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AN UPDATE ON THE FAIR SENTENCING ACT

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The Fair (or Presumptive) Sentencing Act, originally enacted as Ch. 760 of the 1979 Session Laws, was amended in June 1980 by Ch. 1316 of the 1979 Second Session. One effect of the amendments was to postpone the effective date of the act to March 1, 1981.

I am sending you herewith a summary of the Fair Sentencing Act. Section A of the summary describes the act as it now stands, with the 1980 amendments included. Section B of the summary describes proposed amendments that were introduced in the June 1980 session, did not pass, and are likely to be introduced again in 1981; PLEASE NOTE THAT THESE PROPOSED AMENDMENTS IN SECTION B HAVE NOT BEEN ENACTED.

SUMMARY OF PROVISIONS OF FAIR SENTENCING ACT

(S.L. 1979, Ch. 760; S.L. 1979, 2nd Sess., Ch. 1316)

A. The Act As It Now Stands (Oct. 1980)

The act applies to felonies committed on or after March 1, 1981. Generally, the act classifies felonies according to maximum prison terms under present law; sets a presumptive prison term for each felony other than first degree murder and rape, which the sentencing judge must impose unless he makes written findings of reasons; preserves the judge's discretion to suspend a prison term, impose probation, sentence the defendant as a committed youthful offender (CYO), and impose consecutive terms for multiple offenses;

facilitates appellate review of felony sentences; abolishes parole for felons except for CYO parole, parole from a life sentence, and re-entry parole for the last 90 days of the term; grants day-for-day credit toward the prison term for avoiding serious misconduct in prison; and allows the Secretary of Correction to grant additional "gain time" credit toward the prison term.

1. Penalty Classification. The act establishes 10 classes for felonies; for eight of these classes (C through J), it sets a maximum prison term and allows unlimited fines. The classification continues current statutory maximum prison terms, for the most part. The presumptive term* indicated in the list below applies to defendants who have no previous felony convictions in the last 10 years. The act requires a 14-year minimum term without probation or CYO treatment for a repeat felony using a deadly weapon.

Class A. Death or life imprisonment (murder in first degree). Present capital sentencing law (G.S. Chapter 15A, Art. 100) left unchanged. If life sentence, eligibility for parole at 20 years.

Class B. Mandatory life imprisonment. Includes rape in first degree (now punishable by death or life imprisonment), and first-degree sexual offense (now life). Eligibility for parole at 20 years.

Class C. Maximum 50 years, presumptive 20 years. Includes rape in second degree; accessory to murder, arson, burglary, or rape; burglary in first degree; arson of occupied dwelling. (All are now punishable by life or up to life). A minimum term of 14 years, without probation, is required for first degree burglary.

Class D. Maximum 40 years, presumptive 16 years. Includes second degree murder, burglary, rape, and sexual offense; arson of unoccupied dwelling; armed robbery; first degree kidnapping (new offense--kidnapping as defined by G.S. 14-39 where (1) victim not released in safe place, or (2) victim sexually assaulted or seriously injured). (Felonies in Class D are now punishable by life, up to life, or at least 40 years.) A minimum term of 14 years, without probation, is required for second degree burglary and armed robbery.

*S.L. 1979, 2d Sess., Ch. 1251 defined various drug trafficking offenses. These offenses are assigned to classes established by the Fair Sentencing Act, but all carry mandatory minimum prison terms longer than the presumptive terms for their class.

Class E. Maximum 30 years, presumptive 12 years. Includes kidnapping in second degree (kidnapping as in G.S. 14-39 where victim released in safe place and not sexually assaulted or seriously injured), burning public buildings, delivery of controlled substance to persons under 16, and other felonies now punishable by up to 30 years.

Class F. Maximum 20 years, presumptive eight years. Includes voluntary manslaughter, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree rape and sexual offense, and other felonies now punishable by up to 20 years.

Class G. Maximum 20 years, presumptive six years. Includes abduction of children, incest, and other felonies now punishable by up to 15 years.

Class H. Maximum 10 years, presumptive three years six months. Includes safecracking; common law robbery; attempt to commit burglary and certain other felonies; involuntary manslaughter; assault with deadly weapon inflicting serious injury or with intent to kill; felonious breaking or entering; felonious larceny, possession, and receiving; embezzlement; manufacture or sale of Schedule I or II controlled substance; and other felonies now punishable by up to 10 years.

