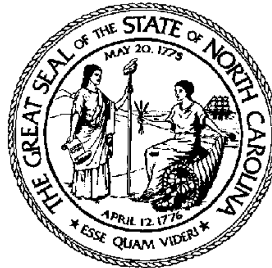
NORTH CAROLINA
SENTENCING AND POLICY ADVISORY COMMISSION

SENTENCING PRACTICES UNDER NORTH CAROLINA'S STRUCTURED SENTENCING LAWS

Prepared By

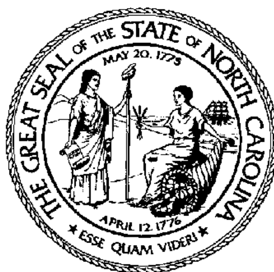
Deborah Dawes
Lorrin Freeman
Susan Katzenelson
Julia Kim
John Madler
Gregg Stahl



Project Partially Funded by a Grant from the Governor's Crime Commission
Grant Number 110-1-99-019-D-469

March 2002

SENTENCING PRACTICES UNDER NORTH CAROLINA'S STRUCTURED SENTENCING LAWS



Project Partially Funded by a Grant from the Governor's Crime Commission
Grant Number 110-1-99-019-D-469

North Carolina Sentencing and Policy Advisory Commission

P.O. Box 2472
Raleigh, NC 27602
(919) 733-9543

The Honorable W. Erwin Spainhour
Chairman

Susan Katzenelson
Executive Director

NC SENTENCING AND POLICY ADVISORY COMMISSION MEMBERSHIP

Hon. W. Erwin Spainhour, Chairman
Superior Court Judge

Hon. Frank W. Ballance, Jr.
State Senator

Locke T. Clifford
NC Bar Association

Sheriff Dan G. Crawford
NC Sheriffs' Association

Hon. William T. Culpepper, III
State Representative

William A. Dudley
NC Dept. of Crime Control & Public Safety Designee

Hon. Linda Dew Garrou
State Senator

Robert G. Greer
NC Association of County Commissioners

Melita Groomes
NC Post-Release Supervision & Parole Commission Designee

Hon. Wib Gulley
State Senator

Hon. R. Phillip Haire
State Representative

William P. Hart
NC Attorney General's Designee

Mary Y. "Larry" Hines
Private Citizen, Governor's Appointee

Judge Jonathan L. Jones
NC District Court Judges' Association

Hon. Larry T. Justus
State Representative

Judge Linda McGee
NC Court of Appeals Designee

Moe McKnight
NC Retail Merchants' Association

Luther T. Moore
Lieutenant Governor's Appointee

Hon. Ronald L. Moore
NC Conference of District Attorneys

Hon. Diana R. Morgan
NC Association of Clerks of Superior Court

Judge Fred G. Morrison, Jr.
Justice Fellowship

Chief Frank Palombo
NC Association of Chiefs of Police

Judge Ronald K. Payne
NC Conference of Superior Court Judges

Sandy C. Pearce
NC Department of Correction Designee

Katherine Prescott
NC Victim Assistance Network

Lao E. Rubert
NC Community Sentencing Association

Billy J. Sanders
Commission Chairman's Appointee

Secretary George Sweat
Dept. of Juvenile Justice & Delinquency Prevention

Dr. George P. Wilson
Professor, NC Central University

Lyle J. Yurko
NC Academy of Trial Lawyers

NC SENTENCING AND POLICY ADVISORY COMMISSION

STAFF MEMBERS

==

Susan Katzenelson
Executive Director

John Madler
Associate Director for Policy, Staff Attorney

Karen Jones
Senior Research & Policy Associate

Deborah Dawes
Senior Research & Policy Associate

Becky Ebron
Research & Policy Associate

Virginia Hevener
Senior Research & Policy Associate

Fannie Peele
Administrative Assistant

Michelle Moore
Secretary

==

ACKNOWLEDGMENTS

The staff of the Sentencing Commission would like to thank the various superior court judges, district attorneys and assistant district attorneys, public defenders and the defense bar for their cooperation and assistance in researching this project, and Dr. Rodney Engen for his expert help in reviewing relevant literature and offering valuable technical advice and insight with the research design and statistical analysis of the study. Our special thanks go to Nancy Copolla, a summer Law School intern from the University of North Carolina at Chapel Hill, for her enthusiastic participation and help with every phase of the project. Finally, the Sentencing Commission would like to acknowledge the grant provided by the Governor's Crime Commission (Grant Number 110-1-99-019-D-469) that greatly facilitated an exploration of the issues presented in this study.

TABLE OF CONTENTS

EXECUTIVE SUMMARY i

1. INTRODUCTION: RESEARCH QUESTIONS AND METHODOLOGICAL APPROACH 1
Research Questions 1
Methodological Approach 2
Field interviews with practitioners 2
Statistical analysis 3
Report Outline 4
Comparative Findings on Disparity under Sentencing Guidelines 4
Summary of Findings on Race and Sentencing Under Guidelines 5
Methodological Issues in Research on Sentencing Guidelines 6
Disparity and the Impact of Prosecutorial Discretion 7
The importance of qualitative data 8
Controlling for Contextual Differences 9

2. FELONY PROSECUTION: STATUTORY OVERVIEW 10
Initiating a Felony Charge 10
Disposition of a Felony Charge 13
Sentencing 15

3. FELONY PROSECUTION: THE EXERCISE OF DISCRETION 18
Initiating a Felony Charge 18
Pretrial Release 20
Disposition of the Felony Charge 20
Sentencing 25
Observations on the Effects of Discretion within the System 29

4. OFFENDER PROFILE 33
A Statistical Profile of FY 1999/00 Convictions 33
Plea Patterns 43

5. A MULTIVARIATE ANALYSIS OF FACTORS RELATED TO CHARGING AND SENTENCING OUTCOMES 50
Multivariate Analysis: A Brief Discussion 50
Summary of Findings 52
Overview of Models 60

6. SUMMARY AND CONCLUSIONS 68
Case Processing and Discretion 68
Legal and Extralegal Factors Affecting the Process 69
Summary 71

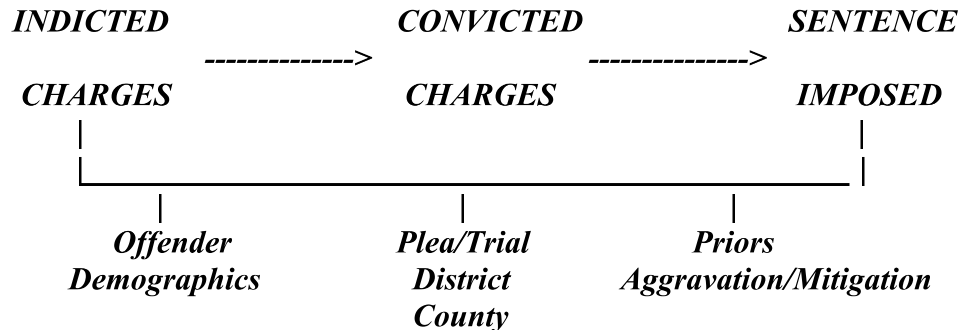
APPENDICES ....
Appendix A - Sentencing Practices Protocol ....
Appendix B - List of References ....
Appendix C – Table: Logistic Regression Results of Legal and Extra
Legal Factors on Charging and Sentencing Outcomes ....

EXECUTIVE SUMMARY

RESEARCH QUESTIONS

With over six years since the implementation of Structured Sentencing in North Carolina, it is vital to evaluate emerging sentencing practices and their impact on one of the more important facets of justice -- evenhandedness in handing down convictions and meting out penalties. Within this context, this study aims to explore two general issues in North Carolina's handling of criminal cases. The first issue pertains to *felony case processing*, tracking the stepwise progression of a case through the system from arrest to initial charging, indictment, plea offers and negotiations or trial, conviction, and sentencing. The second issue involves the exercise of *discretion* and the criteria used in reaching case-based decisions, with special emphasis on the impact of legal and extralegal factors in this process.

The basic question of whether factors other than those legally relevant affect the processing and disposition of cases is narrowed in this study to two steps in the criminal justice system, *conviction* and *sentencing*, with the clear understanding that extralegal factors may impact earlier decisions steps, *e.g.,* arrest and charging, as well.



METHODOLOGICAL APPROACH

This study provides a detailed description of court practices, plea processes and sentencing policies in North Carolina's courts under Structured Sentencing based on information gathered through interviews with practitioners in the field and statistical analysis of aggregate court data. Six of North Carolina's 39 judicial districts were selected for site visits and interviews with judges, prosecutors and defense attorneys. Aggregate statistical analysis was conducted on all 27,015 cases charged as felonies and convicted in North Carolina's courts during Fiscal Year 1999/00.

Discretionary decisions in processing a felony case included: reduction from a felony charge to a less serious felony or a misdemeanor conviction; imposition of a non-active sentence (where active sentences are non-mandatory); and, for active sentences, the specific sentence length imposed. The factors considered in affecting these decision points included: characteristics of the offense; offender's criminal history; mode of conviction; offender sex, race

and age; and systemic characteristics such as type of counsel, judicial division and county profile.

FELONY CASE PROCESSING

The process for prosecution of those charged with felony offenses in North Carolina is set out in statute. North Carolina General Statutes 15A-301 through 15A-1365 outline the process for initiation and disposition of a felony charge, and sentencing. As part of its study, the Sentencing Commission staff visited six districts in North Carolina and conducted field interviews with defense attorneys, prosecutors and judges to learn more about the process of handling felony charges as a matter of practice. The questions focused on three stages of the process: charging and time awaiting trial, disposition of the charge by plea, and sentencing.

(1) Initiating a Felony Charge

Law enforcement officers initiate the majority of felony charges. The degree to which a prosecutor is involved in the charging decision at this stage varied among the districts surveyed. Yet in all of the districts respondents agreed that the charges usually accurately reflect the criminal conduct. However, respondents also stated that law enforcement tends to overcharge (*i.e.*, charge the most serious offense possible which would involve that type of conduct) or to charge multiple offenses based on the same act in certain types of cases.

Prosecutors and defense attorneys agreed that the indicted charge is usually the same as the initial charge. Where the indicted charge differs, several possible reasons were given: charges may be upgraded or added if law enforcement did not take a fact into account or new evidence becomes available, charges may be reduced or dropped if law enforcement missed an element of an offense or the evidence is weak or insufficient to support the charge. Prosecutors in at least one district explained that all plea negotiations take place prior to indictment. The primary factor that the prosecutor appears to consider in filling out the indictment is what he can prove in court.

At the time of indictment the prosecutor also collects the defendant's criminal history. Based on that history, the prosecutor may consider charging the defendant with the status offense of being an habitual felon or a violent habitual felon. Among the districts surveyed, prosecutors reported charging defendants as habitual felons relatively frequently. Some prosecutors stated that they include it as one of the indicted charges whenever a defendant is eligible while others explained that they examine the defendant's prior record to see if a real career criminal intent exists beyond the three requisite prior convictions. Respondents indicated that offenders who commit low level property offenses and non-trafficking drug offenses are most likely to be charged as habitual felons. Some prosecutors said that this was because of the short sentence lengths in the lower offense classes. The enhancement does not add much time to the more serious offenses and is therefore not worth pursuing.

(2) Disposition of a Felony Charge

A defendant may plead guilty, not guilty, or, if the prosecutor and judge consent, no contest. The prosecutor and the defendant or defense counsel may negotiate charges to which the defendant may plead. A negotiated plea may include charge reductions or dismissals, and/or sentencing recommendations which are consistent with Structured Sentencing. Plea practices vary among the districts surveyed. In some districts, plea negotiations focus on the sentence. In others, charge bargaining is more frequent, especially if the presiding judge refuses to accept pleas including negotiated sentences.

In determining which cases to negotiate, prosecutors have to prioritize their cases. The prosecutors who were surveyed indicated that they prioritize their cases based on the seriousness of the offense and the offender, and the risks and costs of taking the case to trial.

Most of the districts surveyed indicated that there were no official policies governing plea negotiations. The elected district attorneys appear to grant wide discretion to their assistants in deciding how to proceed with a felony charge.

Most of the districts surveyed indicated that habitual felon status is used more as a tool in plea negotiations than as a charge. If the defendant pleads to the underlying charge, then the prosecutor drops the habitual felon charge. The defendant may even agree to consecutive sentences or sentences from the aggravated range in exchange for the dismissal.

Generally, prosecutors indicated they may drop the habitual felon charge if the sentence for the underlying offense would be the same or similar. They use habitual felon status more for multiple low level felonies such as breaking and entering, larceny, drug offenses, and possession of a firearm by a convicted felon.

All of the respondents agreed that prior record is never negotiated as part of a plea. Respondents also agreed that the facts that support a plea are usually not negotiated or intentionally understated.

Although prosecutors have a great deal of authority in the plea negotiation process, other actors influence the process as well. It is the defendant who must ultimately decide whether or not to accept a plea. Respondents indicated that a defendant might agree to plead for several reasons. He may be getting a break from the sentence he could receive at trial. The defendant may get a shorter active sentence or avoid active time altogether by getting probation. Whether or not the defendant gets a break, he will gain more control over the sentence by pleading. The outcome is more predictable than what a judge and jury may decide to do.

Defense attorneys also play a role in the plea negotiation process by influencing a defendant's decision to accept a plea. Defense attorneys consider the strength of the case against their clients and weigh the potential outcome at trial against the benefits of pleading.

Judges influence the nature of the plea negotiation if they participate in the plea conferences or if they refuse to accept negotiated sentence recommendations. In addition, some

judges see it as their responsibility to prevent a plea that is unconscionable based on the facts of the case. In this way they act as a check and balance within the process.

With a heightened recognition of victims' rights, a victim may also impact the plea negotiation process. In a system of limited resources and a high volume of cases, an active victim can ensure that his or her case does not fall through the cracks.

(3) Sentencing

The judge is ultimately responsible for determining the sentence imposed upon the defendant. Structured Sentencing provides mandatory sentencing guidelines for a judge to follow, but the judge has discretion within those guidelines to craft an individual sentence. In one-third of the cells on the felony punishment chart the judge chooses the type of sentence to impose (an active sentence versus a suspended sentence with a community-based sanction). In every cell the judge must choose a specific sentence length from either the mitigated, presumptive or aggravated range. There is an increase in sentence length of over two hundred percent from the bottom of the mitigated to the top of the aggravated ranges. Finally, there are two statutory tools, consecutive sentencing and extraordinary mitigation, which the judge has the discretion to apply in a case.

In some of the districts surveyed, the prosecutor and the defense attorney agree to recommend the type of sentence and the length of sentence as part of the plea bargain. The judge usually accepts those recommendations. In other districts they may agree to recommend the type of sentence but leave the length to the judge. Finally, in a few of the districts surveyed, the prosecutor and defense attorney agree only to the charges that the defendant will plead to and leave the actual sentence to the judge. Which decisions will be made as part of the plea bargain appears to vary by district as well as by judge. In every case the judge has the authority to reject the plea.

Some factors which were commonly emphasized include the nature of the crime and the defendant's criminal history, including prior record level, types of prior offenses, time lapsed since the last offense, probation or prison history, and the defendant's criminal justice status at the time of the current offense. Respondents also indicated judges consider the defendant's age, gender, family structure, employment history and status, support system in the community, level of remorse, whether his behavior is explained by some sort of mental impairment or substance abuse problem, the victim's statements, and what is in the best interest of public safety.

The effect that any of these factors has on the sentencing decision may differ from judge to judge. Generally, judges reported that, where there is a choice between an active and a suspended sentence, they look for indications that a defendant might succeed or fail on probation.

Beyond the individual characteristics of the defendant and the case, having the option to use community-based alternatives may influence a judge's decision as to what type of sentence to impose. Most of the judges who were interviewed reported that having the option to impose community-based alternatives did affect their sentencing decision. They do not want to send a

defendant to prison unless it is necessary. They prefer to keep the offender in his own community, especially if he does not present a high risk of reoffending and if he wants a chance to change. Judges also stated that the more information they had about a defendant the more likely they were to impose a community-based sanction if it was appropriate. However, because of North Carolina's system of rotating superior court judges, a judge may not be familiar with the resources of the community to which he is assigned. Some judges reported relying on defense attorneys, probation officers, and prosecutors to make recommendations and inform them about community-based options in the given area while another judge suggested that lack of knowledge regarding local resources results in greater judicial reliance on state-operated programs (*e.g.*, intensive probation and split sentences). The perceived quality of the program may also influence the judge's decision. One judge stated that a lack of uniform standards among some local programs might cause him to hesitate to use a program he uses frequently in another district. Finally, the availability of a program opening or "slot" may sway a judge's decision to impose probation and require participation in a program. Some judges reported imposing sentence without regard for slot availability.

The decision to impose consecutive sentences is an important point of discretion as it can, in some instances, more than double the length of the overall sentence. Generally judges impose consecutive sentences in cases involving two or more distinct offenses and/or victims which warrant separate punishment and in cases where the defendant has a particularly bad record or is on probation at the time of the current offense. Generally, judges appear to use consecutive sentences to achieve the sentence length they think is appropriate based on the facts of the case. It was also frequently reported that judges impose consecutive sentences as leverage in cases where an inactive sentence is ordered, to encourage the defendant to comply with the conditions of probation.

As a general rule, judges may not deviate from the sentences authorized by the structured sentencing laws. There is one statutory exception, which allows the judge to suspend the active sentence authorized by the grid and impose an intermediate punishment. This occurs when the judge finds extraordinary mitigating factors. In practice, judges reported rarely ever finding extraordinary mitigation.

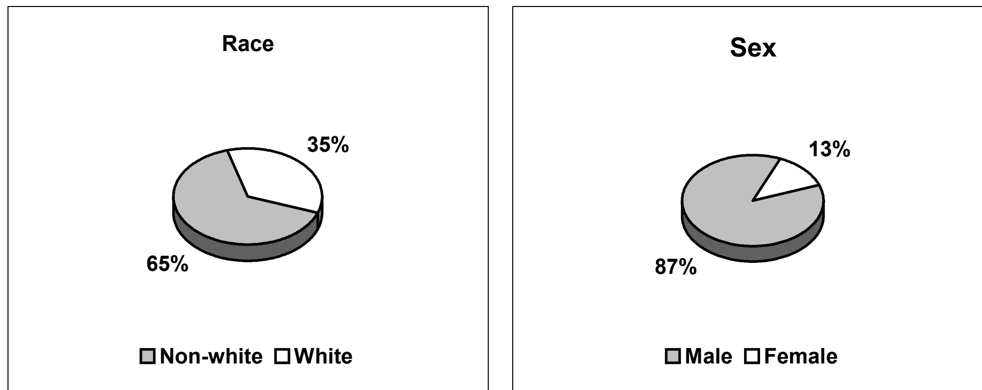
A STATISTICAL PROFILE OF FY 1999/00 CONVICTIONS

There has been much discussion in North Carolina and nationwide about the overrepresentation of racial and ethnic minorities in the criminal justice system. The concept itself is problematic and often ill-defined. The most common usage of the term compares the ratio of a specific minority in the general population with the ratio of that minority in the prison system. While blacks comprise approximately 22% of North Carolina's population, they constitute 65% of the State's convicted felons and 63% of its prison population.[1] Alternative definitions use as baseline the ratio of all crimes committed by a minority group, compared to the relative representation of that group within all those arrested; prosecuted; convicted; or sentenced to incarceration. However, baseline data on all crimes committed are usually not available, and in any case were outside the scope of the current study.

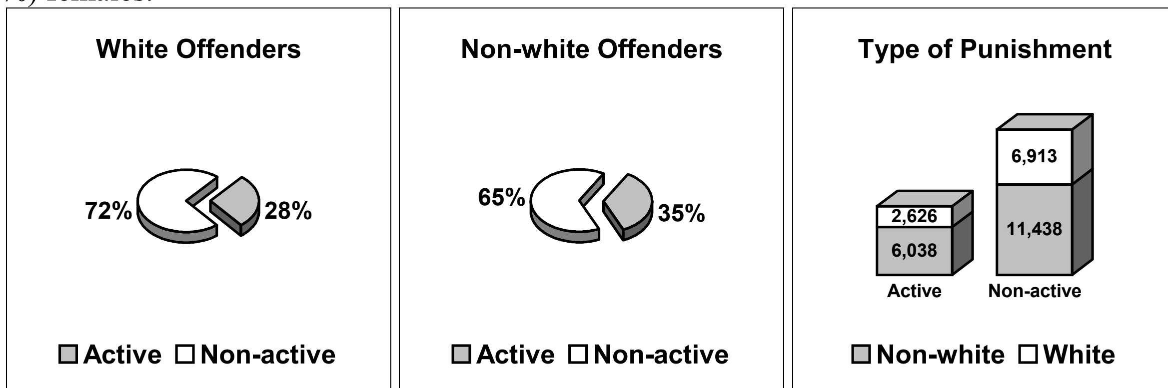
[1] Figures based on 2000 data from the Census Bureau and the NC Department of Correction.

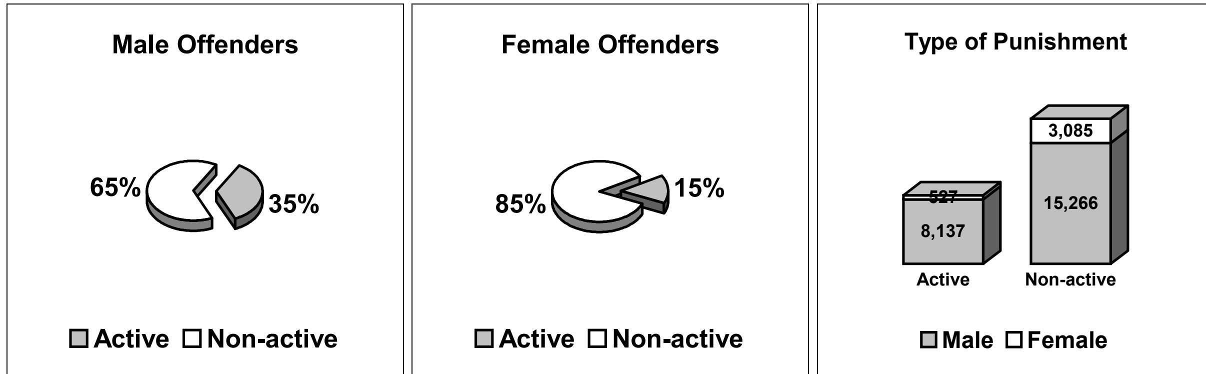
As a further caveat, the terms "overrepresentation" and "disparity " should not be used interchangeably. Disparity, in the criminal justice context, refers to a series of unfavorable decisions in a case where the minority status of the offender (or any other specified extralegal factor) is used to arrive at the decision. Within the initial sample of 27,015 cases for this study, males (87%) and non-whites (65%) were heavily overrepresented compared to the composition of the state's population.

The question addressed in this study is whether, given this initial overrepresentation, disparate decisions were made in the processing and disposing of cases based on the offender's sex and race.



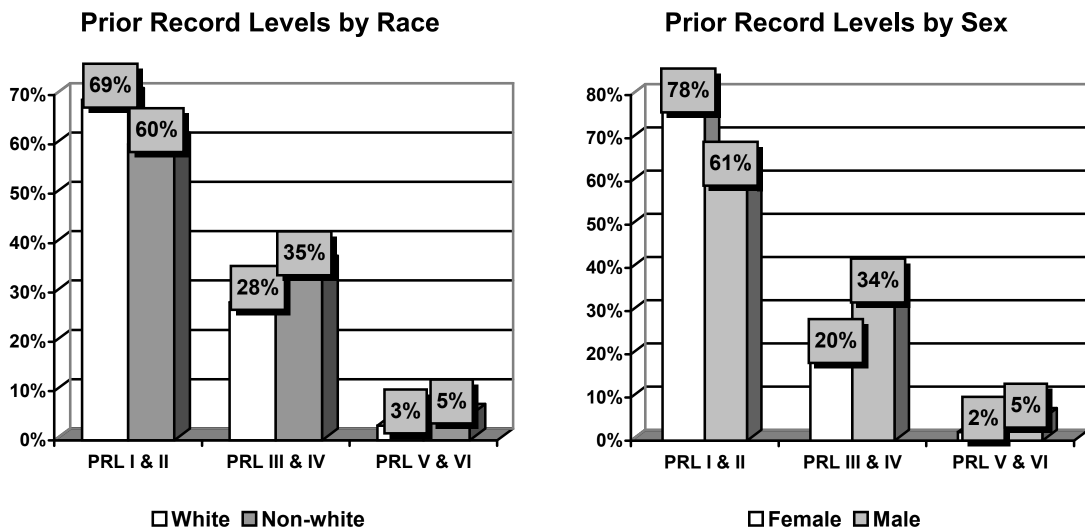
The overall active rate in the sample was 32%. White offenders received prison terms less often than non-white offenders (an active rate of 28% versus 35%, respectively); as did female offenders compared to their male counterparts (active rates of 15% versus 35%, respectively). In absolute numbers, of the 27,015 cases 8,664 offenders were sentenced to prison: 2,626 (30%) white and 6,038 (70%) non-white offenders, 8,137 (94%) males and 527 (6%) females.





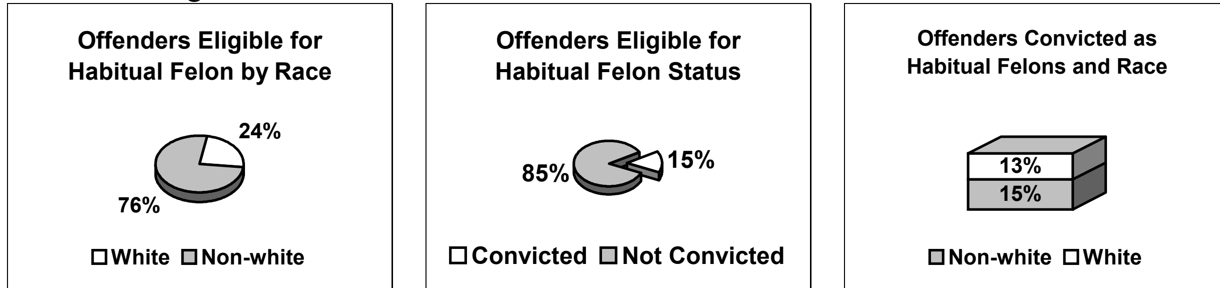
The length of prison terms imposed (average of 35 months) varied considerably by offender sex: the average minimum sentence for men was 35 months compared to an average of 28 months for women. Differences in sentence lengths between the two race groups by offense class were less pronounced: 37 months for white offenders and 34 months for non-white offenders.

