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Using the Fair Sentencing Act to Protect the Criminal Defendant

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I. INTRODUCTION

We do not live in Utopia. If we did, we should have no need for the Fair Sentencing Act. Since we must live with the failings of man, our duty must be to punish those failings in an even-handed manner. In North Carolina, we now discharge this duty by use of the Fair Sentencing Act.

This Survey provides a guide to defense attorneys who must deal with the statutory aggravating and mitigating factors set out in the Fair Sentencing Act. The Survey reviews the major cases handed down by the North Carolina Supreme Court since the Act was passed. It then concentrates on all cases from the appellate

* Research by M. Greg Crumpler, Elizabeth J. Mitchell, clerks; Elizabeth Morriss, intern; Stanley F. Hammer, Mark D. Montgomery, clerks; and the author, under the direction of Associate Justice Louis B. Meyer, North Carolina Supreme Court (1986).

2. Id.
3. N.C. GEN. STAT. § 15A-1340.4(a) (1983). These factors are set out in the Appendix.
4. Article 81A was enacted by ch. 760, 1979 N.C. Sess. Laws 850, amended by 1981 N.C. Sess. Laws 150. Section 6 of the Act was amended by ch. 179 § 14, 1981 N.C. Sess. Laws at 153 to provide that: “This act shall become effective on July 1, 1981, and shall apply only to offenses committed on or after that date, unless specific language of the act indicates otherwise.”
courts from August 1981 through August 1986, with a view to analyzing each aggravating and mitigating factor.5 The Survey seeks to show what factors are most likely to result in a remand for resentencing on appeal, and what elements each factor should contain for a successful appeal.

II. BACKGROUND

The Fair Sentencing Act applies to felonies, other than Class A or Class B felonies, committed on or after July 1, 1981.6 The Act limits the once wide disparity of sentences imposed by superior court judges7 and attempts to strike "a balance between the inflexibility of imposing [a presumptive sentence which insures that] punishment [is] commensurate with the crime, but without regard to the nature of the offender, and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender."8 Every felony carries a presumptive sentence. A sentence may not be imposed outside the minimum or maximum statutory limits set forth for the felony involved.9

Effective appellate review is an essential ingredient of an equitable sentencing system. Without some measure of review, "trial judges could disregard legislatively prescribed guidelines for sentencing, [and] the system would quickly revert to the unjust results of [a] discretionary system."10 Philosophically, the Act seeks,

to balance competing policies: allowing judges to modify sentences on the basis of aggravating or mitigating circumstances [which] allow them to humanly judge the relative seriousness of an act in its unique surrounding circumstances; [while] at the same time [allowing] legislative specification of the relevant factors [to] control judicial discretion.11

5. This Survey does not cover capital sentencing cases. For a discussion of capital cases, see Exum, The Death Penalty in North Carolina, 8 CAMPBELL L. REV. 1 (1985).
11. Braswell, Shaping A Safe And Sound Fair Sentence, address to North Carolina Superior Court judges (March 24, 1984) (quoting Zaleman, The Rise and
The Act specifies four purposes of sentencing: "[1] to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; [2] to protect the public by restraining offenders; [3] to assist in rehabilitation of offenders; and [4] to deter criminal behavior." Therefore, the starting point in a sentencing procedure under the Act must be the actual offense for which the criminal defendant was convicted, with consideration of the special circumstances surrounding the crime and any special characteristics of the individual offender.

The Fair Sentencing Act specifies sixteen aggravating factors and fifteen mitigating factors each of which the North Carolina Legislature deemed relevant to the purposes of sentencing. Four questions determine whether a statutory aggravating factor has been properly found: (1) whether the State has properly and sufficiently proved the factor by a preponderance of the evidence; (2) whether evidence supporting the factor goes beyond evidence necessary to prove an element of the offense; (3) whether evidence supporting the factor is the same as evidence supporting another aggravating factor; and (4) whether the facts relied upon in the aggravating factor amount to a joined or joinable offense. If one can answer the first or second questions negatively, or the third and fourth questions affirmatively, the factor is not properly found. The trial court must determine whether any of the statutory mitigating factors exist even if the defendant does not request it to do so and must find all such factors shown by a preponderance of the evidence. "The court need not, however, find a mitigating factor when the proof offered fails to establish the factor by a preponderance of the evidence, and an appellate court will not reverse [this] failure . . . unless it has been proved by substantial, uncontradicted and manifestly credible evidence." In the years since the Act was passed, the appellate courts have had occasion to

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Fall of the Indeterminate Sentence, 24 WAYNE L. REV. 857, 885 (1978)).
15. Fair Sentencing: The First Five Years, supra note 7, at 10.
16. Id. at 11.
17. Id.
18. Id. (citing State v. Michael, 311 N.C. 214, 316 S.E.2d 276 (1984)).
address and interpret nearly every factor.

