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THE FAIR SENTENCING ACT

by

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The Fair Sentencing Act, enacted as Ch. 760 of the 1979 Session Laws, does not go into effect until July 1, 1980. The Institute plans to include information on the provisions of the Fair Sentencing Act in its regular programs for judges, prosecutors, public defenders, probation/parole officers, and others during the Spring of 1980. However, because there has been so much interest in the subject, I am sending you the attached copy of a summary of the bill, written by me and reprinted from North Carolina Legislation 1979.

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PRESUMPTIVE SENTENCING

The presumptive or "fair" sentencing act, enacted as Ch. 760 (S 560), was the cornerstone of the Governor's crime-control program in the 1979 session. Applicable to felonies committed on or after July 1, 1980, the act is intended to make punishment for felonies more certain, fair, and even-handed by regulating the sentencing superior court judge's discretion. But the act leaves certain important areas of this discretion unregulated. In summary, the act:

-- Classifies felonies into 10 classes (A through J) according to the maximum prison terms authorized by law. (In most instances, the maximum terms of present law are unchanged; an exception is "up to life" maximums, which are each changed to either 40 or 50 years.)
-- Sets a "presumptive" (standard) prison term for each felony other than Class A and B felonies (first-degree murder and first-degree rape), which the sentencing judge must impose unless he gives written reasons for not doing so.
-- Preserves the sentencing judge's discretion to suspend a prison term, impose probation supervision, sentence the defendant as a committed youthful offender (CYO), and impose consecutive terms for multiple offenses without giving any reasons.
-- Facilitates appellate review of sentences when defendants desire it.
-- Grants day-for-day credit toward service of a felony prison term for good behavior (or, more accurately, for avoiding major misconduct) while in prison and allows the Secretary of Correction to grant a prisoner additional "gain time" credit for work and meritorious conduct.
-- Abolishes parole for felons <u>except for</u> (a) parole from life sentences (for first-degree murder and first-degree rape), (b) parole for felon CYOs, and (c) "re-entry parole" for other felons for last 90 days of their prison term.

<u>Classification of Felonies</u>. The act classifies felonies into 10 classes, A through J, making few changes in present maximum punishments and definitions of criminal offenses. Class A offenses (first-degree murders only) remain punishable by death or life imprisonment under present capital-sentencing procedures, and if sentenced to life, the murderer is eligible for parole at 20 years. Class B (first-degree rape only) is punishable by mandatory life imprisonment, with parole eligibility at 20 years. (Under present state law, first-degree rape is punishable by either death or life imprisonment, but the death penalty has been held unconstitutional.) Felonies in other classes carry these maximum terms: C--50 years, D--40 years, E--30 years, F--20 years, G--15 years, H--10 years, I--five years, and J--three years. In most instances, classified felonies retain the maximum prison term provided by present law.

<u>Presumptive Prison Term</u>. The act sets a "presumptive" or standard prison term for each class of felonies other than A and B. This presumptive

term depends not only on the class to which a felony belongs but also on the type and seriousness of previous felony convictions the defendant has had during the past 10 years. For example, if a defendant was convicted of felonious larceny, a Class H offense, the presumptive term would be three years and six months if he had no prior felony convictions, five years if he had one prior conviction of a felony lower than Class H, and six years if he had one prior conviction of a higher-class felony or two or more prior convictions of lower-class felonies.

Whatever the presumptive prison term is for the defendant's particular offense and prior felony convictions, the sentencing judge must impose it unless he finds--and states in writing--reasons for imposing a longer or shorter term. Such reasons may include any factor the judge wishes to consider that is relevant to the purposes of sentencing. The act defines these purposes as: punishment of the defendant commensurate with the injury caused by the crime, consideration of circumstances relevant to his degree of culpability; restraint of dangerous offenders; deterrence of crime; and rehabilitation of offenders. There are certain aggravating and mitigating factors that the judge must consider in sentencing every felon. These include the amount of bodily injury and property loss or damage caused by the crime, whether the defendant induced others to participate in the crime, and his age and mental condition. The judge is free to assign whatever importance he chooses to the factors he considers, as long as he gives his reasons for imposing an other-than-presumptive prison term.

Appellate Review of Sentence. The act facilitates appellate review of felony sentences by requiring a written record of reasons for an other-than-presumptive prison term. (Now no such record is required, with the result that if a defendant claims that his sentence was imposed for improper reasons, the appellate court has little choice but to assume that the sentencing judge acted properly as long as the sentence is within the wide range authorized by law.) Under the new law, if the defendant wants the North Carolina Court of Appeals to review whether his sentence is appropriate in the circumstances as shown by the trial court's record, he may obtain such review in one of two ways: (1) If he was convicted by trial and received a prison term longer than the presumptive term, he has a right to appeal the appropriateness of his sentence; (2) if he was convicted by pleading guilty or received a prison term that did not exceed the presumptive term, he may petition for certiorari (discretionary review), which the Court of Appeals may refuse.

Good Behavior and "Gain Time" Credit Toward Service of Prison Term. Under present law the Secretary of Correction has broad discretion to reduce prison terms in such amounts as he chooses for good behavior, work, and participation in rehabilitation programs. Prison regulations now provide for reduction of about one-third for good behavior--actually, for avoiding serious bad behavior. This credit is known as "good time." Prisoners may also earn additional "gain time" for certain kinds of work and participation in programs. "Good time" and "gain time" as now administered may together reduce a prison term by nearly 50 per cent. The new act takes away much of the Secretary's discretion to reduce felony prison terms. It requires that felony prisoners (except those who are serving mandatory life sentences) automatically receive one day of good-behavior credit for each day served;

such credit may be forfeited if the prisoner is found guilty of serious misconduct after a hearing. The Secretary will retain his discretion to grant additional "gain time" credit for work and meritorious conduct at the rate of up to 30 days per month.