Under Structured Sentencing, the two main components in determining the disposition and duration of an offender's sentence are the seriousness of the offense (Offense Class) and the criminal history of the offender (Prior Record Level). In interpreting the findings in the previous tables, it is worth noting the prior record distribution of the offender population by race and sex. Considerably more females than males (78% versus 61%) and more whites than non-whites (69% versus 60%) were concentrated in Prior Record Levels I and II, meaning that sentences for these groups were more closely correlated with the severity of their instant offense and less driven by add-on penalties for their prior criminality.



A special set of penalties under North Carolina law applies to habitual felons – offenders with three prior and a current felony conviction. At the prosecutor's discretion, a qualifying offender, if also indicted and convicted as an "habitual felon," will be sentenced in Offense Class C. Based on Department of Correction statistics, 3,336 offenders convicted in FY 1999/00

qualified for habitual offender status. Over 76% of those qualifying as habitual felons were non-white, greater than their 65% in the entire felon population. Overall, 15% of those eligible were actually convicted and sentenced as habitual felons – 13% of the eligible white offenders and 15% of the eligible non-white offenders.



A relevant factor in case processing and disposition is the type of legal representation afforded the offender. Over half of all sample offenders had court appointed counsel, another 18.5% had a public defender, and close to 24% hired a privately retained attorney. While there were no differences in the type of defense attorney by offender sex, white offenders were considerably more likely to have privately retained counsel than non-white offenders: 31% and 20%, respectively.

Finally, a relatively larger proportion of non-white offenders than white offenders came from high population density districts (41% versus 27%).

PLEA PATTERNS

The court data utilized in this study contain information on the offense classes for both the most serious charged offense in a case and the most serious convicted offense. Keeping in mind that ninety-seven percent of felony convictions are obtained as a result of a plea, this information allows for some insights into the plea process, by comparing the offense class of the most serious charged versus most serious convicted offense. In considering plea patterns, it is helpful to keep in mind that a defendant may plead guilty to the charged offense or may receive a reduction in charges. Charge reductions may occur in different ways. For example, a defendant may be convicted of a lesser included offense of the most serious charged offense or, if the defendant is charged with multiple offenses, the most serious charge may be dismissed and a conviction on one of the lesser remaining charges obtained.

Overall, of the cases originally charges as felonies, 56% plead guilty to a misdemeanor or to a less serious felony; 36% of those were a reduction from a felony to a misdemeanor as the most serious convicted charge. The pattern varied by offense class: only 18% charged as a Class B1 were convicted in the same class, compared to 65% in Class F. In general, violent offenses (Classes B1 to E) tended to receive a reduction more often than offenses in Classes F-I.

It is interesting to note that for Classes B1 through D felony offenses that result in convictions for lower level felonies, the patterns of reduction push the largest percentage of convictions into felony offense classes E and below. In looking at the Structured Sentencing felony punishment chart, there are significant differences in sentence type and duration for Class D and above felony offenses. Any reduction from a Class B1 through D felony offense to a

Class E or lower felony would result not only in a significant reduction in the possible sentence length but most likely would also open up additional disposition options beyond the active sentence mandated for Classes B1 through D. In short, a defendant receives a big "break" when his felony charge is reduced from a Class D or above to a Class E or below.

Variations in plea patterns by the offender's race were not consistent, and seemed to vary by offense class. On the other hand, females were much more likely than males to receive charge reductions to less serious felony and misdemeanor convictions.

MULTIVARIATE ANALYSIS

From the charging decision through the sentencing decision, offenders may be afforded certain opportunities or "breaks" which may affect their sentencing outcome. Looking at offenders originally charged with felonies who were subsequently convicted of either a felony or misdemeanor, regression analysis was used to examine how certain legal and extralegal factors may be related to an offender's chance of receiving a "break." Four stages or "breaks" in the system were analyzed:

- *Misdemeanor conviction* - whether an offender charged with a felony is convicted of a misdemeanor;
- *Charge reduction* - whether an offender convicted of a felony received a charge reduction to a less serious felony;
- *Active sentence* - whether an offender convicted of a felony received an active sentence (*i.e.*, incarceration); and
- *Sentence length* - the severity of the minimum sentence length imposed for those felons who received an active sentence.

The analysis included the following legal factors: offense seriousness, offense type, and criminal history. Extralegal factors such as age, sex, race, jurisdictional characteristics, defense attorney type, and mode of disposition were also included.

From the charging decision through the sentencing decision, legal factors such as offense seriousness, offense type, and criminal history consistently affected an offender's chance of receiving "breaks."

- *Offense Seriousness* - As expected, offenders charged with serious felonies were less likely to receive a reduction to a misdemeanor conviction. In addition, when judges had the discretion to impose either an active or probation sentence, they were more likely to impose active sentences for offenders convicted of more serious felonies. Only offenders convicted of the most serious felony offenses received sentences that were above the midpoint sentences of the felony punishment chart.

Stages in the Charging and Sentencing Decision-making Process

Stage 1: Reduction from a felony charge to a misdemeanor conviction

The analysis included offenders charged with a felony who were subsequently convicted of a felony or misdemeanor in FY 1999/00 (n=42,204). Felony charges were reduced for 36% of offenders.

Stage 2: Reduction from a felony charge to a conviction for a less serious felony

The analysis included offenders charged with a felony who were subsequently convicted of a felony in FY 1999/00 (n=27,015). Felony charges were reduced for 20% of offenders.

Stage 3: Imposition of an active sentence (incarceration)

The analysis included offenders convicted of a felony in FY 1999/00 who fell into cells of the felony punishment chart where the judge had the option to impose either a probation or prison sentence (n=17,450). Thirty-three percent of offenders received an active sentence.

Stage 4: Imposition of a sentence length

The analysis included offenders convicted of a felony in FY 1999/00 who received an active sentence (n=7,792).

- ► *Offense Type* – Offenders charged with felony offenses against a person were less likely than offenders charged with a felony property offense to receive a misdemeanor conviction or a reduction to a less serious felony.
- ► *Criminal History* - In general, offenders with a lengthy or more serious criminal history faired worse throughout the charging and sentencing processes relative to those offenders who had little or no criminal history.

In addition to legal factors, various extralegal factors such as age, sex, jurisdictional characteristics, defense attorney type and mode of disposition also affected an offender's chance of receiving "breaks." The offender's race had no effect in any of the analyses.

- ► *Age* - Older offenders were less likely to receive a misdemeanor conviction from a felony charge and were less likely to receive a reduction to a less serious felony. However, older offenders convicted of a felony were less likely to receive an active sentence.
- ► *Sex* - Relative to female offenders, male offenders faired worse throughout the

charging and sentencing processes. In particular, male offenders were less likely to receive a misdemeanor conviction from a felony charge; were less likely to receive a reduction to a less serious felony; and, were more likely to receive an active sentence.

- ► *Judicial division of conviction* - In general, the analyses revealed that consistent and sizeable variations in punishment exist between judicial divisions. While it is not clear from the analyses why differences were found, these differences may reflect local practices, procedures and community norms.
- ► *Defense attorney type* - Throughout the charging and sentencing processes, defense attorney type consistently affected an offender's chance of receiving "breaks." Offenders who retained a private attorney were more likely to receive a misdemeanor conviction from a felony charge; were more likely to receive a reduction to a less serious felony; were less likely to receive an active sentence; and, tended to receive shorter active sentences.
- ► *Mode of disposition* - Relative to offenders who pleaded guilty, offenders who opted for a jury trial were less likely to receive any "breaks." Offenders who opted for a jury trial were less likely to receive a misdemeanor conviction from a felony charge; were less likely to receive a reduction to a less serious felony; were more likely to receive an active sentence; and, tended to receive longer active sentences.

It is clear that the decision-making processes of judges and prosecutors are complex, balancing the demands from the public for justice and safety with the realities of limited judicial and prosecutorial resources. As such, judges and prosecutors use their discretion to grant "breaks" to certain offenders in order to maintain this delicate balance. The regression models describe which offenders, based on legal and extralegal characteristics, were more likely to receive such "breaks." The analyses confirm what field interviews revealed, that legally relevant factors such as offense seriousness and criminal history are important factors considered by judges and prosecutors in granting "breaks" to offenders. However, what is of possible concern is the apparent influence of extralegal factors such as age, sex, judicial division of conviction, attorney type and mode of disposition on the final resolution of a case.

SUMMARY

North Carolina' criminal justice system processed over 93,000 felony filing and produced close to 28,000 felony convictions in FY 1999/00. The main vehicle in moving these cases through the system was the use of discretion at various decision points in the system, and negotiated pleas that provided compromises acceptable to both sides. Most compromises were reached in an evenhanded fashion, and in primary consideration of the legally relevant components of the case and the criminal history of the offender. A number of extralegal factors were found to affect case processing and disposition, most importantly: district of adjudication, mode of disposition, type of defense, and offender's sex. While this current study provides a baseline for depicting North Carolina's felony processing system, the observed extralegal factors that may lead to differential treatment of similarly situated offenders could serve as a useful starting point for further research and public discourse on the topic.

CHAPTER 1

INTRODUCTION: RESEARCH QUESTIONS AND METHODOLOGICAL APPROACH

RESEARCH QUESTIONS

Structured Sentencing was enacted in North Carolina in 1993. The manifest goals of the new sentencing law were to restore truth in sentencing, establish fair, rational and consistent sentencing policies, and construct a system in which these policies are balanced with available correctional resources.

With over seven years since the implementation of Structured Sentencing it is vital to evaluate emerging sentencing practices and their impact on the administration of justice in North Carolina. Within this context, this study aims to explore two general issues in the handling of criminal cases. The first issue pertains to the decision points in the processing of felony cases, tracking the stepwise progression of a case through the system from arrest to initial charging, indictment, plea offers and negotiations or trial, conviction, and sentencing. In Fiscal Year 1999/00 the state's 105 superior court judges, 39 elected district attorneys and 438 assistant district attorneys handled 93,602 felony filings and 27,737 felony convictions.[1] With a caseload of this volume, discretionary decisions are a necessary component of the system. This study, therefore, focuses special attention on the decisions made within this process, and the amount of discretion vested in the various role players (primarily judges, prosecutors and defense attorneys).

The second issue involves the criteria used, as far as they can be ascertained from interviews and statistical analysis, in reaching case-based decisions. Disparate handling and disposition of cases would only become a concern in this context if cases were processed in consideration of extralegal factors (*i.e.*, factors that are not considerations under the law) and, more specifically, factors related to an offender's demographic profile.

The basic question of whether factors other than those legally relevant affect the processing and disposition of cases is narrowed in this study to two procedures in the criminal justice system, conviction and sentencing, with the clear understanding that extralegal factors may impact earlier decisions steps, *e.g.,* arrest and charging, as well.[2]

Discretion is a feature of all criminal justice systems, although its degree and use will vary with the specifics of each system. North Carolina's Structured Sentencing limits sentencing choices to a degree within a grid based on offense class and prior record level. However, at least

---

[1] North Carolina Administrative Office of the Courts statistics for FY 1999/2000.

[2] Law enforcement, criminal filings and initial charging decisions, for which the Sentencing Commission had no available data, were outside the scope of this study, but understanding of these earlier steps would be vital for a more complete understanding of the discretionary nature of the criminal justice system.

two major discretionary processes remain:

< The process of changing, reducing or dropping charges, most often as part of the plea negotiation process - the reduction in the number and type of charges will have an obvious impact on the sentencing options in a system based on convicted charges, especially as it affects the final (most serious) offense class, any applicable mandatory penalties, incarceration-only options, or habitual felon status.

< The three-phase sentence disposition process - a determination whether to sentence in the presumptive, aggravated or mitigated range of the cell; a decision whether to impose an active (prison) sentence or to suspend it (when authorized) in favor of an intermediate or community alternative; and, given an active sentence, its duration within the range of minimum sentences authorized in that cell.

METHODOLOGICAL APPROACH

This study was designed to provide a detailed description of court practices, plea processes and sentencing policies in North Carolina's courts under Structured Sentencing through interviews with practitioners in the field and statistical analysis of aggregate court data.

Field Interviews with Practitioners

A survey instrument[3] was developed and pretested in two districts (not included in the study). The survey, administered in face-to-face interviews with court practitioners, included a general introduction and purpose statement for the study, and focused on three areas of felony processing:

(1) charging and time awaiting trial;
(2) plea negotiations; and
(3) sentencing.

Some final questions probed the respondents regarding their general observations about defendants, the appropriateness of punishments, and Structured Sentencing. Questions were slightly modified depending on the role of the interviewee in the system (*i.e.,* judge, prosecutor, or defense attorney).

Six of North Carolina's 39 judicial districts were selected for site visits and interviews by Commission staff.[4] The districts, as much as possible, represent the state's regional variation, district size, and urban/rural counties. A total of 40 interviews were completed: ten with superior court judges; 15 with district attorneys and assistant district attorneys, and 15 with public defenders and defense attorneys.

[3] For a copy of the survey instrument, *see* Appendix A.

[4] Some of the 39 prosecutorial/superior court districts are single-county based, others encompass two or more counties.

Statistical Analysis

A further goal, utilizing 1999/00 aggregate court data, was to analyze stepwise decisions made in processing felony cases from charging to conviction, to describe systematic variations in
these discretionary decisions, and to test the impact of legal and extralegal factors on sentencing outcomes. The factors considered were based on available empirical data.

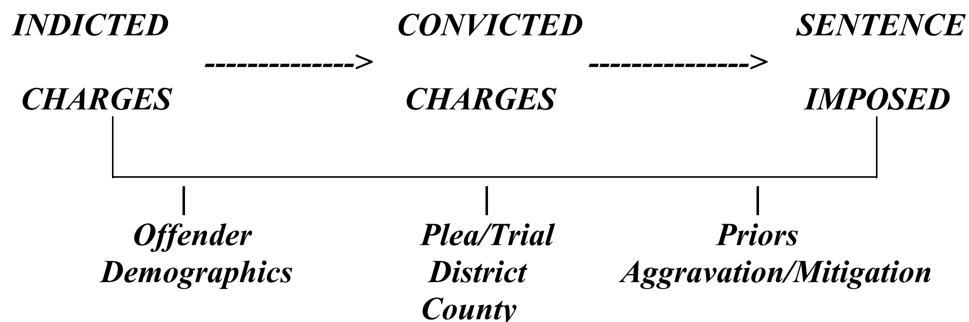
The study examined the following decision points (dependent variables):

< Reduction from a felony charge to a misdemeanor conviction;
< Reduction in charges by one or more felony offense classes;
< Imposition of a non-active sentence (where active sentences are non-mandatory);
< When an active sentence is imposed, the determination of the specific sentence length, and the relative location of the sentence within the available range.

The factors considered in affecting these decision points (independent variables) included:

< Offense characteristics: offense class, most serious charge at conviction, number of charges, enhancements (*e.g.,* mandatory minimum, gun), aggravating/ mitigating factors;
< Offender's criminal history: prior record level and points, habitual/violent habitual felon status;
< Mode of conviction: trial or guilty plea;
< System characteristics: judicial division, county profile, type of defense attorney (privately retained or appointed);
< Offender demographics: age, sex, race.

The following chart graphically depicts the conceptual framework for this study. It follows the procedural steps in felony case processing from initial charges brought by the state to conviction and sentencing. The process plays out in the context of a wide variety of factors - legal and extralegal - each potentially affecting the decisions and outcomes of a case as it moves through the criminal justice system.



REPORT OUTLINE

The current study represents a first effort to examine sentencing practices and the existence of any sentencing disparities under Structured Sentencing in North Carolina. This study attempts to account for some of the limitations of previous research by examining the impact of prosecutorial discretion on sentencing decisions; analyzing qualitative data on the role of race and ethnicity in charging and sentencing; and reviewing jurisdictional variations in sentencing within the state. As a study of first impressions, the report presents information about the Structured Sentencing law and practices under the law, in addition to statistical analyses of court data regarding convictions and sentences.

Following the introduction and methodological approach presented in this chapter, chapters 2 and 3 describe criminal justice process and practice in North Carolina based on field interviews with practitioners. Chapter 2 focuses on the statutory framework for felony processing. Chapter 3 follows with a discussion of specific practices in felony charging, plea negotiations, convictions and sentencing. Chapter 4 profiles convictions and sentences for all cases charged as a felony in Fiscal Year 1999/00 and details some of the more common plea patterns. Chapter 5 utilizes multivariate analysis techniques to test the relative impact of legal and extralegal factors on sentence outcomes. Finally, Chapter 6 summarizes the findings and conclusions of the study, and explores its possible policy implications for the State's court system.

The next section provides a short review of current research and methodological issues in exploring sentencing guidelines and disparity in sentencing.

COMPARATIVE FINDINGS ON DISPARITY UNDER SENTENCING GUIDELINES[5]

The introduction of sentencing guidelines, or structured sentencing, at state and federal levels has generated a sizeable body of scholarly research, both on the laws themselves, and on their consequences for criminal sentencing. Most research on sentencing guidelines can be classified as one of four types: (1) policy analyses of the legal and philosophical principles embodied in guidelines and their implications for jurisprudence and substantive justice (*e.g.,* Coffee and Tonry 1983; Nagel and Schulhofer 1992; Boerner 1995); (2) analyses of the creation and implementation of guidelines, including judicial attitudes toward, and compliance with, guidelines (*e.g.*, von Hirsch, Knapp and Tonry 1987; Miethe and Moore 1988; Frase 1993a; Gelacak, Nagel and Johnson 1996; Tonry 1996); (3) analyses examining the impact of the introduction of guidelines on sentence lengths and prison populations (*e.g.*, Boerner 1993; Frase 1993b); and (4) studies examining whether, and to what extent, race or gender disparities in sentencing persist in jurisdictions with guidelines. This review focuses on the latter group of studies.[6]

---

[5] The following sections, reviewing the research literature on disparity and methodological issues under sentencing guidelines, were prepared for this study by Dr. Rodney L. Engen of the Department of Sociology and Anthropology at NC State University, in partial compliance with a contract with the NC Sentencing Commission.

[6] For a list of references from the research literature, *see* Appendix B.

In research on sentencing and disparity, sentence severity is usually measured by two decisions: (1) the decision to incarcerate in jail or prison versus some less restrictive sanction (often referred to as the "in/out" decision), and (2) the term of incarceration ordered, or "sentence length." A small number of studies also examined the impact of judicial "departures" from guidelines - sentences that departed from the prescribed sentence type or range - on disparity. Typically, studies have assessed the effects of "extralegal" factors on the severity of imposed sentences, holding constant the seriousness of the primary conviction offense and criminal history - factors that, by law, should be the principal determinants of sentencing decisions. The extralegal factors examined in this literature typically include defendants' race or ethnicity, sex, age, mode of conviction (*i.e.*, whether defendants pled guilty or were convicted at a trial), and contextual or jurisdictional characteristics. Because sentencing guidelines vary considerably, research conducted in different jurisdictions may not be directly comparable.

Summary of Findings on Race and Sentencing Under Guidelines

Studies that have examined the relationship between race and sentencing in states with presumptive sentencing guidelines and in the federal courts consistently have found that the legally prescribed factors (offense severity, criminal history) were the primary determinants of sentences. Several studies have found that extralegal factors such as race, ethnicity and sex affect sentence severity. However, the evidence regarding effects of offender characteristics on sentencing under guidelines is complex.

Three studies have examined the impact of race and other socioeconomic status characteristics on incarceration and sentence length under Minnesota's sentencing guidelines, and each concluded that neither race nor gender had significant effects on these decisions (Miethe and Moore 1985; Moore and Miethe 1986; Dixon 1995). One of these studies (Miethe and Moore 1985) compared the effects of legal and extralegal factors on sentencing pre- and post-guidelines. Importantly, they found no evidence that minority offenders were sentenced more harshly than whites either before or after the introduction of guidelines.

By contrast, research in Pennsylvania (Kramer and Steffensmeier 1993; Steffensmeier *et al.* 1998; Steffensmeier and Demuth 2001), Washington (Engen and Gainey 2000) and U.S. courts (Albonetti 1997, 1998; Steffensmeier and Demuth 2000), consistently has found that minority offenders (black and Hispanic) and males are more likely to be incarcerated than whites and females, even controlling for offense seriousness, criminal history, the specific type of offense, and mode of conviction. Evidence of disparities in sentence length decisions is less consistent. In Washington, Engen and Gainey (2000) found that Hispanic defendants received slightly longer sentences than non-Hispanic whites, but that there was no difference between white and black offenders. In Pennsylvania, Kramer and Steffensmeier (1993) concluded that race (black) had only a trivial effect on sentence length. The studies of sentencing in U.S. courts, however, each have found significant disparities in sentence length between white offenders and both black and Hispanic offenders.

These studies also reveal that findings regarding sentencing disparity are complex. For instance, Steffensmeier, Ulmer and Kramer (1998) examined the combined effects of race, age

and gender on the in/out decision and sentence length and found that young black males were punished more harshly than any other age-race-sex combination. Also, both at the state and federal levels, studies consistently find that sentence severity varies by jurisdiction (*e.g.*, across county or circuit courts). Furthermore, Ulmer and Kramer (1996) explicitly compared sentencing in three Pennsylvania counties and found significant racial disparities in only two counties. Finally, Steffensmeier and Demuth (2000) found that disparities may vary by type of offense, and were most pronounced among drug offenses in U.S. courts. Clearly, broad generalizations about if, when, and how offender characteristics affect sentencing decisions would be premature.

Finally, some studies have found that judicial departures from guidelines contribute to racial sentencing disparities when guidelines allow departures. Evidence is limited, but some studies have found that minority offenders were less likely to be sentenced below the guidelines in Minnesota (Miethe and Moore 1986, but not Frase 1993a), Pennsylvania (Kramer and Ulmer 1996), and U.S. courts (Everett and Nienstedt 1999). Also, two studies in U.S. courts (Albonetti 1997; Steffensmeier and Demuth 2000) and one in Pennsylvania (Kramer and Ulmer) found that black and Hispanic offenders benefitted less from departure sentences, when they received them. Although North Carolina's Structured Sentencing does not allow for departures, it does give judges non-incarcerative options in many cases. The evidence regarding judicial departures in other jurisdictions may be relevant because it suggests that when guidelines allow alternatives to standard range sentences, the use of these alternatives may be a point of disparity.

In summary, empirical studies of disparity under sentencing guidelines have produced a complex array of evidence. The one consistent finding is that offense seriousness and criminal history are the primary determinants of sentences, as is the intent of guidelines. Importantly, a number of studies also conclude that the race, ethnicity and gender of the defendant affect sentence severity above and beyond differences in offending and criminal history. However, these disparities do not appear to be universal. Disparities are found more often in the decision to incarcerate than in the sentence length decisions, suggesting that the "in/out" decision is a critical decision with respect to disparity. Also, disparities in incarceration have been found consistently in some states with guidelines and in U.S. courts, but not in all states. Further, there may be important differences in sentencing disparity across courts even within a single guideline jurisdiction (*e.g.,* within states or among U.S. courts). Finally, even in jurisdictions where unexplained racial or ethnic disparities exist, these may not be uniform. Rather, disparity by race or ethnicity may also depend on the age or sex of the offender, or on the type of offense.

METHODOLOGICAL ISSUES IN RESEARCH ON SENTENCING GUIDELINES

Existing research on disparity in sentencing under guidelines suffers from a number of methodological limitations. Three issues are critical to ensure the validity of conclusions reached in research on disparity under guidelines: (1) Studies of sentencing must also examine the impact of prosecutorial discretion on sentences via charging and plea bargaining; (2) Studies should include qualitative as well as quantitative data on the role of race and ethnicity in charging and sentencing under guidelines; and (3) Studies must take into account variation in sentencing practices across jurisdictions.

Disparity and the Impact of Prosecutorial Discretion

First, and perhaps most importantly, few studies have examined the impact on sentences of discretion exercised by prosecutors in charging decisions and plea agreements.[7] This is problematic for research attempting to assess whether offenders who have committed similar crimes, with similar criminal histories, are receiving similar punishments. A fundamental criticism of sentencing guidelines, the *displacement hypothesis*, argues that because the sentence ranges and options available to judges are determined primarily by the crimes of conviction (along with prior convictions), sentencing disparity under structured sentencing laws may simply shift to the charging and plea-bargaining stages (Alschuler 1978; Coffee and Tonry 1983; Boerner 1995; Tonry 1996). Thus, disparity and discrimination might persist under guidelines, but studies that examine only sentences in relation to offenses at conviction might underestimate it or even fail to detect disparity at all. The Bureau of Justice Administration (1996) emphasized the need for research addressing this issue in its comprehensive review of Structured Sentencing, stating that "[o]ne of the key issues facing those attempting to control sentencing discretion is displacement of discretion from the courts to the prosecutors (p.9)."

To date, few studies have examined disparity in prosecutorial decisions under guidelines. Miethe and Moore (1985) and Miethe (1987) examined the likelihood that offenders received either charge or sentence reductions in exchange for guilty pleas (*i.e.*, charge-bargaining and sentence-bargaining). Contrary to the displacement hypothesis, however, they found little evidence of changes in prosecutorial practices post-guidelines, and no evidence of racial disparity in these decisions. Given that race had little effect on sentencing in Minnesota in the first place, it is perhaps not surprising that race continued to have little effect on processing following the introduction of guidelines.

Other research, though, provides evidence that charging and plea-bargaining practices often did change in response to changes in sentencing laws, and, in fact, may have circumvented specific provisions of sentencing guidelines. For instance, a study by Knapp (1987; see also Frase 1993) found that prosecutors in Minnesota manipulated charges in ways that mitigated the impact of sentencing guidelines designed to decrease the use of prison sentences for property offenders. More recently, Engen and Steen (2000) found that changes to the sentencing laws for felony drug offenders between 1986 and 1995 in Washington were followed by changes in the relative frequency of convictions for different types of drug offenses. They concluded that charging and plea-bargaining practices changed in response to changes in sentencing laws, although they did not examine charging decisions directly. Nagel and Schulhofer (1992), however, examined this issue directly, studying whether federal prosecutors used their discretion in plea-bargaining to circumvent U.S. sentencing guidelines. Based on interviews with federal court practitioners in three jurisdictions, they concluded:

[7] Most studies of sentencing include the type of disposition as a control variable in statistical analyses (*i.e.,* guilty plea versus jury or bench trial), but they do not typically examine whether an explicit plea-bargain was made, what the nature of the agreement was (*i.e.,* if charges were reduced or dropped), or whether charging and plea-bargaining practices are impacted by race.