The North Carolina Supreme Court first considered the Fair Sentencing Act in State v. Ahearn. Ahearn had moved in with a young woman whom he had met in a bar. During the first two weeks of their relationship, the young woman's two-year-old child was in the hospital. Although Ahearn had been deaf from birth, he nevertheless cooked and cared for the baby once it returned home, while the mother spent her time elsewhere. He soon became dissatisfied with this arrangement. On July 21, 1981, the baby died of a cerebral hemorrhage caused by multiple blows to his head inflicted by "some sort of blunt object." The examining physician concluded that the child was the victim of "battered child syndrome." Ahearn was convicted of voluntary manslaughter and felonious child abuse pursuant to his guilty pleas. He received sentences which exceeded the presumptive terms prescribed by North Carolina General Statutes Section § 15A-1340.4(f). The trial judge found three factors in aggravation and five factors in mitigation. Of these, the statutory aggravating factors were (1) the offense was especially heinous, atrocious or cruel and (2) the victim was very young or mentally or physically infirm. The statutory mitigating factors were (1) the defendant had no record of criminal convictions, (2) he was suffering from a mental or physi-

20. Id. at 587, 300 S.E.2d at 691.
21. Id.
22. Id. at 586, 300 S.E.2d at 691.
23. Id.
24. N.C. GEN. STAT. § 15A-1340.4(f) provides:
   Unless otherwise specified by statute, presumptive prison terms for felonies classified under Chapter 14 and any other specific penalty statutes are as follows:
   (1) For a Class C felony, imprisonment for 15 years.
   (2) For a Class D felony, imprisonment for 12 years.
   (3) For a Class E felony, imprisonment for 9 years.
   (4) For a Class F felony, imprisonment for 6 years.
   (5) For a Class G felony, imprisonment for 4½ years.
   (6) For a Class H felony, imprisonment for 3 years.
   (7) For a Class I felony, imprisonment for 2 years.
   (8) For a Class J felony, imprisonment for 1 year.

Ahearn received prison sentences of sixteen years for voluntary manslaughter and five years for felonious child abuse.
cal condition that was insufficient to constitute a defense but re-
duced his culpability for the offense, 28 (3) his immaturity or his
limited mental capacity at the time of the commission of the of-
fense reduced his culpability for the offense, 29 (4) 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, 30 and (5) he had been a person of good charac-
ter or had had a good reputation in the community in which he
lived. 31 The trial court found, however, that the aggravating factors
outweighed the mitigating factors.

On appeal, 32 the North Carolina Court of Appeals determined
that the trial court improperly relied upon several aggravating fac-
tors in sentencing Ahearn, but held that Ahearn had "failed to
carry his burden of showing grounds for reversal of the sentences
imposed by showing he was prejudiced by the court's erroneous
findings in aggravation." 33 The North Carolina Supreme Court re-
versed and remanded for a new sentencing hearing. 34 The supreme
court held that the trial court's finding that the felonious child
abuse was especially heinous, atrocious or cruel was not supported
by the evidence. 35 The evidence disclosed that the baby had been
struck on at least three occasions, tied to his crib and placed under
a mattress, 36 but this fell "short of supporting a finding that the
offense was especially heinous, atrocious or cruel." 37 In interpreting
this aggravating factor, the court found guidance in its capital
cases. The court concluded that the evidence had to show excessive
brutality beyond that normally present in any killing or the por-
trayal of a crime which was "conscienceless, pitiless or unnecessa-

What concerned the supreme court was the weight given to
the factors as set out in the statute. The court of appeals had ap-

