

## North Carolina Sentencing after *Blakely v. Washington* and the *Blakely* Bill

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### Contents

I. Introduction	1
II. SSA Felony Offenses Committed On or After June 30, 2005—The <i>Blakely</i> Bill	5
A. Aggravating Factors	6
1. Admitted or Submitted to the Jury and Proved Beyond a Reasonable Doubt	6
2. Trial Procedure	7
3. Admission by Defendant	8
4. Pleading and Notice	10
B. Prior Record Level Points	14
C. Structural Error	14
III. Non-SSA Offenses and SSA Felonies Committed Before June 30, 2005	15
A. Pre- <i>Blakely</i> Cases	15
B. Post- <i>Blakely</i> Cases Not Covered by the <i>Blakely</i> Bill	16
1. SSA Felonies	16
a. “Prescribed Statutory Maximum” is the Presumptive Range	17
b. Notice and Pleading	17
c. Aggravating Factors	19
d. Prior Record Level Points	20
e. Mitigating Factors and Factor Balancing	21
f. Presumptive and Mitigated Range Sentencing	21
g. Admission or Stipulation	22
h. Trial Procedure	23
i. Waiver	24
j. Structural Error	25
k. Remedy	27
2. Misdemeanors Not Subject to the SSA	28
Appendix: S.L. 2005-145	33

### I. Introduction

*Blakely v. Washington*,<sup>1</sup> decided by the United States Supreme Court on June 24, 2004, had a dramatic impact on determinate sentencing in North Carolina and around the nation. *Blakely* was foreshadowed by two cases, both of which played important roles in the development of North Carolina case law. The first of these precursor cases was *Apprendi v. New*

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1. 542 U.S. 296 (2004).

*Jersey*.<sup>2</sup> In *Apprendi*, the Court interpreted the constitutional due process and jury trial guarantees to require that, other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt.<sup>3</sup> Although *Apprendi* impacted North Carolina sentencing law, its effects initially were limited.

Under North Carolina's Structured Sentencing Act (SSA) in place at the time, most felony sentences were determined, by applying a two-step process. First, the sentencing judge determined the minimum sentence by consulting a punishment chart, which set out a range of minimum sentences for various offenses.<sup>4</sup> Second, the sentencing judge determined the maximum sentence that corresponds with the minimum selected by consulting a statutory table.<sup>5</sup>

For all felonies except first-degree murder, the minimum sentence in the punishment chart is divided into three categories: mitigated, presumptive, and aggravated. Mitigated terms are at the low end, aggravated terms are at the high end and presumptive sentences fall in the middle.<sup>6</sup> The presumptive range is the "basic" sentencing range—no special findings need be made for presumptive range sentencing to apply. A judge, however, could deviate upward from the presumptive range and sentence in the aggravated range if he or she determined that

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2. 530 U.S. 466 (2000).

3. *Apprendi* involved a sentence on a firearm possession offense that was "enhanced" by a judge who found, by a preponderance of the evidence, that the defendant acted with the purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity. *Apprendi* itself was foreshadowed by *Jones v. United States*, 526 U.S. 227 (1999), a case involving a federal carjacking statute. *See Apprendi*, 530 U.S. at 467.

4. *See* G.S. 15A-1340.17(c). All citations to SSA provisions refer to the 2004 General Statutes. As discussed below, *see infra* § II, S.L. 2005-145 amended G.S. 15A-1340.16, 15A-1340.14, and 15A-925 and created a new G.S. 15A-1022.1.

5. G.S. 15A-1340.17(d) & (e). Maximum sentences for Class B1-E felonies with minimum terms of 340 months or more are prescribed by G.S. 15A-1340.17(e1).

6. *See* G.S. 15A-1340.17(c)(2)-(4).

aggravating factors were present and were sufficient to outweigh any mitigating factors.<sup>7</sup>

Aggravating factors include things such as the fact that the crime was especially heinous, atrocious, or cruel.<sup>8</sup> Mitigating factors include things like the fact that the defendant has a positive employment history or is gainfully employed.<sup>9</sup> A judge could sentence below the presumptive range in the mitigated range, if the judge determined that mitigating factors were present and were sufficient to outweigh any aggravating factors.<sup>10</sup>

Another factor that comes into play on the punishment chart is prior record level points.<sup>11</sup> The higher the points, the more severe the sentence.<sup>12</sup> Although most prior record points result from prior convictions, that is not so for all such points.<sup>13</sup> Under the SSA as it existed at the time *Apprendi* was decided, both aggravating factors and prior record level points were found by a judge. The standard of proof was by a preponderance of evidence.<sup>14</sup>

The reason that *Apprendi* initially had limited impact on SSA felony sentencing was because the North Carolina Supreme Court construed *Apprendi*'s operative term, "prescribed statutory maximum," to mean the maximum sentence that could be imposed at the highest prior record level and in the aggravated range.<sup>15</sup> Defined this way, no judge-made finding as to aggravating factors or prior record level points could increase the prescribed statutory maximum sentence because the prescribed statutory maximum was the maximum sentence in the aggravated range and at the highest prior record level. Under this definition, the only way a

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7. G.S. 15A-1340.16(b).

8. The aggravating factors are set out in G.S. 15A-1340.16(d).

9. The mitigating factors are set out in G.S. 15A-1340.16(e).

10. G.S. 15A-1340.16(b).

11. G.S. 15A-1340.14.

12. G.S. 15A-1340.17(c).

13. G.S. 15A-1340.14(b).

14. G.S. 15A-1340.16(a) (aggravating factors); G.S. 15A-1340.14(f) (prior record level).

15. *See* State v. Lucas, 353 N.C. 568, 596-97 (2001), *overruled in part by*, State v. Allen, 359 N.C. 425 (2005).

sentence could be elevated beyond the prescribed statutory maximum was by application of special judge-determined sentencing enhancements tacked on after the sentence was calculated in the traditional two-step process. One such enhancement was a sixty-month sentence enhancement for use of a firearm during a felony. Not surprisingly, this type of judge-determined enhancement was held unconstitutional under *Apprendi*.<sup>16</sup> However, the use of judge-determined aggravating factors and prior record points for SSA felony sentencing continued.

The second precursor case to *Blakely* was *Ring v. Arizona*.<sup>17</sup> In *Ring*, the Court applied *Apprendi* and concluded that because Arizona law authorized the death penalty only if an aggravating factor was present, *Apprendi* required the existence of such a factor to be proved to a jury rather than to a judge. *Ring* was later the basis of a defendant's unsuccessful challenge to North Carolina's short-form murder indictment in *State v. Hunt*,<sup>18</sup> discussed below.<sup>19</sup>

Two years after *Ring*, the Court handed down *Blakely*, holding that the term "statutory maximum" for *Apprendi* purposes "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."<sup>20</sup> Put another way, the relevant statutory maximum "is not the maximum sentence a judge may impose after finding additional facts, but the maximum [the judge] may impose *without* any additional findings."<sup>21</sup>

As soon as *Blakely* was decided, it was apparent that the North Carolina Supreme Court's post-*Apprendi* interpretation of the term "prescribed statutory maximum" would not stand and

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16. See *Lucas*, 353 N.C. 568; G.S. 15A-1340.16A. The firearm enhancement provision later was amended to comply with *Apprendi* and *Lucas*. See G.S. S.L. 2003-378 sec. 2.

17. 536 U.S. 584 (2002).

18. 357 N.C. 257 (2003).

19. See *infra* § II.A.4.

20. See *Blakely*, 124 S. Ct. at 2537 (emphasis in original). The defendant in *Blakely* pleaded guilty to kidnapping. The facts admitted in his plea supported a maximum sentence of 53 months. The trial court imposed an "exceptional" sentence of 90 months, after determining that the defendant had acted with deliberate cruelty. See *id.* at 2534.

21. See *id.* (emphasis in original).

that *Blakely* had significant implications for SSA felony sentencing. At the same time, it was clear that *Blakely* had no impact on SSA misdemeanor sentencing. Under the SSA, the only enhancing factors that apply in misdemeanor sentencing are prior convictions<sup>22</sup>—factors specifically excluded from *Blakely*.<sup>23</sup> Non-SSA misdemeanors punishable under G.S. 20-179, such as impaired driving, however, were impacted because the applicable sentencing scheme allowed sentences to be enhanced on the basis of judge-determined factors other than prior convictions.<sup>24</sup>

Since June 2004, dozens of cases involving *Blakely* claims have been decided by the North Carolina appellate courts. Additionally, the North Carolina General Assembly has enacted legislation designed to cure the constitutional infirmities of the SSA.<sup>25</sup> This paper summarizes the current state of the law as it applies to three main categories of cases: (1) cases subject to North Carolina’s “*Blakely* Bill”;<sup>26</sup> (2) post-*Blakely* cases not subject to the *Blakely* Bill;<sup>27</sup> and (3) pre-*Blakely* cases.<sup>28</sup>

## II. SSA Felony Offenses Committed on or After June 30, 2005—The “*Blakely* Bill”

In the wake of *Blakely*, the North Carolina General Assembly enacted Session Law 2005-145 (S.L. 2005-145). The “*Blakely* Bill,” as it is known, is effective only in prosecutions for

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22. See G.S. 15A-1340.20 through -1340.23.