> . . . in most cases, the exercise of prosecutorial discretion does not thwart the benefits of structuring judicial discretion at sentencing. But these benefits do not ensue for a minority of cases, most of which involve the distribution of drugs. So long as mandatory minimum sentences, and guidelines anchored by mandatory minimums, are tied to the charges for which the defendant is convicted and prosecutors exercise unfettered discretion in charging decisions, the goals of certainty, uniformity, and the reduction of unwarranted disparity are at risk. (p.561)

Perhaps most relevant to the present research, Collins *et al*.'s (1999) study of the implementation of Structured Sentencing in North Carolina examined the impact of this state's sentencing model on rates of dismissals and charge reductions. This study concluded that, "[a]lthough no major differences were observed between the pre-structured and structured sentencing defendants," (p.44) some modest but consistent changes did appear. Specifically, the frequency of charge dismissals, and reductions in charge severity, increased among felony defendants. The study did not assess the overall impact of changes at the prosecutorial stage on sentencing outcomes, or on disparities by race. Any effects would seem to be small though, given that the increase in the percentages of cases receiving various charge reductions ranged from 2% to 5%.

In sum, little research addresses the impact of prosecutorial discretion on sentencing disparity under guidelines. Research examining the impact of the movement from indeterminate sentencing to determinate sentencing guidelines on case processing (including stages other than sentencing) is limited to two studies in Minnesota and one in North Carolina, and in each case to relatively short periods of time after guidelines were introduced. The studies by Knapp (1987; see also Frase 1993a), Engen and Steen (2000), and Collins *et al.* (1999), however, demonstrated the influence that discretion in charging and plea-bargaining had on sentencing outcomes generally, and showed that prosecutorial practices have changed at times in response to changes in laws. These studies thus lend plausibility to the argument that disparity in sentencing could result from prosecutorial discretion, and highlight the importance of examining both charging and sentencing decisions in research on disparity under Structured Sentencing.

The Importance of Qualitative Data

The sentencing literature, particularly studies of sentencing under guidelines, is largely quantitative in method. While rigorous quantitative analyses are essential for making inferences about the importance of race, ethnicity, gender or other factors that may influence sentencing decisions, quantitative data alone cannot tell the whole story. Much can be learned about the sentencing process through systematic and careful analysis of interviews with key criminal justice actors. While anecdotes must not be mistaken for systematic patterns, the descriptions from criminal justice actors (judges, prosecutors, and defense attorneys) about how they do their jobs can prove invaluable in guiding the researcher's analysis of quantitative data (*e.g.*, by suggesting what empirical questions should be asked, and by identifying important factors that should be statistically controlled), and in interpreting the findings of quantitative analyses and the reasons behind the patterns observed. Examples of research that combined systematic qualitative analyses with rigorous quantitative analysis of sentencing under guidelines include

Kramer and Ulmer (1996), Ulmer (1997) and Ulmer and Kramer (1998).

Controlling for Contextual Differences

Controlling for contextual differences in sentencing (*i.e.*, differences by jurisdiction) is important for two reasons. First, sentencing disparity may be greater, or more prevalent, in some jurisdictions than in others (Bridges et al. 1987; Myers and Talarico 1986). As a result, when cases from multiple jurisdictions (*e.g.*, cases from all judicial districts in one state) are examined collectively, disparity in sentencing may be obscured. Second, minority populations are not equally distributed geographically within most states. This is important because systematic differences in sentencing practices between jurisdictions can produce disparity in punishment between white and minority offenders, in the aggregate, even if all defendants are treated equally within jurisdictions. A number of the studies reviewed above report statistically significant effects of context on sentencing decisions (*e.g.*, Albonetti 1997; Dixon 1995; Kramer and Steffensmeier 1993; Steffensmeier *et al*. 1993; Kramer and Ulmer 1996).

In conclusion, there has been some research examining the existence and extent of race or gender disparities in sentencing in several guideline states and the federal system since the latest sentencing reforms. The results have been complex. Consistently, it appears that sentences are determined primarily by offense seriousness, criminal history, and legislative intent. However, these studies also suggest that possible disparities in sentencing might be associated with clusters of social factors directly or indirectly correlated with race, ethnicity, gender and age of the defendant.

CHAPTER 2

FELONY PROSECUTION: A STATUTORY OVERVIEW

The process for prosecution of those charged with felony offenses in North Carolina is set out in statute. Chapters 15A-300 through 15A-1300 of the North Carolina General Statutes outline the process for initiation and disposition of a felony charge, and sentencing. As part of its study, the Sentencing Commission staff visited six districts in North Carolina and conducted field interviews with defense attorneys, prosecutors and judges to learn more about the process of handling felony charges as a matter of practice. This chapter sets forth the statutory process of felony prosecutions[8] and includes some observations about specific practices in the districts surveyed. (Chapter 3 presents more detailed observations.)

INITIATING A FELONY CHARGE

A felony charge may be initiated by arrest.[9] A person may be arrested with or without a warrant by law enforcement. A law enforcement officer may secure a warrant for arrest from the magistrate upon a showing of probable cause prior to the actual arrest. A finding of probable cause requires the existence of facts which provide reasonable grounds to believe that the defendant committed the offense of which he is charged. The warrant for arrest contains a statement of the crime of which the person to be arrested is accused, and an order directing that the person so accused be arrested and held to answer to the charges made against him. Under certain circumstances, a law enforcement officer may make an arrest without first obtaining a warrant; for instance, when an officer has probable cause to believe a person has committed a criminal offense in the officer's presence, or when an officer has probable cause to believe a person has committed, though not in the officer's presence, a felony or certain misdemeanors enumerated in statute.

In practice, almost all felony charges within the districts surveyed are initiated by law enforcement with an arrest. Law enforcement may consult with the prosecutor prior to making an arrest to determine the appropriateness of the charge. However, it appears that, generally, prosecutors first review the evidence in a case following charging, and that law enforcement consults with the prosecutor prior to charging only in particularly serious, complex, or high profile cases. Variations to this practice include one district in which an assistant district attorney is designated to be "on call" to review a felony case before charges are brought, and another in which prosecutors, prior to charging, formally review police reports and authorize which charges to bring.

---

[8] The decision by law enforcement to initiate a charge is not within the scope of this study.

[9] *See* N.C.G.S. 15A-304 and 15A-401 through 15A-406 for statutory provisions regarding arrest.

Following arrest, the offender is brought by law enforcement before a magistrate for the initial appearance.[10] At this time the magistrate informs the offender of the charges against him, sets bail or conditions of pretrial release (except in capital cases), and notifies the defendant of his right to communicate with counsel. If the arrest is made without a warrant, the magistrate must prepare a magistrate's order containing a statement of the crime with which the defendant is charged. The magistrate must also make an initial finding of probable cause. The initial appearance must be held "without unnecessary delay."

Those defendants charged with a felony must appear before a district court judge for a first appearance[11] hearing within 96 hours of having been arrested or at the next session of district court, whichever occurs first. (The 96-hour time limitation does not occur if the defendant is released on bail.) At the first appearance, the district court judge must determine whether the defendant has retained counsel, or if indigent, has been assigned counsel. In practice, in the districts surveyed, an attorney appointed by the court to represent a defendant found to be indigent becomes involved at the first appearance or shortly thereafter. A retained attorney may become involved in a case prior to arrest if contacted by the defendant. The judge also reviews the charge against the defendant to determine whether it is without defect, informs the defendant of the charges against him, sets pre-trial release conditions (if the defendant was not released at the initial appearance) or reviews pre-trial release conditions, and schedules a probable cause hearing or secures a waiver of the hearing from the defendant.

A person charged with a non-capital offense has a right to pretrial release[12] upon reasonable conditions. When considering pretrial release of a defendant, the magistrate or judge must consider factors enumerated in statute such as the nature of the charge, the weight of the evidence against the defendant and any ties to the community that the defendant has which would prevent him from fleeing. One of the following four conditions of release must be imposed: 1) a written promise to appear; 2) an unsecured bond; 3) custody supervision; or 4) a secured bond. A secured bond may be required only if the other three conditions of pretrial release "will not reasonably assure the appearance of defendant, will pose a danger of injury to any person, or is likely to result in destruction of evidence, subornation of perjury or intimidation of potential witnesses." While a defendant's dangerousness and potential for harm are to be considered in determining whether to require a secured bond, only the risk of the defendant's non-appearance should be considered in setting the amount of the bond. The conditions of release may be reviewed at both the initial and first appearances as well as at any time upon motion of the defendant or his counsel. Once a case is in superior court, only a superior court judge has authority to modify a pretrial release order. As a matter of practice, it appears that jail cases are more likely to be expedited, particularly in counties in which the sheriff exerts pressure on the district attorney's office to prevent or alleviate jail overcrowding.

---

[10] *See* N.C.G.S. 15A-511 for statutory provisions governing the initial appearance.

[11] *See* N.C.G.S. 15A-601 through 15A-606 for statutory provisions governing the first appearance.

[12] *See* N.C.G.S. 15A-531 through 15A-543 for statutory provisions governing bail and pre-trial release.

The probable cause hearing[13] must be held within 15 working days of the first appearance unless it is continued upon motion of either party or the defendant waives the right to hearing. The purpose of the probable cause hearing is to ensure that the State has sufficient evidence to proceed against the defendant in order to prevent a defendant from unnecessarily remaining in jeopardy of loss of liberty for a prolonged period of time. At the probable cause hearing, the district court judge must find probable cause that the defendant committed the offense charged or a lesser included offense, or he must dismiss the case. If the district court judge finds probable cause that the defendant has committed a felony, or if the defendant waives probable cause, the case is bound over to superior court. (A probable cause hearing does not occur in those cases where the prosecutor obtains an indictment from the grand jury or files a bill of information in superior court upon waiver of the indictment prior to the probable cause hearing.) Because the probable cause hearing is considered a "critical stage" in the proceeding, the defendant has a right to counsel at the hearing.

In practice, probable cause hearings seldom occur in most of the districts surveyed. Defendants typically waive probable cause. Some districts use the court time at which the probable cause hearing would be held as an opportunity to negotiate and plead out cases to misdemeanors or Class H or I felonies in district court. In the smaller districts surveyed where the grand jury is not regularly convened and where there are only a few sessions of criminal superior court each year, the probable cause hearing appears to be used more often. Such hearings allow both prosecutors and defense attorneys to preview the evidence and gauge the credibility of witnesses, and thus assess the likelihood of a conviction at trial.

Once a felony has been bound over to superior court, the defendant must be indicted[14] (*i.e.,* formally accused in writing by action of the grand jury). In some cases, the prosecutor may initiate felony charges in superior court with an indictment.[15] The defendant may waive indictment in non-capital cases if represented by defense counsel. If the defendant waives indictment the prosecutor must file a bill of information with the court charging the defendant with the commission of an offense. If the defendant does not waive indictment, the prosecutor must prepare and submit a bill of indictment to the grand jury[16] (unless a true bill[17] of indictment has already been returned). As a matter of practice in the districts surveyed, because probable cause hearings are no longer commonly held, preparation of the bill of indictment usually

[13] *See* N.C.G.S. 15A-606 and 15A-611 through 15A-615 for statutory provisions governing the probable cause hearing.

[14] *See* N.C.G.S. 15A-641 through 15A-646 for statutory provisions regarding indictment.

[15] An indictment is a pleading containing formal allegations of the criminal conduct.

[16] A grand jury's duty is comprised of hearing evidence from the State's witnesses and then determining whether there is probable cause to support the charge. A grand jury consists of eighteen members. Twelve must vote in favor of returning a true bill of indictment or the charge fails. *See* N.C.G.S. 15A-621 through 15A-631 for statutory provisions governing the grand jury.

[17] A true bill indicates that a grand jury finds the evidence sufficient to support the accusation set out in the bill of indictment presented by the prosecutor.

provides the prosecutor the first opportunity to review closely the arrest charges and corresponding evidence. Such screening may result in indictment charges that are different from arrest charges.

Status charges may be added at this stage. A defendant may be charged as an habitual felon[18] if the prosecutor finds he has been convicted of or pled guilty to three felony offenses in any federal or state court or both, each offense occurring after the defendant was convicted for the prior offense. A defendant's eligibility for habitual felon status is often unknown until after the prosecutor has reviewed the arrest charges and the offender's prior record, and thus habitual felon is a charge that often arises initially at the indictment stage. Similarly, the charge of violent habitual felon may arise at indictment though not charged at arrest. A defendant may be charged as a violent habitual felon[19] if he has been convicted of or pled guilty or no contest to two violent felonies (Class A, B1, B2, C, D, or E felonies) in any federal or state court or both, each offense occurring after the defendant was convicted for the prior offense. Respondents to the survey reported that the charge of violent habitual felon is rarely applicable, and thus is seldom, if ever, indicted.

DISPOSITION OF A FELONY CHARGE

A defendant may plead[20] guilty, not guilty, or, if the prosecutor and judge consent, no contest. The prosecutor and the defendant or defense counsel may negotiate charges to which the defendant may plead. A negotiated plea may include charge reductions or dismissals, and/or sentencing recommendations, which are consistent with Structured Sentencing. Plea practices vary among the districts surveyed. In some districts, plea negotiations focus on the sentence. In others, charge bargaining is more frequent, especially if the presiding judge refuses to accept pleas, which include sentence negotiations.

Beginning in 1999, all felony cases in superior court must be set for an administrative hearing within 60 days of indictment or service of notice of indictment, or at the next regularly scheduled session of superior court.[21] At that setting, the judge sets deadlines for the delivery of discovery and the filing of motions, may hear pretrial motions and may set a trial date. If the district attorney has made a determination of whether a plea will be offered, he must inform the defendant of the offer and its terms. The judge may schedule additional administrative hearings if necessary. A trial date must be set at the final administrative hearing. In practice, prosecutors in most of the districts surveyed will communicate a plea offer to the defendant or his attorney prior to the first administrative hearing. The defendant may then enter a plea at that setting. If the defendant does not plead at this time, another administrative hearing will be set. Most of the

[18] *See* N.C.G.S. 14-7.1 through 14-7.6 for statutory provisions governing habitual felon.

[19] *See* N.C.G.S. 14-7.7 through 14-7.12 for statutory provisions governing violent habitual felon.

[20] *See* N.C.G.S. 15A-1011 through 15A-1012 for statutory provisions governing pleas, and N.C.G.S. 15A-1021 through 15A-1027for statutory provisions governing superior court procedures relating to guilty pleas.

[21] *See* N.C.G.S. 7A-49.4(b) for the statutory provision regarding administrative settings.

districts surveyed limit the number of administrative settings; on average, it appears most of the districts allow three administrative hearings.

During the administrative hearing phase, plea conferences, in which the judge participates, may occur.[22] If the prosecutor and the defendant have reached a proposed plea arrangement in which the prosecutor has agreed to recommend a particular sentence, they may, with the permission of the trial judge, advise the judge of the terms of the arrangement prior to the time for tender of the plea. The judge may indicate to the parties whether he will concur in the proposed disposition. Plea conferences, in practice, are informal hearings, which occur as a matter of routine in some districts, but not others. In the districts surveyed where plea conferences occur, the judge "previews the results," that is, reviews the plea offer and informs the defendant of the sentence that would be imposed if the defendant accepts the plea.

At the time for tender of the plea, the prosecutor and the defendant, or the defendant's attorney, must inform the court of the terms of any plea negotiation prior to the defendant entering a plea in superior court. If the defendant chooses to enter a guilty or no contest plea, the judge must go over the plea transcript with the defendant in open court. The judge reviews the defendant's rights with him, ensures that he is represented by counsel or has waived counsel, and makes a determination that the defendant understands the charge against him and the possible sentence, that there has been a plea agreement and that the defendant understands the terms of the agreement, that the defendant is voluntarily and willingly entering a plea, and that there is a factual basis for the plea. The defendant must sign the plea transcript. If the plea agreement includes a recommended sentence, and the judge does not sentence the defendant accordingly, the defendant may withdraw his plea without prejudice and have the case continued. In practice, most judges accept pleas, which include sentence recommendations.

If the defendant enters a plea of not guilty, then his case proceeds to trial.[23] The defendant is entitled to a fair trial by an impartial jury of twelve of his peers.[24] Once the jury is impaneled, the State presents its case and has the burden of proving the defendant's guilt beyond a reasonable doubt.[25] At the close of the State's evidence, the defendant may present evidence if he so chooses. After all the evidence has been presented to the jury and closing arguments have been made, the judge instructs the jury on the applicable law. All guilty verdicts must be

[22] *See* N.C.G.S. 15A-1021 for the statutory provision governing plea conferences.

[23] Cases disposed of by trial are not within the scope of this study, and they comprise less than three percent of all felony convictions in the state. *See* N.C.G.S. 15A-1221 through 15A-1243 for statutory provisions regarding the criminal jury trial in superior court.

[24] U.S. Const. art 3, sec. 2.; U.S. Const. amend. 6; N.C. Const., art. 1, sec. 24.; N.C.G.S. 15A-1201. To secure an impartial jury, counsel has the right to reject or challenge an individual juror or the entire jury panel. [*See* N.C.G.S. 15A-1211through -1214.] Counsel may either challenge for cause (must show reason why a juror should be disqualified) or may enter up to six peremptory challenges (no reason is required). [N.C.G.S. 15A-1214. *See also,* N.C.G.S. 15A-1217 regarding number of peremptory challenges.]

[25] U.S. Const. amend. 14; *In re* Winship (1970).

unanimous. If the jury cannot reach a unanimous decision, then a mistrial may be declared. If a mistrial is declared because the jury is deadlocked, then the defendant may be tried again.[26]

SENTENCING

After the defendant enters a guilty plea or the jury returns a guilty verdict, the case proceeds to the sentencing phase.[27] Detailed information may be presented to the court for consideration in determining the sentence.[28] The court may order the probation officer to prepare a presentence report containing any information about the defendant relevant to sentencing. Both the prosecutor and the defendant may present witnesses and arguments on factors related to sentencing. The State may offer a victim impact statement for the court's consideration.[29]

Under Structured Sentencing, sentences are prescribed based on the defendant's current conviction and prior record level. Prior convictions are weighted for seriousness of offense according to a schedule set out in statute, and prior record level is determined by calculating the sum of points assigned to each of the offender's prior convictions. The burden is upon the prosecutor to present proof of any prior convictions belonging to the defendant. Sentence lengths and disposition types are authorized for each combination of offense and prior record level. Given the sentence disposition(s) authorized for any given combination of offense and prior record level, the judge may impose an active sentence (a sentence to be served in confinement) or an inactive sentence (a sentence to be served on probation). Under Structured Sentencing, there are two levels of probation: intermediate and community. If an intermediate sentence is imposed, the defendant is supervised on probation and the court must impose at least one of the conditions of probation prescribed specifically for intermediate sentences. If a community sentence is imposed, probation may be supervised or unsupervised and any other conditions may be imposed.

The judge must impose a minimum sentence length from one of three sentence ranges: the presumptive range, the aggravated range, or the mitigated range. The court must sentence within the presumptive range unless the court finds that an aggravated or mitigated sentence is appropriate based on evidence presented by either the prosecutor or the defendant. The State bears the burden of proof (by a preponderance of the evidence) that an aggravating factor exists, and the defendant bears the burden of proof that a mitigating factor exists. The judge must consider the factors presented, but the judge's decision to depart from the presumptive range is completely within his discretion. If the judge sentences the defendant to a sentence within the

---

[26] N.C.G.S. 15A-1065

[27] *See* N.C.G.S. 15A-1331 through 15A-1340.23 for statutory provisions governing sentencing.

[28] The rules of evidence do not apply at the sentencing hearing.

[29] *See* N.C.G.S. 15A-1340.34 and N.C.G.S. 15A-1340.35.

aggravated or mitigated range, then he must provide written reasons for departing from the presumptive range. As a matter of practice, respondents in the districts surveyed reported that most sentences imposed are within the presumptive range.

Once the judge determines the minimum sentence from the appropriate sentence range, the maximum sentence is determined by referencing the statute governing maximum sentences. Under Structured Sentencing, each minimum sentence length corresponds to a maximum sentence length specified in statute. Maximum sentence lengths for Class F through I felonies are set at 120% of the minimum sentence length rounded to the next highest month. Maximum sentences for Class B1 through E felonies are set at 120% of the minimum sentence rounded to the next highest month plus nine months for post-release supervision. Under Structured Sentencing, offenders may serve up to the maximum sentence imposed, but must serve the entire minimum sentence.[30]

Three sentence enhancements are available to increase the length of the sentence.[31] A sentence may be enhanced if a person wears, or has in his or her immediate possession, a bulletproof vest during the commission of a felony. If the bulletproof vest enhancement applies,[32] then upon conviction, the defendant is guilty of a felony that is one class higher than the actual felony committed. Also, a sentence may be enhanced if the offender used, displayed, or threatened to use or display a firearm during the commission of a Class A through E felony. If the firearm enhancement is applicable,[33] the judge must add 60 months to the minimum sentence imposed for the substantive felony, and then determine the maximum sentence as described above. Finally, a sentence may be enhanced if a defendant with one or more prior convictions for a Class B1 felony is convicted of a second or subsequent B1 felony, and the victim was 13 years old or younger at the time of the offense and the court finds that there are no mitigating factors present. If this enhancement applies, the defendant must be sentenced to life imprisonment without parole.

If the defendant is convicted of more than one offense at the same session of court, the judge may order concurrent, consolidated or consecutive sentences. If concurrent sentences are imposed, judgments are entered for each conviction and served simultaneously; thus the length

[30] Under Structured Sentencing, an inmate may earn a reduction of up to four days per month against the maximum sentence length for work performed while incarcerated. The Department of Correction promulgates the rules governing reward and forfeiture of "earned time."

[31] The factors comprising the sentence enhancements must be alleged in an indictment and proven to the jury beyond a reasonable doubt.

[32] The bulletproof vest enhancement does not apply if the evidence that the defendant had a bulletproof vest is needed to prove an element of the underlying felony. The enhancement also does not apply to law enforcement officers.

[33] The firearm enhancement does not apply if evidence of the use, display, or threatened use or display of the firearm is needed to prove an element of the underlying Class A through E felony, or if the court sentences the defendant to an intermediate punishment (because the defendant falls into Class E, Prior Record Level I or II, or the court finds extraordinary mitigation).

of imprisonment is only as long as the longest of the individual sentences. If a consolidated sentence is imposed, the court consolidates the offenses for judgment and imposes a single judgment based on the appropriate prior record level of the most serious offense. If the judge imposes consecutive sentences, judgment is entered for each of the offenses, and the sentences are served one after the other. Sentences are presumed to run concurrently unless otherwise specified by the court.

In some cases, the court may depart from the sentence authorized by statute for a given offense and prior record level. Under the doctrine of extraordinary mitigation,[34] in cases in which only an active sentence is authorized for the offense and prior record level,[35] the court may impose an intermediate punishment if the court finds that "extraordinary mitigating factors" exist that substantially outweigh any aggravating factors, and that imposition of an active sentence would be a "manifest injustice." A finding of extraordinary mitigation must be in writing and the factors which the court finds must be specified in the judgment. The decision to find any mitigating factors is in the court's discretion. For offenders convicted of drug trafficking offenses,[36] if the court finds that the offender provided "substantial assistance"[37] in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals, the court may impose a prison term less than the applicable minimum sentence prescribed by statute, or suspend the active sentence and impose an intermediate or community punishment. Respondents in the districts surveyed reported that, in practice, extraordinary mitigation is rarely imposed, while substantial assistance is imposed with greater frequency.

[34] *See* N.C.G.S. 15A-1340.13(g) and N.C.G.S. 15A-1340.13(h) for the statutory provisions governing extraordinary mitigation.

[35] There are some exceptions. Extraordinary mitigation is not applicable if the offense is a Class A or Class B1 felony, a drug trafficking or drug trafficking conspiracy offense, or the defendant has five or more prior record level points. Thus, in effect, extraordinary mitigation applies only to defendants who are convicted of Class B2, C, or D felonies and fall into Prior Record Level I or Prior Record Level II.

[36] Drug trafficking offenders are sentenced to mandatory active sentences according to a schedule of minimum and maximum sentences that is not within Structured Sentencing. *See* N.C.G.S. 90-95(h).

[37] *See* N.C.G.S. 90-95(h) for the statutory provision governing substantial assistance.

CHAPTER 3

FELONY PROSECUTIONS: THE EXERCISE OF DISCRETION

While criminal procedure statutes and the Structured Sentencing Act establish the framework by which felony cases are processed and sentenced, there are areas of discretion within that framework that determine the actual punishment a defendant receives. These areas include what offense is initially and finally charged, whether charges and/or sentence recommendations are negotiated, and what type and length of sentence is imposed. Prosecutors, judges, defendants, and their attorneys each participate in the exercise of this discretion.

North Carolina's 100 counties are divided into forty-six superior court judicial districts, each with a senior resident superior court judge. These judicial districts are grouped into eight judicial divisions. There are 91 resident superior court judges; they are elected within a district to eight-year terms, but travel to other districts within a division to hold court (on a six-month rotation). In addition, there are 14 special superior court judges appointed by the governor. The state is divided into thirty-nine prosecutorial districts, some encompassing more than one judicial district. The district attorney is elected within a prosecutorial district and serves the entire four-year term in that district. Four hundred thirty-eight assistant district attorneys are hired by and serve at the pleasure of the 39 elected district attorneys.

Defendants have a right to represent themselves or to be represented by an attorney. If they cannot afford to retain an attorney, then the court appoints an attorney or, where available, an attorney from the public defender's office represents them. An appointed attorney is compensated at a fixed hourly rate by the state while an attorney in the public defender's office is a salaried state employee. There are 11 public defenders in 13 counties who are appointed to four-year terms by the senior resident superior court judge, and 121 assistant public defenders.

Sentencing Commission staff visited six judicial districts and asked judges, prosecutors and defense attorneys questions about their decision making process. These questions focused on three stages of the process: charging and time awaiting trial, disposition of the charge by plea,[38] and sentencing. Relying upon information collected in these interviews, this chapter seeks to examine the role of the various members of the criminal justice system at each discretionary point in the process and to highlight the factors that they consider in making decisions.

