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LIMITATIONS ON A JUDGE'S AUTHORITY TO IMPOSE A MORE SEVERE SENTENCE AFTER A DEFENDANT'S SUCCESSFUL APPEAL OR COLLATERAL ATTACK

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Resentencing hearings after successful direct appeals and motions for appropriate relief are *de novo* as to the appropriate sentence.[1] That is, at resentencing, the judge "makes a new and fresh determination" regarding the presence of aggravating and mitigating factors and has discretion to give a factor more or less weight than may have been given at the original sentencing hearing.[2] Notwithstanding this, when a conviction or sentence is set aside on direct appeal or collaterally through a motion for appropriate relief, both federal constitutional and impose a more severe sentence at resentencing. This bulletin explores the scope of these limitations.

1. *See* State v. Mitchell, 67 N.C. App. 549, 551 (1984); *see also* State v. Hemby, 333 N.C. 331, 335 (1993) (quoting *Mitchell)*; State v. Swimm*,* 316 N.C. 24, 31 (1986) ("A resentencing hearing is a de novo proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing."); State v. Boyd, 148 N.C. App. 304, 308 (2002) (citing and quoting *Swimm*); State v. Jones, 314 N.C. 644, 649 (1985) (stating that a resentencing hearing is a *de novo* proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing); State v. Wells, 104 N.C. App. 274, 278 (1991) (citing *Mitchell* and *Jones*).

The North Carolina Court of Appeals has recognized that "if an appellate court has squarely ruled that certain evidence does not support a certain [aggravating or mitigating] factor, and the identical evidence is offered at the resentencing hearing to support the same factor, the trial court is bound by the appellate ruling … because it is binding precedent directly on point." State v. Daye, 78 N.C. App. 753, 756 (1986). The court noted that "[t]his is not a limitation on the *de novo* nature of the resentencing proceeding; rather, it is a recognition that the trial court's rulings are always governed by applicable appellate decisions." *Id.*

2. *Mitchell*, 67 N.C. App. at 551.

G.S. 15A-1335 and *North Carolina v. Pearce*

G.S. 15A-1335 provides that when a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, that is more severe than the prior sentence less the portion of the prior sentence previously served. This provision generally embodies the rule of *North Carolina v. Pearce*,[3] but as noted below, is more restrictive than *Pearce.*

In *Pearce,* the United States Supreme Court explored the constitutional limitations on the imposition of more severe punishment after conviction for the same offense in a new trial. The *Pearce* decision ruled on two cases, one of which originated in North Carolina. In the North Carolina case, the defendant was convicted in state court and sentenced to prison for twelve to fifteen years. Later, the defendant initiated a post-conviction proceeding and obtained a new trial. The defendant then was retried, convicted, and sentenced to an eight-year term in prison. When this eight-year term was added to the time the defendant already had spent in prison, it resulted in a sentence greater than the one initially imposed. The defendant challenged the more severe sentence on constitutional grounds and the case eventually came before the United States Supreme Court.

The Supreme Court framed the issue before it as follows: When a criminal defendant obtains a new trial, to what extent does the constitution limit the imposition of a harsher sentence after conviction upon retrial? The Court began by holding that neither the Double Jeopardy Clause nor the Equal Protection Clause imposes an absolute constitutional bar to the imposition of a more severe sentence upon retrial. It stated: "A trial judge is not constitutionally precluded . . . from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities."[4] The court went on, however, to consider the impact of the Due Process Clause of the Fourteenth Amendment, holding that penalizing a defendant for having successfully pursued a right of appeal or collateral attack would violate due process.[5] It continued, holding that due process "requires that vindictiveness against a defendant for having successfully attacked [a] first conviction must play no part" in the sentence imposed after a new trial and that a defendant be freed of the apprehension of vindictiveness that might deter exercise of the right to appeal or collaterally attack a conviction.[6] Because of this, the Court concluded that whenever a judge imposes a more severe sentence after a new trial, the reason for doing so must be based on "objective information" regarding "identifyable conduct" occurring after the time of the original sentencing and the relevant facts must appear in the record.[7]