23. *Shepard v. United States*, 125 S. Ct. 1254 (2005), has been read by some as hinting to a reconsideration of the prior conviction exception.

24. See *infra* § III.B.2. (discussing *Blakely*’s applicability to impaired driving and related offenses). Note that the Sixth Amendment right to jury trial does not apply to petty offenses. As a general rule, petty offenses include those with a maximum prison term of six months or less. See *Blanton v. City of North Las Vegas*, 489 U.S. 538 (1989).

25. S.L. 2005-145.

26. See *infra* § II.

27. See *infra* § III.B.

28. See *infra* § III.A.

offenses committed on or after June 30, 2005.<sup>29</sup> Additionally, the *Blakely* Bill pertains only to SSA felonies; it does not correct *Blakely* problems with regard to non-SSA offenses, such as impaired driving.<sup>30</sup> The *Blakely* Bill applies in both district and superior court.<sup>31</sup> The law applicable to offenses not covered by the *Blakely* Bill—that is, offenses that are not SSA felonies or were committed before the statute’s effective date—is discussed in Section III, below.

## **A. Aggravating Factors**

### **1. Admitted or Submitted to Jury and Proved Beyond a Reasonable Doubt**

The *Blakely* Bill amends G.S. 15A-1340.16 to provide that the burden of proof as to all aggravating factors is beyond a reasonable doubt.<sup>32</sup> It also amends that section to require that, with one exception, unless admitted to by a defendant, aggravating factors must be submitted to a jury.<sup>33</sup> The one exception is that a judge must determine whether aggravating factor G.S. 15A-1340.16(d)(18a) exists.<sup>34</sup> This factor applies when the defendant previously has been adjudicated delinquent for an offense that would be a Class A, B1, B2, C, D, or E felony if committed by an adult. The *Blakely* Bill provides that the G.S. 15A-1340.16(d)(18a) determination must be made in the sentencing hearing.<sup>35</sup> Presumably, the North Carolina General Assembly believed that this factor was not subject to *Blakely*. However, after the bill became law, the North Carolina Court

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29. S.L. 2005-145 sec. 5.

30. As noted above, *Blakely* does not affect SSA misdemeanors.

31. G.S. 7A-272(c) gives a district court judge jurisdiction to accept a defendant’s plea of guilty or no contest to a Class H or I felony, under certain circumstances. Obviously, if a jury trial is required, the case must be tried in superior court. *See State v. Speight*, 359 N.C. 602 n.2 (2005), *petition for cert. filed* (Aug. 31, 2005).

32. *See* S.L. 2005-145 sec. 1.

33. *See id.*

34. *See id.*

35. *See id.*

of Appeals held, in *State v. Yarrell*, that this aggravating factor *is* subject to *Blakely*.<sup>36</sup> The court's analysis turned on the fact that a delinquency adjudication does not constitute a prior conviction. In support of its holding, the court cited G.S. 7B-2412, which provides that an adjudication that a juvenile is delinquent shall not be considered a conviction of any criminal offense. On August 30, 2005, the North Carolina Supreme Court issued a temporary stay in this case. If *Yarrell* remains good law, this aggravating factor should be submitted to the jury and proved beyond a reasonable doubt, notwithstanding S.L. 2005-145.

Under the *Blakely* Bill, the trial court still determines whether mitigating factors are present<sup>37</sup> and continues to balance the aggravating factors against any mitigating factors.<sup>38</sup>

## **2. Trial Procedure**

S.L. 2005-145 provides that if a defendant does not admit an aggravating factor,<sup>39</sup> the trial judge has two procedural options for submitting the factor to the jury. First, the judge may submit the aggravating factor to the jury during the trial on the underlying felony.<sup>40</sup>

Alternatively, if the interests of justice require, the judge may bifurcate the trial and hold a separate sentencing proceeding, during which the jury determines whether the aggravating factor has been proved.<sup>41</sup> If the trial judge bifurcates the proceeding, he or she must conduct the sentencing phase before the trial jury as soon as possible after the guilty verdict is returned.<sup>42</sup> If necessary, alternate jurors may be used, provided that sentencing phase deliberations have not

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36. \_\_ N.C. App. \_\_ (August 2, 2005), *temporary stay allowed*, 2005 WL 2277388 (N.C. Aug. 30, 2005).

37. *See* G.S. 15A-1430.16(b).

38. *See id.*

39. Admissions are discussed below. *See infra* § II.A.3.

40. *See* S.L. 2005-145 sec. 1. *See generally* N.C.P.J.I. 204.25 (aggravating factor pattern jury instruction).

41. *See* S.L. 2005-145 sec. 1. *See generally* N.C.P.J.I. 204.05 (pattern instruction for bifurcated proceeding).

42. *See* S.L. 2005-145 sec. 1.

begun.<sup>43</sup> If the trial jury cannot reconvene for the sentencing phase, the judge must impanel a new jury to determine the issue.<sup>44</sup> In this case, jury selection proceeds in the same manner as jury selection for criminal trials.<sup>45</sup> Finally, if the jury finds aggravating factors, the trial court must ensure that those findings are entered in a document used to record the findings of sentencing factors.<sup>46</sup>

The *Blakely* Bill does not specify whether the rules of evidence<sup>47</sup> apply to a “trial” on the aggravating factors. However, given that the United States Supreme Court has indicated that such factors are equivalent to elements of the offense, it seems likely that the evidence rules will be held to apply to these proceedings.<sup>48</sup>

### **3. Admission by Defendant**

The *Blakely* Bill provides that a defendant may admit to the existence of an aggravating factor.<sup>49</sup> In some situations, a defendant may wish to plead guilty to the felony and admit the aggravating factors. In others, the defendant may wish to plead guilty to the felony and contest the aggravating factors. In this situation, the *Blakely* Bill requires that a jury be impaneled to determine if the aggravating factor exists.<sup>50</sup> A third possibility is that the defendant wishes to admit the aggravating factor but contest the felony. In this instance, a jury must be impaneled to

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43. *See id.*

44. *See id.*

45. *See id.*

46. *See id.*

47. *See* G.S. 8C-1.

48. *See* *Apprendi v. New Jersey*, 530 U.S. 466, 494-96 (2000) (noting the “constitutionally novel and elusive distinction between ‘elements’ and ‘sentencing factors’”); *Ring v. Arizona*, 536 U.S. 584, 605, 609 (2002) (rejecting the distinction between elements of an offense and sentencing factors; holding that Arizona’s aggravating factors operate as “the functional equivalent of an element of a greater offense” (quoting *Apprendi*, 530 U.S. at 494 n.19)).

49. *See* S.L. 2005-145 sec. 1.

50. *See id.*



determine guilt or innocence of the felony charge.<sup>51</sup> Evidence that relates only to the establishment of an aggravating factor may not be admitted in the felony trial.<sup>52</sup>

*Blakely* expressly notes that a defendant may waive his or her jury trial rights.<sup>53</sup> Consistent with case law holding that waivers of constitutional rights must be knowing and voluntary, the North Carolina Court of Appeals subsequently held that an admission to an aggravating factor must be knowing and voluntary.<sup>54</sup> Because the *Blakely* Bill's provision regarding admissions to aggravating factors incorporates an existing statutory procedure for taking guilty pleas that satisfies the knowing and voluntary standard and adds other protections, the bill's new provisions are likely to pass constitutional muster.<sup>55</sup>

Under S.L. 2005-145, admissions of aggravating factors, as well as *Blakely*-covered prior record level points, must be made pursuant to new G.S. 15A-1022.1.<sup>56</sup> That section provides that before accepting a plea of guilty or no contest to a felony, the court must determine (1) whether the state seeks a sentence in the aggravated range and if so, which factors are at issue; (2) whether the state seeks a finding that a prior record level point should be found under G.S. 15A-1340.14(b)(7) (offense committed while defendant was on probation etc.); and (3) whether the required notice was provided or whether the right to notice was waived by the defendant.<sup>57</sup>

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51. *See id.*

52. *See id.*

53. *See Blakely*, 124 S. Ct. at 2541 (“[N]othing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant . . . stipulates to the relevant facts . . .”).

54. *See infra* § III.B.1.g.

55. The statutory procedure for taking guilty pleas, G.S. 15A-1022, is designed to comply with the constitutional requirement that a plea be knowing and voluntary. *See generally*, Jessica Smith, *Pleas and Plea Negotiations in North Carolina Superior Court*, Admin. of Justice Bulletin No. 2005/03 (July 2005) (available on-line at: <http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0503.pdf>).

56. *See* S.L. 2005-145 sec. 1.

57. *See id.* sec. 4; *see also infra* § II.A.4. (discussing statutory requirements as to notice).