Class I. Maximum five years, presumptive two years. Includes assault with deadly weapon on law enforcement officer, forgery and uttering, manufacture or sale of Schedule III-VI controlled substances, simple possession of Schedule I controlled substance, welfare and medicaid fraud, and other felonies now punishable by up to five years.

Class J. Maximum three years, presumptive one year. Includes financial transaction card theft and fraud, forgery of financial transaction card, prison escape, other felonies now punishable by up to three years, and all other felonies not specifically classified by bill.

2. Sentencing for felony other than Class A and B. The sentencing judge must impose the presumptive prison term unless he finds aggravating or mitigating factors. The presumptive term is increased by specific amounts, ranging from one to four years, for previous felony convictions within the last 10 years, based on their frequency and seriousness. If the judge imposes a term shorter or longer than the applicable presumptive term, he must make written findings of aggravating and mitigating factors on which the

sentence is based. The judge may consider any factor relevant to the stated purposes of sentencing, which are: (1) punishment commensurate with the injury caused by the offense; (2) protection of the public by restraining offenders; (3) rehabilitation of offenders; (4) deterrence of crime. The judge must consider certain specified aggravating factors (the amount of bodily injury, the amount of property loss, and whether the defendant induced others to participate in the crime) and mitigating factors. Specified mitigating factors include these: minimal bodily injury; minimal property loss; absence of previous criminal convictions punishable by more than 60 days; duress that reduced the defendant's culpability; defendant's age and mental capacity; and a "negotiated plea and any circumstance arising from the evidence which the court deems to have mitigating value."

3. Suspension of prison term, probation, consecutive terms, and CYO commitment. The act leaves full discretion to the sentencing judge to suspend a prison term, impose probation, impose concurrent or consecutive terms for multiple offenses, and commit the defendant to prison as a youthful offender (CYO) as allowed by present G.S. Ch. 15A, Art. 82, and Ch. 148, Art. 3B.

4. Appeal of sentence. The act facilitates appellate review of felony sentences by requiring a written record of reasons for a prison term when it is different from the presumptive term (now, no such record is required). If the term is longer than the presumptive term, and the defendant has been convicted by trial (rather than plea), the defendant may appeal as a matter of right the issue of whether his sentence is supported by evidence on the record. Otherwise, the defendant may petition for appellate review of sentence by writ of certiorari.

5. Good behavior credit and "gain time." The act gives a felony prisoner credit for good behavior at the rate of one day for each day spent in prison or jail, which the prisoner may forfeit only for serious misconduct. The Secretary of Correction has discretion to grant additional "gain time" credit to individual prisoners for meritorious conduct and work inside or outside prison or jail (including work release). The act's provisions and the Secretary's regulations on prisoner conduct, good time, and gain time apply to sentenced prisoners in local jails as well as those in state prisons.

6. Felony parole. Felons convicted of Class A or B offenses or committed as CYOs remain eligible for parole under present law. Other felons are eligible only for "re-entry parole", as follows: The Parole Commission must parole the prisoner 90 days before the end of his term, less

credit for good time, gain time, and time previously served. The purpose of such parole is to assist the prisoner in re-entering the free community. The term of re-entry parole is limited to 90 days (now, the parole term may be up to five years or the unserved portion of prison term). If the parolee violates the conditions of re-entry parole, he returns to prison to serve 90 days less good time, etc., and then is unconditionally discharged.

The act clarifies G.S. 15A-1371's provisions regarding parole from a life sentence where no minimum term is set: A prisoner with such a sentence will be eligible for parole after serving 20 years. (This provision applies to offenses committed on or after the act's effective date.)

B. Amendments Expected To Be Introduced in 1981

**** PLEASE NOTE: THESE AMENDMENTS HAVE
NOT BEEN ENACTED! ****

The Sentencing Procedures Committee, appointed jointly by the Governor and Chief Justice Branch and chaired by Judge Harry Martin of the Court of Appeals, prepared a number of amendments to the Fair Sentencing Act for submission to the second 1979 legislative session in June 1980. The General Assembly passed the amendments that it regarded as purely technical (these have been integrated into the summary above of the act as it now stands) and postponed the act's effective date until March 1, 1981 (S.L. 1979, 2d Sess., Ch. 1316). What follows is a summary of the more substantial amendments that were not adopted in June 1980 and will probably be introduced again in January 1981, in the form in which they have been re-drafted by the Sentencing Procedures Committee in October 1980.