Thus, *Pearce* allows for a more severe sentence based on conduct that occurs after the initial sentencing, provided the reasons are clearly set forth in the record so that the reviewing court can verify that the increased sentence did not result from vindictiveness. G.S. 15A-1335, however, is a blanket prohibition on the imposition of a more severe sentence. Thus, while *Pearce* permits a more severe sentence to be imposed if intervening factors would support it, G.S. 15A-1335 does not. This means that North Carolina statutory law offers greater protection to defendants than does federal constitutional law;[8] G.S. 15A-1335 prohibits the resentencing judge from imposing a more severe sentence even when conduct that occurred after the original sentence was imposed would support such a sentence.[9]

G.S. 15A-1335— General Application

G.S. 15A-1335 applies both when the original conviction resulted from a guilty verdict rendered by a jury and when it resulted from a negotiated plea bargain.[10] It does not apply to a *de novo* appeal from

3. 395 U.S. 711 (1969).

4. *Id.* at 722 (quotation omitted).

5. *See id*. at 724.

6. *See id*. at 725.

7. *Id.* at 726.

8. The Official Commentary to G.S. 15A-1335 expressly recognizes this point. It states: "This section embodies generally the rule of [*North Carolina v. Pearce*], but does not allow a more severe sentence even if intervening factors would argue for a more severe sentence, as the [*Pearce*] decision permits."

9. *See* State v. Swimm, 316 N.C. 24, 33 (1986) (defendant's bad conduct while in prison during the period between initial incarceration and resentencing may not be used as a basis to increase his or her sentence); State v. Mitchell, 67 N.C. App. 549, 551 (1984) ("North Carolina has changed that part of … [*Pearce*] which would have allowed a more severe sentence for intervening factors.").

10. *See* State v. Wagner, 356 N.C. 599, 602 (2002) (concluding that, contrary to the State's argument, the fact

district to superior court[11] or when a prayer for judgment results in a sentence for an offense for which the court previously had arrested judgment.[12]

Sometimes, determining whether the new sentence is more severe than the original one is a simple matter. In *State v. Holt,*[13] for example, the court of appeals easily concluded that imposition of a life sentence violated G.S. 15A-1335 when the original sentence was 196 to 245 months in prison. Even when multiple sentences are involved, the application of the rule can be relatively straightforward: the statute bars imposing an increased sentence for any of the convictions, even if the total term of imprisonment does not exceed that of the original sentence.[14] Application of the G.S. 15A-1335 prohibition on imposition of a more severe sentence can be difficult when the Fair Sentencing Act (FSA) applies and the conviction at issue was consolidated with others at the initial sentencing. These were the facts of *State v. Hemby*.[15] In *Hemby*, the defendant was convicted on eight indictments, labeled for convenience by the appellate court as indictments A through H. Each indictment charged one count of dissemination of obscene material and one count of possession of obscene material with intent to disseminate. Both offenses were Class J felonies with presumptive sentences of one year.

At the original sentencing, the trial court found no aggravating or mitigating factors and consolidated the eight indictments into three groups as follows. Group one consisted of indictments A, B, and C. For this group, the defendant received a sentence of three years' imprisonment. Group two consisted of indictments D, E, and F, for which the defendant received a consecutive sentence of three years. Finally, Group three consisted of indictments G and H, for which the defendant received a consecutive sentence of two years. Thus, the defendant's aggregate term was eight years. When the defendant appealed, the court of appeals found no error in the guilt phase of the trial, but held that the trial court erred by imposing a sentence for each pornographic item disseminated rather than for each transaction involving one or more such items. The court of appeals upheld the two-year sentence imposed on indictments G and H but remanded on indictments A, B, C, D, E, and F.

At the resentencing, the trial court arrested judgment on indictments C, E, and F, as required by the appellate decision. Having been upheld on appeal, the two-year sentence on indictments G and H was left undisturbed. As to the remaining indictments A, B, and D, the trial court found aggravating circumstances and imposed a three-year sentence for the conviction on indictment D, and, after consolidating the convictions on indictments A and B, imposed another three-year sentence. Since both three-year sentences were to run consecutively to each other, the total sentence remained eight years. Thus, defendant's aggregate term of imprisonment remained the same as it had been before appeal.