INITIATING A FELONY CHARGE

The decision of whether to charge a defendant and what to charge represents the first discretionary step in the process. As discussed in Chapter 2, respondents indicated that the

[38] Because such a small percentage of cases are resolved by trial, Commission staff focused its questions on the disposition of charges by plea.

majority of felony charges are initiated by law enforcement officers.[39] The degree to which a prosecutor is involved in the charging decision at this stage varied among the districts surveyed. In some of the districts the prosecutor is not involved, in other districts the prosecutor may be consulted as needed or in serious or complex cases, and in other districts the district attorney's office requires that a prosecutor review charges prior to arrest. Yet in all of the districts respondents agreed that the charges usually accurately reflect the criminal conduct. Respondents also stated that law enforcement tends to overcharge (*i.e.*, charge the most serious offense possible which would involve that type of conduct) or to charge multiple offenses based on the same act in certain types of cases. The types of cases respondents identified varied between the districts. They included drug offenses, sex offenses, especially those involving minors, assaultive offenses, and property offenses. Prosecutors and defense attorneys both agreed that the practices of overcharging and bringing multiple charges help the prosecutor in plea negotiations. This may be because they allow the prosecutor to reduce or drop charges while still maintaining a substantial charge against the defendant. It may also be because they place the defendant in the position of accepting a negotiated plea or facing trial on all counts.

Law enforcement may file the initial charges, but the prosecutor is responsible for deciding what charges go into the bill of indictment. In all of the districts surveyed, prosecutors and defense attorneys agreed that the indicted charge is usually the same as the initial charge. Where the indicted charge differs, several possible reasons were given: charges may be upgraded or added if law enforcement did not take a fact into account or new evidence becomes available, charges may be reduced or dropped if law enforcement missed an element of an offense or the evidence is weak or insufficient to support the charge. Prosecutors in at least one district explained that all plea negotiations take place prior to indictment. The primary factor that the prosecutor appears to consider in filling out the indictment is what he can prove in court.

At the time of indictment, the prosecutor also collects the defendant's criminal history. Based on that history, he may consider charging the defendant with the status offense of being an habitual felon or a violent habitual felon. An habitual felon is a person whose current offense is a felony and who has three prior felony convictions, each offense occurring after the person was convicted for the prior offense. If the defendant is found to be an habitual felon, he is sentenced for a Class C offense regardless of the class of the underlying offense. A violent habitual felon is a person whose current offense is a violent felony (Class A, B1, B2, C, D, or E), and who has two prior violent felony convictions, each occurring after the person was convicted for the prior offense. A defendant found to be a violent habitual felon is sentenced to life without parole regardless of the class of the underlying offense. Among the districts surveyed, prosecutors reported charging defendants as habitual felons relatively frequently. Some prosecutors stated that they include it as one of the indicted charges whenever a defendant is eligible while others explained that they examine the defendant's prior record to see if a real career criminal intent exists beyond the three requisite prior convictions. Respondents indicated that offenders who commit low level property offenses and non-trafficking drug offenses are most likely to be charged as habitual felons. Some prosecutors said that this was because of the short sentence lengths in the lower offense classes. The enhancement does not add much time to the more

[39] The decision by law enforcement to initiate a charge is not within the scope of this study.

serious offenses and is therefore not worth pursuing. Only one district attorney reported using the violent habitual felon charge and that was only in three cases. Prosecutors explained that defendants generally do not meet the requirements.

Because prosecutors have the authority to choose which charge to proceed upon, it may appear that they have the most influence over this stage in the process. But concerns over preserving good working relationships with law enforcement may cause prosecutors to hesitate to deviate far from the officer's original charge. This may account for why the indicted charge, as reported, rarely differs from the original charge. The involvement of the defense attorney may also influence a prosecutor's decision at this stage. A privately retained attorney who becomes involved during the investigation may be able to influence the ultimate charge by bringing additional evidence to the attention of the prosecutor or by shaping the prosecutor's view of the evidence.

PRETRIAL RELEASE

The determination of pre-trial release conditions is another discretionary point in the process.[40] Magistrates set the initial requirements for release and judges have the authority to review and modify those conditions. The factors that a judge relies upon in making this decision are set out in statute. These factors include a defendant's family ties, employment, and length of residence in the community, factors which indicate ties to the community that would make it less likely that a defendant would flee. Although no questions were asked concerning this issue, some respondents suggested that these criteria work against certain groups of defendants and make it more likely they will remain in jail prior to trial. They also indicated that a defendant who is detained in jail is more willing to plead in order to get out.

DISPOSITION OF THE FELONY CHARGE

Once the charge has been established, a case proceeds toward trial. In general, prosecutors have the duty of zealously prosecuting defendants charged with criminal offenses in order to ensure justice and public safety. At the same time, prosecutors are aware that limited resources prohibit them from trying each defendant. Therefore, the prosecutor has the discretion to negotiate with a defendant or his attorney in order to obtain a guilty plea from the defendant and dispose of the case prior to trial. The prosecutor may agree to reduce or dismiss certain charges or to recommend or not oppose a particular sentence in order to reach an agreement. In determining which cases to negotiate, prosecutors have to prioritize their cases. The prosecutors who were surveyed indicated that they prioritize their cases based on the seriousness of the offense and the offender, and the risks and costs of taking the case to trial. It is important to remember that the way a prosecutor analyzes these factors and the weight he assigns to each of them is as varied as the individuals in this role.

[40] Disparate outcomes in felony cases as a result of pre-trial release practices were not analyzed as a part of this study.

Prosecutors reported using several factors to gauge the seriousness of the offense. They consider the nature, type, and severity of the offense. They also look at whether it was a random offense, planned, or part of a recurring behavior pattern.

Prosecutors reported measuring the seriousness of the offender primarily by examining his criminal history. They consider the number of prior convictions he has, what types of offenses they were, and the age of those convictions. Prosecutors look at whether the defendant was on probation at the time of the current offense or had received probation in the past. Other respondents indicated that prosecutors might also consider characteristics of the defendant himself, including his age, gender, personal problems (*e.g.*, substance abuse), his attitude toward the criminal justice system, his willingness to cooperate (*e.g.*, whether he made a confession or aided in the recovery of stolen property), and the level of his remorse.

Beyond the seriousness of the offense and the offender, prosecutors indicated that they consider the advantages and disadvantages of trying the case. Prosecutors listed a variety of case-related factors they might consider, including the age of the case, their chances of obtaining a conviction, what defenses are available to the defendant, and whether there are any recent changes to the law that might help or hurt the case. Prosecutors explained that, when possible, they also try to take into account the individual players in a case. They look at the victim and whether he is a reliable witness, a particularly vulnerable witness, or somehow culpable in the case. They examine other witnesses, including the investigating officer, as to their credibility and availability. Prosecutors consider who the defense attorney is, his reputation and trial skills. A few defense attorneys said that the prosecutor might take into account his relationship with the defense attorney. Prosecutors also reported considering how a jury might perceive the defendant, the facts, and the relevant legal theories. There are many costs associated with taking a case to trial that are not present when a defendant pleads guilty, including court time and the cost to individuals serving on a jury. Finally, prosecutors also stated they consider who the judge is and what his predilections are.

While almost all prosecutors appear to consider the seriousness of the offense and the offender and the risks and costs of taking a case to trial when prioritizing cases for negotiation, they also reported some collateral factors that may play a role in their decisions. The prosecutor may weigh the investment of time and effort against the length of the sentence the defendant could receive. If he is eligible only for probation or a short active sentence, the prosecutor may be inclined to preserve trial resources and obtain a comparable sentence through a plea agreement. The amount of restitution owed, if any, and the defendant's ability to pay it, may influence the type of plea offered. Prosecutors may be inclined to offer a plea that will result in a probationary sentence if it means that the defendant will be able to earn money to make restitution. They also try to process cases faster when the defendant is unable to make pretrial release and has been detained in jail. This may mean reducing a charge to a point where the defendant can receive a sentence equal to the time he has spent in jail.

The prioritization of cases may also be influenced by the volume of cases and community standards in the district. For example, a breaking and entering charge in a high volume district where such crimes are extremely common, and therefore the public and media pay little attention

to it, may be given a lower priority by a prosecutor in that district than by one in a low volume district where breaking and entering ranks as one of the most serious offenses committed and draws a lot of attention.

Most of the districts surveyed indicated that there were no official policies governing plea negotiations. The elected district attorneys appear to grant wide discretion to their assistants in deciding how to proceed with a felony charge. Yet some respondents noted some consistencies in the way a district attorney's office disposes of certain types of offenses and some prosecutors did indicate there were guidelines for certain situations.

Charges appear to be reduced most often in the lower level felonies. It was frequently reported that low level property offenses, such as breaking and entering and larceny, and financial crimes, such as forgery and uttering, embezzlement and worthless checks, may be reduced to misdemeanors. Low level drug offenses may also be reduced (*e.g.*, non-sale drug offenses may be reduced to misdemeanor possession of drug paraphernalia). Generally, there appears to be a preference for dealing with low priority cases before they reach trial.

In those districts surveyed, respondents indicated that there were fewer reductions of charges for the more serious offenses. Some prosecutors stated that they might reduce armed robbery to common law robbery or conspiracy to commit robbery, but only for the less culpable offenders. Other respondents indicated that assault with a deadly weapon with intent to kill inflicting serious injury may sometimes be reduced to a less serious assault because it is easier to prove. More respondents indicated that the most serious sex offenses may be reduced to indecent liberties either because of the victim's age or vulnerability or because of the fact situation (*e.g.*, the relationship was between teenagers and was consensual).

While prosecutors indicated a general willingness to negotiate, they also stated that there were certain "zero tolerance crimes" for which charges are the least likely to be reduced. These offenses included drug trafficking and violent felonies like serious assaults, domestic violence, kidnapping, burglary, armed robbery and weapons on school grounds. Some prosecutors also stated that once a defendant is indicted as an habitual felon, that charge will not be dismissed.

Besides reducing charges, respondents also indicated that the prosecutor may offer to drop charges, such as possession of stolen property, resisting arrest, or other misdemeanor charges, if the defendant agrees to plead to the most serious charge. Yet some prosecutors expressed a preference for the defendant pleading to all charges in exchange for consolidating the judgments. Prosecutors especially do not want to dismiss charges if there are multiple victims. One prosecutor explained that he would do so only if the defendant still agreed to pay restitution to that victim.

Defense attorneys indicated that in their experience multiple charges are often dropped, especially in drug cases where law enforcement overcharged and in property cases where the defendant agrees to pay restitution. One defense attorney stated that he has found the prosecutor looks at the desired sentence and calculates backward to determine how many charges are needed to reach that sentence.

One area of charge negotiation in which prosecutors have tremendous discretion and which may account for different sentences for the same offense is in the use of habitual felon status. As discussed above, an offender who is convicted of being an habitual felon is sentenced as a Class C felon, regardless of the underlying felony offense. District attorneys have absolute discretion in the decision as to whether to indict a defendant as an habitual felon or not.

Most of the districts surveyed indicated that habitual felon status is used more as a tool in plea negotiations than as a charge. If the defendant pleads to the underlying charge, then the prosecutor drops the habitual felon charge. The defendant may even agree to consecutive sentences or sentences from the aggravated range in exchange for the dismissal.

Two of the districts surveyed, however, indicated that habitual felon status is not used as a bargaining tool but is actually pursued in most cases where the defendant is eligible. Those prosecutors explained that they consider the seriousness of the current offense and whether it is supported by sufficient evidence as well as the age and type of the prior convictions before charging the defendant. If the defendant agrees to plead to the habitual felon charge, the prosecutor may agree to a sentence in the low end of the mitigated range, usually agreeing to "acceptance of responsibility" as a mitigating factor.

Generally, prosecutors indicated they may drop the habitual felon charge if the sentence for the underlying offense would be the same or similar. They use habitual felon status more for multiple low level felonies such as breaking and entering, larceny, drug offenses, and possession of a firearm by a convicted felon.

Violent habitual felon status could also create different sentences for the same offense. If a defendant is found to be a violent habitual felon, he is sentenced to life without parole regardless of the underlying offense. All of the respondents indicated that violent habitual felon status is rarely if ever used as a plea negotiation tool or as a charge. This is usually because the defendant is not eligible.

There are also three sentencing enhancements that, if imposed, would increase a sentence length prescribed by Structured Sentencing. The enhancements are available if an offender used, displayed, or threatened to use or display a firearm and that firearm was not an element of the underlying offense, if an offender used a bulletproof vest while committing a felony, or if an offender committed his second or subsequent Class B1 offense against a victim who is thirteen or younger and there were no mitigating factors. Respondents indicated that the prosecutor almost never mentions these enhancements in the plea negotiation process, usually because the facts of the case do not meet the legal requirements.

As discussed in Chapter 2, sentences under Structured Sentencing are prescribed based on the defendant's current offense and prior record level. The burden is upon the prosecutor to present proof of any prior convictions belonging to the defendant. All of the respondents agreed that prior record is never negotiated as part of a plea. If there is some question about a prior conviction, such as an out-of-state conviction, the prosecutor may decide to leave that conviction out or may seek a certified copy of the judgment, depending upon the seriousness of the case.

Respondents also agreed that the facts which support a plea are usually not negotiated or intentionally understated. In some of the districts surveyed, the prosecutor presents the facts and the defense attorney stipulates to them. In other districts the defense attorney may add facts that were left out by the prosecutor or may present his own version of the facts. However, some prosecutors and defense attorneys did explain that they may leave out some irrelevant facts to make the plea more palatable to the judge or understate the facts if a plea agreement has been reached which both sides want. Judges stated that they sometimes like to have the victim present to help explain the facts. A few prosecutors said they might understate the amount of drugs involved in a case to make the quantity fit the charge while others said they state the actual amount regardless of the charge.

Although prosecutors have a great deal of authority in the plea negotiation process, other actors influence the process as well. It is the defendant who must ultimately decide whether or not to accept a plea. Respondents indicated that a defendant may agree to plead for several reasons. He may be getting a break from the sentence he could receive at trial. The defendant may get a shorter active sentence or avoid active time altogether by getting probation. Whether or not the defendant gets a break, he will gain more control over the sentence by pleading. The outcome is more predictable than what a judge and jury may decide to do. Respondents listed several other reasons why a defendant may plead including the strength of the case against him, a particularly bad prior record, a sympathetic victim who will testify against him, or pressure from his attorney or his family. Many respondents indicated that a defendant who has been detained in jail prior to trial is often more willing to plead in order to get out of the local jail. Some defense attorneys also indicated that defendants are penalized for proceeding to trial. For example, prosecutors are more likely to seek an aggravated sentence or to ask for consecutive sentences in cases that proceed through trial.

Defense attorneys also play a role in the plea negotiation process by influencing a defendant's decision to accept a plea. Defense attorneys consider the strength of the case against their clients and weigh the potential outcome at trial against the benefits of pleading. Some defense attorneys are able to negotiate "better deals" than others. This appears to be based on one of several possible factors, including the relationship between the defense attorney and the prosecutor and the reputation of the defense attorney to win at trial.

Judges may also influence the nature of the plea negotiation if they participate in the plea conferences or if they refuse to accept negotiated sentence recommendations. In addition, some judges see it as their responsibility to prevent a plea that is unconscionable based on the facts of the case. In this way they act as a check and balance within the process.

Victims also may influence the plea negotiation process. In a system of limited resources and a high volume of cases, an active victim can ensure that his or her case does not fall through the cracks. Although most prosecutors stated that they do not allow victims to dictate the plea offered, practically all admitted that an active victim does impact the way a case is handled. Defense attorneys stated that an active victim can break an otherwise agreed upon plea.

Finally, the criminal case process can influence a plea bargain. As discussed in Chapter 2, all felony cases in superior court must be set for an administrative hearing within 60 days of indictment or service of notice of indictment, or at the next regularly scheduled session of superior court. In practice, prosecutors in most of the districts surveyed reported that they will communicate a plea offer to the defendant or his attorney prior to the first administrative hearing. In some of those districts, that plea offer will be available until the prosecutor begins the trial. In other districts, the plea offer will be available only until the judge sets a trial date or becomes involved in a plea conference. In the remaining districts, the plea offer is available only at the first administrative hearing. At the second hearing a less favorable plea may be offered. By the time the case goes to trial, the defendant may be allowed to plead only to the original charges.

SENTENCING

The judge is ultimately responsible for determining the sentence he will impose upon the defendant. Structured Sentencing provides mandatory sentencing guidelines for a judge to follow, but he has discretion within those guidelines to craft an individual sentence. In one-third of the cells on the felony punishment chart the judge chooses the type of sentence to impose (an active sentence versus a suspended sentence with a community-based sanction). In every cell the judge must choose a specific sentence length from either the mitigated, presumptive or aggravated range. There is an increase in sentence length of over two hundred percent from the bottom of the mitigated to the top of the aggravated ranges. Finally, there are two statutory tools, consecutive sentencing and extraordinary mitigation, which the judge has the discretion to apply in a case.

In some of the districts surveyed, the prosecutor and the defense attorney agree to recommend the type of sentence and the length of sentence as part of the plea bargain. The judge usually accepts those recommendations. In other districts they may agree to recommend the type of sentence but leave the length to the judge. Finally, in a few of the districts surveyed, the prosecutor and defense attorney agree only to the charges that the defendant will plead to and leave the actual sentence to the judge. Which decisions will be made as part of the plea bargain appears to vary by district as well as by judge. In every case the judge has the authority to reject the plea.

Each judge is unique in the set of factors he considers and the weight he assigns them in determining the appropriate sentence. When questioned about the factors that a judge relies upon in making a decision about sentencing, respondents repeatedly answered, “it depends on the judge.” Some factors which were commonly emphasized include the nature of the crime and the defendant’s criminal history, including prior record level, types of prior offenses, time lapsed since the last offense, probation or prison history, and the defendant’s criminal justice status at the time of the current offense. Respondents also indicated judges consider the defendant’s age, gender, family structure, employment history and status, support system in the community, level of remorse, whether his behavior is explained by some sort of mental impairment or substance abuse problem, the victim’s statements, and what is in the best interest of public safety. Some judges have their own unique factors that they consider. For example, one judge reported that he gives special consideration to defendants who are veterans.

The effect that any of these factors has on the sentencing decision may differ from judge to judge. For example, some judges find the existence of a drug addiction, particularly if documented or acknowledged, a compelling reason to impose probation and treatment for a non-violent offender. Other judges are indifferent to a defendant's substance abuse problem; the sentence will include a treatment component, but the decision of whether to impose an active sentence or not stands apart from the substance abuse problem. Generally, judges reported that, where there is a choice between an active and a suspended sentence, they look for indications that a defendant might succeed or fail on probation.

Beyond the individual characteristics of the defendant and the case, having the option to use community-based alternatives may influence a judge's decision of what type of sentence to impose. Structured Sentencing requires that certain types of offenses and offenders go to prison; however, it also permits, and in some cases requires, community-based sanctions for other offenses and offenders. Most of the judges who were interviewed reported that having the option to impose community-based alternatives did affect their sentencing decision. They do not want to send a defendant to prison unless it is necessary. They prefer to keep the offender in his own community, especially if he does not present a high risk of reoffending and if he wants a chance to change. Judges also stated that the more information they had about a defendant the more likely they were to impose a community-based sanction if it was appropriate. Most prosecutors and defense attorneys agreed that the availability of community-based alternatives for certain offenses and offenders influenced the judges' decisions; however, some stated that the decision was based solely on the judge's personal philosophy. A few of the defense attorneys indicated that in their experience judges will only use community-based sanctions if they can impose multiple sanctions or if the sanction includes a period of confinement (*e.g.,* split sentence and IMPACT).[41] IMPACT (Intensive Motivational Program of Alternative Correctional Treatment) is a residential program in which the offender, as a condition of probation, is required to reside in a facility for ninety to 120 days and to participate in a strictly regimented paramilitary program. (*See* N.C.G.S. § 15A-1343.1).

Judges also reported that the local programs themselves can be an issue in sentencing. Because of North Carolina's system of rotating superior court judges, a judge may not be familiar with the resources of the community to which he is assigned. Some judges reported relying on defense attorneys, probation officers, and prosecutors to make recommendations and inform them about community-based options in the given area while another judge suggested that lack of knowledge regarding local resources results in greater judicial reliance on state-operated programs (*e.g.*, intensive probation and split sentences). The perceived quality of the program may also influence the judge's decision. One judge stated that a lack of uniform standards among some local programs may cause him to hesitate to use a program he uses frequently in another district. Finally, the availability of a program opening or "slot" may sway a judge's decision to impose probation and require participation in a program. Some judges reported imposing sentence without regard for available program capacity. One judge stated that

[41]A split sentence (also know as special probation) is a sentence to probation with the requirement that the offender serve a period or periods of imprisonment in the custody of the Department of Correction or a local confinement facility. (*See* N.C.G.S. § 15A-1351)

the defendant has a right to the appropriate sanction and should not be affected by limited resources. Other judges said that the lack of an opening in a particular program may affect their decision. Consequently, one offender may sit in jail awaiting a program opening while another is sentenced to prison despite the existence of an appropriate program.

In every case the judge must select a sentence length from either the mitigated, the presumptive or the aggravated sentence range. He considers evidence of mitigating and aggravating factors which are enumerated in statute and presented by the prosecution and the defense in order to select the appropriate range. Prosecutors reported not always seeking aggravated sentences, even when evidence of aggravating factors exist. They usually sought and received aggravated sentences in cases that were especially heinous (*i.e.*, unusually violent or involve a particularly vulnerable victim). Other respondents stated that aggravated sentences are sought frequently by the prosecution when the defendant rejects a plea offer and the case proceeds to trial. Defense attorneys reported almost always presenting evidence of mitigating factors if such evidence exists. Judges stated they will find mitigation where the defendant has been particularly cooperative and has admitted full responsibility. Other circumstances where judges have tended to impose a mitigated sentence include where the defendant is young and has no prior record, where the defendant is mentally impaired, or where the defendant has paid restitution or made other pretrial efforts such as seeking treatment. These are situations in which it was reported prosecutors are unlikely to oppose a mitigated sentence. Finally, a judge may choose to sentence from within the aggravated range when he believes the defendant has been given too great of a charge reduction based on the facts of the case; or conversely, a judge will sentence from the mitigated range if he believes the defendant deserves a bigger break than that provided for by the plea negotiation.

When a defendant has been convicted of multiple offenses, judges have the discretion to consolidate convictions for a single sentence, to run sentences concurrently, or to run them consecutively. The decision to impose consecutive sentences is an important point of discretion as it can, in some instances, more than double the length of the overall sentence. Respondents indicated that generally judges impose consecutive sentences in cases involving two or more distinct offenses and/or victims which warrant separate punishment and in cases where the defendant has a particularly bad record or is on probation at the time of the current offense. Some judges impose consecutive sentences in cases involving numerous serious or violent charges, while others impose them in cases where the grid authorizes minimal active time (*e.g.*, lower level felonies). Consecutive sentences can be a means by which judges can offset any perceived leniency in the conviction charges, for example, if the defendant was permitted to plead to a lesser charge. A few respondents reported that consecutive sentences are imposed if the defendant goes to trial and is found guilty. Generally, judges appear to use consecutive sentences to achieve the sentence length they think is appropriate based on the facts of the case. It was also frequently reported that judges impose consecutive sentences in cases where an inactive sentence is ordered as leverage to encourage the defendant to comply with the conditions of probation.

As a general rule, judges may not deviate from the sentences authorized by the structured sentencing laws. There is one statutory exception which allows the judge to suspend the active

sentence authorized by the grid and impose an intermediate punishment. This occurs when the judge finds extraordinary mitigating factors.[42] In practice, judges reported rarely ever finding extraordinary mitigation. Where it was found, it was because the defendant was particularly young and had no prior record, particularly old and sickly, or the circumstances of the case were less serious than they typically are for that offense. As one judge indicated, the facts of a case have to be truly "extraordinary" to warrant use of extraordinary mitigation.

Drug trafficking offenses are not sentenced according to Structured Sentencing. They are subject to mandatory active sentences with preset lengths. However, the judge has the authority to deviate from these sentences if he finds substantial assistance. In those cases, the judge may reduce the sentence length or suspend the active sentence and impose probation. In contrast to extraordinary mitigation, most of the respondents stated that substantial assistance is applied with great frequency. Judges may rely on the testimony of law enforcement or the recommendations of the prosecutor in determining whether to find substantial assistance. A few respondents indicated that substantial assistance is incorporated into the plea agreement rather than left to the judge (*i.e.,* charge bargaining). The standard for what constitutes substantial assistance varies among judges and prosecutors: some consider it substantial assistance if the defendant has provided any information or assistance to law enforcement, while others require the defendant to have provided direct evidence leading to the arrest of another defendant. One prosecutor opined that substantial assistance accounts for the greatest disparity in the way drug cases are handled.[43]

Other individuals play a role in the final sentence decision. The prosecutor, the defendant, and his attorney control the charge of conviction which in turn assigns the defendant to a particular cell on the felony punishment chart. As a result, they play a role in setting the parameters within which the judge must enter a sentence. Depending on the extent the judge allows sentence negotiation as part of a plea agreement, the prosecutor and defense attorney may play an extensive role in sentencing, although it is ultimately the judge's decision whether to accept the agreed-upon sentence or not. Prosecutors or defense attorneys may also try to influence the sentencing process by making recommendations as to sentencing. Prosecutors and defense attorneys use the tools available to judges, aggravated or mitigated sentences and consecutive sentences, in plea negotiations. For example, a prosecutor will agree to recommend a mitigated sentence if the defendant will plead to the most serious charge; conversely, a defendant will agree to an aggravated sentence if the prosecutor offers him a bigger charge reduction. Most of the judges stated that they consider the statements of a victim but that they do not allow a highly involved victim to influence the sentence. One judge admitted that a victim who is present and visible to the judge puts a face on the crime and can have an impact on the sentence type and length decisions. Several judges stated that the absence of a victim is

[42] Extraordinary mitigation allows the judge to impose an intermediate sentence where only an active sentence is authorized upon a finding that extraordinary mitigating factors exist and that they outweigh any factors in aggravation and that imposition of an active sentence would be a "manifest injustice". Extraordinary mitigation is only available in Classes B2, C, and D, Prior Record Levels I and II.