33. Id. at 50, 295 S.E.2d at 625.
35. Id. at 599, 300 S.E.2d at 698.
36. Id.
37. Id.
38. Id. (citing State v. Pinch, 306 N.C. 1, 34, 292 S.E.2d 203, 228 (1982), cert.
denied, 459 U.S. 1056, reh'g. denied, 459 U.S. 1189 (1983)).
parently indulged in assigning weights to the aggravating and mitigating factors despite the fact that the statute reserved this task solely to the trial court.\textsuperscript{39} The supreme court stated that appellate courts were not to attempt to second guess the sentencing judge with respect to the weight given to any particular factor, nor were they to engage in numerical balancing in order to determine whether a sufficient number of aggravating factors remained to "tip the scales."\textsuperscript{40} The court concluded:

More important, however, it must be assumed that every factor in aggravation measured against every factor in mitigation, with concomitant weight attached to each, contributes to the severity of the sentence—the quantitative variation from the norm of the presumptive term. It is only the sentencing judge who is in a position to re-evaluate the severity of the sentence imposed in light of the adjustment. For these reasons, we hold that in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, the case must be remanded for a new sentencing hearing.\textsuperscript{41}

Ahearn also contended the trial court had erred in finding the statutory aggravating factor that the victim was very young or mentally or physically infirm in the felonious child abuse offense.\textsuperscript{42} In support of this argument he pointed to the language of North Carolina General Statutes Section 15A-1340.4(a) which provides that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation . . . ."\textsuperscript{43} He argued that because the age of the victim is an element of the offense of felonious child abuse, the trial judge was precluded from considering the age of the victim as an aggravating factor. The supreme court however, was unpersuaded, because it considered vulnerabil-ity as the concern addressed by this factor. The fact that the baby was very young was not an element necessary to prove felonious child abuse. In addition, because the baby was immobilized by a body cast at the time of the attack, it was physically infirm. The court found no error in the mitigating factors\textsuperscript{44} as to the felonious

\begin{itemize}
\item [39.] 307 N.C. at 602, 300 S.E.2d at 700-01.
\item [40.] Id., 300 S.E.2d at 701.
\item [41.] Id. (emphasis in original).
\item [42.] Id.
\item [43.] N.C. GEN. STAT. § 15A-1340.4 (1983).
\item [44.] Id. at 604, 300 S.E.2d at 701-02.
\end{itemize}
child abuse offense.

With respect to the voluntary manslaughter offense, the court reached a different result. Because the baby was beaten to death—struck against a bed post with such force that his cast was shattered and his skull crushed—so that his injuries were multiple and death not immediate, the evidence supported the finding that the offense was especially heinous, atrocious or cruel.45 The evidence also supported the finding in aggravation that the victim was very young, or mentally or physically infirm.46 However, the court found error in the statutory mitigating factor that Ahearn voluntarily acknowledged wrongdoing to a law enforcement officer prior to arrest or at any early stage of the criminal process.47 Ahearn had expressly denied any wrongdoing connected with the baby's death during his interrogation. In the court's view, the fact that he pled guilty to the charge had no bearing on the policy behind this mitigating factor. Since the court had previously held a defendant's failure to plead guilty to an offense was not a factor in aggravation, a plea of guilty was not a factor in mitigation.48

The major difficulty in Ahearn's appeal resulted from the trial court's failure to list separately the aggravating and mitigating factors for each of the two offenses.49 Separate findings for the aggravating and mitigating factors for each offense would have facilitated appellate review and would have offered the appellate courts the option of affirming judgment for one offense while remanding for resentencing only the offense in which error was found.50 The supreme court, therefore, ruled that in every case in which the sentencing judge was required to make findings in aggravation and mitigation to support a sentence which varied from the presumptive term, each offense, whether consolidated for hearing or not, was to be treated separately and separately supported by findings tailored to the individual offense and applicable only to that offense.51

The importance of Ahearn lies in the procedural rulings and the interpretation of some of the aggravating factors which most often appear in support of sentences greater than the presumptive

45. Id. at 606-07, 300 S.E.2d at 703.
46. Id. at 607, 300 S.E.2d at 703.
47. Id. at 608, 300 S.E.2d at 704.
49. 307 N.C. at 598, 300 S.E.2d at 698.
50. Id.
51. Id.
term as set out in the statute. The cases following Ahearn which reached the North Carolina Supreme Court built on the foundations laid out there.