1. Exemption of plea-bargained active sentences from finding requirement. The proposed amendments provide that when an active prison term is imposed pursuant to a plea arrangement under Art. 58 of G.S. Ch. 15A, the judge need make no findings regarding aggravating and mitigating factors--even though the agreed-upon sentence may be less than or greater than the presumptive sentence. (No such exemption exists in the present act, although the entry of a negotiated plea is listed as a mitigating factor.)

2. Aggravating and mitigating factors: new list of factors, standard of proof, separation from proof of elements of offense. The proposed amendments require that aggravating and mitigating factors be proven by "preponderance of the evidence" (no standard of proof is specified by the present act); also, they provide that if the judge imposes a term

longer than the presumptive term, he must find that aggravating factors "outweigh" mitigating factors, and if he imposes a term shorter than the presumptive term, he must find that mitigating factors "outweigh" aggravating factors (the present act has no such provisions). The proposed amendments also provide that the evidence "necessary to prove" an element of the offense may not be used again to prove a factor in aggravation, and that a single item of evidence may not be used to prove more than one aggravating factor (the intention is to avoid double jeopardy problems that the present act might create by not expressly forbidding dual use of evidence). A new list of aggravating and mitigating factors is substituted by the proposed amendments for the list in the present act.

The following is a list of the proposed new aggravating factors, paraphrased for brevity:

- Defendant induced others to participate in offense
- Offense was committed to escape or avoid arrest
- Offense was committed "for pecuniary gain"
- Offense was committed to disrupt governmental functions
- Offense was committed against witness, juror, or certain criminal justice officials
- Offense was especially heinous or cruel
- Defendant knowingly created great risk of death to more than one person
- Defendant was public official and offense related to conduct of his office
- Defendant was armed with deadly weapon at time of crime
- Victim was very young, very old, or mentally or physically infirm
- Offense involved more than one victim
- Defendant involved person under 16 in commission of the crime
- Offense involved damage of great monetary value or unusually large amount of contraband
- Defendant took advantage of position of trust to commit offense
- Defendant has prior criminal convictions punishable by more than 60 days imprisonment [Note that this replaces provisions in the present act that increment the presumptive prison term based on the frequency and seriousness of prior felony convictions]

The proposed new mitigating factors include all those of the present act, except entry of a negotiated plea and infliction of only the minimum amount of loss or injury necessary to prove the offense. It also includes some which are not in the present act, which can be paraphrased as follows:

Victim was over 16 and consented to defendant's conduct
 Defendant aided in apprehension or prosecution of
 another felon

Relationship between offender and victim involved strong
 provocation or was otherwise extenuating

Defendant did not contemplate that offense would cause
 or threaten serious bodily harm or fear, or exercised
 caution to avoid such consequences

Defendant reasonably believed his conduct was legal

Defendant voluntarily acknowledged wrongdoing to a law
 enforcement officer before arrest was imminent

3. De-emphasis of prior felony convictions. The present act emphasizes the frequency and seriousness of the defendant's prior felony convictions by raising the presumptive prison term in certain specified increments. The proposed amendments de-emphasize prior convictions by removing the increments to the presumptive prison term, making prior convictions simply one aggravating factor along with many others, and leaving up to the judge how much weight to assign to the frequency and seriousness of prior convictions.

4. No time limit on prior felony convictions. The proposed amendments set no limit on how long before the present conviction a prior conviction must have occurred to be considered in sentencing. (The present act counts prior felony convictions for the purpose of incrementing the presumptive prison term only if they have occurred within ten years of the present conviction.)

5. Proof of prior conviction. The proposed amendments provide that a prior conviction may be proven either by stipulation or the original or a certified copy of the record of the conviction. No prior conviction may be considered in sentencing unless the defendant was represented by counsel with respect to that conviction or waived the right to counsel. (The present act does not indicate how a prior conviction may be proven.)

6. Motion for appropriate relief and appellate review regarding sentence. The proposed amendments prohibit a post-conviction motion (motion for appropriate relief) on the ground that the judge's findings on which the sentence is based are not supported by evidence introduced at the trial and sentencing hearing. (The present act allows such a motion but requires that it be made within ten days after entry of judgment.) The proposed amendments also limit appellate review on this ground to writ of certiorari (the present act allows appeal as of right if the conviction was by trial rather than guilty plea and the prison term imposed exceeded the presumptive term).