[43] There was some suggestion that substantial assistance benefits only "the big fish" or those defendants with significant information, while "dumb mules" with no information are sentenced more harshly.

influential on their decision as well. Prosecutors stated that an active victim may mean the judge imposes an active sentence over a suspended sentence or that the judge imposes a longer sentence than he would otherwise.

OBSERVATIONS ON THE EFFECTS OF DISCRETION WITHIN THE SYSTEM

As evidenced in the preceding discussion, despite the fact that much of the process is set out in statute, there remain numerous areas of discretion, which determine how felony cases are ultimately resolved. One goal of Structured Sentencing is to ensure that offenders convicted of similar offenses, who have similar prior records, generally receive similar sentences. Through information gathered during site visits, several explanations emerged as to what may cause any disparate treatment of similarly situated offenders. These may be identified as district variations, the influence of individuals involved in the case, and characteristics specific to the defendant, which loosely relate to socioeconomic status.

As previously noted, North Carolina's criminal justice system is organized by prosecutorial and judicial districts. These districts are composed of either several counties or a single county, depending on the population concentration of the area. This structure is important because it is within these districts that judges and district attorneys are elected and serve, and it is at this level that community standards and expectations may come into play.

Despite the fact that there are many similarities across the state in the way felony cases are processed, there are some notable differences among the districts visited which may result in statewide variation in the way an offender is treated. Elected district attorneys and judges promulgate local policies for the handling of cases. For example, in one district, prosecutors evaluate felony cases in depth prior to law enforcement bringing charges, while in other districts, the prosecutor reviews the case only after charging. Because the prosecutor in the district that reviews cases up front may screen out weaker cases (choosing not to charge or to charge a lesser offense than the law enforcement officer would), there may be less of a reduction from the charged offense to the offense of conviction compared to districts where such screening does not occur.[44] Likewise, the elected district attorney in a particular district may set charging and plea policies that are distinct from those of his colleague in another district. This is perhaps detected most easily, for example, in the use of habitual felon. Whereas some district attorneys have implemented a policy of indicting and prosecuting every eligible defendant, other district attorneys, sometimes even in adjoining counties, are more selective in their use of this status offense. Other differences between districts arise due to the practice of certain judges. For example, some judges may willingly accept negotiated sentences as part of a plea bargain, while other judges refuse. Where sentence bargaining does not occur, there may be a tendency to offer a greater "break" in the charge reduction.

[44] Because our data does not capture decisions prior to the charge, the analysis may falsely reflect that a defendant in a district that does not have a practice of pre-charge screening is more likely to receive a greater reduction in charges than a defendant in a district where screening occurs up front.

Because the district attorneys and judges serve at the pleasure of the local citizens, they are subject to community influence. Differences between districts may also occur because community opinion about a particular crime varies from one district to another. This opinion seems to be formed based on the volume and nature of crimes to which the community is subjected. For example, it was noted that a case involving a defendant charged with possession of a dime bag of marijuana in a rural county not accustomed to drug activity will draw much more community interest than in a large, metropolitan county where drug charges are numerous. Factors specific to a district, such as unemployment rate, school drop-out rate, and the size and demographic composition of its population, impact the prevalence and type of criminal activity. This community opinion, or standard, in turn shapes the manner in which prosecutors handle cases. In at least one multi-county district visited, prosecutors adhere to a set of guidelines that encourage them to consider the priorities in their county when making charging decisions. The fact that the district attorney is elected locally indelibly links prosecutorial discretion to the community standard.

These explanations of why offenders may be treated differently in different districts point to an inherent dilemma in the way the state's court system is structured. The criminal code is uniformly applicable to the entire state, but it is applied locally by locally elected officials. The accountability of these officials is to their constituents, and their interpretation of the seriousness of crimes and the appropriateness of penalties is reflective of local community norms and preferences. The possible result of district based disparity in criminal case processing is not easily resolvable, being the product of the conflict between statewide laws and locally elected (and accountable) judges, district attorneys and other law enforcement and criminal justice officials.

Intertwined in these differences detectable by district comparison are variations, which arise as a result of the fact that the system is operated and controlled by individuals, each performing specific tasks subject to their personal opinions and according to the way they interpret their responsibility. The way in which these individuals operate and relate to one another provides an important context for understanding the handling and resolution of cases. Organizationally there are three major subgroups of actors within the court system (separate from the defendant himself) that collectively create the court's culture. These three subgroups are prosecutors, defense attorneys and judges. Because the resolution of cases involves not only an adversarial component but also a great deal of negotiation, the manner in which these groups interact with each other may impact the outcome. Theoretically, the more familiar they are with each other and the more easily they can anticipate each other's actions and reactions, the smoother and more effective negotiations will be.

Within this framework, the design of North Carolina's criminal justice system explains the special position held by its district attorneys. While recognizing that multiple players impact the disposition of a felony case, the control exercised by the prosecutor over the process is paramount.[45] Because the district attorney has an organized office and is assigned to a single

[45] Staff asked those interviewed who has the greatest influence on the final sentence - the judge, the prosecutor or the defense attorney. Overwhelmingly, respondents indicated that it is the prosecutor who has the most control.

district, unlike superior court judges who rotate within judicial divisions composed of a number of districts, he stands in the best position to impact the way a case is handled and resolved. Defense attorneys - and public defender services offered in eleven districts - represent a less organized and influential component of the court subculture. The tone of the court subculture that inevitably emerges in any court environment is therefore more likely to be set by the district attorney and his office than by its judges.

In addition to the strength drawn from this organizational structure, there are a number of other possible explanations for the power the prosecutor holds. First, as it has been noted, district attorneys are vested with important authority, which they exercise according to their discretion. Ultimately, they decide what charge the defendant faces, whether a plea will be offered and, if so, what the parameters of that plea will be. Unlike judges, whose discretion is guided by the structured sentencing laws, there are no statutory guidelines, which apply to the prosecutor's exercise of discretion. In fact, there reportedly are very few self-imposed guidelines for the exercise of this discretion.

Second, it is possible that the state's sentencing laws indirectly enhance the prosecutor's control. Under Structured Sentencing, the defendant's prior record level and the offense class of the current conviction determine the possible outcome of a case - the sentence disposition and range. Consequently, how a defendant ends up in a particular cell in the felony punishment chart becomes the basis for negotiation. In order to significantly affect a defendant's final sentence, it is necessary to impact the offense of conviction and/or the prior record level. Statutorily a defendant's prior record level is not negotiable and, in fact, respondents indicated during interviews that it is never the subject of plea negotiations. Therefore, the offense of which the defendant is convicted is elevated in its importance and ultimately dictates, within a specified range, the outcome of the case. The prosecutor's authority to decide which charges to bring and what plea offer to make becomes even more important under Structured Sentencing.

Apart from the relative power of the individual actors and the way in which they interact is the underlying fact that the system involves individuals who may affect the processing of a case based on their own preconceptions, likes and dislikes. Repeatedly in field interviews when asked what factors a judge considers when crafting a sentence it was reported that "it depends upon the judge." Despite the fact that similarity appeared in the factors that each of these actors relied upon, the weight they assign to them and the manner in which they interpret them varied. For example, whereas for some judges the identification of a substance abuse problem in the defendant would lead them to sentence the defendant to a community sanction where treatment was available, other judges would not make their decision based on this factor but would see that the defendant receive treatment in conjunction with the underlying sentence.

Finally, responses from those interviewed in the six sites did not indicate that offender demographics, such as sex and race, play a role in the processing and disposition of felonies. However, a group of loosely related social and socioeconomic factors such as family background, education, stable employment, ability to pay restitution, and general demeanor and "attitude" were often mentioned as considered by court officials, and may lead to disparate treatment of offenders. Further study is warranted whether these factors, closer to the general

construct of “socioeconomic status,” and which may correlate with race, do in turn play a role in the case disposition process. Unfortunately, for this study, data about offenders’ socioeconomic status was not available.

CHAPTER 4

OFFENDER PROFILE

The aggregate statistical analysis presented in Chapters 4 and 5 is based on criminal indictments, convictions and sentences entered into the Administrative Office of the Courts Criminal Information System during FY 1999/00. It includes 27,015 cases in which the offenders were indicted for felonies and convicted in that time frame.

In profiling the population of offenders, descriptive statistics are presented by offender sex and race – two variables considered "legally irrelevant" (or extralegal) in determining the various outcomes in processing a case through the criminal justice system. Race was defined as a dichotomous variable – white and non-white – with the small percentages (up to 5%) of Hispanic, American Indian and Other race/ethnic groups combined, for analytic purposes, with the non-white group. The study also presents some findings on a third demographic variable: offender age.

A STATISTICAL PROFILE OF FY 1999/00 CONVICTIONS

There has been much discussion in North Carolina and nationwide about the overrepresentation of racial and ethnic minorities in the criminal justice system. The concept itself is problematic and often ill-defined. The most common usage of the term compares the ratio of a specific minority in the general population with the ratio of that minority in the prison system. While blacks comprise approximately 22% of North Carolina's population, they constitute 65% of its convicted felons and 63% of its prison population.[46] Alternative definitions use as a baseline the ratio of all crimes committed by a minority group, compared to the relative representation of that group within all those arrested, prosecuted, convicted, or sentenced to incarceration. However, baseline data on all crimes committed are usually not available, and in any case were outside the scope of the current study.

As a further caveat, the terms "overrepresentation" and "disparity" should not be used interchangeably. Disparity, in the criminal justice context, refers to a series of unfavorable decisions in a case where the minority status of the offender (or any other specified extralegal factor) is used to arrive at the decision. Within the initial sample of convictions for this study, which includes all cases charged as felonies for FY 1999/00, males and non-whites were heavily overrepresented compared to the composition of the state's population. The question addressed in this and the following chapter is whether, within this initial overrepresentation, disparate decisions were made in the processing and disposing of cases in consideration of an offender's sex, race and other legally irrelevant factors. While the statistics presented in this chapter are informative and provide a snapshot of aspects of case processing and outcome by race and by gender, conclusions about whether there is disparate treatment of offenders should not be made based solely on these descriptive findings. A more thorough examination of the impact of

[46] Figures based on 2000 data from the Census Bureau and the NC Department of Correction.

extralegal factors on decisions is attempted in the multivariate analyses (Chapter 5), accounting and controlling for the combined effect of multiple factors, such as offense seriousness and the offender's prior record.

Of the sample population of 27,015 convictions in FY 1999/00, 86.6% were male and 64.7% were non-white. Table 1 and Chart 1 display the disposition of all cases by offender sex and offender race. White offenders received prison terms less often than non-white offenders (an active rate of 27.5% versus 34.6%, respectively), as did female offenders compared to their male counterparts (active rates of 14.6% versus 34.8%, respectively). In absolute numbers, of the 27,015 cases 8,664 offenders were sentenced to prison: 2,626 white and 6,038 non-white offenders; 8,137 males and 527 females.

While the active rate for all cases was 32.1%, it was 32.7% for cases falling in discretionary cells of the sentencing grid, where both active and suspended sentences are authorized.

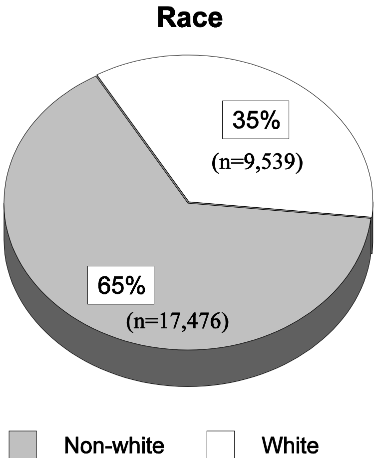
Further analysis of dispositions by offense class (*see* Table 2) demonstrated that the greatest differences between whites and non-whites in the rate of active sentences occurred in Class E (42.7% for whites compared to 48.1% for non-whites), Class H (25.0% versus 32.4%), and Class I (9.1 versus 15.0%). Women were less likely to receive prison terms than men in Offense Classes B2 through I.

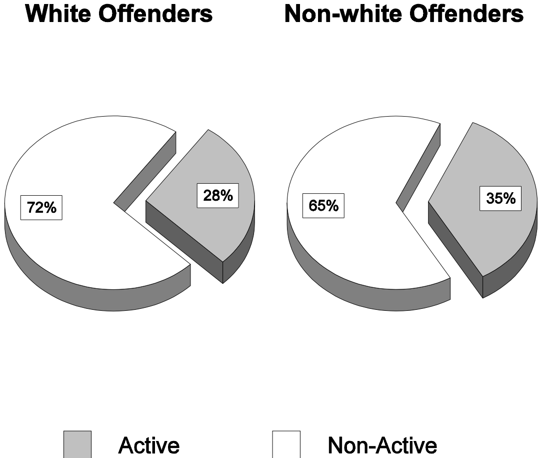
Table 1
Type of Disposition by Offender Race and Sex

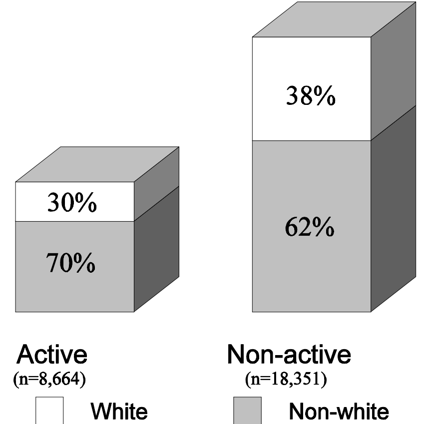
Type of Disposition	Race		Sex		Total	
	White	Non-white	Male	Female	%	N
% Active	27.5	34.6	34.8	14.6	32.1	8,664
% Intermediate	39.9	39.2	39.6	38.6	39.5	10,666
% Community	32.6	26.2	25.6	46.8	28.4	7,685
TOTAL	100.0 (9,539)	100.0 (17,476)	100.0 (23,403)	100.0 (3,612)	100.0	27,015

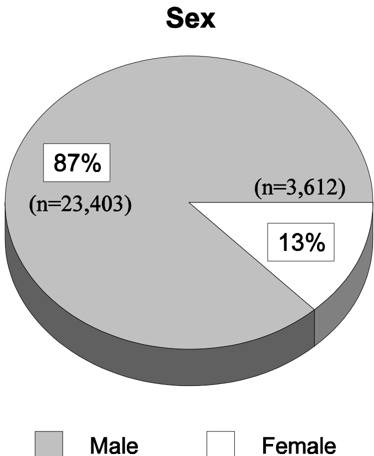
SOURCE: NC Sentencing Commission felony convictions data set for FY 1999/00.

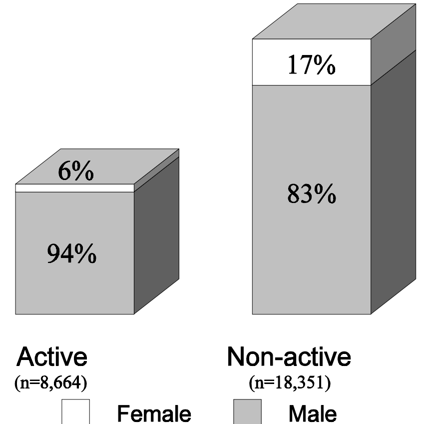
Chart 1
Type of Punishment by Race, Sex











SOURCE: NC Sentencing and Policy Advisory Commission felony convictions data set for FY 1999/00

Table 2
Percent Active Sentence by Offense Class and Offender Race and Sex

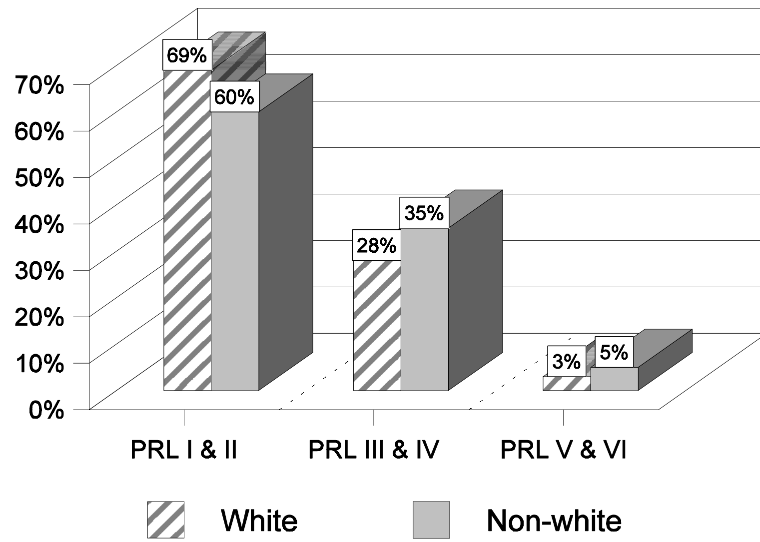
Offense Class	Percent Active Sentence				Total	
	By Race		By Sex			
	White	% Non-white	Male	Female	%	N
B1	98.6	100.0	99.2	100.0	99.2	120
B2	97.6	99.4	99.2	94.7	98.8	257
C	98.9	98.4	98.6	97.3	98.5	663
D	94.6	97.0	96.9	90.0	96.5	744
E	42.7	48.1	48.5	25.2	46.2	1,058
F	44.3	43.1	44.6	32.3	43.7	1,805
G	40.5	41.9	43.5	21.4	41.6	3,054
H	25.0	32.4	32.0	14.3	29.6	11,213
I	9.1	15.0	14.4	6.4	12.9	8,101
TOTAL	27.5	34.6	34.8	14.6	32.1	27,015

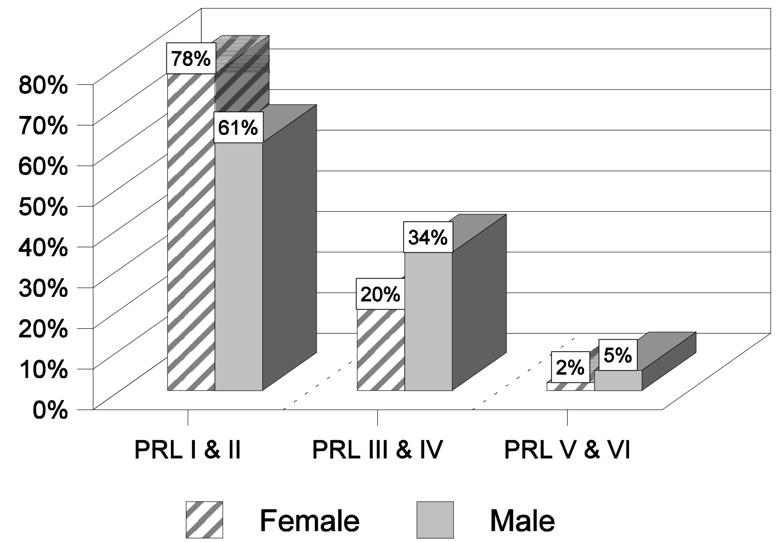
SOURCE: NC Sentencing Commission felony convictions data set for FY 1999/00.

The length of prison terms imposed varied considerably by offender sex: the average minimum sentence for men was 35.3 months compared to an average of 27.9 months for women. (*See* Table 3.) This difference held true in all offense classes except B1. Differences in sentence lengths between the two race groups by offense class were both less consistent and less pronounced. Overall, the average prison term was 36.7 months for white offenders and 34.1 months for non-white offenders.

Under Structured Sentencing, the two main components in determining the disposition and duration of an offender's sentence are the seriousness of the offense (Offense Class) and the criminal history of the offender (Prior Record Level). Therefore, differences by race or by sex in the severity of sentences could be explained by differences among these groups in offense classes and prior record. In interpreting the findings in the previous tables, it is important to examine the prior record distribution of the offender population by race and sex, presented in Table 4 and Chart 2. Considerably more females than males (78% versus 60.8%) and more whites than non-whites (68.7% versus 60.1%) were concentrated in Prior Record Levels I and II, meaning that sentences for these groups were more closely correlated with the severity of their current offense and less driven by add-on penalties for their prior criminality.

Chart 2
Prior Record Levels by Race, Sex





SOURCE: NC Sentencing and Policy Advisory Commission felony convictions data set for FY 1999/00

Table 3
Average Minimum Sentence by Offense Class and Offender Race and Sex

Offense Class	Average Minimum Sentence (in months)				Total
	Race		Sex		
	White	Non-white	Male	Female	
B1	262.2	259.5	261	267	261.2
B2	177.1	178.8	179.2	165.8	178.3
C	94.8	93.3	94.3	83.3	93.7
D	70.2	72.5	72.2	66.5	72.0
E	32.1	32.6	32.7	28.2	32.5
F	19.3	20.3	19.8	19.4	19.8
G	16.6	16.8	16.9	13.5	16.7
H	10.6	11.6	11.4	9.4	11.2
I	11.9	12.5	12.8	7.6	12.4
TOTAL	36.7	34.1	35.3	27.9	34.9

SOURCE: NC Sentencing Commission felony convictions data set for FY 1999/00.

Table 4
Prior Record Level by Offender Race and Sex

Prior Record Level	Race		Sex		Total	
	White	Non-white	Male	Female	%	N
I	29.0	23.3	23.5	37.2	25.3	6,838
II	39.7	36.8	37.3	40.8	37.8	10,209
III	18.0	21.7	21.4	14.2	20.4	5,508
IV	10.0	13.3	13.1	5.7	12.2	3,283
V	2.0	3.1	2.9	1.6	2.7	744
VI	1.3	1.8	1.8	0.5	1.6	433
TOTAL	100.0 (9,539)	100.0 (17,476)	100.0 (23,403)	100.0 (3,612)	100.0	27,015

SOURCE: NC Sentencing Commission felony convictions data set for FY 1999/00.

A special set of penalties under North Carolina law applies to habitual felons – offenders with three separate prior felony convictions and a current felony conviction. At the prosecutor's discretion, a qualifying offender, if also indicted and convicted as an habitual felon, will be sentenced in Offense Class C. Based on Department of Correction statistics, 3,336 offenders convicted in FY 1999/00 qualified for habitual offender status (*see* Table 5 and Chart 3).[47] Over 75% of those qualifying as habitual felons were non-white, greater than their 65% in the entire felon population. Overall, 14.6% of those eligible were actually convicted and sentenced as habitual felons – 13.4% of the eligible white offenders and 15% of the eligible non-white offenders.

Table 5
Habitual Felon Status by Offender Race and Sex

Eligible for Habitual Felon Status	Race		Sex		Total	
	White	Non-white	Male	Female	%	N
% Convicted as Habitual Felon	13.4	15.0	13.3	14.7	14.6	(487)
% Not Convicted as Habitual Felon	86.6	85.0	86.7	85.3	85.4	(2,849)
TOTAL	24.4 (813)	75.6 (2,523)	93.7 (3,126)	6.3 (210)	100.0	(3,336)

SOURCE: The North Carolina Department of Correction's OPUS data set for FY 1999/00.

A relevant factor in case processing and disposition is the type of legal representation afforded the offender. Over half of all sample offenders had court appointed counsel, another 18.5% had a public defender, and close to 24% hired a privately retained attorney (*see* Table 6). While there were no differences in the type of defense attorney by offender sex, white offenders were considerably more likely to have privately retained counsel while non-white offenders were more likely to have court appointed or public defender services. Table 7 shows the distribution of cases by defense attorney type for each combination of offense class and prior record level.[48] In general, offenders who retained a private attorney tended to be less serious felony offenders. For example, relative to offenders represented by court appointed counsel, a greater proportion of offenders who retained a private attorney fell into Prior Record Level 1 or II (59.6% versus 74.7%). Not only were these offenders less serious in terms of prior record level, they were also less serious in terms of offense seriousness. For example, relative to offenders represented by court appointed counsel, a greater proportion of offenders who retained a private attorney were convicted of non-violent (Class F – Class I) offenses (87.5% versus 91.8%).

[47] The court data set used in this study provides only a prior record point total for each offender, which cannot be disaggregated to determine the number of prior felony convictions. To estimate the pool of offenders eligible to be convicted as habitual felons (*i.e.,* having the three requisite prior felonies), the Department of Correction's Offender Population Unified System (OPUS) was utilized to ascertain an offender's number of prior felony convictions. Note that this method does not allow a determination of whether the qualifying prior convictions were each separate (each conviction obtained before commission of the next offense) and, as a result, it overestimates the actual pool of eligible offenders.

[48] For purposes of this analysis, "court appointed" also included public defender.

Chart 3
Offenders Eligible for Habitual Felon Status

SOURCE: The North Carolina Department of Correction's OPUS data set for FY 1999/00

Table 6
Type of Defense Attorney by Offender Race and Sex

Defense Attorney Type	Race		Sex		Total	
	% White	% Non-white	% Male	% Female	%	N
Court Appointed	50.5	55.1	53.5	53.2	53.5	14,446
Public Defender	14.5	20.7	18.4	19.2	18.5	5,007
Privately Retained	30.5	20.2	23.9	23.1	23.8	6,432
Waived	4.5	4.0	4.2	4.5	4.2	1,130
TOTAL	100.0 (9,539)	100.0 (17,476)	100.0 (23,403)	100.0 (3,612)	100.0	27,015

SOURCE: NC Sentencing Commission felony convictions data set for FY 1999/00.