Admissions also must comply with G.S. 15A-1022(a), the existing statutory procedure for taking guilty pleas.<sup>58</sup> Additionally, the trial court must address the defendant personally and advise the defendant that: (1) he or she is entitled to have a jury determine the existence of any aggravating factors or points under G.S. 15A-1340.14(b)(7); and (2) he or she has the right to prove the existence of any mitigating factors at a sentencing hearing before the sentencing judge.<sup>59</sup> Before accepting an admission to the existence of an aggravating factor or a prior record level point under G.S. 15A-1340.14(b)(7), the trial court must determine that there is a factual basis for the admission, and that the admission is the result of the defendant's informed choice.<sup>60</sup> In making this determination, the court may base its determination on the factors specified in G.S. 15A-1022(c), as well as any other appropriate information.<sup>61</sup>

Admissions may be made before or after the trial of the underlying felony.<sup>62</sup> And finally, the *Blakely* Bill provides that the procedures specified in G.S. Chapter 15A, Article 58 for the handling of guilty pleas apply to the handling of admissions to aggravating factors and prior record points under G.S. 15A-1340.14(b)(7), "unless the context clearly indicates that they are inappropriate."<sup>63</sup> The Transcript of Plea form, AOC-CR-300 is currently being revised to incorporate these statutory requirements.<sup>64</sup>

#### **4. Pleading and Notice**

S.L. 2005-145 provides that neither the statutory aggravating factors in G.S. 15A-1340.16(d)(1)-(19) nor the prior record point in G.S. 15A-1340.14(b)(7) need be included in an

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58. S.L. 2005-145 sec. 4.

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. Judicial forms are available on-line at: <http://www.nccourts.org/Forms/FormSearch.asp>.

indictment or other charging instrument.<sup>65</sup> This is consistent with subsequent North Carolina case law, discussed below, holding that statutory aggravating factors need not be charged in the indictment. However, the *Blakely* Bill requires that a non-statutory aggravating factor under G.S. 15A-1340.16(d)(20) (the “catch all”) must be charged in an indictment or other charging instrument, as specified in G.S. 15A-924.<sup>66</sup>

In drafting the notice provisions in the *Blakely* Bill, the N.C. Sentencing and Policy Advisory Commission and the General Assembly undoubtedly were guided by two North Carolina Supreme Court decisions. The first, *State v. Lucas*,<sup>67</sup> held that the then-existing statutory procedure for imposition of the sixty-month firearm sentencing enhancement in G.S. 15A-1340.16A was unconstitutional under *Apprendi*. Under procedures then in place, this sentencing factor was determined by a judge. *Lucas* also held that for future cases in which the state seeks to impose the sixty-month enhancement, the state must allege the enhancing facts in the indictment.

In the second case, *State v. Hunt*,<sup>68</sup> the defendant argued that the United States Supreme Court’s decision in *Ring v. Arizona*,<sup>69</sup> rendered North Carolina’s short-form murder indictment unconstitutional. The *Hunt* court upheld the short-form indictment, even though it did not allege

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65. S.L. 2005-145 sec. 1.

66. The *Blakely* Bill amends G.S. 15A-924(a) to provide that a criminal pleading must contain:

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

S.L. 2005-145 sec. 3. Also, the post-*Lucas* changes to the statutory sentence enhancers, *see* S.L. 2003-378, such as the firearm enhancement in G.S. 15A-1340.16A, requiring that the enhancers be pled in the indictment remain in effect. *See infra* § III.B.1.b.

67. 353 N.C. 568 (2001), *overruled in part by*, *State v. Allen*, 359 N.C. 425 (2005).

68. 357 N.C. 257 (2003).

69. 536 U.S. 584 (2002); *see supra* § I. (discussing *Ring*).

the aggravating circumstances that would support imposition of the death penalty. After concluding that the Fifth Amendment’s indictment requirement did not apply to the states, *Hunt* recognized that the Sixth Amendment’s requirement that the accused be informed of criminal accusations does apply. That amendment requires that criminal defendants “have a right to reasonable notice sufficient to ensure that they are afforded an opportunity to defend against the charges.”<sup>70</sup> In the case before it, the court found this standard satisfied, holding that the “nature of the aggravators themselves ensures that defendants will be reasonably apprised of the evidence that could lead to a sentence of death” in that G.S. 15A-2000(e) contains a short, exclusive list of eleven aggravating circumstances, none of which is a catch-all.<sup>71</sup> The court distinguished *Lucas* on grounds that it did not involve a short-form indictment.<sup>72</sup> Furthermore, the court held, capital defendants are in a very different position than defendants who might be subject to the firearm enhancement. It explained:

Unlike defendants for whom the State had an option to seek a firearm enhancement, neither capital defendants nor their attorneys will *ever* be blindsided with aggravating circumstances. Just because a defendant is indicted for a certain noncapital crime, it does not necessarily follow that the State will later seek to attach a firearm enhancement. However, first-degree murder is the *only* crime to which the exclusive list of [G.S. 15A-2000(e)] aggravators can apply. [G.S. 15A-2000(e)] is necessarily implicated at the very moment a defendant is informed of the State’s intent to seek the death penalty . . . .<sup>73</sup>

The court went on to conclude that additional mechanisms are in place to provide notice of aggravating circumstances, including that the parties must consider the existence of aggravating circumstances at the Rule 24 hearing, that defendants have the option of seeking a

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70. *Hunt*, 357 N.C. at 271 (quotation omitted).

71. *Id.* at 276.

72. *Id.*

73. *Id.* (emphasis in original).

bill of particulars as to the evidence of the aggravating circumstances, and that aggravating circumstances may become evident during pretrial discovery or other pretrial proceedings.<sup>74</sup>

After *Hunt* and *Blakely*, *State v. Allen*<sup>75</sup> overruled that portion of *Lucas* requiring that enhancing factors be plead in the indictment.<sup>76</sup> Neither *Hunt* nor *Allen* referred to the body of North Carolina law requiring an indictment to allege all essential elements of the crime, unless a statutory short-form is used.<sup>77</sup>

In the end, whether out of concern that non-capital aggravating factors and prior record level points under G.S. 15A-1340.14(b)(7) might not be treated like the capital aggravating circumstances in *Hunt* or because of a policy decision to provide protections above any constitutional floor, the General Assembly, in enacting S.L. 2005-145, imposed notice requirements on the state in non-capital cases. Specifically, the *Blakely* Bill provides that the state must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under G.S. 15A-1340.16(d) or a prior record level point under G.S. 15A-1340.16(b)(7).<sup>78</sup> Notice must be provided at least thirty days before trial or the entry of a guilty or no contest plea and must list all of the aggravating factors the state seeks to establish.<sup>79</sup> The right to notice, however, may be waived by the defendant.<sup>80</sup>

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74. *Id.* at 277.

75. 359 N.C. 425 (2005).

76. *See also* *State v. Wissink*, \_\_ N.C. App. \_\_ (August 16, 2005) (prior record point under G.S. 15A-1340.14(b)(7) need not be alleged in indictment).

77. *See generally*, Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, Admin. of Justice Bulletin No. 2004/03 (School of Government, UNC-Chapel Hill 2004); *see supra* n. 48 (citing cases suggesting there is no distinction between sentencing factors and elements).

78. *See* S.L. 2005-145 sec. 1.

79. *See id.*

80. *See id.*

## **B. Prior Record Level Points**

Prior record points are set out in G.S. 15A-1340.14(b). The points assigned in subsections (b)(1) – (5) all are based on prior convictions. G.S. 15A-1340.14(b)(6) assigns one prior record level point if all of the elements of the offense are included in a prior offense for which the defendant was convicted. And finally, G.S. 15A-1340.14(b)(7) assigns one point if the offense was committed while the offender was on probation, parole or post-release supervision or while on escape.

S.L. 2005-145 provides that if the state seeks to establish the existence of a prior record level point under G.S. 15A-1340.14(b)(7), the jury must determine whether the point should be assessed, using the same procedures prescribed for aggravating factors.<sup>81</sup> Although the law provides that the state need not allege in an indictment or other pleading that it intends to establish the point,<sup>82</sup> the same notice requirements for aggravating factors apply to this prior record point.<sup>83</sup> Admissions to prior record points under G.S. 15A-1340.14(b)(7) must be made in the same manner as admissions to aggravating factors.<sup>84</sup>

The *Blakely* Bill makes no special provision for the point under G.S. 15A-1340.14(b)(6). This treatment is consistent with subsequent case law from the North Carolina Court of Appeals, holding that no *Blakely* violation occur when a judge determines this prior record level point.<sup>85</sup>

## **C. Structural Error**

As is discussed in more detail below,<sup>86</sup> in a case that was not subject to the *Blakely* Bill, the North Carolina Supreme Court held that *Blakely* violations are structural errors warranting

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81. See S.L. 2005-145 sec. 1 & 2.

82. See *id.* sec. 1.

83. See *id.* sec. 2.

84. See *id.* sec. 4; see also *supra* § II.A.3.

85. See *infra* § III.B.1.d.

automatic reversal. It would appear that the same standard will apply to violations of those portions of the *Blakely* Bill that implement *Blakely*'s constitutional requirements.

### **III. Non-SSA Offenses and SSA Felonies Committed Before June 30, 2005**

The *Blakely* Bill only applies to prosecutions for SSA felonies that were committed on or after June 30, 2005. Many pending felony prosecutions thus fall outside of the law's coverage. Additionally, the law does not impact the many felony cases that became final before its effective date and now may come to the trial courts on motions for appropriate relief.<sup>87</sup> And finally, the *Blakely* Bill does not apply to non-SSA offenses.

