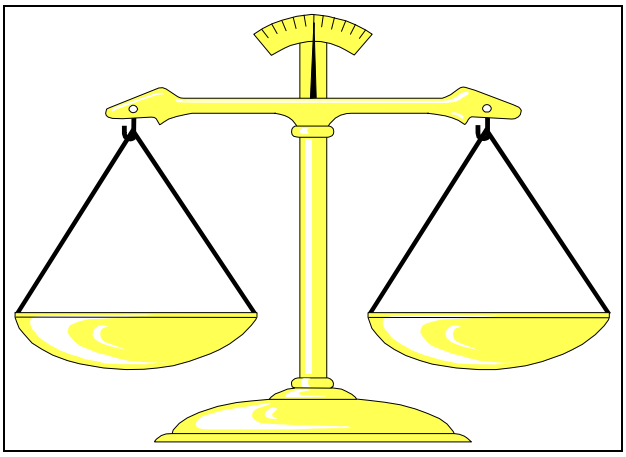
NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION



REPORT ON STUDY OF STRUCTURED SENTENCING ACT IN LIGHT OF BLAKELY V. WASHINGTON PURSUANT TO SESSION LAW 2004-161, SECTION 44.1

SUBMITTED TO THE 2005 SESSION OF THE NORTH CAROLINA GENERAL ASSEMBLY JANUARY 2005

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NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION

REPORT TO THE NORTH CAROLINA GENERAL ASSEMBLY
In compliance with
SESSION LAW 2004-161, SECTION 44.1

January, 2005

I. Introduction

In 2000, the United States Supreme Court held that the United States Constitution required that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The North Carolina Supreme Court subsequently found that the firearm enhancement under North Carolina General Statute 15A-1340.16A increases the penalty for a crime beyond the prescribed statutory maximum and, therefore, when the state seeks the enhancement it must "allege the statutory factors supporting an enhancement in an indictment… and submit those facts to the jury." *State v. Lucas*, 353 N.C. 568, 598 (2001). In 2003, the North Carolina General Assembly amended the sentencing enhancement statutes (N.C.G.S. 15A-1340.16A through –1340.16C) to require that the enhancing facts be alleged in the indictment and proved to a jury beyond a reasonable doubt. Session Law 2003-378.

In 2004, The United States Supreme Court applied *Apprendi* when it held:

> [T]he "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority. (emphasis in original opinion; citations and internal quotations omitted). *Blakely v. Washington*, No. 02-1632 (June 24, 2004).

The North Carolina Court of Appeals applied the principles in *Blakely* to North Carolina's structured sentencing laws. The Court held that a trial court cannot impose a sentence beyond the presumptive range unless the jury finds the aggravating factors. *State v. Allen*, No. COA03-1369 (September 7, 2004).

During the 2004 Session of the General Assembly, the legislature asked the North Carolina Sentencing and Policy Advisory Commission, pursuant to its statutory responsibilities under Article 4 of Chapter 164 of the General Statutes, to "study the North Carolina Structured Sentencing Act in light of the United States Supreme Court's decision in *Blakely v. Washington*, decided June 24, 2004." The Commission was asked

to report its findings and recommendations, including any proposed legislation, to the 2005 General Assembly upon its convening. Session Law 2004-161, Section 44.1.

The Sentencing Commission met on September 10, 2004, and discussed the case. The members agreed that the case raised issues for North Carolina regarding the finding of aggravating factors and of the additional prior record points assigned for criminal justice status at time of the offense and for committing the same offense as a prior conviction. The Commission established a subcommittee to develop recommendations for the Commission to consider.

The Subcommittee met on October 8, 2004. The Subcommittee reviewed the issues raised at the Commission meeting and received information concerning aggravated sentences under structured sentencing. The Subcommittee discussed changing the felony punishment chart to eliminate aggravated sentences versus changing the sentencing process to comply with the requirements of the *Blakely* case. The Subcommittee also discussed how the defendant would get notice of the factors the prosecutor was seeking and when the jury would hear the evidence supporting the factors. The Subcommittee developed recommendations and reported them to the Sentencing Commission. The Commission discussed the recommendations and adopted them at its December 3, 2004, meeting.

II. Recommendations

1. **The Sentencing Commission recommends retaining the three separate sentence ranges in the felony punishment chart (aggravated range, presumptive range, and mitigated range) but changing the sentencing process as necessary in order to comply with the *Blakely* decision.**

   Commentary: The Sentencing Commission considered changing the felony punishment chart to eliminate aggravated sentences versus changing the sentencing process to comply with the requirements of the *Blakely* case. The Commission decided to retain the current structure of the felony punishment chart and recommend changing the process instead. Eliminating the aggravated range would prohibit a judge from imposing a longer sentence where the specific facts of the case make it more serious than other cases. Expanding the presumptive range to include the aggravated range would reduce the consistency in sentencing. Similar offenders with similar criminal records could receive much more disparate sentences. Improving consistency was a goal of structured sentencing. In addition, expanding the presumptive range would make the prediction of resource needs much more difficult and less reliable and balancing policies with resources was another goal of structured sentencing.