Table 7
Most Serious Conviction Class and Prior Record Level by Defense Attorney Type

MOST SERIOUS CONVICTION CLASS	PRIOR RECORD LEVEL & ATTORNEY TYPE						TOTAL	
	I/II		III/IV		V/VI			
	Court Appointed	Privately Retained	Court Appointed	Privately Retained	Court Appointed	Privately Retained	Court Appointed	Privately Retained
	Percent and Number		Percent and Number		Percent and Number		Percent and Number	
B1	69.6 (n=71)	94.4 (n=17)	26.5 (n=27)	5.6 (n=1)	3.9 (n=4)	0.0 (n=0)	0.5 (n=102)	0.3 (n=18)
B2	71.6 (n=161)	80.0 (n=24)	24.9 (n=56)	20.0 (n=6)	3.5 (n=8)	0.0 (n=0)	1.2 (n=225)	0.5 (n=30)
C	30.5 (n=227)	50.0 (n=43)	54.2 (n=404)	45.4 (n=39)	15.3 (n=114)	4.6 (n=4)	3.8 (n=745)	1.3 (n=86)
D	64.0 (n=396)	76.5 (n=91)	30.8 (n=191)	21.0 (n=25)	5.2 (n=32)	2.5 (n=3)	3.2 (n=619)	1.9 (n=119)
E	74.5 (n=556)	90.0 (n=243)	22.3 (n=166)	8.2 (n=22)	3.2 (n=24)	1.8 (n=5)	3.8 (n=746)	4.2 (n=270)
F	63.4 (n=761)	79.4 (n=436)	33.2 (n=398)	19.1 (n=105)	3.4 (n=41)	1.5 (n=8)	6.2 (n=1,200)	8.5 (n=549)
G	51.5 (n=1,188)	68.1 (n=442)	43.6 (n=1,006)	30.8 (n=200)	4.9 (n=112)	1.1 (n=7)	11.9 (n=2,306)	10.1 (n=649)
H	60.1 (n=4,977)	72.0 (n=1,714)	35.1 (n=2,902)	26.0 (n=620)	4.8 (n=396)	2.0 (n=47)	42.5 (n=8,275)	37.0 (n=2,381)
I	62.0 (n=3,247)	76.9 (n=1,792)	32.6 (n=1,708)	21.5 (n=500)	5.4 (n=280)	1.6 (n=38)	26.9 (n=5,235)	36.2 (n=2,330)
TOTAL	59.6 (n=11,584)	74.7 (n=4,802)	35.2 (n=6,858)	23.6 (n=1,518)	5.2 (n=1,011)	1.7 (n=112)	100.0 (n=19,453)	100.0 (n=6,432)

Finally, Tables 8 and 9 examine the offender sample within the demographic context of their prosecutorial district, a regional entity comprised of one or more counties. A relatively larger proportion of non-white offenders than white offenders came from high population density districts (40.5% and 27.1%, respectively). There was also a direct correlation between the racial composition of district populations and the percent of non-white offenders among all offenders convicted in that district.

Table 8
District Context: Level of District Population Density by Offender Race and Sex

Level of District Population Density	Race		Sex		Total	
	White	Non-white	Male	Female	%	N
Low	36.5	31.7	33.4	33.9	33.4	9,029
Medium	36.4	27.8	30.7	31.6	30.8	8,327
High	27.1	40.5	35.9	33.5	35.8	9,659
TOTAL	100.0 (9,539)	100.0 (17,476)	100.0 (23,403)	100.0 (3,612)	100.0	27,015

SOURCE: NC Sentencing Commission felony convictions data set for FY 1999/00 and NC Office of State Planning 1999 Census projections.

Table 9
District Context: Percent Non-white Offenders by Percent Non-whites in District Population

Non-whites in District Population	Non-white Offenders in District
Up to 10%	32.6
20%	52.0
30%	69.7
40%	76.7
50%	80.7
60%	80.4
70%	86.3
Total	67.4 (17,476)

SOURCE: NC Sentencing Commission felony convictions data set for FY 1999/00 and NC Office of State Planning 1999 Census projections.

PLEA PATTERNS

Ninety-seven percent of felony convictions in North Carolina are obtained as a result of a guilty plea. Guilty pleas are important in the process because a defendant may plead guilty to the charged offense or may receive a reduction in charges. Charge reductions may occur in different ways. For example, a defendant may be convicted of a lesser included offense of the most serious charged offense, or if the defendant is charged with multiple offenses, the most serious charge may be dismissed and a conviction on one of the lesser remaining charges obtained.[49] Because the severity of charges determines, to a large extent, the sentence that results, charge reductions can have a significant effect on the type and severity of sentence offenders receive. Therefore, if charge reductions differ by the sex or race of the defendant, the plea process could be an important source of disparity.

Available data afforded some insights into the plea process by comparing the offense class of the most serious charged versus most serious convicted offense. Table 10 details charge to conviction patterns for the entire felon population, tracking each offense class of the most serious charge by the various offense classes of the most serious conviction in the case.[50] Tables 11 and 12 display the same patterns, controlling for offender race and offender sex, respectively. By identifying select criminal offenses within each offense class, the following analysis attempts to provide a picture of the more common plea patterns. The identified charged and resulting convicted offenses are meant to be examples and are not exclusive of other possible offense combinations.

Looking first at Table 10, a significantly large percentage of charges resulted in a convicted offense within the same offense class.[51] The lowest percentage of convictions within the same offense class was for Class B1 offense charges; still, 17.5% of Class B1 charges resulted in a conviction for a Class B1 offense. Class F offense charges resulted in the highest percentage of convictions in that same class, 64.7%. Across offense classes, there was no definitive pattern in the percentage of charges that actually result in a conviction within the same offense class. However, in offense classes B2 through E approximately one-third of the charges resulted in a conviction in the same offense class while more than fifty percent of charges in offenses F through I actually resulted in convictions for the same offense class. The fact that the more serious felony offense charges were more likely to be reduced may be explained by a number of considerations. First, there is more room to reduce a serious felony offense while still obtaining a felony conviction. Second, because there is a choice in sentence dispositions in the lower level felonies, it may be more common to negotiate a probationary sentence than to negotiate a charge reduction as part of a plea agreement, whereas in the high level felonies the type of sentence is non-negotiable with mandatory active sentences.

[49] From the court files used in this study, it was not possible to determine which of these avenues resulted in the most serious convicted offense.

[50] Class A felony offenses were excluded from this study.

[51] In these instances, it is likely that the defendant has either been tried and convicted of the original charge, or has entered a guilty plea in exchange for a negotiated sentence disposition and/or length or for dismissal of less serious charged offense(s).

Looking at those charges that resulted in a significantly large percentage of convictions in a lower offense class, it is possible to identify several possible patterns of reduction. In doing so it is helpful to consider the most common offenses for each class and the relationship of these offenses to each other (*e.g.*, is one a lesser included offense of the other, or do the two offenses address similar criminal conduct?). For example, 14.9% of Class B1 felony charges resulted in a conviction for a Class C felony. Considering common offenses for each of these classes, it is likely that this depicts a plea pattern of a charge of first-degree rape or first-degree sex offense (Class B1) being reduced to the lesser included offense of second-degree rape or second-degree sex offense (Class C). Most frequently, Class B1 felonies resulted in a conviction for a Class F felony (40.2%). This likely reflects a reduction from first-degree rape[52] or first-degree sex offense[53] or statutory rape or sexual offense of a 13, 14, or 15 year old[54] to the less serious, related offense of taking indecent liberties with a minor.[55]

A similar exercise can be undertaken for each charged offense class. Reviewing Class B2 felony offense charges for example, 5.7% resulted in a Class D felony conviction while 31.5% resulted in a Class F felony conviction. Class B2 offenses include second-degree murder as well as attempted first-degree rape, attempted first-degree sex offense and attempted statutory rape or sexual offense of a 13, 14, or 15 year old.[56] The reduction from a Class B2 to a Class D offense likely reflects a charge of second-degree murder resulting in a conviction of voluntary manslaughter, while the reduction to a Class F offense likely depicts the aforementioned attempted sexual offenses being reduced to the offense of taking indecent liberties with a minor.

It is interesting to note that for Classes B1 through D felony offenses that result in convictions for lower level felonies, the patterns of reduction push the largest percentage of convictions into felony Offense Classes E and below. In looking at the Structured Sentencing felony punishment chart, there are significant differences in sentence type and duration for Class D and above felony offenses. Any reduction from a Class B1 through D felony offense to a Class E or lower felony would result not only in a significant reduction in the possible sentence length but most likely would also open up additional disposition options beyond the active sentence mandated for Classes B1 through D offenses. In short, a defendant receives a big "break" when his felony charge is reduced from a Class D or above to a Class E or below.

---

[52] Where the victim is under the age of 13 years old and the defendant is at least 12 years old and is at least four years older than the victim. N.C.G.S. 14-27.2(a)(1).

[53] Where the victim is under the age of 13 years old and the defendant is at least 12 years old and is at least four years older than the victim. N.C.G.S. 14-27.4(a)(1).

[54] N.C.G.S. 14-27.7A(a).

[55] N.C.G.S. 14-202.1

[56] Under Structured Sentencing, an attempt to commit a felony is punishable as one class lower than the offense itself. N.C.G.S. 14-2.5.

Defendants receive another big "break" when felony charges are reduced to misdemeanors. According to Table 10, a significant number of felony charges resulted in misdemeanor convictions. Perhaps not surprisingly, 39.6% of Class H and 47.6% of Class I felony offense charges resulted in misdemeanor convictions. Of greater interest is the relatively high percentages of Class B1 through E felonies resulting in misdemeanor convictions. In fact, of all felonies, Class E charges resulted in the highest percentage of misdemeanor convictions, 49.0%. This likely reflects the Class E charges of assault with a deadly weapon inflicting serious injury and assault with a deadly weapon with intent to kill being reduced to a misdemeanor A1 assault.

Table 11 and Table 12 show the most serious charged offense class and corresponding most serious convicted offense class by race and sex, respectively. By comparing the percentages within the table for each category (white versus non-white, male versus female), it is possible to examine whether these demographic factors appear to influence common plea patterns.

Examining Table 11, the overall patterns for whites and non-whites are in fact quite similar to that of the entire sample. Whites were more likely than non-whites to be convicted as charged when the charged offense class was B1, B2, E and F. Non-whites were more likely than whites to be convicted as charged when the charged offense class was C, D, G and I. There was only a trivial difference in class H.

Patterns of reduction by race, however, seem to vary by offense class. More of the white offenders, for example, were convicted as charged in B1 (20.4% compared to 14.4% non-white), while more non-white offenders were reduced to a misdemeanor conviction (12.7% compared to 6.2% white). Non-white offenders charged with a Class D felony, on the other hand, were more likely to be convicted of a Class D felony than white offenders (33.6% compared to 22.2%).

As Table 12 demonstrates, the differences in plea patterns between male and female offenders were evident. In each charged offense class, female offenders were less likely to be convicted in the same offense class than their male counterparts and, in all but Classes B1 and B2, females were more likely to receive a misdemeanor conviction. For example, 31.6% of male offenders charged with a Class D felony were convicted of such compared to only 16.8% of similarly charged female offenders. Of those charged with a Class E felony, 69.3% of female offenders were convicted of a misdemeanor compared to 44.8% of male offenders. An analysis of Table 12 would lead one to conclude that an offender's sex is a factor that influences plea patterns. The degree to which female offenders receive a greater charge reduction than their male counterparts varies between classes.

As noted earlier, the data presented in this chapter describe the patterns of charge reduction that resulted among felony convictions in North Carolina. However, this analysis does not take into account other factors that may influence charge reductions and that may account for differences by race and sex (*e.g.*, guilty pleas, prior record, jurisdiction). Chapter 5 presents multivariate analyses of charge reductions and sentencing decisions in order to assess whether disparate treatment of offenders exists one these other factor are taken into account.

In this chapter, basic descriptive statistics and an analysis of plea patterns have been presented. Although informative, the findings are limited in directly testing whether and to what degree disparity may occur in the handling and sentencing of felony cases, because they fail to take into account important factors such as offense seriousness or the offender's prior criminal record. Chapter 5, using multivariate analysis, attempts to answer more definitively the question of whether there is evidence of disparate treatment of offenders based on their race or gender.

Table 10
Most Serious Charged and Convicted Offense Class

Charged Offense Class	Convicted Offense Class										Total	
	B1	B2	C	D	E	F	G	H	I	Misdemeanor	%	N
B1	**17.5**	4.6	14.9	4.3	5.2	40.2	0.6	0.5	2.9	9.3	100.0	(656)
B2	0	**39.3**	0	15.7	5.6	31.5	0	0	0	7.9	100.0	(89)
C	0	1.0	**33.1**	4.6	19.6	8.8	3.5	8.4	4.0	17.0	100.0	(1,636)
D	0	0.9	0.2	**30.5**	7.5	3.4	30.9	12.3	1.5	12.8	100.0	(1,858)
E	0	0.5	0.2	0.2	**35.4**	7.7	1.9	3.9	1.2	49.0	100.0	(1,452)
F	0	0.1	0	0	0.5	**64.7**	6.8	2.9	3.9	21.1	100.0	(1,741)
G	0	0.1	0.1	0	0.1	0.2	**62.1**	23.6	3.3	10.5	100.0	(3,442)
H	0	0	0	0	0	0.1	0.5	**50.8**	9.0	39.6	100.0	(19,173)
I	0	0	0	0	0	0	0	0.9	**51.5**	47.6	100.0	(11,614)

SOURCE: NC Sentencing Commission felony convictions data set for FY 1999/00

Table 11
Most Serious Charged and Convicted Offense Class by Offender Race

Charged Offense Class	Offender Race	Convicted Offense Class										Total	
		B1	B2	C	D	E	F	G	H	I	Misdemeanor	%	N
B1	White	**20.4**	5.2	12.8	3.8	7.3	40.5	0	0.6	3.2	6.2	100.0	(343)
	Non-white	**14.4**	3.8	17.3	4.8	2.9	39.9	1.3	0.3	2.6	12.7	100.0	(313)
B2	White	0	**47.4**	0	13.2	5.3	31.6	0	0	0	2.6	100.0	(38)
	Non-white	0	**33.3**	0	17.6	5.9	31.4	0	0	0	11.8	100.0	(51)
C	White	0	0	**30.3**	5.0	21.5	13.2	1.2	7.1	3.5	18.3	100.0	(423)
	Non-white	0	1.3	**34.1**	4.5	18.9	7.3	4.4	8.8	4.2	16.6	100.0	(1,213)
D	White	0	0.6	0	**22.2**	8.6	4.5	29.8	16.4	1.6	16.4	100.0	(513)
	Non-white	0	1.0	0.3	**33.6**	7.1	3.0	31.3	10.7	1.5	11.4	100.0	(1,345)
E	White	0	0	0.2	0	**38.0**	7.4	0.8	3.4	1.2	49.1	100.0	(502)
	Non-white	0	0.7	0.2	0.3	**34.0**	7.9	2.4	4.1	1.2	49.2	100.0	(950)
F	White	0.1	0.2	0	0.1	0.3	**65.4**	8.0	3.3	2.8	19.8	100.0	(964)
	Non-white	0	0	0	0	0.8	**63.8**	5.0	2.4	5.3	22.6	100.0	(777)
G	White	0	0	0	0	0.2	0.2	**56.1**	21.8	3.1	18.6	100.0	(642)
	Non-white	0	0.1	0.1	0	0	0.2	**63.5**	24.0	3.4	8.6	100.0	(2,800)
H	White	0	0	0	0	0	0.1	0.1	**50.0**	4.7	45.3	100.0	(7,751)
	Non-white	0	0	0	0	0	0.1	0.8	**51.3**	11.9	35.8	100.0	(11,422)
I	White	0	0	0	0	0	0	0	0.7	**48.2**	51.1	100.0	(5,012)
	Non-white	0	0	0	0	0	0	0.1	1.0	**53.9**	44.9	100.0	(6,602)

SOURCE: NC Sentencing Commission felony convictions data set for FY 1999/00.

Table 12
Most Serious Charged and Convicted Offense Class by Offender Sex

Charged Offense Class	Offender Sex	Convicted Offense Class										Total	
		B1	B2	C	D	E	F	G	H	I	Misdemeanor	%	N
B1	Male	**18.0**	4.6	15.2	4.3	5.1	39.3	0.6	0.5	2.9	9.5	100.0	(631)
	Female	**4.0**	4.0	8.0	4.0	8.0	64.0	0	0	4.0	4.0	100.0	(25)
B2	Male	0	**39.5**	0	16.3	5.8	30.2	0	0	0	8.2	100.0	(86)
	Female	0	**33.3**	0	0	0	66.7	0	0	0	0	100.0	(3)
C	Male	0	1.1	**33.5**	4.5	19.4	8.9	3.7	8.7	4.3	16.0	100.0	(1,521)
	Female	0	0	**28.7**	5.2	21.7	7.0	1.7	4.3	0.9	30.4	100.0	(115)
D	Male	0	0.9	0.2	**31.6**	7.5	3.0	31.0	12.0	1.5	12.4	100.0	(1,716)
	Female	0	1.4	0	**16.8**	7.7	8.4	30.1	16.1	2.1	17.5	100.0	(143)
E	Male	0	0.6	0.3	0.3	**37.7**	8.6	2.2	4.3	1.3	44.8	100.0	(1,198)
	Female	0	0	0	0	**24.4**	3.5	0.4	2.0	0.4	69.3	100.0	(254)
F	Male	0.1	0.1	0	0.1	0.5	**65.1**	6.8	2.9	4.0	20.4	100.0	(1,629)
	Female	0	0	0	0	0.9	**58.0**	5.4	3.6	2.7	29.5	100.0	(112)
G	Male	0	0.1	0.1	0	0.1	0.2	**62.6**	23.7	3.1	10.2	100.0	(3,098)
	Female	0	0	0	0	0	0	**58.4**	22.4	5.5	13.7	100.0	(344)
H	Male	0	0	0	0	0	0.1	0.5	**53.2**	9.5	36.6	100.0	(15,766)
	Female	0	0	0	0	0	0.1	0.2	**39.5**	6.8	53.5	100.0	(3,407)
I	Male	0	0	0	0	0	0	0.1	0.9	**52.9**	46.1	100.0	(8,932)
	Female	0	0	0	0	0	0.1	0	0.8	**46.8**	52.2	100.0	(2,682)

SOURCE: NC Sentencing Commission felony convictions data set for FY 1999/00.

CHAPTER 5

A MULTIVARIATE ANALYSIS OF FACTORS RELATED TO CHARGING AND SENTENCING OUTCOMES[57]

The descriptive statistics in Chapter 4 profiled offenders convicted under Structured Sentencing during FY 1999/00. These aggregate data provided an overall picture by describing offenders in terms of offense seriousness (charged and convicted offense), criminal history, race, sex and defense attorney type. The descriptive analysis uncovered interesting findings, particularly those related to charge bargaining practices. Using multivariate techniques, this chapter further explores these findings by examining the individual impact of a variety of factors such as offense seriousness, criminal history, sex and race on charging and sentencing outcomes.

MULTIVARIATE ANALYSIS: A BRIEF DISCUSSION

A regression model is a statistical tool used to estimate the association of a number of independent variables (*e.g.*, age, sex, or offense seriousness) with a dependent variable (*e.g.*, receiving a charge reduction), holding constant the contribution of other variables in the model. For example, this analysis tests whether the sex of the offender is related to an offender's probability of receiving a charge reduction, controlling for other factors such as age, race or criminal history. It also indicates the strength of the relationship between each factor in the model and the decision examined.

Using data for convictions that occurred under Structured Sentencing in FY 1999/00, logistic and ordinary least-squares regression were used to model how legal and extralegal factors affect a number of charging and sentencing outcomes.[58] The regression models show the relationship, if any, between the independent variables and the dependent variable analyzed in each model. *Although the analyses may reveal a relationship exists, it does not necessarily mean that an independent variable (e.g., sex) is the cause of the particular outcome (e.g., the offender received a charge reduction). Rather, it indicates that a statistical association exists that is not accounted for by the other variables included in the analysis.*[59]

---

[57] Dr. Rodney L. Engen of the Department of Sociology and Anthropology at North Carolina State University provided technical assistance in the development of the regression models used in the multivariate analysis, in partial compliance with a contract with the North Carolina Sentencing and Policy Advisory Commission.

[58] Logistic regression involves regression using the logit (*i.e*., the logarithm of the odds) of an outcome occurring. This type of analysis is most appropriate for regression models with a dichotomous dependent variable such as receiving a charge reduction or not. Ordinary least-squares regression is most appropriate for regression models with a continuous dependent variable such as the length of a prison sentence.

[59] The effects were converted from logistic model coefficients and indicate the estimated increase or decrease in the probability of an outcome occurring, which is associated with each independent variable for the average offender. See Aldrich and Nelson (1984: 41-44) for further information on converting logistic coefficients to "effects." *See* Appendix C for logistic coefficients for each model.

Dependent Variables (Outcome Measures) Modeled

Regression analysis was used to model the following four dependent variables:

< *Misdemeanor conviction* – whether an offender charged with a felony is convicted of a misdemeanor;
< *Charge reduction* – whether an offender convicted of a felony received a charge reduction to a less serious felony;
< *Active sentence* – whether an offender convicted of a felony received an active sentence (*i.e.*, incarceration); and
< *Sentence length* – the minimum sentence length imposed for those felons who received an active sentence (*i.e.*, incarceration).

Independent Variables Used in the Regression Models

The independent variables used in the regression models can be grouped into sets of legal and extralegal factors.

1. Legal Factors[60]

< *Offense seriousness* - the offense class of the offender's most serious charge and the offense class of the offender's most serious conviction
< *Type of offense* - person, property, non-trafficking drug or other type of offense
< *Criminal history* - whether the offender had at least one prior felony or misdemeanor conviction or, where applicable, the offender's prior record level
< *Charge reduction* - the number of felony offense classes the charge was reduced
< *Presumptive sentence* – the mathematical midpoint of the sentencing range for a given cell on the felony punishment chart

2. Extralegal Factors[61]

Demographic
< *Offender's age at sentencing*
< *Offender's sex*
< *Offender's race*

[60] Cases where the judge must impose either a sentence of life without parole (Class A or Violent Habitual Felon convictions) or a death sentence (Class A convictions) were excluded from the regression analyses. Since this study focused on sentencing practices under the Structured Sentencing Act, drug trafficking cases, which are subject to mandatory minimum sentences and are not covered under the Act, were excluded from the regression analyses. Since this study focused on sentencing practices under the Structured Sentencing Act, drug trafficking cases, which are subject to mandatory minimum sentences and are not covered under the Act, were excluded from the regression analyses.

[61] Cases where the offender's age was missing were excluded from the analyses. Race was collapsed into two categories, white and non-white. Black, Hispanic, Asian and American Indian offenders as well as offenders with an "other" or "unknown" race were included in the non-white category.

< *Jurisdictional characteristics* - population density of each prosecutorial district and racial composition of residents in each prosecutorial district as measured by the percent of non-white residents.[62] The models also include variables for judicial divisions. As a whole, jurisdictional characteristics are included to account for regional variation.

Systemic

< *Defense attorney type*

< *Mode of disposition*[63]

SUMMARY OF FINDINGS

The following is a discussion of the major findings from the four regression models. For purposes of discussion, only findings that are statistically significant (meaning that it is highly unlikely that the findings are the result of random variation in sampling or chance) are reviewed.

The regression models in this chapter treat each sentencing outcome as an independent event; however, each outcome should be viewed as part of a progressive process from charging to sentencing. At each stage of the process, an offender may be afforded certain opportunities or "breaks" which affect his sentencing outcome. This study attempts to determine how certain legal and extralegal factors are related to an offender's chance of receiving each of these "breaks." In the analyses, the first two "breaks" involve the charging decision.[64] The first "break" for an offender is receiving a misdemeanor conviction from a felony charge. The second "break" for an offender is receiving a charge reduction to a less serious felony. The third "break" in the process involves the punishment decision, where the offender receives a probation sentence versus an active sentence (*i.e.*, incarceration). And finally, the fourth "break" is measured by the severity of the sentence length for those offenders who receive an active sentence.

---

[62] Population density and racial composition for each prosecutorial district were determined by using 1990 Census information from the North Carolina Office of State Planning. To estimate these statistics for 1999, the Office of State Planning projected and revised the 1990 Census data by sample study. Population density is defined as population per square mile. The resulting densities were divided into thirds to arrive at low (35 - 145), medium (150 - 343) and high density (447 - 1,217) designations for each district. The racial composition of each district is expressed as the percentage of non-white residents. For purposes of these analyses, the percentage of non-white residents was collapsed into seven categories in increments of 10%. For example, prosecutorial districts in the lowest category (1) fell into 1%-10% range of non-white residents. Prosecutorial districts in the highest category (7) fell into the 61% - 70% range of non-white residents.

[63] While the percentage of jury trials in a year is small (2%-3%), opting for a jury trial has been found to consistently impact case outcomes.

[64] This study focuses on the prosecutor's charging decision. Therefore, the charges examined are not necessarily the original charges brought forth by law enforcement.

Figure 1
Stages in the Charging and Sentencing Decision-making Process

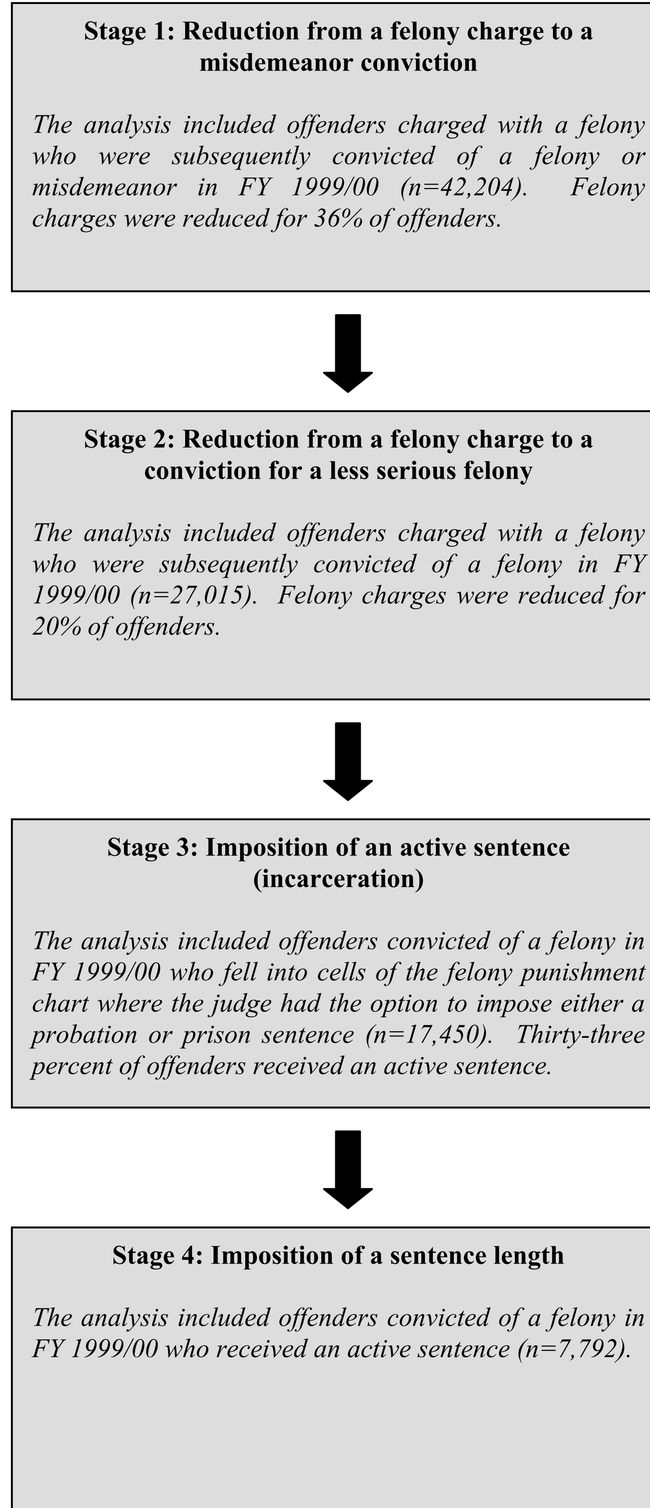


Table 13 shows the effects of legal and extralegal factors on the probability of three outcomes: conviction of a misdemeanor reduced from a felony charge (Model 1), conviction of a less serious felony (Model 2), and receiving an active sentence (Model 3). Table 14 shows how certain legal and extralegal factors may affect the severity of the minimum sentence imposed (Model 4). *While this study does not attempt to measure the degree to which these "breaks" are cumulative, it is clear that effects from each stage may be compounded throughout the entire charging and sentencing process and may have a much greater impact than the analyses show.*

Model 1: The Probability of Receiving a Misdemeanor Conviction from a Felony Charge

The first stage of the charging and sentencing process examined in this study is the decision to reduce charges from felony to misdemeanor. All offenders charged with a felony offense who were subsequently convicted of either a felony or a misdemeanor during FY 1999/00 were included in this analysis (n=42,204). The analysis examined whether reduction of a felony charge to a misdemeanor conviction was related to the legal and extralegal factors described in the previous section. Model 1 in Table 13 presents the estimated effect of each legal and extralegal factor on the probability that an offender charged with a felony is ultimately convicted of a misdemeanor as the highest charge. It should be noted again that only statistically significant findings are discussed in this section and presented in Table 13.