#### **A. Pre-*Blakely* Cases**

*Blakely* applies to all future cases as well as those that were pending on direct review and not yet final at the time it was decided (June 24, 2004).<sup>88</sup> As a general rule, a conviction is final when a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari to the United States Supreme Court has elapsed or a timely petition for certiorari has been finally denied.<sup>89</sup> The question of *Blakely*'s retroactive application to cases that became final before it was decided has not yet been decided by the United States Supreme Court or the North Carolina appellate courts. For an extensive discussion of retroactivity analysis and application of that analysis to *Blakely*, see Jessica Smith, Retroactivity of Judge-Made Rules, Admin. of Justice Bulletin No. 2004/10 (Dec. 2004) (available on-line at: <http://www.iog.unc.edu/programs/crimlaw/aoj200410.pdf>).

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86. See *infra* § III.B.1.j.

87. See G.S. 15A-1411 through -1422.

88. See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). The Court stated in *Griffith*: "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 322.

89. See *id.* at 321 n.6.

## **B. Post-*Blakely* Cases Not Covered by the *Blakely* Bill**

As noted, *Blakely* applies to all future cases as well as those that were pending on direct review and not yet final at the time it was decided (June 24, 2004).<sup>90</sup> *State v. Allen*<sup>91</sup> was the first case in which the North Carolina Supreme Court applied *Blakely* to SSA felony sentencing. It held, in part, that the SSA procedure allowing a judge to determine felony aggravating factors was unconstitutional under *Blakely*. The *Allen* court stated that its holdings apply to cases “in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final.” This language cannot be read to overrule established United States Supreme Court law making *Blakely* applicable to all future cases as well as to cases that were pending on direct review or not yet final at the time *Blakely* was decided, regardless of their status at the time the *Allen* was rendered.

This section explores *Blakely*’s application to post-*Blakely* cases that fall outside of the coverage of the *Blakely* Bill.<sup>92</sup>

### **1. SSA Felonies**

If *Blakely* applies,<sup>93</sup> its rule impacts all SSA felony sentencing, whether in district or superior court. Obviously, if *Blakely* requires a jury trial for a SSA felony, the case must be tried in superior court.<sup>94</sup>

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90. *See supra* § III.A.

91. 359 N.C. 425 (2005).

92. *See supra* § II. (discussing the scope of the *Blakely* Bill).

93. *See supra* § III.A. (discussing retroactivity).

94. *See State v. Speight*, 359 N.C. 602 n.2 (2005), *petition for cert. filed* (Aug. 31, 2005); G.S. 7A-272(c) gives a district court judge jurisdiction to accept a defendant’s plea of guilty or no contest to a Class H or I felony, under certain circumstances.



**a. “Prescribed Statutory Maximum” is the Presumptive Range**

The most important post-*Blakely* felony case decided in North Carolina is *State v. Allen*.<sup>95</sup> *Allen* held, in part, that as applied to SSA felony sentencing, the *Blakely* rule is: Other than a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to the jury and proved beyond a reasonable doubt.<sup>96</sup>

**b. Notice and Pleading**

In *Allen*,<sup>97</sup>—a case in which *Blakely* but not the *Blakely* Bill applied—the defendant argued that *Blakely* and *State v. Lucas*<sup>98</sup> required that factors increasing punishment beyond the presumptive range must be alleged in the indictment. Relying on its decision in *State v. Hunt*,<sup>99</sup> *Allen* rejected that argument and expressly overruled language to the contrary in *Lucas*.<sup>100</sup> Following *Allen*, the North Carolina Court of Appeals held that facts supporting a prior record level point under G.S. 15A-1340.14(b)(7) need not be alleged in the indictment.<sup>101</sup> These cases make clear that for *Blakely* cases not covered by the *Blakely* Bill, neither aggravating factors nor

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95. 359 N.C. 425 (2005).

96. The court overruled that part of *State v. Lucas*, 353 N.C. 568 (2001), which defined “statutory maximum” in a manner inconsistent with its opinion.

97. 359 N.C. 425.

98. 353 N.C. 568 (2001), *overruled in part by*, *State v. Allen*, 359 N.C. 425 (2005). *Lucas* is discussed in more detail above. *See supra* § II.A.4.

99. 357 N.C. 257 (2003). *Hunt* is discussed in more detail above. *See supra* § II.A.4.

100. *See Allen*, 359 N.C. 425; *see also* *State v. Blackwell*, \_\_ N.C. \_\_ (August 19, 2005). There is some question as to the applicability of *Allen*’s holdings. In *Allen*, the court stated that its holdings apply to cases “in which the defendant have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final.” As noted in the text above, *see supra* § III.B., this language cannot preclude *Blakely*’s application to all future cases and to cases that were pending on direct review and not yet final at the time *Blakely* was decided. In light of this, there is some ambiguity about the meaning of the “applicability” language in *Allen*, including its meaning as to the court’s holding regarding charging in the indictment.

101. *See State v. Wissink*, \_\_ N.C. App. \_\_ (August 16, 2005).

prior record level points under G.S. 15A-1340.14(b)(7) need to be alleged in the indictment.<sup>102</sup>

However, the post-*Apprendi* statutory amendments to the sentence enhancers, such as the sixty-month firearm enhancement, continue to require that the facts supporting those enhancers be alleged in the indictment. And finally, as noted above, none of the post-*Blakely* charging cases have addressed the body of state case law requiring that, except when an approved short-form indictment is used, the indictment must allege every essential element of the offense.<sup>103</sup>

As noted,<sup>104</sup> *State v. Hunt*<sup>105</sup> recognized that the Sixth Amendment requires that defendants have a “right to reasonable notice sufficient to ensure that they are afforded an opportunity to defend against the charges.”<sup>106</sup> *Hunt* went on to hold that even when the short-form murder indictment was used, capital defendant had adequate notice of the aggravating circumstances that would support imposition of the death penalty. And as noted, the General Assembly responded to *Hunt* in the *Blakely* Bill by requiring notice of aggravating factors and prior record points under G.S. 15A-1340.14(b)(7) thirty days before trial. Whether such notice is sufficient has not yet been decided. Nor has a non-capital case been decided in which some other form of notice was given. Thus, for *Blakely* cases not subject to the *Blakely* Bill, the scope of any notice requirement remains undefined.

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102. See G.S. 15A-1340.16A (firearm enhancement); G.S. 15A-1340.16B (B1 felony recidivist when victim is 13 years of age or younger enhancement); G.S. 15A-1340.16C (bullet-proof vest enhancement); see also G.S. 15A-1340.14D (methamphetamine enhancement). See generally S.L. 2003-378 (amending G.S. 15A-1340.16A through .16C). The methamphetamine enhancement was enacted in 2004 by S.L. 2004-178.

103. See *supra* § II.A.4.

104. See *supra* § II.A.4.

105. 357 N.C. 257 (2003).

106. *Id.* at 271 (quotation omitted).

### c. Aggravating Factors

*State v. Allen*<sup>107</sup> held that unless a defendant has admitted to an aggravating factor or factors, he or she may not be sentenced in the aggravated range unless the factor has been submitted to the jury and proved beyond a reasonable doubt. Since *Allen*, every appellate case that has asserted a *Blakely* error as to aggravating factors has resulted in an order requiring a new sentencing hearing.<sup>108</sup>

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107. 359 N.C. 425 (2005).

108. *See State v. Blackwell*, \_\_ N.C. \_\_ (August 19, 2005) (judge found aggravating factor that defendant was on pretrial release for another charge when he committed the offense); *State v. Hurt*, \_\_ N.C. \_\_ (August 19, 2005) (judge found the following aggravating factors: the offense was especially heinous, atrocious or cruel, the defendant joined with one other person in committing the offense and was not charged with committing a conspiracy, and defendant took property by force and “placed [the] victim with threats of bodily harm”); *State v. Battle*, \_\_ N.C. App. \_\_ (August 2, 2005) (judge found aggravating factor that defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy), *temporary stay allowed*, 2005 WL 2210040 (N.C. August 11, 2005); *State v. Bullock*, \_\_ N.C. App. \_\_ (July 19, 2005) (judge found aggravating factor that the victim suffered serious injury that is permanent and debilitating), *temporary stay allowed*, 2005 WL 2051333 (N.C. August 3, 2005); *State v. Caudle*, \_\_ N.C. App. \_\_ (August 2, 2005) (judge found aggravating factor that defendant committed the offense while on pretrial release on another charge), *temporary stay allowed*, 2005 WL 22099013 (N.C. August 16, 2005); *State v. Dorton*, \_\_ N.C. App. \_\_ (August 16, 2005) (judge found aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense); *State v. Everette*, \_\_ N.C. App. \_\_ (August 2, 2005) (judge found the following statutory and non-statutory aggravating factors: (1) the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws; (2) defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person; (3) defendant committed the offense while on pretrial release on another charge; (4) defendant shot more than one time and in more than one occupied property and made repeated acts which were more than required for the offense), *temporary stay allowed*, 2005 WL 2249560 (N.C. August 22, 2005); *State v. Jacobs*, \_\_ N.C. App. \_\_ (August 2, 2005) (judge found aggravating factor that defendant committed the offense to disrupt and hinder the lawful exercise of a governmental function or the enforcement of laws); *State v. Jones*, \_\_ N.C. App. \_\_ (August 2, 2005) (judge found aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense); *State v. Lewis*, \_\_ N.C. App. \_\_ (August 2, 2005) (judge found aggravating factor that defendant took advantage of a position of trust or confidence); *State v. McBride*, \_\_ N.C. App. \_\_ (September 6, 2005) (judge found non-statutory aggravating factor “obstruction of justice”); *State v. Meynardie*, \_\_ N.C. App. \_\_ (August 2, 2005) (judge found aggravating factor that defendant took advantage of a position of trust and confidence to commit the offense),