The defendant appealed again. When the case came before the North Carolina Supreme Court, that court held that the resentencing violated G.S. 15A-1335. The court began by noting that under G.S. 15A-1340.4(a) of the FSA, one way a trial judge could deviate from the presumptive term was by consolidating multiple convictions for judgment, provided the term imposed fell within certain parameters. Specifically, it could not be greater than the total presumptive terms for each felony consolidated or the maximum term for the most serious felony and could not be shorter than the presumptive term for the most serious felony. The court concluded that in the case before it, the trial court clearly intended to impose a sentence of one year on each

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that the original conviction resulted from a plea bargain rather than a jury verdict was of no consequence; holding that a sentence of 135 to 175 months in prison was contrary to G.S. 15A-1335 when the original sentence was only 101 to 131 months).

11. *See* State v. Burbank, 59 N.C. App. 543, 546-47 (1982). Additionally, there is no *constitutional* impediment to imposing a more severe sentence when a defendant appeals from a conviction in district court and is convicted in superior court. *See* Colten v. Kentucky, 407 U.S. 104 (1972). *But see* State v. Midgett, 78 N.C. App. 387 (1985) (not mentioning *Colten* and incorrectly citing *Wasman v. United States,* 468 U.S. 559 (1984), to support its statement that a presumption of vindictiveness can arise when a defendant receives an increased sentence in superior court after a trial *de novo*; because the statement in *Midgett* is contrary to *Colten,* it should be considered erroneous). For a discussion of the due process limitations on proceeding on a more serious charge after a defendant has been convicted in district court and appeals for a trial *de novo* in superior court, see *Blackledge v. Perry*, 417 U.S. 21 (1974). *See also* State v. Mayes, 31 N.C. App. 694 (1976).

12. *See* State v. Pakulski, 106 N.C. App. 444, 452-53 (1992) (State prayed for judgment on felonies that constituted predicate offenses for felony-murder conviction after murder conviction was overturned and State opted not to retry the defendants a fifth time for murder; imposition of punishment for these offenses did not constitute a resentencing within the meaning of G.S. 15A-1335).

13. 144 N.C. App. 112, 116 (2001).

14. *See* State v. Oliver, 155 N.C. App. 209 (2002).

15. 333 N.C. 331 (1993).

indictment and, pursuant to G.S. 15A-1340.4(a), to total these sentences when it consolidated the indictments for sentencing. It then held:

> [W]hen indictments or convictions with equal presumptive terms are consolidated for sentencing without the finding of aggravating or mitigating circumstances, and the terms are totaled to arrive at the sentence, nothing else appearing in the record, the sentence, . . . because of the provisions of [G.S. 15A-1340.4(a)], will be deemed to be equally attributable to each indictment or conviction.[16]

Applying this rule to the case at hand, the court held that the three-year sentences for the indictments in groups one and two must be apportioned equally among the indictments in each group. Thus, it concluded, in each group, the defendant was sentenced to a one-year term of imprisonment on each indictment. When the resentencing court consolidated indictments A and B, compliance with G.S. 15A-1335 required that no more than two years' imprisonment be imposed. However, the resentencing court imposed a three-year sentence for these indictments. Similarly, when the resentencing court resentenced on indictment D, compliance with G.S. 15A-1335 required that no more than a one-year term be imposed. However, the new sentence provided for three years' imprisonment. Thus, the court held that the new sentences were more severe than the ones originally imposed.

State v. Nixon,[17] another FSA case, was decided similarly. In *Nixon,* the defendant was convicted of first-degree kidnapping, second-degree rape, and second-degree sexual offense. Each charge had a presumptive sentence of twelve years. The trial court consolidated the charges, made no findings of aggravating or mitigating factors, and sentenced the defendant to thirty-six years in prison. The defendant successfully appealed and the case came on for resentencing on the kidnapping and rape convictions, judgment having been arrested on the sexual offense conviction, as required by the appellate decision. At resentencing, the trial court found one aggravating factor, no mitigating factors, and that aggravating factors outweighed mitigating factors. The trial court then sentenced the defendant to twenty-four years on the kidnapping conviction. The court also imposed a consecutive twelve-year sentence on the rape conviction. Thus, the defendant's total sentence remained thirty-six years. The defendant appealed, arguing that the new sentence on the kidnapping conviction violated G.S. 15A-1335.