The analysis revealed that 36% of offenders charged with a felony were convicted of less serious misdemeanor offenses, and that these charge reductions were related to a number of legal and extralegal factors. The values presented for Model 1 indicate the approximate change in the probability of a misdemeanor conviction associated with each independent variable relative to a reference category. As expected, the seriousness of the charge impacted the probability of an offender receiving a misdemeanor conviction. These effects ranged from about a 7% to a 32% decrease in the probability of receiving a misdemeanor conviction from a felony charge, based on the charged offense class. For example, offenders charged with a Class H felony were 15% less likely to receive a misdemeanor conviction than offenders charged with a Class I felony (the reference category). Similarly, offenders charged with a Class G felony were about 29% less likely to receive a misdemeanor conviction than offenders charged with a Class I felony. Generally speaking, the more serious the charge, the less likely a misdemeanor conviction becomes.

Independent of offense seriousness, the type of charge also affected the probability of receiving a misdemeanor conviction. Felony drug charges were the least likely to result in a misdemeanor conviction. The effect of person crimes appeared to be relatively small compared to property crimes (the reference category), reducing the probability of a misdemeanor conviction by only about 6%. This 6% reduction associated with crimes against persons was in addition to the already strong negative effect of offense seriousness.

In addition to offense-related factors, having at least one prior conviction had a strong negative effect on the probability of receiving a misdemeanor conviction from a felony charge.

Offenders having at least one prior conviction were about 13% less likely than those who had no prior convictions to receive a misdemeanor conviction from a felony charge.

Several extralegal factors also affected an offender's probability of receiving a misdemeanor conviction from a felony charge. In general, older offenders and male offenders charged with a felony offense were less likely to receive a misdemeanor conviction. The offender's race had no effect in this analysis.

The analysis also considered other extralegal factors, such as the racial composition and population density of each prosecutorial district as well as the judicial division of conviction, in order to account for regional variations. In general, offenders convicted in districts with a higher minority population were less likely to receive a misdemeanor conviction from a felony charge. Offenders convicted in high density districts were about 10% more likely than those in low density districts to receive a misdemeanor conviction from a felony charge.

Finally, the analysis also included other systemic factors that may affect the probability of receiving a misdemeanor conviction from a felony charge. Offenders who retained a private defense attorney were about 8% more likely than those who did not to receive a misdemeanor conviction from a felony charge. Offenders who opted for a jury trial were about 26% less likely to receive a misdemeanor conviction from a felony charge than those who pleaded guilty.

Model Summary

Legal and extra legal factors influencing the probability of receiving a misdemeanor conviction from a felony charge included:

- offense seriousness
- offense type
- criminal history
- age
- sex
- racial composition of prosecutorial district
- population density of prosecutorial district
- judicial division of conviction
- defense attorney type
- mode of disposition

Model 2: The Probability of Receiving a Felony Charge Reduction

The second stage of the charging and sentencing process examined in this study was the decision to reduce the severity of felony charges. All offenders charged with a felony offense who were subsequently convicted of a felony during FY 1999/00 were included in this analysis (n=27,015). Model 2 in Table 13 presents the estimated effects of each legal and extralegal

factor on the probability that an offender charged with a felony received a charge reduction to a less serious felony.

About 20% of offenders charged with a felony received a charge reduction to a less serious felony. Legal factors such as offense seriousness, offense type and criminal history each impacted the probability of this outcome. Offenders charged with a serious felony offense were more likely to receive a reduction to a lower level felony while offenders charged with a low level felony offense were less likely to receive such a reduction. This finding may reflect the nature of North Carolina's legal structure. As a practical matter, Model 1 (receiving a misdemeanor conviction from a felony charge) and Model 2 are not independent of each other. The "break" for offenders charged with low level felonies may be receiving a charge reduction to a misdemeanor (Model 1). The offenders remaining in Model 2 are those who did not receive this reduction. In addition, there must be a lesser included charge available for an offender to receive a charge reduction. In the low level felony offense classes there is less opportunity to bargain a charge down to an even lower level felony. In this instance, it may be the case that offenders charged with low level felonies negotiate a "break" in the type of punishment (*e.g.*, probation instead of prison) instead of a "break" in the charge.

Controlling for all other factors, the type of charge also affected an offender's probability of receiving a charge reduction. Again, felony drug charges were the least likely to result in a charge reduction. Having any criminal history decreased an offender's probability of receiving a charge reduction by about 12 - 14% across Prior Record Levels II - VI.

As in Model 1, extralegal factors such as age and sex also impacted this outcome. In general, older offenders and male offenders charged with a felony offense were less likely to receive a reduction to a less serious felony. The offender's race had no effect in this analysis.

In order to account for regional variations in punishment, the analysis also considered the racial composition and population density of each prosecutorial district as well as the judicial division of conviction. Each of these extralegal factors impacted the probability of receiving a charge reduction. Offenders convicted in districts with a higher minority population were less likely to receive a charge reduction. Relative to offenders convicted in low density districts, offenders convicted in medium density districts were nearly 3% more likely to receive a charge reduction. Offenders convicted in high density districts were about 13% more likely than offenders convicted in low density districts to receive a charge reduction.

The analysis also looked at the effects of two systemic factors. Offenders who retained a private defense attorney were nearly 14% more likely to receive a charge reduction than those who did not. Offenders who opted for a jury trial were about 19% less likely to receive a charge reduction than those who pleaded guilty.

Model Summary

Legal and extralegal factors influencing the probability of receiving a felony charge

reduction included:

- offense seriousness
- offense type
- criminal history
- age
- sex
- racial composition of prosecutorial district
- population density of prosecutorial district
- judicial division of conviction
- defense attorney type
- mode of disposition

Assessing the information on the charge reduction phase as a whole (Models 1 and 2), of all offenders initially charged with a felony (n=42,204), 56% received a reduction at conviction to either a misdemeanor or a lesser felony.

Model 3: The Probability of Receiving an Active Sentence (Incarceration)

The third stage of the charging and sentencing process examined in this study was the decision to impose an active sentence (incarceration). This analysis included offenders convicted of a felony offense under the Structured Sentencing Act during FY 1999/00 who fell into cells of the Structured Sentencing grid where the judge had the option to impose either a probation or prison sentence (n=17,450).[65] Model 3 in Table 13 presents the estimated effects of each legal and extralegal factor on the probability of an offender receiving an active sentence.

Nearly 33% of offenders who fell into discretionary cells of the sentencing grid received an active sentence. As expected, legal factors such as offense seriousness, the type of offense and criminal history were related to whether an offender received an active sentence. The analysis shows that the greater the seriousness of the felony offense, the greater the probability the offender will be sentenced to an active term of imprisonment. For example, offenders convicted of a Class G felony were about 7% more likely to receive an active sentence than were offenders convicted of a Class I felony (the reference category). Similarly, offenders convicted of a Class E felony were about 22% more likely to receive an active sentence than were offenders convicted of a Class I felony. In terms of offense type, offenders convicted of a drug offense were about 6% less likely than offenders convicted of a property offense (the reference category) to receive an active sentence. This finding may be due to the fact that under Structured Sentencing community-based punishment is emphasized for non-violent drug offenders, while prison resources are first reserved for violent and repeat offenders. Prior convictions had a strong effect on the probability of receiving an active sentence. For example, offenders in Prior

[65] The initial analysis of this sentencing outcome included all offenders convicted of a felony under Structured Sentencing during FY 1999/00. However, since there were so few cases where the presumptive active sentence was not imposed (2%) in cells where an active sentence is mandatory, the analysis focused on those cases in which the judge has the option to impose either probation or an active term of imprisonment.

Record Level II were about 14% more likely than offenders in Prior Record Level I (the lowest prior record level) to receive an active sentence. Offenders in Prior Record Level VI (the highest prior record level) were nearly 58% more likely than offenders in Prior Record Level I to receive an active sentence.

This model also considered the effect of the number of offense classes the offender's charge was reduced. In general, the greater the charge reduction, the more likely an active punishment becomes.

As the previous models show, several extralegal factors were related to the probability that an offender will receive an active sentence. Age and sex were significant: older offenders were less likely than younger offenders to receive an active sentence; males were nearly 13% more likely than females to receive an active term of imprisonment. The offender's race had no impact in this model. Other demographic factors such as racial composition of each prosecutorial district and judicial division of conviction also affected an offender's chance of receiving an active sentence. Offenders convicted in districts with a higher minority population were less likely to receive an active sentence. Population density had no effect.

Following the patterns of the previous models, two systemic factors, defense attorney type and mode of disposition, had a strong effect on the probability of receiving an active term of imprisonment. Offenders who retained a private attorney were about 11% less likely than those who did not to receive an active sentence. Offenders who opted for a jury trial were nearly 29% more likely than those who pleaded guilty to receive an active sentence.

Model Summary

Legal and extralegal factors influencing the probability of receiving an active sentence included:

< offense seriousness
< offense type
< criminal history
< charge reduction
< age
< sex
< racial composition of prosecutorial district
< judicial division of conviction
< defense attorney type
< mode of disposition

Model 4: The Length of the Minimum Active Sentence (Incarceration)[66]

The fourth and final stage of the charging and sentencing process examined in this study was the selection of a minimum sentence length from the available sentencing range. All offenders convicted of a felony offense under Structured Sentencing during FY 1999/00 who received an active sentence (n=7,792) were included in this analysis. Model 4 in Table 14 presents the estimated impact of each legal and extralegal factor on the severity of the minimum sentence imposed.[67]

As found in the previous models, legal factors such as offense seriousness, offense type and criminal history each impacted this sentencing outcome to some degree. Once the expected average sentence is controlled for, only offenders convicted of a Class B1 or Class B2 offense received sentences that were above those averages or midpoints of the felony punishment chart. Judges tended to impose an additional 19 months above the midpoint for offenders convicted of a Class B1 or Class B2 offense. However, considering offense seriousness in general, this analysis indicates that judges are reasonably comfortable with the sentence lengths prescribed by the felony punishment chart. In terms of offense type, offenders convicted of an offense against a person received sentences that were about three months longer than the expected average sentence while offenders convicted of an "other" offense received sentences that were nearly three months below the expected average sentence. Although the analysis accounted for the expected average sentence, criminal history still impacted the sentence length imposed by the judge. In other words, judges tended to impose sentences that were over and above the expected average sentence for offenders with prior convictions even though the sentence lengths prescribed by the felony punishment chart are based, in part, on criminal history. Offenders falling in Prior Record Level II or Prior Record Level III received sentences that were about two months longer than the expected average sentence. The greatest impact was for offenders falling in Prior Record Level VI whose sentences were nearly five months above the expected average sentence.

[66] In addition to analyzing the severity of the minimum sentence imposed, a linear regression model was developed to analyze the relative location or "spot" of the minimum sentence within the sentencing range. That is, controlling for all the independent variables in Model 4, what effect did these factors have on the relative location of the minimum sentence imposed by the judge? For purposes of this analysis, the sentencing range was defined as the shortest sentence length in the mitigated range through the longest sentence length in the aggravated range. The relative location of the minimum sentence length imposed or "spot" is expressed as a percentage from 0% (the lowest point in the mitigated range) to 100% (the highest point in the aggravated range). While several factors (*e.g.*, being male, having a prior criminal record, opting for a jury trial) impacted the "spot" chosen by the judge, as a whole most of the factors included in the model did not adequately explain the relative location of the minimum sentence length imposed.

[67] This model controls for an expected average sentence for each combination of offense class and prior record level (cell) on the felony punishment chart in order to estimate the impact of the independent variables above and beyond what is prescribed by the chart. The expected average sentences used in this analysis are calculated as the mathematical midpoints of the sentencing range of each cell.

Few extralegal factors considered in this model had an effect on the minimum sentence length imposed by the judge. The demographic factors of age, sex and race had no effect. As in all of the previous models, there were variations between judicial divisions in the length of the minimum sentence imposed. In addition to this regional difference, the minimum sentence imposed tended to be lower for offenders convicted in districts with higher minority populations. Population density had no effect in this model. Finally, as found in the previous models, defense attorney type and mode of disposition each affected the severity of the minimum sentence imposed. The minimum sentence imposed for offenders who retained a private attorney was one month shorter than for those who did not. The minimum sentence imposed for offenders who opted for a jury trial was about 11 months longer than for those who pleaded guilty.

Model Summary

Legal and extralegal factors influencing the length of the minimum sentence imposed included:

< offense seriousness
< offense type
< criminal history
< judicial division of conviction
< racial composition of prosecutorial district
< defense attorney type
< mode of disposition

OVERVIEW OF MODELS

It is clear from the analyses that a number of legal and extralegal factors are related to an offender's chance of receiving certain "breaks" with regard to felony case processing from the charging decision through the sentencing decision. Throughout the process, legal factors such as offense seriousness, offense type and criminal history appear to play a critical role in the decision to grant a "break" to an offender. For example, from the first "break" analyzed in this study (receiving a misdemeanor conviction from a felony charge) through the last "break" (length of sentence), offenders with a lengthy or more serious criminal history fair worse relative to those offenders who have little or no criminal history. As evidenced from these analyses, as well as from field interviews, criminal history has great bearing on the decision-making processes of judges and prosecutors in their willingness to grant "breaks" to offenders, and the impact of these decisions has a cumulative effect on the offender.

OVERVIEW OF MODELS (continued)

It may seem obvious that legal factors such as criminal history are given special consideration by judges and prosecutors in their decision-making processes. Less obvious and more troublesome is the role of extralegal factors such as age, sex, and attorney type, for example. The composition of the prison population may suggest that race is a factor judges and prosecutors consider when offering "breaks;" however, the analyses offer no support to this notion. Other extralegal factors that seem to be critical throughout the charging and sentencing process include not only demographics such as age, sex and judicial division of conviction but also systemic factors such as defense attorney type and mode of disposition. For example, throughout the charging and sentencing process, male offenders are considerably less likely than female offenders to receive "breaks." Another interesting and consistent finding is the impact of the offender's judicial division of conviction. Although one goal of Structured Sentencing is to improve fairness and certainty in punishment across the state, it seems as if some fairly substantial variation in punishment exists between judicial divisions. And finally, while it is a defendant's constitutional right to a trial by jury, it appears from the analyses as well as from field interviews, that offenders who opted for a jury trial fair much worse that those who pleaded guilty. It should also be noted that the impact of these extralegal factors on the decision-making processes of judges and prosecutors is cumulative: males were not only less likely than females to receive a misdemeanor conviction from a felony charge or receive a charge reduction to a less serious felony, but once convicted, they were more likely to receive an active sentence.

In summary, it is clear that the decision-making processes of judges and prosecutors are complex, balancing the demands from the public for justice and safety with the realities of limited judicial and prosecutorial resources. As such, judges and prosecutors use their discretion to grant "breaks" to certain offenders in order to maintain this delicate balance. This chapter describes which offenders, based on legal and extralegal characteristics, are more likely to receive such "breaks." The analyses confirm what field interviews revealed, that legally relevant factors, such as offense seriousness and criminal history, are important factors considered by judges and prosecutors in making decisions favorable to the offender. However, what is of possible concern is the apparent influence of extralegal factors such as age, sex, judicial division of conviction, defense attorney type and mode of disposition.

TABLE 13

Effect of Legal and Extra Legal Factors on Charging and Sentencing Outcomes: Logistic Regression

	Estimated Effect on Probability of:		
	Model 1: Receiving a Misdemeanor Conviction from a Felony Charge (N=42,204) *Average probability of receiving a misdemeanor conviction from a felony charge=36.0%*	**Model 2: Receiving a Charge Reduction** (N=27,015) *Average probability of receiving a charge reduction=20.3%*	**Model 3: Receiving an Active Sentence (Incarceration)** (N=17,450) *Average probability of receiving an active sentence=32.7%*
Independent Variables			
Legal Factors:			
Charge Reduction (each offense class reduced)	N/A	N/A	1.9%
Offense Seriousness	**by Charged Offense**	**by Charged Offense**	**by Convicted Offense**
Class B1	-32.4%	13.9%	N/A
Class B2	-32.3%	*NS*	N/A
Class C	-26.8%	11.7%	N/A
Class D	-30.7%	*NS*	N/A
Class E	-7.2%	60.1%	22.4%
Class F	-26.4%	-11.8%	17.4%
Class G	-28.7%	-12.7%	6.9%
Class H	-15.0%	*reference category*	*NS*
Class I	*reference category*	-18.5%	*reference category*

TABLE 13 (cont.)
Effect of Legal and Extra Legal Factors on Charging and Sentencing Outcomes: Logistic Regression

	Estimated Effect on Probability of:		
	Model 1: Receiving a Misdemeanor Conviction from a Felony Charge (N=42,204) *Average probability of receiving a misdemeanor conviction from a felony charge=36.0%*	**Model 2: Receiving a Charge Reduction** (N=27,015) *Average probability of receiving a charge reduction=20.3%*	**Model 3: Receiving an Active Sentence (Incarceration)** (N=17,450) *Average probability of receiving an active sentence=32.7%*
Offense Type	**Charged Offense Type**	**Charged Offense Type**	**Convicted Offense Type**
Person	-5.8%	-7.4%	*NS*
Drug (Non-Trafficking)	-23.7%	-14.5%	-5.8%
Other	-6.4%	-12.7%	6.0%
Property	*reference category*	*reference category*	*reference category*
Criminal History			
At Least One Prior Conviction	-13.2%	N/A	N/A
Prior Record Level I	N/A	*reference category*	*reference category*
Prior Record Level II	N/A	-12.0%	14.3%
Prior Record Level III	N/A	-12.4%	38.2%
Prior Record Level IV	N/A	-13.5%	50.8%
Prior Record Level V	N/A	-13.3%	55.6%
Prior Record Level VI	N/A	-13.5%	57.5%

TABLE 13 (cont.)
Effect of Legal and Extra Legal Factors on Charging and Sentencing Outcomes: Logistic Regression

	Estimated Effect on Probability of:		
	Model 1: Receiving a Misdemeanor Conviction from a Felony Charge (N=42,204) *Average probability of receiving a misdemeanor conviction from a felony charge=36.0%*	**Model 2: Receiving a Charge Reduction** (N=27,015) *Average probability of receiving a charge reduction=20.3%*	**Model 3: Receiving an Active Sentence (Incarceration)** (N=17,450) *Average probability of receiving an active sentence=32.7%*
Extra legal Factors:			
Demographic			
Age (each year)	-0.07%	-0.2%	-0.2%
Male	-6.3%	-9.7%	12.5%
Non-white	*NS*	*NS*	*NS*
Percent Non-white in District (each 10% increase)	-2.8%	-3.6%	-1.2%
Low Density District	*reference category*	*reference category*	*reference category*
Medium Density District	*NS*	2.9%	*NS*
High Density District	10.2%	13.2%	*NS*
First Judicial Division	*reference category*	*reference category*	*reference category*
Second Judicial Division	-8.6%	-9.3%	-10.2%
Third Judicial Division	-5.2%	-12.2%	-11.5%
Fourth Judicial Division	-4.6%	-12.9%	-13.7%
Fifth Judicial Division	-13.4%	-16.0%	-15.7%
Sixth Judicial Division	-3.8%	-9.2%	-11.1%
Seventh Judicial Division	-20.6%	-17.7%	-14.1%
Eighth Judicial Division	-9.4%	-15.4%	-5.6%

TABLE 13 (cont.)
Effect of Legal and Extra Legal Factors on Charging and Sentencing Outcomes: Logistic Regression

	Estimated Effect on Probability of:		
	Model 1: Receiving a Misdemeanor Conviction from a Felony Charge (N=42,204) *Average probability of receiving a misdemeanor conviction from a felony charge=36.0%*	**Model 2: Receiving a Charge Reduction** (N=27,015) *Average probability of receiving a charge reduction=20.3%*	**Model 3: Receiving an Active Sentence (Incarceration)** (N=17.450) *Average probability of receiving an active sentence=32.7%*
Systemic			
Private Defense Attorney	8.0%	13.5%	-10.8%
Jury Trial	-26.1%	-19.3%	28.5%

Notes:
1. NS indicates that the effect is not statistically significant.
2. Effect on probability for offender with mean probability in data set.

TABLE 14
Effect of Legal and Extra Legal Factors on Sentencing : Linear Regression

	Dependent Variable
	Model 4: Minimum Active Sentence Length (Incarceration) (N=7,792)
Independent Variables	
Legal Factors:	
Charge Reduction (each offense class reduced)	*NS*
Offense Seriousness	
Class B1 Conviction	18.9
Class B2 Conviction	19.2
Class C Conviction	*NS*
Class D Conviction	*NS*
Class E Conviction	*NS*
Class F Conviction	*NS*
Class G Conviction	*NS*
Class H Conviction	*NS*
Class I Conviction	*reference category*
Offense Type	
Person Conviction	3.0
Drug Conviction	*NS*
Other Conviction	-2.7
Property Conviction	*reference category*
Criminal History	
Prior Record Level I	*reference category*
Prior Record Level II	*NS*
Prior Record Level III	2.1
Prior Record Level IV	2.5
Prior Record Level V	*NS*
Prior Record Level VI	4.5

TABLE 14 (cont.)
Effect of Legal and Extra Legal Factors on Sentencing : Linear Regression

	Dependent Variable
	Model 4: Minimum Active Sentence Length (Incarceration) (N=7,792)
Extra legal Factors:	
Demographic	
Age	*NS*
Male	*NS*
Non-white	*NS*
Percent Non-white in District (each 10% increase)	-0.6
Low Density District	*reference category*
Medium Density District	*NS*
High Density District	*NS*
First Judicial Division	*reference category*
Second Judicial Division	-3.1
Third Judicial Division	-1.8
Fourth Judicial Division	-2.4
Fifth Judicial Division	-2.8
Sixth Judicial Division	-2.1
Seventh Judicial Division	-2.7
Eight Judicial Division	-4.6
Systemic	
Private Defense Attorney	-1.0
Jury Trial	11.3

Notes:
1. Adjusted R-Square .9432
2. *NS* indicates that the effect is not statistically significant.
3. An additional independent variable representing the predicted probability of receiving a non-active sentence was also included in this model. It was found to be statistically significant with B=3.7.

CHAPTER 6

SUMMARY AND CONCLUSIONS

This study, conducted six years after the implementation of Structured Sentencing, set out to explore the processing of felony cases in North Carolina's criminal justice system and possible disparities in case disposition. Data were collected through interviews with field practitioners and statistical analysis of aggregate court records. It should be noted that the information used related only to cases convicted in Fiscal Year 1999/00 and originally charged as felonies. The analysis focused on these cases from charging to sentencing, and no data were available or collected on earlier steps in the process.

Given the discretionary nature of justice, the study first attempted to map out the decision points from charging to conviction and sentencing, with special attention to the amount of discretion exercised by various players in the system. Some basic statistics serve as markers to substantiate the discretionary nature of the process: 97% of all felony convictions were the result of a guilty plea; 56% of convicted cases originally charged as felonies received a reduction in charges (either to a misdemeanor or to a less serious felony); 67% of the cases where both incarceration and probation were authorized received community based sentences; 71% of all sentences were imposed in the presumptive, rather than the aggravated or mitigated, range; and active sentences, on the average, were lower than the midpoint of the duration authorized by law in the applicable cell of the Felony Punishment Chart.

A second, and not unrelated, issue the study examined aimed to identify some of the legal and extralegal criteria considered in reaching case-based discretionary decisions, with special attention to the goals of fairness and consistency in the process. Multivariate statistical methods allowed isolating the impact of various factors such as offender race or criminal history on case outcomes, *independent* of all the other factors for which data were available.

CASE PROCESSING AND DISCRETION

While specific findings are presented throughout the report, some general observations addressing the basic questions of this study are in order, and will be discussed in this chapter. As outlined in the introduction to the report, the issues raised center around the discretionary decisions characterizing the adjudication process, the actors making them, and the legal and extralegal factors influencing them in this process.

Felony processing decisions are both necessitated and delineated by a number of components, including North Carolina's criminal code, rules of evidence and structured sentencing laws, as well as systemic resources at the court and correctional level. One important fact that is evident is that, with a caseload too voluminous to be resolved in trials, plea bargains must be struck. Bargains can only be reached if outcomes are satisfactory to both sides. The bargains are expected to provide the government (and, by extension, the public) with the certainty of conviction and some punishment to the offender viewed as sufficient to satisfy

justice. These same bargains are also the vehicle for the offender and his attorney to exercise some degree of control over his fate by reducing the seriousness of the charges and/or the severity of the penalties attached.