Parole of Felons. Present law permits the Parole Commission to parole a felon immediately after he begins serving his prison term if his sentence includes no minimum prison term (although this occurs very rarely) and to reduce his maximum prison term by as much as four-fifths if his sentence includes a minimum. The new act sharply reduces the Parole Commission's authority to reduce time served for felonies, although it leaves intact the laws allowing parole of misdemeanants (offenders who are serving prison terms of two years or less).

The act leaves in effect the laws regarding parole of felon CYOs (Committed Youthful Offenders) and those who are serving mandatory life sentences for first-degree murder and first-degree rape. (CYOs are eligible for parole at any time, and lifers may be paroled after serving 20 years.) Other felons sentenced under the act are entitled only to 90-day "re-entry" parole: That is, 90 days before the prisoner would otherwise complete his prison term, less credit for good behavior, "gain time," and time served in jail before trial, the prisoner must be released on re-entry parole. Supervision on re-entry parole is very limited and lasts only 90 days. Its purpose is to give the parolee some support in readjusting to the free community. If the parolee violates the very limited conditions of re-entry parole, he must return to prison but must be released after serving no more than 90 additional days.

Comments. Some features of the act seem to be at odds with its goal of reducing unjustified variation in sentencing.

(a) The act retains a wide range in permissible prison terms for felonies, ranging from one day to as much as 50 years. Some critics say that this wide range is the real source of unfairness and unpredictability in sentencing.

(b) The judge is not required by the act to consider any specific criteria or give any reasons for suspending a prison term, although he must give reasons for imposing even one day of imprisonment unless he imposes the presumptive term.

(c) The judge is not required to consider any specific criteria or give reasons for making prison terms for multiple offenses run consecutively (rather than concurrently). This is an important area of discretion because felons are often convicted of several related offenses, such as breaking and entering plus larceny committed afterward.

(d) The judge is also free to sentence a felon under 21 to prison as a committed youthful offender, thus making him eligible for parole at any time, without stating any reasons for his decision.

(e) The act does not provide any new procedure for gathering the information needed for sentencing; in fact, it allows the judge to impose sentence without any presentence investigation if he wishes.

(f) Although each judge is required to consider the same kinds of criteria in sentencing a felon, there is no way other than appellate review of individual cases to insure that judges will not vary greatly in the

importance they attach to various aggravating and mitigating circumstances. Appellate review may be an inadequate means of controlling such variation. Under the act, only the defendant, not the prosecutor, can seek review; thus appellate review can be expected to reduce unjustifiably severe sentences but not unjustifiably lenient ones. Also, the Court of Appeals may be too busy or otherwise unwilling to develop sentencing policies that will help to achieve the act's purposes.

Plea-bargaining. There is justifiable concern over the effect of plea-bargaining on the sentencing scheme established by the act, and vice versa. Plea-bargaining may well be used to obviate the requirement of justifying other-than-presumptive sentences by allowing the defendant to plead guilty to a reduced charge that carries whatever presumptive sentence the prosecutor and defense have agreed upon. On the other hand, the act may discourage plea-bargaining and cause an increase in trials that could overload the courts: If prosecutors have less influence on the sentence, defendants may be less confident of receiving an acceptable sentence and therefore more reluctant to plead guilty.

The Effect on Overcrowding. Will the presumptive-sentencing system add to the already serious overcrowding in North Carolina's prison? The act leaves judges free, as they are now, to suspend felony sentences without giving any justification; but it is possible that judges may suspend sentences less often because they believe that the presumptive prison term set by the act is meant to be the standard of a "fair" sentence. If judges do in fact suspend felony sentences less often, the prison population may increase. Another way in which the act may increase the prison population is by increasing active prison terms. There is some reason to believe that the average amount of time served in prison by felons sentenced under the new act may be somewhat longer than the average served in the recent past. If one assumes that the average prison term for most felonies under the act will be the presumptive term, and that this term will usually be cut in half by automatic good-behavior time and reduced further by 90 days for re-entry parole, the resulting amount of time served under the act (under these assumptions) will still be somewhat longer than the average time served by prisoners for the most frequent kinds of felonies, computed from statistics for felon prisoners released during the year July 1, 1977-June 30, 1978. Such an increase in time served, like a decrease in the likelihood of suspension of prison terms, could increase the felon population. However, the increase could be countered by reducing time served still further through discretionary "gain time."

Conclusion. The presumptive-sentencing law makes--or at least is intended to make--a major change in long-established judicial practice. For this reason, it may be worthwhile to conduct a systematic study of the results--both intended and unintended--of the new law so that the state can learn from its judicial system's experience. Also, it would appear very difficult to accomplish the objectives of the act without some careful planning during the year before it becomes effective. This planning would fail without the active participation of superior court judges and the representation of prosecutors, defense attorneys, and probation officers in the planning process would also seem desirable. At the very least the planning committee should consider: (1) sentencing procedures needed to implement the act, including the use and

format of presentence reports; and (2) technical changes that need to be made during the 1980 session of the General Assembly, before the act goes into effect. The committee could also develop, or set up a mechanism for developing, guidelines for sentencing under the new law to encourage regularity--if not uniformity--among sentencing judges.

--Stevens H. Clarke