The *Nixon* court began by noting that under *Hemby*, when indictments or convictions with equal presumptive terms are consolidated for sentencing without findings in aggravation or mitigation, and terms are totaled to arrive at the sentence, unless something in the record indicates otherwise, the sentence will be deemed to be equally attributable to each conviction or indictment. Applying the *Hemby* rule, the court held that the original thirty-six year sentence was equally attributable to the three convictions. Thus, it concluded, even though the aggregate sentence did not increase, the resentencing violated G.S. 15A-1335 because the new twenty-four-year sentence for kidnapping exceeded the original twelve-year term.[18]

Both *Hemby* and *Nixon* were FSA cases, and as noted, the *Hemby* rule derived from the provision in Fair Sentencing law that allowed a judge to deviate from the presumptive range without considering aggravating and mitigating factors when consolidateing convictions, provided certain requirements were met regarding the length of the sentence. The Structured Sentencing Act (SSA) works differently. While consolidation is permitted under the SSA, a sentence must conform to that required for the offense class and prior record level of the most serious offense consolidated. Thus, the *Hemby* logic does not fit neatly into the SSA. Consider, for example, how *Nixon* might have played out if it was decided as a SSA case. In *Nixon*, the defendant was convicted of three felonies: first-degree kidnapping, second-degree rape, and second-degree sexual offense. All three are Class C felonies. To impose a single sentence under the SSA the judge could consolidate the three offenses and sentence at the appropriate prior record level for a Class C felony. Now suppose that the sex offense conviction was overturned on appeal and the case was remanded for resentencing on the remaining two convictions. The *Hemby* logic does not fit to apportion the original sentence among all consolidated convictions because the all three offenses were the same class and thus each could be said to have controlled the original sentence. Thus, the only limits

16. *See Hemby,* 333 N.C. at 336.

17. 119 N.C. App. 571 (1995).

18. For a case declining to apply *Hemby* when multiple offenses with different presumptive terms were consolidated and the sentence was less than a total of the presumptive terms, see *State v. Harris*, 115 N.C. App. 42 (1984).

that G.S. 15A-1335 imposes on resentencing in this context is probably that the new sentence cannot exceed the original term for the consolidated offenses.

G.S. 15A-1335—Exceptions and Limitations

Although G.S. 15A-1335 prohibits imposition of a more severe sentence after a reweighing and rebalancing of aggravating and mitigating factors, it does not prohibit imposition of a more severe sentence when the higher sentence is statutorily mandated. Two North Carolina appellate cases apply this exception. In the first case, *State v. Williams*,[19] the defendant was convicted of armed robbery. The defendant mounted a successful collateral attack and a new trial was ordered. After the defendant again was found guilty, the trial judge imposed a sentence of fourteen years, two years greater than the sentence imposed at the original trial. At the time, G.S. 14-87(d), which since has been repealed, provided that any person convicted of armed robbery must receive a sentence of at least fourteen years in prison. The defendant challenged the new sentence, arguing it violated G.S. 15A-1335.

The court of appeals began by noting that G.S. 15A-1335 applies when the trial court is reweighing aggravating and mitigating factors on resentencing and prohibits the trial judge from imposing a more severe sentence because of that reweighing or because of a finding of new aggravating factors. It concluded, however, that G.S. 15A-1335 did not apply because here, the trial judge did not reweigh aggravating and mitigating factors. Rather, on resentencing, the trial judge had no discretion to impose a sentence of less than fourteen years.

