.<sup>213</sup> He may impose a sentence greater than the presumptive only if he finds that the factors in aggravation outweigh those in mitigation. The Act dictates that a trial judge may impose less than the presumptive sentence only if he finds that the mitigating factors outweigh the aggravating factors.

Prior to the effective date of the Act, many trial judges thought they would be stripped of much of the sentencing discretion they traditionally held.<sup>214</sup> Appellate courts have always been deferential to trial courts' decisions regarding sentencing as long as trial judges remained within the limits of sentencing set by statute.<sup>215</sup> This attitude of deference by appellate courts has not changed under the Fair Sentencing Act.<sup>216</sup> The court of appeals, in *State v. Davis*,<sup>217</sup> its first case construing the Act, was quick to reassure trial judges that they retained discretion in sentencing.

The fair sentencing act did not remove, nor did it intend to remove, all discretion from the sentencing judge. Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within their sound discretion. Thus, upon a finding by the preponderance of the evidence that aggravating factors outweigh mitigating factors, the question of whether to increase the sentence above the presumptive term, and if so, to what extent, remains within the trial judge's discretion.

The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors

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

212. *Id.*

213. *State v. Davis*, 58 N.C. App. 330, 334, 293 S.E.2d 658, 661 (1982). A trial court need not list specific mitigating factors found by a preponderance of the evidence if he finds that the aggravating factors outweigh the mitigating factors. *State v. Jones*, 64 N.C. App. 505, 307 S.E.2d 823 (1983).

214. See Snapp, *supra* note 78, at IV-1. See also Comment, *supra* note 3, at 649-54, whose author takes the position that the only real effect of the Act in limiting trial courts' discretion in sentencing is psychological. *Id.* at 652.

215. *State v. Locklear*, 294 N.C. 210, 213, 241 S.E.2d 65, 67 (1978); *State v. Stansbury*, 230 N.C. 589, 591, 55 S.E.2d 185 (1949).

216. Trial courts may still impose "consecutive terms for multiple offenses." *State v. Isom*, 65 N.C. App. 223, 227-28, 309 S.E.2d 283, 286 (1983).

217. 58 N.C. App. 330, 293 S.E.2d 658 (1982).

of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case. N.C. Gen. Stat. 15A-1340.4(a). The balance struck by the trial judge will not be disturbed if there is support in the record for his determination.<sup>218</sup>

The day after imposing sentence and during the session of court, the trial judge in *Davis* struck one of the aggravating factors he found the day before; however, he left intact the sentence, which was above the presumptive. The trial court was held not to have abused its discretion. The supreme court has consistently relied on the *Davis* rationale<sup>219</sup> and language<sup>220</sup> whenever a question of the weighing of sentencing factors has arisen.<sup>221</sup> Trial courts have been well-assured that they may exercise discretion within certain bounds which will not be disturbed on appeal. The appellate courts have not yet found that a trial court abused its discretion under the Fair Sentencing Act.<sup>222</sup>

Trial courts, in the weighing of factors in aggravation and mitigation, must assign a weight to each factor. Trial courts should welcome arguments of counsel to aid them in this difficult task. Trial courts should not be reluctant to find mitigating factors.<sup>223</sup> They may find that the aggravating factors *outweigh* the mitigating factors even though the mitigating factors are greater in number. Similarly, trial judges may find that mitigating factors outweigh aggravating factors even though they are fewer in number. Trial defenders should insist that trial judges find mitigating factors which are proved by a preponderance of the evidence.<sup>224</sup> Trial advocates for both the State and defendants

218. *Id.* at 333-34, 293 S.E.2d at 661.

219. *State v. Melton*, 307 N.C. 370, 380, 298 S.E.2d 673, 680 (1983).

220. *State v. Ahearn*, 307 N.C. 584, 597, 300 S.E.2d 689, 697 (1983).

221. *E.g.*, *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983); *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983).

222. There have been some cases ripe for a finding that the trial court abused its discretion in sentencing, *e.g.*, *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983) (seventeen-year-old defendant sentenced to life imprisonment for second degree murder, when presumptive sentence was fifteen years, based upon evidence that he was a lookout for a robbery which resulted in the death of the victim; remanded for resentencing not because of abuse of discretion but because the trial court improperly found an aggravating factor); *State v. Sandlin*, 61 N.C. App. 421, 300 S.E.2d 893, *disc. rev. denied*, 308 N.C. 679, 304 S.E.2d 760 (1983) (imposition of a thirty-five year sentence, twenty years over the presumptive of fifteen years, in a case of second degree murder where the trial court found that the heinous, atrocious, or cruel act of killing by strangulation outweighed the defendant's lack of a criminal record).