2. **The Sentencing Commission recommends requiring the jury to find whether an aggravating factor exists unless the defendant stipulates to the factor. The judge will still find whether an aggravating factor exists if the factor relates to prior**

convictions or adjudications. All such factors must be found beyond a reasonable doubt.

Commentary: Recent state and federal appellate cases require the jury to find all the facts that are necessary to support the sentence imposed by the judge. The only exception to this rule is prior convictions. The judge may still find the existence of prior convictions.

3. **The Sentencing Commission recommends authorizing the jury to make the finding during the trial unless the trial judge determines that, in the interests of justice, a separate sentencing proceeding should be held or the defendant pleads guilty to the offense but not the aggravating factor. The judge is then authorized to hold a separate sentencing proceeding.**

   Commentary: Having the jury consider aggravating factors while it is considering the facts supporting the charge would be the most efficient process. However, there may be times where it would be prejudicial to the defendant for the jury to consider those factors before it has determined guilt or innocence. The judge would have the discretion to make that determination after holding a hearing on the matter.

4. **The Sentencing Commission recommends requiring that the State provide the defendant with written notice, no later than ten days prior to trial, of the aggravating factors the State will be seeking. The Sentencing Commission also recommends that aggravating factors that are not listed in statute be listed in the indictment or other charging instrument. Aggravating factors that are listed in statute do not have to be listed in the indictment or other charging instrument.**

   Commentary: The defendant knows initially that he can be charged with any of the aggravating factors listed in G.S. 15A-1340.16(d) and the written notice will serve to identify the specific factors that will be used. However, the defendant would not know the basis for a non-statutory aggravating factor until it is stated. Including it in the indictment would give the defendant sufficient time to prepare, and would satisfy constitutional concerns about notice.

5. **The Sentencing Commission recommends requiring the jury to find whether the prior record level point assigned if the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, should be assessed unless the defendant stipulates to it. The point must be found beyond a reasonable doubt.**

   Commentary: The status of the defendant during the commission of the offense is a factual issue and, therefore, must be determined by the jury. Whether all the elements of the current offense are included in a prior offense for which the defendant has been convicted is a legal issue and for the judge to decide.

6. **The Sentencing Commission recommends authorizing the jury to make the finding during the trial unless the trial judge determines that, in the interests of justice, a separate sentencing proceeding should be held or the defendant pleads guilty to the offense but not the prior record level point. The judge is then authorized to hold a separate sentencing proceeding.**

   Commentary: Having the jury consider the status of the defendant while it is considering the facts supporting the charge would be the most efficient process. However, there may be times where it would be prejudicial to the defendant for the jury to consider that fact before it has determined guilt or innocence. The judge would have the discretion to make that determination after holding a hearing on the matter.

7. **The Sentencing Commission recommends requiring that the State provide the defendant with written notice, no later than ten days prior to trial, that the State will be seeking the additional prior record point.**

   Commentary: Written notice will provide the defendant with actual notice that the state will be seeking the additional prior record point and will allow the defendant sufficient time to prepare.

8. **The Sentencing Commission recommends that the court, before accepting a plea of guilty or no contest to a felony, determine whether the state intends to seek a sentence in the aggravated range, and if so, which factors the state will seek to establish, whether the state intends to seek a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7), and whether the state has provided notice to the defendant.**

   Commentary: In order for the defendant to make an informed choice regarding the plea, it is necessary for the court to determine that the defendant has received all of the necessary information. The court will also advise the defendant of his or her right to a jury trial on the aggravating factors and prior record point and advise him or her of their right to present mitigating factors.

APPENDICES

A. Study Request

B. Draft Legislation

Appendix A

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2003

SESSION LAW 2004-161
SENATE BILL 1152

AN ACT CONCERNING STUDIES AND OTHER PURPOSES.

The General Assembly of North Carolina enacts:

PART XLIV. NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION STUDY

SECTION 44.1. The North Carolina Sentencing and Policy Advisory Commission, pursuant to its statutory responsibilities under Article 4 of Chapter 164 of the General Statutes, shall study the North Carolina Structured Sentencing Act in light of the United States Supreme Court's decision in Blakely v. Washington, decided June 24, 2004. The Commission shall report its findings and recommendations, including any proposed legislation, to the 2005 General Assembly upon its convening.