State v. Kirkpatrick,[20] followed *Williams.* In *Kirkpatrick,* the defendant was convicted in count one of felonious possession of stolen property and in count two of being an habitual felon. He was sentenced to a term of three years in prison on the possession count and to a consecutive term of fifteen years on the habitual felon count. When the defendant appealed, the court of appeals held that he was improperly given a separate sentence on the habitual felon count. The case was remanded for resentencing, and the defendant was resentenced to a term of fifteen years in prison for felonious possession while being a habitual felon. The defendant appealed again, arguing that by increasing his sentence on count one from three years to fifteen, the trial court violated G.S. 15A-1335. The court of appeals disagreed. Citing *Williams,* it held that when the trial court is required by statute to impose a particular sentence on resentencing, G.S. 15A-1335 does not prevent the imposition of the more severe sentence. Applying this rule to the case before it, the court noted that G.S. 14-7.6 requires that habitual felons be sentenced as Class C felons and that under the law then in effect, the presumptive sentence for a Class C felon was fifteen years. Thus, the court concluded, the resentencing did not violate G.S. 15A-1335 because the fifteen year term was statutorily mandated.

The later case of *State v. Holt*,[21] explores the meaning, in this context, of a statutorily mandated sentence. In *Holt,* the defendant was convicted of second-degree murder. At his first sentencing, the trial judge found two aggravating factors, one mitigating factor and that the aggravating factors outweighed the mitigating factor. The judge sentenced the defendant in the aggravated range under the SSA as a Class B2 felon to a term of imprisonment of 196 to 245 months. The defendant appealed and the court of appeals held that because of the date of the offense, the FSA, not the SSA applied. The case then was remanded for resentencing under the FSA. At the resentencing, the trial court found two aggravating factors and five mitigating factors, but again determined that the aggravating factors outweighed the mitigating factors. The court sentenced the defendant in the aggravated range as a Class C felon under the FSA to a term of life imprisonment.

The defendant challenged his new sentence, contending that it violated G.S. 15A-1335. The court of appeals concluded that the sentence imposed on resentencing—life imprisonment—was not statutorily mandated. The court noted that under the FSA, although the presumptive sentence for a Class C felony was fifteen years, a Class C felon could have been punished by imprisonment up to 50 years or life, by a fine, or by both imprisonment and a fine. Thus, it concluded, "life imprisonment was not a statutorily mandated sentence" and the *Williams/ Kirkpatrick* exception to G.S. 15A-1335 did not apply. Because the life sentence exceeded the original sentence of 196 to 245 months, the court vacated and remanded for a new sentencing hearing.

Holt suggests that in order for a sentence to be statutorily mandated, the relevant statute must constrain judicial discretion as to sentence.[22] As noted

19. 74 N.C. App. 728 (1985).

20. 89 N.C. App. 353 (1988).

21. 144 N.C. App. 112 (2001).

22. *See also Williams*, 74 N.C. App. at 729 (concluding that fourteen-year sentence for armed robbery was statutorily mandated when the language of G.S. 14-87(d)

above, in *Williams* the relevant statute prescribed a minimum sentence of fourteen years and fourteen years was imposed. In *Kirkpatrick*, a presumptive sentence of fifteen years applied. Both cases contrast with *Holt*, where the judge had discretion to sentence up to fifty years or life. Since the SSA prescribes ranges of minimum sentences for almost all felonies, it allows some sentencing discretion for these offenses. Thus, one might question whether the statutorily mandated exception under the FSA has any application under the SSA. Although there is no case law on point, some situations where the exception still is likely to apply include: (1) drug trafficking, where the statute prescribes a single fixed minimum and maximum penalty for each relevant offense class as well as a requirement that the sentence run consecutive to any already imposed;[23] (2) habitual felon sentencing, where the statutes require that a sentence for being an habitual or violent habitual felon run consecutively to any other sentence already being served;[24] and (3) the sixty-month enhanced sentence for firearms use.[25]