223. See *supra* notes 161-63 and accompanying text. Error is more likely in a trial court's failure to find a mitigating factor than in its having found one not supported by the evidence.

224. Defendants who do not insist at trial upon a finding in mitigation may not be able to complain upon appeal. See *supra* note 170.

should vigorously argue, to the extent allowed, the weight to be attributed to each sentencing factor.

## VI. APPELLATE RULES

A defendant convicted of a felony and punished with a sentence above the presumptive has an appeal of right to the appellate courts.<sup>225</sup> He may question whether his sentence is supported by the evidence, but evidence introduced both at trial and during a sentencing hearing must be considered.<sup>226</sup>

The supreme court has formulated a clear rule when error is found in a trial court's finding in aggravation and the trial court used that factor to sentence the defendant above the presumptive. In early cases the court of appeals usually affirmed the trial courts' sentences notwithstanding error.<sup>227</sup> The court of appeals was little concerned with the possibility that the trial judge might have imposed a lesser sentence if he had to weigh the sentencing factors minus the aggravating factor or factors which he improperly found. The supreme court, in *State v. Ahearn*,<sup>228</sup> adopted a rule which contemplates that possibility and requires remand to the trial judge, who is in the best position to fashion a new sentence. "[I]n every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing."<sup>229</sup>

This rule puts a greater onus upon the trial judge not to find an aggravating factor either not supported by a preponderance of the evidence or not reasonably related to the purposes of sentencing.<sup>230</sup> The rule does not specifically apply to errors in mitigation findings. A trial court could impose a sentence beyond the presumptive after failing to find a mitigating factor which it should have found. Once again it is the trial judge who is in the best position to know how the error affected his sentencing decision. Such an error occurred in *State v. Graham*.<sup>231</sup> The court of appeals in that case said "the balancing process

225. N.C. GEN. STAT. § 15A-1444(al) (1983); *State v. Teague*, 60 N.C. App. 755, 757, 300 S.E.2d 7, 8 (1983). All the appeals from judgments under the Fair Sentencing Act are to the court of appeals, except those cases in which the defendant pleads not guilty and receives a sentence of life imprisonment. In that instance, appeal lies directly to the North Carolina Supreme Court. See N.C. GEN. STAT. §§ 7A-27(a) & (b) (1981).

226. *State v. Teague*, 60 N.C. App. at 757, 300 S.E.2d at 8. The record on appeal must contain specific references to pages of the transcript containing the evidence upon which the defendant relies in assigning error. *State v. Milam*, 65 N.C. App. 788, 310 S.E.2d 141 (1984).

227. See chart located in *State v. Ahearn*, 307 N.C. at 601, 300 S.E.2d at 700.

228. *Id.* at 602, 300 S.E.2d at 701.

229. *Id.* See *State v. Isom*, 65 N.C. App. 223, 231-32, 309 S.E.2d 283, 288-89 (1983).

230. See *supra* notes 140-60 and accompanying text.

231. 61 N.C. App. 271, 300 S.E.2d 716 (1983).

cannot be properly completed if the trial judge fails to consider a factor listed in G.S. 15A-1340.4(a) which has been established by the evidence,"<sup>232</sup> and remanded the case for resentencing. It is clear, then, that the *Ahearn* rule, though it speaks only in terms of errors made in findings of aggravation, also applies to errors made in findings of mitigation.

In early cases the appellate courts had difficulty deciding issues when trial courts sentenced a defendant for more than one crime, but made only one set of findings as to sentencing factors. The supreme court then articulated a rule:

[I]n every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense.<sup>233</sup>

Trial courts which follow the required procedure will not be faced with a situation where an entire case is remanded for resentencing because an appellate court was forced to find error in sentencing findings as they related to all the crimes for which the defendant was sentenced.<sup>234</sup>

## VII. CONCLUSION

In the more than two years since the effective date of the Fair Sentencing Act, many of the questions regarding its implementation have been answered. The North Carolina appellate courts have dealt with the major controversies under the Act. It is unlikely that there will be many major future decisions in the North Carolina appellate courts involving the Act. The courts' decisions have left a good deal of discretion in the hands of trial courts, which will now decide the contests under the Act's provisions.

RICHARD J. ANDERSON

232. *Id.* at 274, 300 S.E.2d at 718.

233. *State v. Ahearn*, 307 N.C. at 598, 300 S.E.2d at 698.

234. *See, e.g., State v. Farrow*, 66 N.C. App. 147, 150-51, 310 S.E.2d 418, 420 (1984).