#### **d. Prior Record Level Points**

Prior record level points are assigned by statute in G.S. 15A-1340.14(b); most points are assigned because of prior convictions. Because *Blakely* specifically excludes prior convictions from the scope of its rule, points calculated on the basis of prior convictions are unaffected by *Blakely*.<sup>109</sup> However, under G.S. 15A-1340.14(b)(6), one prior record level point is assigned if all of the elements of the present offense are included in a prior offense for which the offender was convicted. The North Carolina Court of Appeals has held that no *Blakely* violation occurs

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*temporary stay allowed*, 2005 WL 2249561 (N.C. August 22, 2005); *State v. Murphy*, \_\_ N.C. App. \_\_ (August 16, 2005) (judge found the following three aggravating factors: (i) the victim of the crime was very young; (ii) defendant took advantage of a position of trust or confidence to commit the offense; and (iii) defendant was absent without leave from the United States Army at the time of the offense), *temporary stay allowed*, 2005 WL 2277338 (N.C. September 2, 2005); *State v. Norris*, \_\_ N.C. \_\_ (August 16, 2005) (judge found aggravating factor that during the commission of the offense, defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person), *temporary stay allowed*, 2005 WL 2277433 (N.C. September 6, 2005); *State v. Phillips*, \_\_ N.C. App. \_\_ (August 2, 2005) (judge found aggravating factors that defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants and that defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy); *State v. Poore*, \_\_ N.C. App. \_\_ (August 16, 2005) (judge found aggravating factor that defendant was armed with a deadly weapon at the time of the crime); *State v. Sanchez*, \_\_ N.C. App. \_\_ (August 2, 2005) (judge found aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense); *State v. Verrier*, \_\_ N.C. App. \_\_ (September 6, 2005) (judge found aggravating factor that defendant took advantage of a position of trust or confidence); *State v. Watts*, \_\_ N.C. App. \_\_ (August 2, 2005) (judge found aggravating factor that defendant committed the offense while on pretrial release on another charge), *temporary stay allowed*, 2005 WL 2249568 (N.C. August 22, 2005); *State v. Yarrell*, \_\_ N.C. App. \_\_ (August 2, 2005) (judge found the following aggravating factors: (i) defendant committed the offense while on pretrial release on another charge; (ii) defendant joined with more than one other person in committing the offense and was not charged with committing conspiracy; and (iii) defendant had previously been adjudicated delinquent for an offense that would be a Class A, B, C, D, or E felony if committed by an adult), *temporary stay allowed*, 2005 WL 2277388 (N.C. August 30, 2005).

109. *But see supra* n. 23 (noting that one United States Supreme Court case has been read as hinting that this exception might be reconsidered).

when a judge makes the determination that all of the elements of the offense are included in a prior offense and assigns a prior record level point on this basis.<sup>110</sup> It said:

We conclude that neither *Blakely* nor *Allen* preclude the trial court from assigning a point in the calculation of one's prior record level where "all of the elements of the present offense are included in [a] prior offense." This is true even though the same has neither been found by a jury beyond a reasonable doubt nor admitted by the defendant. The exercise of assigning a point for the reason set forth in G.S. 15A-1340.14(b)(6) is akin to the trial court's determination that defendant had in fact been convicted of certain prior offenses, and is not something that increases the "statutory maximum" within the meaning of *Blakely* or *Allen*.<sup>111</sup>

Additionally, under G.S. 15A-1340.14(b)(7), the SSA assigns one prior record level point if the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment. The North Carolina Court of Appeals has held that *Blakely* applies to this prior record level point.<sup>112</sup>

#### **e. Mitigating Factors and Factor Balancing**

*State v. Allen*<sup>113</sup> expressly stated that those portions of G.S. 15A-1340.16 governing a sentencing judge's finding of mitigating factors and permitting a judge to balance aggravating and mitigating factors are not affected by *Blakely*.

#### **f. Presumptive and Mitigated Range Sentencing**

After *Blakely* and *Allen*, the presumptive range was viewed by some as a "safe harbor." However, in *State v. Norris*,<sup>114</sup> the North Carolina Court of Appeals held, over a dissent, that a

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110. See *State v. Poore*, \_\_ N.C. App. \_\_ (August 16, 2005).

111. See *id.* (citation omitted)

112. See *State v. Wissink*, \_\_ N.C. App. \_\_ (August 16, 2005).

113. 359 N.C. 425 (2005) (slip op. at 8).

114. \_\_ N.C. App. \_\_ (August 16, 2005), *temporary stay allowed*, 2005 WL 2277433 (N.C. Sept. 6, 2005).

defendant's right to jury trial is violated when the judge finds an aggravating factor but nevertheless decides to sentence the defendant in the presumptive range. Under this decision, any judicial finding of an aggravating factor violates *Blakely*, regardless of sentence. If this decision stands, the presumptive range will be a safe harbor only when no aggravating factors have been found.<sup>115</sup> It is not clear whether *Norris* will be extended to mitigated range sentencing in cases where an aggravating factor has been found. In the meantime, the North Carolina Supreme Court has issued a temporary stay in the *Norris* case.<sup>116</sup>

#### **g. Admission or Stipulation**

*Blakely* defined the statutory maximum as the maximum sentence a judge may impose “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”<sup>117</sup> It made clear that “nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant . . . stipulates to the relevant facts . . . .”<sup>118</sup> Consistent with this, *State v. Allen*,<sup>119</sup> held unconstitutional only those portions of G.S. 15A-1340.16 that require trial judges to consider evidence of aggravating factors “not found by a jury or admitted by the defendant.” As to the form of such an admission, the North Carolina Court of Appeals has indicated that waivers of constitutional rights, must be done knowingly and intelligently.<sup>120</sup> Specifically, the court has

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115. See *State v. Tuck*, \_\_ N.C. App. \_\_ (September 6, 2005) (*Blakely* does not apply because defendant was sentenced in the mitigated and presumptive ranges and the trial court did not find any aggravating factors).

116. See *State v. Norris*, 2005 WL 2277433 (N.C. Sep. 6, 2005).

117. *Blakely*, 124 S. Ct. at 2537 (emphasis in original).

118. See *id.*

119. 359 N.C. 425 (2005).

120. See *State v. Meynardie*, \_\_ N.C. App. \_\_ (August 2, 2005), *temporary stay allowed*, 2005 WL 2249561 (N.C. August 22, 2005); see also *State v. Everette*, \_\_ N.C. App. \_\_ (August 2, 2005), *temporary stay allowed*, 2005 WL 2249560 (N.C. August 22, 2005); *State v. Wissink*, \_\_ N.C. App. \_\_ (August 16, 2005).

rejected an argument by the state that a defendant had stipulated to the existence of an aggravating factor by stipulating to the factual basis for the plea.<sup>121</sup> Noting that a waiver of the right to jury trial must be knowing and voluntary, the court concluded:

Since neither *Blakely* nor *Allen* has been decided at the time of defendant’s sentencing hearing, defendant was not aware of his right to have a jury determine the existence of the aggravating factor. Therefore, defendant’s stipulation to the factual basis for his plea was not a [knowing and intelligent act].<sup>122</sup>

As noted above, for offenses committed on or after June 30, 2005, S.L. 2005-145 requires an “admission” to an aggravating factor or a prior record level point under G.S. 15A-1340.14(b)(7) be taken with the same formality as a guilty plea.<sup>123</sup> It is not clear how the appellate courts will decide a post-*Blakely* case not subject to S.L. 2005-145 in which the defendant “stipulates”—but does not plead guilty—to the existence of an aggravating factor or prior record level point under G.S. 15A-1340.14(b)(7).

There appears to be no federal constitutional bar to allowing a defendant to waive *Blakely* rights and consent to judicial fact-finding as to the sentencing enhancement. However, such a procedure does not appear to be permissible under the North Carolina Constitution.<sup>124</sup>

#### **h. Trial Procedure**

In cases subject to *Blakely* but not subject to the *Blakely* Bill, the appellate courts have provided little guidance on trial procedure, other than the Court of Appeals’ indication in one case that the judicial remedy of affording a jury trial on aggravating factors may be crafted to

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121. *See Meynardie*, \_\_\_ N.C. App. \_\_\_.

122. *See id.*

123. *See supra* § II.A.3. (discussing the statutory requirements).