In State v. Chatman the defendant was convicted of first-degree rape, first-degree sexual offense and first-degree burglary. The trial judge imposed the maximum sentence of fifty years for the first-degree burglary. To support the sentence, the judge found two statutory factors in aggravation: (1) the defendant was armed with or used a deadly weapon at the time of the crime and (2) he had a prior conviction or convictions for criminal offenses punishable by more than sixty days confinement. The only mitigating factor was that 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. Chatman contended that because he used a knife in the rape but not the burglary, the first aggravating factor was erroneous. His contention failed. He was armed with the knife at the time he committed the actual burglary offense and this was enough to bring him within the straightforward language of that aggravating factor. Chatman demonstrates the courts' unwillingness to make fine linguistic distinctions in the meaning of the Fair Sentencing Act, although concededly, Chatman's argument was weak.

In State v. Abdullah, the supreme court considered the "pe-

52. 308 N.C. 169, 301 S.E.2d 71 (1983).
53. Id. at 179, 301 S.E.2d at 77. The presumptive sentence is fifteen years.
54. Id. In addition, the judge found as a nonstatutory factor in aggravation that the sentence pronounced by the court was necessary to deter others from committing the same crime, and that a lesser sentence would unduly depreciate the seriousness of the defendant's crime. While this Survey does not purport to deal with nonstatutory factors, defense attorneys should note that the supreme court held that these two factors fell within the exclusive realm of the legislature and were presumably considered in determining the presumptive sentence for first degree burglary. The court held that while both factors served as legitimate purposes for imposing an active sentence, neither could form the basis for increasing or decreasing a presumptive term because neither related to the "character or conduct of the offender." Id. at 180, 301 S.E.2d at 78 (emphasis in original).
55. Id. at 179, 301 S.E.2d at 77.
56. Id. He had broken into the victim's house by removing an air conditioning unit from a window, but did not actually make use of the knife with which he was armed until he used it to threaten his rape victim. Id. at 172, 301 S.E.2d at 73.
57. Id.
58. 309 N.C. 63, 306 S.E.2d 100 (1983). Note that originally this factor was described as an "offense committed for hire or pecuniary gain," but was amended
cuniary gain" factor in depth. Abdullah was convicted of first-degree murder, robbery with a firearm, and felonious conspiracy to commit robbery with a firearm, all of which arose out of the fatal shooting of a police officer during the armed robbery of a convenience store. The jury recommended a sentence of life imprisonment for the first-degree murder conviction and, based upon a finding of four statutory aggravating factors, the defendant was sentenced to the maximum forty years imprisonment on the armed robbery conviction and to the maximum three years imprisonment on the conspiracy conviction. Abdullah challenged two of the aggravating factors: that the offense was committed for pecuniary gain and that he was armed with or used a deadly weapon at the time of the crime. He argued that the trial judge erroneously considered them because evidence necessary to prove the elements of the offense was duplicated in proving these aggravating factors.

The Fair Sentencing Act provides that evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. The supreme court stated this language did not proscribe the use of evidence which was merely "inherent in the offense," but rather the use of evidence necessary to prove an element of the offense. Pecuniary gain is not an essential element of the crime of armed robbery. Therefore, if Abdullah had based his argument solely on the assumption that the aggravating factor, pecuniary gain, was an essential element of armed robbery and thereby precluded under the statute, his argument would have failed. In addition, however, he pointed out that the correct interpretation of the aggravating factor precludes its use in any circumstance other than when a defendant is hired or paid to commit the offense. He supported his argument with the fact that the North Carolina Legislature was about to amend the statute to clarify this aggravating factor. The supreme court agreed the amendment evinced "the Legislature's intent to avoid the enhancement of a defendant's sentence simply because money or other valuable

in 1983 to read "the defendant was hired or paid to commit the offense." N.C. Gen. Stat. § 15A-1340.4(a)(1)(c) (1983).

59. Id. at 65-66, 306 S.E.2d at 101-02.
60. Id. at 75, 306 S.E.2d at 107.
61. Id.
64. Id., 309 S.E.2d at 108.
items were involved in the crime charged." The court held that in both the armed robbery and the conspiracy sentences the trial judge had erred because no evidence existed that Abdullah had been paid or hired to commit the offenses. Abdullah also successfully argued that the trial judge improperly enhanced his sentence for the armed robbery by finding in aggravation that he was armed with or used a deadly weapon at the time of the crime. Since an element of armed robbery is possession or use of a firearm or other dangerous weapon, use of this aggravating factor was statutorily proscribed.