Appendix B

NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION

DRAFT LEGISLATION

(Subsections not changed are omitted in this draft)

SECTION 1. G.S. 15A-1340.16 reads as rewritten:

§ 15A-1340.16. Aggravated and mitigated sentences.

(a)Generally, Burden of Proof. - The court shall consider evidence of aggravating or mitigating factors present in the offense, that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving beyond a reasonable doubt ~~by a preponderance of the evidence~~ that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

(a1) Jury to Determine Aggravating Factors; Jury Procedure if Trial Bifurcated. –The defendant may admit to the existence of an aggravating factor, and the factor so admitted shall be treated as though it were found by a jury pursuant to the procedures in this subsection. Admissions of the existence of an aggravating factor must be consistent with the provisions of G. S. 15A-1022.1. If the defendant does not so admit, only a jury may determine if an aggravating factor is present in an offense. The jury impaneled for the trial of the felony may, in the same trial, also determine if one or more aggravating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make that determination. If the court determines that a separate proceeding is required, the proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of whether one or more aggravating factors exist, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which the juror was selected. If the trial jury is unable to reconvene for a hearing on the issue of whether one or more aggravating factors exist after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue. A jury selected to determine whether one or more aggravating factors exist shall be selected in the same manner as juries are selected for the trial of criminal cases.

(a2) Procedure if Defendant Admits Aggravating Factor Only. If the defendant admits that an aggravating factor exists, but pleads not guilty to the underlying felony, a jury shall be impaneled to dispose of the felony charge. In that case, evidence that relates solely to the establishment of an aggravating factor shall not be admitted in the felony trial.

(a3) Procedure if Defendant Pleads Guilty to the Felony Only. – If the defendant pleads guilty to the felony, but contests the existence of one or more aggravating factors, a jury shall be impaneled to determine if the aggravating factor or factors exist.

(a4) Pleading of Aggravating Factors. - Aggravating factors set forth in subsection (d) need not be included in an indictment or other charging instrument. Any aggravating

factor alleged under subdivision (d)(20) of this section must be included in an indictment or other charging instrument, as specified in G.S. 15A-924.

(a5) Procedure to Determine Prior Record Level Points Not Involving Prior Convictions. – If the state seeks to establish the existence of a prior record level point under G.S. 15A-1340.14(b)(7), the jury shall determine whether the point should be assessed using the procedures specified in subdivisions (a1)- (a3). The state need not allege in an indictment or other pleading that it intends to establish the point.

(a6). Notice of Intent to Use Aggravating Factors or Prior Record Level Points.—The state must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors or a prior record level point under G.S. 15A-1340.14(b)(7) at least ten days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice must list all the aggravating factors the state seeks to establish.

(b) When Aggravated or Mitigated Sentence Allowed. - If the jury, or with respect to aggravating factor (18a), the court, ~~court~~ finds that aggravating factors exist or the court finds that mitigating factors exist, the court ~~it~~ may depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If ~~the court finds that~~ aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4). If the court finds that mitigating factors are present and are sufficient to outweigh any aggravating factors that are present, it may impose a sentence that is permitted by the mitigated range described in G.S. 15A-1340.17(c)(3).

(c) Written Findings; When Required. - The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If the jury finds factors in aggravation, the court shall ensure that those findings are entered in the court's determination of sentencing factors form or any comparable document used to record the findings of sentencing factors. Findings shall be in writing. The requirement to make findings in order to depart from the presumptive range applies regardless of whether the sentence of imprisonment is activated or suspended.

(d) Aggravating Factors. - The following are aggravating factors:

(1) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

(2) The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.

(2a) The offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy. A "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of felony or violent misdemeanor offenses, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and having a common name or common identifying sign, colors, or symbols.

(3) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(4) The defendant was hired or paid to commit the offense.
(5) The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
(6) The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.
(7) The offense was especially heinous, atrocious, or cruel.
(8) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.
(9) The defendant held public office at the time of the offense and the offense related to the conduct of the office.
(10) The defendant was armed with or used a deadly weapon at the time of the crime.
(11) The victim was very young, or very old, or mentally or physically infirm, or handicapped.
(12) The defendant committed the offense while on pretrial release on another charge.
(13) The defendant involved a person under the age of 16 in the commission of the crime.
(14) The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.
(15) The defendant took advantage of a position of trust or confidence to commit the offense.
(16) The offense involved the sale or delivery of a controlled substance to a minor.
(17) The offense for which the defendant stands convicted was committed against a victim because of the victim's race, color, religion, nationality, or country of origin.
(18) The defendant does not support the defendant's family.
(18a) The defendant has previously been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult.
(19) The serious injury inflicted upon the victim is permanent and debilitating.
(20) Any other aggravating factor reasonably related to the purposes of sentencing.

Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation. Evidence necessary to establish that an enhanced sentence is required under G.S. 15A-1340.16A may not be used to prove any factor in aggravation.

The judge shall not consider as an aggravating factor the fact that the defendant exercised the right to a jury trial.

Notwithstanding the provisions of subsection (a1), the determination that an aggravating factor (18a) is present in a case shall be made by the court, and not by the jury. That determination shall be made in the sentencing hearing.

SECTION 2. G.S. 15A-1340.14 reads as rewritten:

§ 15A-1340.14. Prior record level for felony sentencing.

(a)Generally. - The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender's prior convictions that the court or, with respect to subsection (b)(7), the jury, finds to have been proved in accordance with this section.

(b) Points. - Points are assigned as follows:

(1) For each prior felony Class A conviction, 10 points.

(1a) For each prior felony Class B1 conviction, 9 points.

(2) For each prior felony Class B2, C, or D conviction, 6 points.

(3) For each prior felony Class E, F, or G conviction, 4 points.

(4) For each prior felony Class H or I conviction, 2 points.

(5) For each prior misdemeanor conviction as defined in this subsection, 1 point. For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving (G.S. 20-138.1), impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes.

(6) If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point.

(7) If the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point.

For purposes of determining prior record points under this subsection, a conviction for a first degree rape or a first degree sexual offense committed prior to the effective date of this subsection shall be treated as a felony Class B1 conviction, and a conviction for any other felony Class B offense committed prior to the effective date of this subsection shall be treated as a felony Class B2 conviction. G.S. 15A-1340.16(a5) specifies the procedure to be used to determine if a point exists under subdivision (b)(7). The state must provide a defendant with written notice of its intent to prove the existence of the prior record point under subdivision (b)(7) as required by G.S. 15A-1340.16(a6).

SECTION 3. G.S. 15A-924 (a) reads as rewritten:

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

a)A criminal pleading must contain:

(1) The name or other identification of the defendant but the name of the defendant need not be repeated in each count unless required for clarity.

(2) A separate count addressed to each offense charged, but allegations in one count may be incorporated by reference in another count.

(3) A statement or cross reference in each count indicating that the offense charged therein was committed in a designated county.

(4) A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time. Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.

(5) A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. When the pleading is a criminal summons, warrant for arrest, or magistrate's order, or statement of charges based thereon, both the statement of the crime and any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant must be used in determining whether the pleading is sufficient to meet the foregoing requirement.

(6) For each count a citation of any applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated. Error in the citation or its omission is not ground for dismissal of the charges or for reversal of a conviction.

(7) A statement that the state intends to use one or more aggravating factors under G.S. 15A-1340.16(d)(20), with a plain and concise factual statement indicating the factor or factors it intends to use under the authority of that subdivision.

SECTION 4. Article 58 of Chapter 15A of the General Statutes is amended by adding a new section to read:

15A-1022.1. Procedure in accepting admissions of the existence of aggravating factors in felonies.

(a) Before accepting a plea of guilty or no contest to a felony, the court shall determine whether the state intends to seek a sentence in the aggravated range. If the state does intend to seek an aggravated sentence, the court shall determine which factors the state seeks to establish. The court shall determine whether the state seeks a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7). The court shall also determine whether the state has provided the notice to the defendant required by G.S. 15A-1340.16(a6) or whether the defendant has waived his or her right to such notice.

(b) In all cases in which a defendant admits to the existence of an aggravating factor or to a finding that a prior record level point should be found under G.S. 15A-1340.14 (b)(7), the court shall comply with the provisions of G.S. 15A-1022 (a). In addition, the court shall address the defendant personally and advise the defendant that:

(1) He or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14 (b)(7); and

(2) He or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.

(c) Before accepting an admission to the existence of an aggravating factor or a prior record level point under G. S. 15A-1340.14(b)(7), the court shall determine that there is a factual basis for the admission, and that the admission is the result of an informed choice by the defendant. The court may base its determination on the factors specified in G.S. 15A-1022(c), as well as any other appropriate information.

(d) A defendant may admit to the existence of an aggravating factor or to the existence of a prior record level point under G.S. 15A-1340.14 (b)(7) before or after the trial of the underlying felony.

(e) The procedures specified in this Article for the handling of pleas of guilty are applicable to the handling of admissions to aggravating factors and prior record points under G.S. 15A-1340.14 (b)(7), unless the context clearly indicates that they are inappropriate.