124. *See State v. Smith*, 291 N.C. 438 (1976) (“as long as [a defendant’s] plea is not guilty the determinative facts cannot be referred to *the judge* even by defendant’s consent—they must be found by the jury”); *State v. Muse*, 219 N.C. 226 (1941) (same).

comply with *Blakely*.<sup>125</sup> Assuming such a procedure is proper and that the trial courts are not limited to presumptive range sentencing, the possible scenarios include:

- A single trial of the underlying felony and aggravating factors;
- A bifurcated trial;
- A trial on only the aggravating factors when the defendant pleads guilty to the underlying felony; and
- A trial on only the underlying felony when the defendant admits the aggravating factors.

No North Carolina appellate case has addressed whether the rules of evidence apply to jury proceedings on aggravating factors. However, given that the United States Supreme Court has indicated that such factors are equivalent to elements of the offense, it seems likely that evidence rules will be held to apply to these proceedings.<sup>126</sup>

#### **i. Waiver**

In *State v. Everett*,<sup>127</sup> the state argued that the defendant waived his right to challenge the trial court's *Blakely* error of finding felony aggravating factors. According to the state, because *Ring v. Arizona*<sup>128</sup> and *Apprendi v. New Jersey*<sup>129</sup> had been decided at the time of defendant's trial, defendant was on notice of his rights under *Blakely* and waived his *Blakely* challenge by not raising the issue at the trial level. Noting that defendant's case was pending at the time *Blakely* and *Allen* were decided, the Court of Appeals rejected the state's argument without specifically addressing the issue of waiver.

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125. See *infra* § III.B.1.k.

126. See *supra* n. 48.

127. \_\_\_ N.C. App. \_\_\_ (August 2, 2005), *temporary stay allowed*, 2005 WL 2249560 (N.C. August 22, 2005).

128. 536 U.S. 584 (2002).

129. 530 U.S. 466 (2000).



## j. Structural Error

As a general rule, constitutional error warrants reversal unless it is found to be harmless beyond a reasonable doubt. The United States Supreme Court's seminal decision on harmless error, *Chapman v. California*,<sup>130</sup> rejected the contention that the federal constitution required automatic reversal for all constitutional error. Instead, it held that constitutional errors should be evaluated against a harmless error standard. *Chapman's* harmless error standard has been incorporated into North Carolina's statutory provisions regarding motions for appropriate relief and appeal.<sup>131</sup>

Over the years, the United States Supreme Court has applied the *Chapman* standard to a wide range of constitutional errors.<sup>132</sup> However, the Court also has acknowledged that some errors—such as the total deprivation of the right to counsel at trial and a judge who was not impartial—“defy analysis” by harmless error standards and require automatic reversal.<sup>133</sup> In *Arizona v. Fulminante*,<sup>134</sup> the Court clarified that the types of error that fall outside of harmless error analysis involve a “structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.”<sup>135</sup> In *State v. Allen*,<sup>136</sup> the North Carolina Supreme Court held that *Blakely* errors are structural errors that are not subject to harmless error review.<sup>137</sup> Rather, it held, such errors require automatic reversal. The North

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130. 386 U.S. 18 (1967).

131. See G.S. 15A-1420(c)(6); G.S. 15A-1443(b).

132. See *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991) (Rehnquist, C.J.) (listing cases).

133. *Id.* at 309-10. *Arizona* noted that other constitutional errors that defy harmless error analysis include: unlawful exclusion of members of the defendant's race from a grand jury, the right to self-representation at trial, and the right to a public trial. See *id.*

134. 499 U.S. 279 (1991).

135. *Id.* at 310.

136. 359 N.C. 425 (2005).

137. See also *State v. Blackwell*, \_\_ N.C. \_\_ (August 19, 2005) (same); *State v. Hurt*, \_\_ N.C. \_\_ (August 19, 2005) (same); *State v. Speight*, 359 N.C. 602 (2005) (same), *petition for cert. filed*

Carolina Attorney General has filed a petition for writ of certiorari in the United States Supreme Court on this issue in another *Blakely* case decided on the same day as *Allen*.<sup>138</sup>

In *Allen*, the North Carolina Supreme Court stated that its holdings apply to cases “in which the defendants have not been indicted as of the certification date of this opinion and to cases that are now pending on direct review or are not yet final.” As noted above, this language cannot be read consistently with established United States Supreme Court law making *Blakely* applicable to all future cases and to cases that were pending on direct review and not final at the time *Blakely* was decided. In light of this, one possible interpretation of *Allen*’s “applicability” language is that it was meant to limit the holding as to structural error—that is, that the court intended its ruling as to structural error and automatic reversal to apply only to pending and future cases. Until there is an appellate decision in a *Blakely* case that was not pending when *Allen* was decided, this issue will remain open.<sup>139</sup>

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(Aug. 31, 2005). In *Ring v. Arizona*, 536 U.S. 584, 609 n.7 (2002), after reversing and remanding on an *Apprendi* error, the Court declined to reach the State’s assertion that any error was harmless, citing *Neder v. United States*, 527 U.S. 1, 25 (1999), with the following parenthetical note: “this Court ordinarily leaves it to lower courts to pass on the harmlessness of error in the first instance”. This footnote can be read to indicate that the Court expected harmless error analysis to apply to *Apprendi* errors. If so, it is a rare point on which the *Ring* majority and dissenting opinions seem to agree. See *Ring*, 536 U.S. at 621 (O’Connor, J., dissenting) (stating the belief that many *Ring* challenges will be unsuccessful in part because defendants will be unable to satisfy the harmless error standard).

138. See *State v. Speight*, 359 N.C. 602 (2005), *petition for cert. filed* (U.S. August 31, 2005).

Relying on *Allen*, the Court of Appeals rejected the state’s suggestion that it review a *Blakely* error for plain error, instead concluding that the error was reversible per se. See *State v. Meynardie*, \_\_ N.C. App. \_\_ (August 2, 2005), *temporary stay allowed*, 2005 WL 2249561 (N.C. August 22, 2005).

139. If the error is not structural, presumably harmless error analysis would apply.

### **k. Remedy**

In *State v. Allen*,<sup>140</sup> after finding structural error had occurred when the judge found an aggravating factor and sentenced the defendant in the aggravated range, the court remanded for resentencing. However, the court did not indicate whether the resentencing judge was permitted to convene a jury for the purpose of hearing aggravating factors or whether the judge was required to resentence in the presumptive range.<sup>141</sup> The court's statement that it would "refrain from unwarranted interference in the legislative revision of North Carolina's structured sentencing scheme,"<sup>142</sup> is read by some as suggesting that the courts could not fashion a "judicial fix" to the statutory sentencing scheme and that sentencing for SSA felonies covered by *Blakely* but not the *Blakely* Bill must be in the presumptive range. Without discussion, a North Carolina Court of Appeals case implicitly rejected that argument. In *State v. Norris*,<sup>143</sup> after finding a *Blakely* error, the court remanded for resentencing, expressly stating that "[o]n remand, the trial court is instructed to submit any factor in aggravation to the jury for proof beyond a reasonable doubt."<sup>144</sup> The North Carolina Supreme Court later issued a temporary stay in *Norris*. In other

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140. 359 N.C. 425 (2005).

141. *But see Allen*, 359 N.C. 425 (Martin, J., concurring in part, dissenting in part) ("I agree that defendant's case should be remanded for a new sentencing hearing at which a jury determines whether the offense in question was especially heinous, atrocious, or cruel").

142. *Allen*, 359 N.C. 425 (slip op. at 13).

143. \_\_ N.C. App. \_\_ (August 16, 2005), *temporary stay allowed*, 2005 WL 2277433 (N.C. September 6, 2005).

144. In *State v. Everette*, \_\_ N.C. App. \_\_ (August 2, 2005), *temporary stay allowed*, 2005 WL 2249560 (N.C. August 22, 2005), the trial judge found a mitigating factor and, in violation of *Blakely*, four aggravating factors. On appeal, defendant argued that because there was no provision in the North Carolina General Statutes providing a procedure by which juries could determine whether aggravating factors exist, the remedy for the *Blakely* violation should be sentencing in the mitigated range, since a mitigating factor was found. The Court of Appeals responded: "However, our Supreme Court stated in *Allen* that the proper procedure when appellate review reveals a *Blakely* error is to simply remand for resentencing. Pursuant to the Supreme Court's directive, we remand for resentencing in accordance with this opinion." (citing

cases, after finding a *Blakely* error, the court of appeals simply remanded for resentencing, without specifying the appropriate procedure.

## 2. Misdemeanors Not Subject to the SSA

As a general rule, *Blakely* applies to any non-SSA misdemeanor that involves the use of judge-determined sentencing factors, other than prior convictions, to increase the sentence beyond the prescribed statutory maximum.<sup>145</sup> Some question remains, however, as to whether *Blakely* applies to non-SSA misdemeanors tried in district court. The issue has been stated as follows:

One view is that *Blakely* is not simply a ruling on the constitutional right to a jury trial, but also rests on rights (such as notice and proof beyond a reasonable doubt) that flow from a sentence that exceeds the statutory maximum as defined in the ruling. Therefore, requirements of a criminal pleading providing notice (either by specific allegations or a statutory short-form pleading) and proof beyond a reasonable doubt apply . . . in district court . . . just as they apply in superior court—except that a district court judge, not a jury, decides whether these factors have been proved beyond a reasonable doubt. . . .