Additionally, despite the judicial discretion inherent in the SSA's range of minimum sentences, the statutorily mandated exception still may be found to apply. Consider this example. At a first sentencing hearing, no aggravating or mitigating factors are found and a Class C felon at prior record level I is improperly sentenced to fifty months in prison. Under G.S. 15A-1340.17, the presumptive range of minimum sentences for a felon of this class and prior record level is fifty-eight to seventy-three months. The maximum sentence that attaches to the minimum of fifty-eight months is seventy-nine months. After the defendant's successful appeal setting aside the conviction on other grounds, the defendant is retried and convicted again. At sentencing, the court finds no aggravating or mitigating factors and sentences the defendant to a term of fifty-eight to seventy-nine months. Arguably, this example is analogous to *Williams*, in which the statute prescribed a minimum of fourteen years and a term of fourteen years was imposed; here the statute prescribes a minimum of fifty-eight months at this class and prior record level and attaches a maximum of seventy-nine months to that minimum. There is, however, no case law on point and thus it is unclear whether, in this context, the sentence is statutorily mandated and as such excepted from the requirements of G.S. 15A-1335.[26]

Aside from the statutorily mandated sentence exception to G.S. 15A-1335, the case law has explored other limitations on the statute's application. Specifically the cases hold that the following actions are not prohibited by G.S. 15A-1335:

- Replacement of concurrent sentences with consecutive sentences, provided neither the individual sentences nor the aggregate sentence exceeds that originally imposed.[27] In this context, consecutive life sentences can never be considered more severe than a death sentence.[28]
- Changing the way the convictions originally were consolidated.[29]

(now repealed) was "unambiguous" and its effect "clear," leaving "no room for judicial construction").

23. *See* G.S. 90-95(h).

24. *See* G.S. 14-7.6 (habitual felon sentencing); G.S. 14-7.12 (violent habitual felon sentencing).

25. *See* G.S. 15A-1340.16A.

26. A twist on this example and issue would be if the original sentence was fifty-eight months and at the second sentencing the defendant received a minimum of sixty-eight months. Is the sixty-eight month minimum statutorily mandated when the range of presumptive minimums that applies is fifty-eight to seventy-three months? Again, there is no case law on point.

27. *See* State v. Oliver, 155 N.C. App. 209 (2002) (replacing first defendant's concurrent death sentences and second defendant's concurrent life and death sentences with consecutive life sentences did not violate G.S. 15A-1335; "Any number of life sentences, even if imposed consecutively, cannot be considered a greater sentence than even one death sentence . . . ."); State v. Ransom, 80 N.C. App. 711, 714 (1986) (the defendant initially received a consolidated sentence of twenty years for multiple offenses; on remand following appeal, the court sentenced him to six consecutive three-year sentences, for a total of eighteen years; new sentence did not violate G.S. 15A-1335).

28. *See Oliver*, 155 N.C. App. at 212.

29. *See Ransom*, 80 N.C. App. at 713 ("While G.S. 15A-1335 prohibits trial courts from imposing stiffer sentences upon remand than originally imposed, nothing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand.").

- Finding new aggravating or mitigating factors, provided those findings are not used to impose a more severe sentence.[30] Imposing the same sentence when fewer aggravating factors are found at resentencing.[31]
- Adding a non-binding recommendation to the Department of Correction.[32]

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30. *See* State v. Hemby, 333 N.C. 331, 334 (1993) ("Although a trial judge may find altogether new aggravating and mitigating circumstances at a resentencing hearing …, such findings cannot justify a sentence which is more severe than the original sentence imposed on the same offense."); *see also* State v. Swimm, 316 N.C. 24, 32-33 (1986) (defendant's good behavior while in prison during the interval between initial incarceration and resentencing may constitute a mitigating factor; defendant's bad conduct during this period may not be used as a basis to increase his or her sentence, but may be found as an aggravating factor to be used in determining whether to impose a sentence not greater than the one originally imposed); State v. Smith, 73 N.C. App. 637, 639 (1985) ("the restriction on resentencing is not against finding new factors in aggravation, but on imposing a more severe sentence than before").

31. *See* State v. Mitchell, 67 N.C. App. 549 (1984) (rejecting the defendant's argument that it was error for the trial judge to impose an identical sentence on resentencing when six aggravating factors were originally found and only two were found at resentencing).

32. *See* State v. Hanes, 77 N.C. App. 222, 225 (1985) (trial judge did not violate G.A. 15A-1335 by adding a condition, as a recommendation, that the defendant's fine and restitution be paid before any early release; the recommendation had no legal effect and was not binding on the Department of Correction).