From the perspective of most offenders, the legalities of case processing are relevant only in a utilitarian sense based on the final results. Given that acquittals were not within the scope of this study, the benefits sought by the convicted offender were primarily focused on the type of disposition, *i.e.,* an "in" or "out" sentence, and the duration and conditions attached to that sentence. A secondary outcome involved the type of convicted charges, as much for their future implications for the offender's accruing criminal history as for their impact on the current case.

While all main participants have significant input on the process, the prosecutor is the one with the most influence on the disposition of a case. Structured Sentencing possibly enhanced this influence further in a number of ways. The judge's discretion is now limited by a prescribed grid of penalties; the prosecutor's discretion in charging and plea bargaining is largely unrestricted by written policies or guidelines. With the authority to negotiate charges, which directly affect the sentence, and having no parole to later mitigate that sentence, the prosecutor has more control over outcomes than either the judge, or the defendant and his attorney. This power is further consolidated by an organizational component: while judges rotate among the various districts within their division, and defense attorneys usually work individually (except in the eleven districts with a public defender's office), the district attorney serves in his electing district, and he and his assistants are an organized entity with shared office policies and centralized accountability.

An interesting point is the contextual implications of various decisions. In districts where judges were less tolerant of sentence bargaining, for example, prosecutors were more likely to resort to charge reductions as a way to secure guilty pleas. Mitigation, aggravation, and consecutive sentences were seen as tools to be used by the actors in the system to arrive at a desired outcome. For example, judges indicated that they use consecutive sentences when, in their opinion, the sentence provided by the grid is too short or the defendant has received too much of a break through charge reduction. Prosecutors and defense attorneys used mitigated and aggravated sentences to offset the charge bargain. Judicial discretion, beyond the specific plea bargain, may also be influenced by the availability (and perceived quality) of the community-based sanctions in the district.

LEGAL AND EXTRALEGAL FACTORS AFFECTING THE PROCESS

In this outcome-oriented framework, the study identified one set of recurring factors that seemed to impact case processing. Primarily, this set included the *legally* most salient variables: offense type and seriousness, and prior record. While both components had a clear, significant and sizeable effect on the disposition of a case, criminal history appeared to carry added weight with prosecutors and judges as they arrive at discretionary decisions about the fate of the offender. It was especially clear at the sentencing phase, where disposition and duration were affected by the content of the offender's prior record, even though it has already been taken into account in the penalty structure prescribed by the State's Felony Punishment Chart.

Another set of factors, best described as *systemic*, also had clear implications for the case. Offenders who opted for a trial were found to receive less of the available "breaks" as they proceeded through the system. The same held true for offenders who could not afford retaining a private defense attorney, although the exact reasons for this finding were not clear and might be related to both the timeliness and caliber of representation.

A finding equally consistent but more complex to interpret was the relationship between the judicial district in which a case was processed and its disposition. Both prosecutors and judges are locally elected officials, clearly responding to local norms, perceptions and expectations about crime and punishment. An added element is the development of unique district-based court subcultures, integrating the community values with the personalities, priorities and work relations of court practitioners. These court subcultures can and do vary considerably, affecting case processing and disposition. Local jurisdictional variations, while explainable in a sociopolitical context, are in direct contrast with criminal laws that apply statewide and are expected to be implemented evenhandedly. A district's population density and racial composition were also significant in determining the outcomes for a case, although the reasons were not entirely clear.

Finally, and independent of all the legally relevant and systemic factors, cases were also impacted by offender *demographics*, such as gender and to a lesser degree age. This finding was especially significant in relation to gender: while controlling for offense seriousness, prior record and other pertinent factors, women were still treated much more leniently at every step of the process than were their male counterparts. While the courts might have socially weighty reasons for this differential, such as the presence of young dependent children or reduced culpability, the degree of difference might raise some concern.

Non-whites, in North Carolina and elsewhere, are overrepresented in the population of convicted offenders and prison inmates compared to their proportion in the general population. This study, however, found no differences in the way whites and non-whites were processed in the courts from charging to conviction and sentencing, when controlling for all the legally relevant factors in a case. One obvious explanation to this encouraging finding is that, in fact, there is no disparate treatment of offenders based on race in the criminal justice system. This, of course, neither rules out nor points to the possibility of disparate decisions at earlier steps of the process. Indications for another factor, possibly associated with race, were found however in the consideration practitioners give at times to socioeconomic components such as an offender's family situation and community ties, education and income, ability to make restitution, and general attitude and demeanor. While this study did not include data on socioeconomic indicators, their impact on justice and their possible link with race are worth further exploration.

As a final observation on the factors correlated with case processing, it should be noted that many of the effects of these factors are interrelated and cumulative. For example, a female offender on the average will have a greater chance to receive a charge reduction than a male offender and, in addition, will have a more favorable disposition within that reduced offense

class than male offenders sentenced in the same class. Similar cumulative effects on case outcome were observed in relation to defense attorney type and trial versus plea dispositions.

SUMMARY

As reported by this study, a large volume of felony cases is being moved through North Carolina's Superior Courts, with the majority being disposed primarily based on the seriousness of the convicted charges and the severity of the offender's prior record. The rules of the process are clearly set out in the structured sentencing laws. Knowledge of these rules by both sides allows them to try and negotiate an outcome – most often a compromise in the form of a plea bargain – acceptable to both. While all participants have some discretionary choices in this process, by far the greatest amount of power resides with the prosecutor. Ultimately, though, the system is composed of individuals, and even as they consider the same set of variables pertinent to the case, there is bound to be individual variation in the weight they assign to each variable in their deliberations.

In addition to legally prescribed considerations, a number of extralegal factors also seem to affect the fate of the offender. Most important of these are the prosecutorial district of adjudication, the mode of disposition (trial or guilty plea), the type of defense, the sex and age of the offender, and possibly some indicators of the offender's socioeconomic status.

The North Carolina Sentencing and Policy Advisory Commission's Sentencing Practices Study is the first of its kind in North Carolina and could serve as a baseline for further research. This baseline reveals a system of justice in which decisions are reached in a mostly evenhanded fashion and in primary consideration of the legal facts of the case. The research observed certain extralegal factors that may lead to differential treatment of similarly situated offenders; those should form the starting point for further research and continued public debate.

APPENDICES:

Appendix A- Sentencing Practices Protocol
Appendix B- List of References
Appendix C- Table: Logistic Regression Results of
Legal and Extra Legal Factors on Charging and
Sentencing Outcomes

APPENDIX A

Sentencing Practices Protocol (01/09/01)

NAME: **POSITION:** **LOCATION:**

INTRODUCTION

(General purpose statement for study.)

1. How long have you been working in the criminal justice system? How long in your current position? What other positions have you held in the criminal justice system?
2. What types of offenses do you usually handle? Are there any offenses you do not handle?
3. (For defense) What percentage of your cases are court appointed versus privately retained?

CHARGING AND TIME AWAITING TRIAL

1. Who makes the charging decisions in a case? How are these decisions made? Do charges accurately reflect the criminal conduct? Are multiple charges arising out of the same criminal conduct commonly brought? (For defense: At what point do you become involved in a case?)
2. Is the indicted charge ever different from the original charge (what law enforcement has charged)? When? For what reason(s)?
3. How often and in what type of case is an eligible defendant prosecuted as an habitual felon? Violent habitual felon?
4. What, if any, impact does an offender's inability to make bail or to meet pre-trial release conditions have on the way a case proceeds? Is ultimately resolved?

PLEA NEGOTIATIONS

1. Does the D.A.'s office have an official plea negotiation policy? If so, what is it?
2. Describe the plea negotiation process:
    < What charges are most likely to be dropped? reduced?
    < What charges are least likely to be dropped? reduced?
    < Are the number of counts negotiated (*e.g.*, agreeing to drop two counts if defendant pleads to the third)?
    < Do you/the prosecutor and the defense attorney/you ever agree upon which facts will be presented to the judge to support the plea agreement? If so, do these facts ever understate the offense?
    < What factor(s) determine whether you/the prosecutor offer/s a plea negotiation?
3. Is prior record calculation ever subject to negotiation? If so, how often? What information do you rely upon when determining whether to negotiate charges?
4. Is Habitual Felon or Violent Habitual Felon status used as a tool in plea negotiations?
5. Are sentencing enhancements used in plea negotiations? If so, how?
6. Why would a defendant choose to plead instead of exercising his right to a jury trial?

SENTENCING

1. Is it common to negotiate the type and duration of sentences as part of a plea agreement, and if so, do judges typically accept or reject the plea? In cells in which the judge has discretion to impose an active or probationary sentence, is it common for the defense and prosecution to make recommendations regarding sentencing?
2. When the grid provides a choice of sentence types, what factors do judges rely on in choosing a disposition? Do you think judges appropriately order intermediate and community sanctions – as opposed to active? Why?
3. Describe the type of case in which a mitigated or aggravated sentence is imposed. (*For judges*, In what types of cases would you impose a sentence from the mitigated range? the aggravated range?
   - < If supported by the evidence, are these factors always presented?
   - < In what type of case might you/the prosecutor seek an aggravated sentence?
   - < When might you/the prosecutor not oppose a mitigated sentence?
   - < When and how is extraordinary mitigation (or, in drug trafficking cases, substantial assistance) used?
   - < In what type of case are consecutive sentences considered/imposed?
4. Does the availability of community based options (*e.g.,* Day Reporting Centers, IMPACT, Intensive Probation) affect sentencing? If so, how?
5. How does a substance abuse problem bear upon the sentencing recommendation/sentence? Are there any other individual characteristics that affect the sentencing recommendation/sentence?
6. What, if any, impact does the active involvement by a victim in the case have on the manner in which a case is handled? Resolved?

GENERAL

1. What do you typically know about an offender? (race, gender, age, economic status)? Describe a typical offender. Has the makeup of offenders / offenses changed over the last (five/ten) years?
2. Do you have an inherent sense of what the appropriate punishment is for a particular type of criminal conduct? Can you provide some examples? Is SS consistent with what you think is appropriate punishment for these types of crimes, and if not, how are these inconsistencies resolved?
3. Under SS, which participant has the greatest influence on the final sentence (Judge, Prosecutor, or Defense Attorney)?
4. One of the reasons Structured Sentencing was enacted was to reduce sentencing disparity. Are there any reasons that you can think of for why offenders convicted of similar offenses with similar prior records might receive different sentences?

CLOSING COMMENTS

(Reiterate study purpose, attention to extralegal factors.)

APPENDIX B

List of References

Albonetti, Celesta A. 1991. "An Integration of Theories to Explain Judicial Discretion." *Social Problem*s 38: 247-266.

Albonetti, Celesta A. 1997. "Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas, and Departures on Sentence Outcomes for Drug Offenses, 1991-1992." *Law & Society Review* 31(4): 789-822.

Albonetti, Celesta A. 1998. "The Role of Gender and Departures in the Sentencing of Defendants Convicted of White-Collar Offenses Under the Federal Sentencing Guidelines." *Sociology of Crime, Law and Deviance* 1:3-48.

Alschuler, Albert. 1978. "Sentencing Reform and Prosecutorial Power." *University of Pennsylvania Law Review* 126:550-77.

Berk, Richard A. 1983. "An introduction to sample selection bias in sociological data." *American Sociological Review* 48:386-98

Blumstein, Alfred. 1982. "On the Racial Disproportionality of United States Prison Populations." *Journal of Criminal Law and Criminology* 73:1259-81.

Boerner, David. 1993. "The Role of the Legislature in Guidelines Sentencing in 'The Other Washington.'" *Wake Forest Law Review* 28:381-420.

Boerner, David. 1995. "Sentencing Guidelines and Prosecutorial Discretion." *Judicature* 78(4):196-200.

Bridges, George S. and Robert D. Crutchfield. 1988. "Law, Social Standing and Racial Disparities in Imprisonment." *Social Forces* 66(3): 699-724.

Bridges, George S., Robert D. Crutchfield and Edith E. Simpson. 1987. "Crime, Social Structure and Criminal Punishment: White and Nonwhite Rates of Imprisonment." *Social Problems* 34(4):345-361.

Bureau of Justice Assistance. 1996. *National Assessment of Structured Sentencing* (NCJ 153853). Washington, DC: U.S. Department of Justice, Office of Justice Programs.

Chiricos, Theodore G. and Charles Crawford. 1995. "Race and Imprisonment: A Contextual Assessment of the Evidence." Pp. 281-309 in Darnell F. Hawkins (ed) *Ethnicity, Race and Crime.* Albany, NY: State University of New York Press.

Coffee, John C. Jr., and Michael Tonry. 1983. "Hard Choices: Critical Trade-offs in the Implementation of Sentencing Reform through Guidelines." Pp. 155-203 in Michael Tonry and Franklin E. Zimring (eds) *Reform and Punishment: Essays on Criminal Sentencing*. Chicago: University of Chicago Press.

Collins, James J., Donna L. Spencer, George H. Dunteman, Harlene C. Gogan, Peter H. Siegel, Brad A. Lessler, Kenneth Parker and Thomas Sutton. 1999. *Evaluation of North Carolina's Structured Sentencing Law. Final Report to the National Institute of Justice*. Research Triangle Park, NC: Research Triangle Institute.

Crawford, Charles., Theodore G. Chiricos, and Gary Kleck. 1998. "Race, Racial Threat, and Sentencing of Habitual Offenders." Criminology 36:481-513.

Daly, Kathleen and Michael Tonry. 1997. "Gender, race, and sentencing." Pp. 201-252 in Michael Tonry (ed) *Crime and Justice: A Review of Research*. Chicago: University of Chicago Press.

Dixon, Jo. 1995. " The Organizational Context of Criminal Sentencing." *American Journal of*

Sociology 100(5): 1157-98.
Engen, Rodney L. and Sara Steen. 2000. "The Power to Punish: Discretion and Sentencing Reform in the War on Drugs." *American Journal of Sociology* 105(5):1357-95
Engen, Rodney L. and Randy Gainey. 2000a. "Modeling the Effects of Legal and Extra-legal Factors Under Sentencing Guidelines: The Rules Have Changed." *Criminology* 38(4):1207-19.
Engen, Rodney L. and Randy Gainey. 2000b. "Conceptualizing the Role of Legal and Extra-legal Factors Under Sentencing Guidelines: Reply to Ulmer." *Criminology* 38(4):1245-52.
Everett, Ronald S. and Barbara C. Nienstedt. 1999. "Race, Remorse and Sentence Reduction: Is Saying You're Sorry Enough?" *Justice Quarterly* 16(1):99-122.
Frase, Richard S. 1993a. "Implementing Commission-Based Sentencing Guidelines: The Lessons of the First Ten Years in Minnesota." *Cornell Journal of Law and Public Policy* 2: 278-337.
Frase, Richard S. 1993b. "Prison Population Growing Under Minnesota Guidelines." *Overcrowded Times* 4(1):1, 10-12.
Gelacak, Michael S., Ilene H. Nagel and Barry L. Johnson. 1996. "Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis." *Minnesota Law Review* 81:299-366.
Gorton, Joe and John L. Boies. 1999. "Sentencing Guidelines and Racial Disparity across Time: Pennsylvania Prison Sentences in 1977, 1983, 1992, and 1993." *Social Science Quarterly* 80(1):37-54.
Hagan, John. 1974. "Extra-legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint." *Law and Society Review* 8:357-83.
Hagan, John. 1977. "Criminal Justice in Rural and Urban Communities: A Study of the Bureacratization of Justice." *Social Forces* 55:597-612.
Hagan, John and Kristin Bumiller. 1983. "Making Sense of Sentencing: A Review and Critique of Sentencing Research." Pp. 1-54 in Alfred Blumstein, Jacqueline Cohen, Susan Martin, and Michael H. Tonry (eds.), *Research on Sentencing: The Search for Reform, Volume II*. Washington, D.C.: National Academy Press.
Kleck, Gary. 1981. "Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence on the Death Penalty." *American Sociological Review* 46: 783-804.
Knapp, Kay A. 1987. "Implementation of the Minnesota Guidelines: Can the Innovative Spirit Be Preserved?" Pp. 127-141 in Andrew von Hirsch, Kay A. Knapp and Michael Tonry (eds.) *The Sentencing Commission and Its Guidelines*. Boston: Northeastern University Press.
Kramer, John and Darrell Steffensmeier. 1993. "Race and Imprisonment Decisions." *Sociological Quarterly* 34(2): 357-76.
Kramer, John and Jeffery T. Ulmer. 1996. "Sentencing Disparity and Departure from Guidelines." *Justice Quarterly* 13:81-106.
Liska, Allen E. 1992. "Introduction to the Study of Social Control." Pp. 1-29 in Allen E. Liska (ed.) *Social Threat and Social Control*. Albany, NY: State University of New York Press.
Miethe, Terence D. 1987. "Charging and Plea Bargaining Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion." *Journal of Criminal Law and Criminology* 78(1): 155-176.
Miethe, Terence D. and Charles A. Moore. 1985. "Socioeconomic Disparities Under

Determinate Sentencing Systems: A Comparison of Pre-guideline and Post-guideline Practices in Minnesota." *Criminology* 23(2):337-363.
Miethe, Terence D. and Charles A. Moore. 1988. "Officials Reactions to Sentencing Guidelines." *Journal of Research in Crime and Delinquency* 25(2):170-87.
Moore, Charles A. and Terence D. Miethe. 1986. "Regulated and Unregulated Sentencing Decisions: An Analysis of First-year Practices Under Minnesota's Felony Sentencing Guidelines." *Law & Society Review* 20:253-277.
Myers, Martha A. and Suzette Talarico. 1986. "Urban Justice, Rural Injustice? Urbanization and its Effect on Sentencing." *Criminology* 24:367-90.
Nagel, Ilene H. and Stephen J. Schulhofer. 1992. "A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines." *Southern California Law Review* 66:501-561.
Peterson, Ruth D. and John Hagan. 1984. "Changing Conceptions of Race: Toward an Account of Anomalous Findings of Sentencing Research." *American Sociological Review* 49: 56-70.
Sampson, Robert J. and Janet L. Lauritsen. 1997. "Racial and Ethnic Disparities in Crime and Criminal Justice in the United States." *Crime and Justice: A Review of Research, Volume 22*. Chicago: University of Chicago Press.
Savelsberg, Joachim. 1992. "Law That Does Not Fit Society: Sentencing Guidelines as a Neoclassical Reaction to the Dilemmas of Substantivized Law." *American Journal of Sociology* 97(5):1346-81.
Spohn, Cassia. 1994. "Crime and Social Control of Blacks: Offender/Victim Race and the Sentencing of Violent Offenders." Pp. 249-268 in George S. Bridges and Martha A. Myers (eds.) *Inequality, Crime and Social Control*. Boulder, CO: Westview Press.
Spohn, Cassia and Jerry Cederblom. 1991. "Race and Disparities in Sentencing: A Test of the Liberation Hypothesis." *Justice Quarterly* 8(3):305-327.
Spohn, Cassia, John Gruhl and Susan Welch. 1981-82. "The Effect of Race on Sentencing: A Re-examination of an Unsettled Question.' *Law & Society Review* 16(1):71-88.
Steffensmeier, Darrell, and Stephen Demuth. 2000. "Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?" *American Sociological Review* 65(5):705-729.
Steffensmeier, Darrell, John H. Kramer, and Cathy Streifel. 1993. "Gender and Imprisonment Decisions." *Criminology* 31:411-446.
Steffensmeier, Darrell, Jeffery Ulmer, and John Kramer. 1998. "The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male." *Criminology* 36(4):763-798.
Tonry, Michael. 1996. *Sentencing Matters.* New York: Oxford University Press.
Tonry, Michael and John C. Coffee Jr. 1987. "Enforcing Sentencing Guidelines: Plea Bargaining and Review Mechanisms." In Andrew von Hirsch, Kay A. Knapp and Michael Tonry (eds.) *The Sentencing Commission and Its Guidelines*. Boston: Northeastern University Press.
Ulmer, Jeffery T. 1997. *Social Worlds of Sentencing: Court Communities under Sentencing Guidelines*. Albany NY: State University of New York Press.

Ulmer, Jeffery T. 2000. "The Rules Have Changed - So Proceed With Caution: A Comment on Engen and Gainey's Method for Modeling Sentencing Outcomes Under Guidelines."

Criminology 38(4):1231-43.
Ulmer, Jeffery T. and John H. Kramer. 1996. "Court Communities Under Sentencing Guidelines: Dilemmas of Formal Rationality and Sentencing Disparity." *Criminology* 34(3):383-407.
Ulmer, Jeffery T. and John H. Kramer. 1998. "The use and transformation of formal decision-making criteria: Sentencing guidelines, organizational contexts, and case processing strategies." *Social Problems* 45(2): 248-267
von Hirsch, Andrew, Kay A. Knapp and Michael Tonry. 1987. *The Sentencing Commission and Its Guidelines*. Boston: Northeastern University Press.
Wilbanks, William. 1987. *The Myth of a Racist Criminal Justice System*. Monterey, CA: Brooks/*Cole.*
Wooldredge, John D. 1998. "Analytical rigor in studies of disparities in criminal case processing." *Journal of Quantitative Criminology* 14:155-179.

APPENDIX C TABLE

LOGISTIC REGRESSION RESULTS OF LEGAL AND EXTRA LEGAL FACTORS ON CHARGING AND SENTENCING OUTCOMES

	Model 1: Receiving a Misdemeanor Conviction from a Felony Charge (N=42,204)		**Model 2: Receiving a Charge Reduction** (N=27,015)		**Model 3: Receiving an Active Sentence (Incarceration)** (N=17,450)	
	B	**SE**	**B**	**SE**	**B**	**SE**
Independent Variables						
Legal Factors:						
Charge Reduction (each offense class reduced)	N/A		N/A		0.09**	0.02
Offense Seriousness	**by Charged Offense**		**by Charged Offense**		**by Convicted Offense**	
Class B1	-2.72**	0.15	0.71**	0.19	N/A	
Class B2	-2.70**	0.40	-0.07	0.29	N/A	
Class C	-1.72**	0.08	0.61**	0.11	N/A	
Class D	-2.31**	0.08	0.08	0.14	N/A	
Class E	-0.33**	0.07	2.78**	0.12	0.93**	0.13
Class F	-1.66**	0.07	-1.00**	0.12	0.73**	0.13
Class G	-1.96**	0.06	-1.13**	0.09	0.30**	0.11
Class H	-0.75**	0.03	*reference category*		0.11	0.09
Class I	*reference category*		-2.62**	0.19	*reference category*	
Offense Type	**Charged Offense Type**		**Charged Offense Type**		**Convicted Offense Type**	
Person	-0.26**	0.06	-0.54**	0.08	-0.15	0.08
Drug (Non-Trafficking)	-1.39**	0.03	-1.42**	0.13	-0.28**	0.08
Other	-0.29**	0.04	-1.13**	0.08	0.26**	0.06
Property	*reference category*		*reference category*		*reference category*	

TABLE C (cont.)

LOGISTIC REGRESSION RESULTS OF LEGAL AND EXTRA LEGAL FACTORS ON CHARGING AND SENTENCING OUTCOMES

	Model 1: Receiving a Misdemeanor Conviction from a Felony Charge (N=42,204)		**Model 2: Receiving a Charge Reduction** (N=27,015)		**Model 3: Receiving an Active Sentence (Incarceration)** (N=17,450)	
	B	**SE**	**B**	**SE**	**B**	**SE**
Criminal History						
At Least One Prior Conviction	-0.65**	0.02	N/A		N/A	
Prior Record Level I	N/A		*reference category*		*reference category*	
Prior Record Level II	N/A		-1.04**	0.07	0.60**	0.06
Prior Record Level III	N/A		-1.09**	0.07	1.61**	0.07
Prior Record Level IV	N/A		-1.24**	0.08	2.34**	0.08
Prior Record Level V	N/A		-1.21**	0.13	2.74**	0.12
Prior Record Level VI	N/A		-1.24**	0.16	2.94**	0.21
Extra legal Factors:						
Demographic						
Age (each year)	-0.003**	0.001	-0.01**	0.002	-0.008**	0.002
Male	-0.29**	0.03	-0.76**	0.07	0.53**	0.07
Non-white	-0.04	0.02	-0.005	0.05	0.07	0.04
Percent Non-white in District (each 10% increase)	-0.12**	0.01	-0.22**	0.02	-0.06*	0.02
Low Density District	*reference category*		*reference category*		*reference category*	
Medium Density District	-0.008	0.03	0.17**	0.05	-0.07	0.05
High Density District	0.42**	0.03	0.68**	0.06	0.02	0.06

TABLE C (cont.)

LOGISTIC REGRESSION RESULTS OF LEGAL AND EXTRA LEGAL FACTORS ON CHARGING AND SENTENCING OUTCOMES

	Model 1: Receiving a Misdemeanor Conviction from a Felony Charge (N=42,204)		**Model 2: Receiving a Charge Reduction** (N=27,015)		**Model 3: Receiving an Active Sentence (Incarceration)** (N=17,450)	
	B	**SE**	**B**	**SE**	**B**	**SE**
First Judicial Division	*reference category*		*reference category*		*reference category*	
Second Judicial Division	-0.40**	0.05	-0.72**	0.09	-0.52**	0.09
Third Judicial Division	-0.23**	0.05	-1.06**	0.09	-0.59**	0.08
Fourth Judicial Division	-0.21**	0.05	-1.16**	0.08	-0.73**	0.08
Fifth Judicial Division	-0.66**	0.06	-1.72**	0.10	-0.87**	0.10
Sixth Judicial Division	-0.17**	0.06	-0.71**	0.10	-0.57**	0.10
Seventh Judicial Division	-1.13**	0.07	-2.26**	0.13	-0.76**	0.11
Eighth Judicial Division	-0.44**	0.07	-1.60**	0.13	-0.27*	0.12
Systemic						
Private Defense Attorney	0.33**	0.03	0.69**	0.05	-0.55**	0.05
Jury Trial	-1.64**	0.15	-3.25**	0.15	1.18**	0.15
Hazard Variable 1[1]	N/A		-11.91**	0.51	-1.44**	0.26
	Likelihood Ratio 8080.2149		Likelihood Ratio 8583.3701		Likelihood Ratio 3418.9500	

* Significant at $p < .05$.
** Significant at $p < .01$.

[1] This hazard variable is used as a control variable and represents the predicted probability of receiving a reduction from a felony charge to a misdemeanor conviction derived from Model 1.