Another view is that *Blakely* rests squarely on the constitutional right to a jury trial. The United States Supreme Court ruled in *Ludwig v. Massachusetts*, 427 U.S. 618 (1976), that there is no federal constitutional right to a jury trial at the first level of a state's trial de novo system. If *Blakely* is based solely on the protection of that right, then it apparently does not apply to the first level of a system, such as North Carolina's, where jury trials are provided only on *de novo* appeal.<sup>146</sup>

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*Allen*, 359 N.C. 425). This response left some ambiguity about the procedure to be employed on resentencing.

145. See *State v. Speight*, 359 N.C. 602 (2005) (holding that *State v. Allen*, 359 N.C. 425 (2005), applies to all cases in which (1) a defendant is constitutionally entitled to a jury trial, and (2) a trial court has found one or more aggravating factors and increased a defendant's sentence beyond the presumptive range without submitting the aggravating factors to a jury), *petition for cert. filed* (Aug. 31, 2005).

146. Robert Farb, *Blakely v. Washington and Its Impact on North Carolina's Sentencing Laws* at pp. 14-15 (July 9, 2004) (revised) (posted on-line at: <http://www.iog.unc.edu/programs/crimlaw/blakelyfarbmemo.pdf>) [hereinafter Farb, *Blakely*]

Although *State v. Speight* can be read as suggesting that the North Carolina Supreme Court will take the latter view,<sup>147</sup> the issue was not before the court in that case. In *Speight*, the defendant's impaired driving conviction was tried before a jury in superior court, along with two felony charges. While *Speight* made clear that "where district court has exclusive original jurisdiction over misdemeanors, defendants do not have a right to a jury trial in district court,"<sup>148</sup> uncertainty remains as to the applicable burden of proof in district court for factors other than prior convictions that increase punishment beyond the prescribed statutory maximum.

The North Carolina misdemeanors not subject to the SSA include following

- 1) Impaired driving under G.S. 20-138.1;
- 2) Impaired driving in a commercial vehicle under G.S. 20-138.2;
- 3) Second and subsequent violations for operating a commercial vehicle after consuming alcohol under G.S. 20-138.2A;
- 4) Second and subsequent violations for operating a school bus, school activity bus, or child care vehicle after consuming alcohol under G.S. 20-138.2B; and
- 5) Health-related offenses under G.S. 130-25(b).<sup>149</sup>

Because punishment for the health related offenses under G.S. 130-25(b) does not involve application of sentencing factors or points, *Blakely* appears to have no application to these non-SSA misdemeanors.<sup>150</sup>

For all of the non-SSA misdemeanor motor vehicle offenses listed above, punishment is prescribed by G.S. 20-179. Under this provision, there are five possible levels of punishment:

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147. 359 N.C. 602 (2005) ("*Allen* applies to all cases in which (1) *a defendant is constitutionally entitled to a jury trial*, and (2) a trial court has found one or more aggravating factors and increased a defendant's sentence beyond the presumptive range without submitting the aggravating factors to a jury") (emphasis added), *petition for cert. filed* (Aug. 31, 2005).

148. *See id.* at n.2.

149. *See* Farb, *Blakely supra* n. 146.

150. *See id.*

Levels One, Two Three, Four and Five.<sup>151</sup> The higher the level, the lighter the sentence.<sup>152</sup> In order to determine the proper level of punishment, the judge first determines whether certain grossly aggravating factors are present.<sup>153</sup> If more than one grossly aggravating factor is present, sentencing is at Level One.<sup>154</sup> If one grossly aggravating factor is present, sentencing is at Level Two.<sup>155</sup> Under the statute, there are five grossly aggravating factors, only two of which involve prior convictions<sup>156</sup> and thus are excepted from *Blakely*.<sup>157</sup>

If no grossly aggravating factors are present, the judge must determine whether aggravating or mitigating factors are present and balance those factors in order to determine the proper punishment level.<sup>158</sup> The statute lists eight specific aggravating factors<sup>159</sup> and one “catch-all” aggravating factor that allows the judge to consider “[a]ny other factor that aggravates the seriousness of the offense.”<sup>160</sup> Of the eight specified factors, three involve prior convictions and thus appear to be excepted from *Blakely*.<sup>161</sup>

Sentencing is at Level Three when no grossly aggravating factors are present and aggravating factors substantially outweigh any mitigating factors.<sup>162</sup> Punishment at Level Four is required when no grossly aggravating factors are present and either no other factors are present

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151. G.S. 20-179(g)-(k).

152. *See id.*

153. G.S. 20-179(c).

154. *See id.*

155. *See id.*

156. G.S. 20-179(c)(1)-(4). The grossly aggravating factors in G.S. 20-179(c)(1) involve prior convictions.

157. *See State v. Tedder*, \_\_ N.C. App. \_\_ (April 5, 2005).

158. G.S. 20-179(c).

159. G.S. 20-179(d)(1)-(8).

160. G.S. 20-179(d)(9).

161. G.S. 20-179(d)(5)-(7).

162. G.S. 20-179(f)(1).

or the aggravating factors are “substantially counterbalanced” by mitigating factors.<sup>163</sup> Finally, punishment is at Level Five when no grossly aggravating factors are present and the mitigating factors substantially outweigh any aggravating factors.<sup>164</sup> The burden of proof for grossly aggravating and aggravating factors is by the greater weight of the evidence.<sup>165</sup>

*Speight* is the only significant post-*Blakely* appellate case dealing with a motor vehicle offense punishable under G.S. 20-179. In *Speight*, the defendant was convicted, in part, for impaired driving. Pursuant to the impaired driving sentencing scheme, the superior court judge found the grossly aggravating factor that the defendant caused serious injury to another person and determined that the defendant should receive a Level Two punishment for impaired driving.<sup>166</sup> *Speight* found this to be error and remanded for resentencing.

Even after *Speight*, questions still remain about how *Blakely* applies to impaired driving offenses in both superior and district courts. And as noted above, S.L. 2005-145 does not address non-SSA offenses. Nevertheless, and as suggested by *Speight*, it seems clear that *Blakely* applies (at least in superior court) to sentencing under Levels One, Two and Three, when the grossly aggravating and aggravating factors do not pertain to prior convictions. *Blakely* would also seem to apply to sentencing under Level Four, unless no aggravating factors are found. It is not clear if or how *Blakely* applies to sentencing under Level Five.

*Speight* held that grossly aggravating and aggravating factors need not be alleged in an indictment.<sup>167</sup> However, *Hunt* recognized that the Sixth Amendment imposes a notice

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163. G.S. 20-179(f)(2).

164. G.S. 20-179(f)(3).

165. G.S. 20-179(o).

166. The trial judge also found an aggravating factor under G.S. 20-179(d).

167. See *Speight*, 359 N.C. 602 (slip op. at 3).

requirement on the state. In *Hunt*, the short-form murder indictment combined with an exclusive statutory listing of aggravating circumstances was held to provide sufficient notice.<sup>168</sup>

G.S. 20-138.1(c) provides a short-form criminal pleading for impaired driving. G.S. 20-138.2(c) provides the same for impaired driving in a commercial vehicle. *Hunt* can be read as suggesting that these short-form pleadings combined with the exclusive list of grossly aggravating factors in G.S. 20-179(c) provide sufficient notice as to grossly aggravating factors. The same argument could be made regarding the aggravating factors in G.S. 20-179(d), with the exception of the catch-all aggravating factor in G.S. 20-179(d)(9). With regard to this latter factor, *Hunt* suggests that some sort of additional notice will be required. On the other hand, *Hunt* relied on the fact that in capital cases, a number of other procedures also provide notice to the defendant. The fact that not all of these procedures apply in impaired driving cases may be enough to distinguish *Hunt*. Because the appellate courts have not yet had occasion to weigh in on what notice is required, this remains an open question.

The discussion about admissions and trial procedure above with respect to non-*Blakely* Bill SSA felony cases applies with regard to non-SSA misdemeanors subject to *Blakely*.<sup>169</sup>

Finally, in *Speight*, the North Carolina Supreme Court noted that its decision did not create a right to a jury trial in district court for misdemeanors.<sup>170</sup> It said: “In cases where district court has exclusive original jurisdiction over misdemeanors, defendants do not have a right to a jury trial in district courts and can obtain a jury trial only by appealing to superior court for a trial de novo.”<sup>171</sup>

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168. *See supra* § II.A.4.

169. *See generally*, N.C.P.J.I. 270.20A (pattern jury instruction for aggravating factors in impaired driving).

170. *See Speight*, 359 N.C. 602 (slip op. at 5 n.2).

171. *Id.*



**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2005  
SESSION LAW 2005-145  
HOUSE BILL 822**

AN ACT TO AMEND STATE LAW REGARDING THE DETERMINATION OF  
AGGRAVATING FACTORS IN A CRIMINAL CASE TO CONFORM WITH THE  
UNITED STATES SUPREME COURT DECISION IN BLAKELY V. WASHINGTON.