*State v. Jones* gave the supreme court an opportunity to address the question of the burden of proof with respect to the Fair Sentencing Act. Jones was convicted of second-degree murder, armed robbery, conspiracy to commit armed robbery and felonious larceny. He appealed the life sentence imposed for the murder conviction, and the imposition of sentences greater than the presumptive for the other convictions. The terms imposed were all based on the aggravating factor that the offenses were committed for pecuniary gain and the mitigating factor that at an early stage of the criminal process, the defendant had voluntarily admitted wrongdoing. In connection with the armed robbery conviction, the judge had also found, as an aggravating factor, that Jones had induced others to participate in the commission of the offense or had occupied a position of leadership or dominance of other participants. Jones argued that four mitigating factors should have been found because they were proved by a preponderance of the evidence: (1) he was a passive participant or played a minor role in the commission of the offense, (2) he was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability, (3) he aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony and (4) he could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or that he exercised caution to avoid such consequences. Although the supreme court found no evidence in the

65. *Id.* (quoting *State v. Thompson*, 62 N.C. App. 586, 303 S.E.2d 86 (1983)).
66. *Id.* at 77, 309 S.E.2d at 108.
68. *Id.* at 217, 306 S.E.2d at 454.
69. *Id.*
70. *Id.* at 218, 306 S.E.2d at 451.
transcript or record to mandate a finding of the second, third and fourth mitigating factors, the court agreed that the first factor should have been found in mitigation because it was supported by uncontradicted evidence. The court stated that the Fair Sentencing Act would be eviscerated if trial judges could ignore evidence in support of a particular aggravating or mitigating factor where such evidence was uncontradicted, substantial and no reason existed to doubt its credibility. One of the Act’s objectives was for the punishment imposed to take “into account factors that may diminish or increase the offender’s culpability.”

The court then proceeded to discuss the burden of proof. The trial court was to take guidance from principles developed in civil cases for directing a verdict for the party with the burden of proof. The court held that the State bears the burden of persuasion on aggravating factors if it seeks a term greater than the presumptive, and the defendant bears the burden of persuasion on mitigating factors if he seeks a term less than the presumptive. This means that when a criminal defendant argues that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, his position is analogous to a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that “the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn,” and the credibility of the evidence “is manifest as a matter of law.” The court concluded that Jones had indeed played only a passive role in the murder and remanded the conviction for a new sentencing hearing. Jones is important for the rules governing the burden of proof and the standards of proof which the defendant must reach to gain a new sentencing hearing.

In State v. Blackwelder the supreme court redefined the focus of “heinous, atrocious, or cruel” and looked at two mitigating factors not previously considered. The case arose out of a shooting death for which Blackwelder was convicted of second-degree mur-

71. Id. at 218-219, 306 S.E.2d at 454-55.
72. “In the sentencing scheme set forth in the Fair Sentencing Act the burden of proving aggravating or mitigating factors is not expressly allocated.” Id. at 219, 306 S.E.2d at 455.
73. Id.
74. Id.
der. He had twice shot his victim with a shotgun, the second time holding the gun's muzzle about an inch from the victim's head, so that his brains were literally blown out. The defendant contended that the facts did not support the trial judge's finding that the murder was excessively brutal, or involved an unusual degree of suffering. The court found its capital cases instructive for a definition of an especially heinous, atrocious or cruel offense, but declined to measure the facts of those capital cases against the facts of cases decided under the Fair Sentencing Act. Instead, the focus was to be on whether the facts disclosed "excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense." The Blackwelder facts clearly fell within these parameters—indeed, the photographs of the crime scene bespoke a "ghoulish, bloody nightmare."