The General Assembly of North Carolina enacts:

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

**"§ 15A-1340.16. Aggravated and mitigated sentences.**

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

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

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

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

(a4) Pleading of Aggravating Factors. – Aggravating factors set forth in subsection (d) of this section need not be included in an indictment or other charging instrument. Any aggravating factor alleged under subdivision (d)(20) of this section shall be included in an indictment or other charging instrument, as specified in G.S. 15A-924.

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

(a6) Notice of Intent to Use Aggravating Factors or Prior Record Level Points. – The State must provide a defendant with written notice of its intent to prove the existence of one or more aggravating factors under subsection (d) of this section or a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the aggravating factors the State seeks to establish.

(b) When Aggravated or Mitigated Sentence Allowed. – If the ~~court~~ jury, or with respect to an aggravating factor under G.S. 15A-1340.16(d)(18a), the court, finds that aggravating factors exist or the court finds that mitigating factors exist, ~~it~~ the court may depart from the presumptive range of sentences specified in G.S. 15A-1340.17(c)(2). If ~~the court finds that~~ aggravating factors are present and the court determines they are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range described in G.S. 15A-1340.17(c)(4). If the court finds that mitigating factors are present and are sufficient to outweigh any aggravating factors that are present, it may impose a sentence that is permitted by the mitigated range described in G.S. 15A-1340.17(c)(3).

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

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

- (1) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.
- (2) The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.
- (2a) The offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy. A "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of felony

or violent misdemeanor offenses, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and having a common name or common identifying sign, colors, or symbols.

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

(20) Any other aggravating factor reasonably related to the purposes of sentencing.

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

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

Notwithstanding the provisions of subsection (a1) of this section, the determination that an aggravating factor under G.S. 15A-1340.16(d)(18a) is present in a case shall be made by the court, and not by the jury. That determination shall be made in the sentencing hearing.

(e) Mitigating Factors. – The following are mitigating factors:

- (1) The defendant committed the offense under duress, coercion, threat, or compulsion that was insufficient to constitute a defense but significantly reduced the defendant's culpability.
- (2) The defendant was a passive participant or played a minor role in the commission of the offense.
- (3) The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's culpability for the offense.
- (4) The defendant's age, immaturity, or limited mental capacity at the time of commission of the offense significantly reduced the defendant's culpability for the offense.
- (5) The defendant has made substantial or full restitution to the victim.
- (6) The victim was more than 16 years of age and was a voluntary participant in the defendant's conduct or consented to it.
- (7) The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
- (8) The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.
- (9) The defendant could not reasonably foresee that the defendant's conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.
- (10) The defendant reasonably believed that the defendant's conduct was legal.
- (11) Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.
- (12) The defendant has been a person of good character or has had a good reputation in the community in which the defendant lives.
- (13) The defendant is a minor and has reliable supervision available.
- (14) The defendant has been honorably discharged from the United States armed services.
- (15) The defendant has accepted responsibility for the defendant's criminal conduct.
- (16) The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.

- (17) The defendant supports the defendant's family.
- (18) The defendant has a support system in the community.
- (19) The defendant has a positive employment history or is gainfully employed.
- (20) The defendant has a good treatment prognosis, and a workable treatment plan is available.
- (21) Any other mitigating factor reasonably related to the purposes of sentences."

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

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

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

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

- (1) For each prior felony Class A conviction, 10 points.
- (1a) For each prior felony Class B1 conviction, 9 points.
- (2) For each prior felony Class B2, C, or D conviction, 6 points.
- (3) For each prior felony Class E, F, or G conviction, 4 points.
- (4) For each prior felony Class H or I conviction, 2 points.
- (5) For each prior misdemeanor conviction as defined in this subsection, 1 point.  
For purposes of this subsection, misdemeanor is defined as any Class A1 and Class 1 nontraffic misdemeanor offense, impaired driving (G.S. 20-138.1), impaired driving in a commercial vehicle (G.S. 20-138.2), and misdemeanor death by vehicle (G.S. 20-141.4(a2)), but not any other misdemeanor traffic offense under Chapter 20 of the General Statutes.
- (6) If all the elements of the present offense are included in any prior offense for which the offender was convicted, whether or not the prior offense or offenses were used in determining prior record level, 1 point.
- (7) If the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment, 1 point.

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

(c) Prior Record Levels for Felony Sentencing. – The prior record levels for felony sentencing are:

- (1) Level I – 0 points.
- (2) Level II – At least 1, but not more than 4 points.
- (3) Level III – At least 5, but not more than 8 points.
- (4) Level IV – At least 9, but not more than 14 points.

- (5) Level V – At least 15, but not more than 18 points.
- (6) Level VI – At least 19 points.

In determining the prior record level, the classification of a prior offense is the classification assigned to that offense at the time the offense for which the offender is being sentenced is committed.

(d) Multiple Prior Convictions Obtained in One Court Week. – For purposes of determining the prior record level, if an offender is convicted of more than one offense in a single superior court during one calendar week, only the conviction for the offense with the highest point total is used. If an offender is convicted of more than one offense in a single session of district court, only one of the convictions is used.

(e) Classification of Prior Convictions From Other Jurisdictions. – Except as otherwise provided in this subsection, a conviction occurring in a jurisdiction other than North Carolina is classified as a Class I felony if the jurisdiction in which the offense occurred classifies the offense as a felony, or is classified as a Class 3 misdemeanor if the jurisdiction in which the offense occurred classifies the offense as a misdemeanor. If the offender proves by the preponderance of the evidence that an offense classified as a felony in the other jurisdiction is substantially similar to an offense that is a misdemeanor in North Carolina, the conviction is treated as that class of misdemeanor for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points. If the State proves by the preponderance of the evidence that an offense classified as a misdemeanor in the other jurisdiction is substantially similar to an offense classified as a Class A1 or Class 1 misdemeanor in North Carolina, the conviction is treated as a Class A1 or Class 1 misdemeanor for assigning prior record level points.

(f) Proof of Prior Convictions. – A prior conviction shall be proved by any of the following methods:

- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction. The original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true. For purposes of this subsection, "a copy" includes a paper writing containing a reproduction of a record maintained electronically on a computer or other data processing equipment, and a document produced by a facsimile machine. The prosecutor shall make all feasible efforts to obtain and present to the court the offender's full record. Evidence presented by either party at trial may be utilized to prove prior convictions. Suppression of prior convictions is pursuant to G.S. 15A-980. If a motion is made pursuant to that section during the sentencing stage of the criminal action, the court may grant a continuance of the sentencing hearing. If asked by the defendant in compliance with

G.S. 15A-903, the prosecutor shall furnish the defendant's prior criminal record to the defendant within a reasonable time sufficient to allow the defendant to determine if the record available to the prosecutor is accurate. Upon request of a sentencing services program established pursuant to Article 61 of Chapter 7A of the General Statutes, the district attorney shall provide any information the district attorney has about the criminal record of a person for whom the program has been requested to provide a sentencing plan pursuant to G.S. 7A-773.1."

**SECTION 3.** G.S. 15A-924(a) is amended by adding a new subdivision to read:

"(a) A criminal pleading must contain:

- (1) The name or other identification of the defendant but the name of the defendant need not be repeated in each count unless required for clarity.
- (2) A separate count addressed to each offense charged, but allegations in one count may be incorporated by reference in another count.
- (3) A statement or cross reference in each count indicating that the offense charged therein was committed in a designated county.
- (4) A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time. Error as to a date or its omission is not ground for dismissal of the charges or for reversal of a conviction if time was not of the essence with respect to the charge and the error or omission did not mislead the defendant to his prejudice.
- (5) A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. When the pleading is a criminal summons, warrant for arrest, or magistrate's order, or statement of charges based thereon, both the statement of the crime and any information showing probable cause which was considered by the judicial official and which has been furnished to the defendant must be used in determining whether the pleading is sufficient to meet the foregoing requirement.
- (6) For each count a citation of any applicable statute, rule, regulation, ordinance, or other provision of law alleged therein to have been violated. Error in the citation or its omission is not ground for dismissal of the charges or for reversal of a conviction.
- (7) A statement that the State intends to use one or more aggravating factors under G.S. 15A-1340.16(d)(20), with a plain and concise factual statement indicating the factor or factors it intends to use under the authority of that subdivision."

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

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

(a) Before accepting a plea of guilty or no contest to a felony, the court shall determine whether the State intends to seek a sentence in the aggravated range. If the State does intend to seek an aggravated sentence, the court shall determine which factors the State seeks to establish. The court shall determine whether the State seeks a finding that a prior record level point should

be found under G.S. 15A-1340.14(b)(7). The court shall also determine whether the State has provided the notice to the defendant required by G.S. 15A-1340.16(a6) or whether the defendant has waived his or her right to such notice.

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

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

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

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

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

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

**SECTION 5.** This act is effective when it becomes law. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.

In the General Assembly read three times and ratified this the 21<sup>st</sup> day of June, 2005.

s/ Marc Basnight  
President Pro Tempore of the Senate

s/ James B. Black  
Speaker of the House of Representatives

s/ Michael F. Easley  
Governor

Approved 2:50 p.m. this 30<sup>th</sup> day of June, 2005