Blackwelder also contended the trial judge had erred in finding as an aggravating factor that he was armed with or used a deadly weapon at the time of the crime because evidence of the use of a deadly weapon was necessary to prove the malice element of the second-degree murder offense. The supreme court agreed, and adopted a "bright line" rule to "avoid hair-splitting factual disputes necessitated by having to second guess jury decisions as to the existence of malice." When the facts justify an instruction on the inference of malice arising as a matter of law from the use of deadly weapon, evidence of the use of that deadly weapon may not be used as an aggravating factor at sentencing. Blackwelder further challenged the trial court's failure to find in mitigation that he had been a person of good character or possessed a good reputation in the community in which he lived. Although Blackwelder provided witnesses who testified that he paid his bills and was nonviolent when drunk, this testimony was not sufficient to meet the uncontradicted, quantitatively substantial and credible level necessary. Finally, the court agreed with Blackwelder's contention that the trial court erred in failing to find his army service as a mitigating factor. If the evidence at resentencing established that

77. Id. at 411, 306 S.E.2d at 787.
78. Id. at 414, 306 S.E.2d at 786.
79. Id.
80. Id. (emphasis in original).
81. Id.
82. Id. at 417, 306 S.E.2d at 788.
83. Id.
84. Id. at 419, 306 S.E.2d at 789.
he had been honorably discharged, the trial judge had to find that factor in mitigation. The court reiterated, however, that the weight to be attributed to the factor remained in the trial court's discretion.85

State v. Thompson86 gave the North Carolina Supreme Court the opportunity to consider two other aggravating factors: the defendant attempted to take property of great monetary value, and had prior convictions of more than sixty days imprisonment. Thompson was caught inside a building because of a burglar alarm. He was convicted of felonious breaking or entering and felonious larceny.87 The trial judge found as factors in aggravation that the offense was committed for hire or pecuniary gain, that the offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, and that the defendant had been convicted of offenses punishable by more than sixty days confinement.88 The court of appeals found error in all three aggravating factors and remanded for resentencing.89 In the supreme court, the State contended that the trial judge had properly found that the defendant committed the offense for pecuniary gain, but, as in previous cases such as Abdullah,90 the court could find no evidence in the record to support this aggravating factor.91 Similarly, no evidence existed to support a finding of an attempted taking of property of great monetary value. Apparently, Thompson had intended to take copper from compressor wires inside the building, but the evidence did not show how much copper was available, its quality or its value. The supreme court did point out, however, that if the evidence had been such as to establish an attempted taking of property of great monetary value, the trial judge would not have been precluded from finding this factor in aggravation simply because Thompson had been charged with larceny, because "[t]he additional evidence necessary to prove a taking or attempted taking of property of great monetary value is not evidence necessary to prove an element of felonious larceny."92

85. Id.
87. Id., 307 S.E.2d at 157.
88. Id. at 421-22, 307 S.E.2d at 158.
89. Id.
91. Id. at 422, 307 S.E.2d at 158.
92. Id. (emphasis in original). The court further emphasized that many of the statutory factors listed in N.C. GEN. STAT. § 15A-1340.4(a)(1) contemplate a dupli-
The court then addressed the most significant issue in *Thompson*. On appeal to the court of appeals, the defendant had challenged the aggravating factor that he had been convicted of offenses punishable by more than sixty days confinement because the State had failed to introduce a certified copy of his record.\(^9\)

The evidence of his prior convictions consisted of his own statements on cross-examination and a statement by the prosecuting attorney.\(^9\) The court of appeals held that methods of proof, as laid out in the Fair Sentencing Act, were permissive rather than mandatory.\(^9\) But the supreme court went on to say that since the record showed nothing as to Thompson's indigency or his counsel representation at the time of the prior convictions, the trial court could not have found by a preponderance of the evidence that he was not indigent or that he had had counsel or had waived it at that time. The court stated that this was a feature of the aggravating factor of prior convictions which had to be proved by the State.\(^9\)

Although the supreme court agreed the statute's language was permissive as to the method of proof of prior convictions, and that therefore a defendant's own statements under oath constituted an acceptable alternative method of proof, it disagreed with the allocation of the burden of proof as to indigency and lack of cation in proof without violating the proscription that evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. The court cited *State v. Abee*, 308 N.C. 379, 302 S.E.2d 230 (1983), where it held that if the defendants pled guilty to only one act of fellatio, repeated acts of fellatio were properly considered as aggravating factors under the statute. *Thompson*, 309 N.C. at 422, 307 S.E.2d at 158 n.1.

93. *Id.* at 423, 307 S.E.2d at 159.

94. *Id.*

95. N.C. GEN. STAT. § 15A-1340.4(e) provides:

A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein. No prior convictions which occurred while the defendant was indigent may be considered in sentencing unless the defendant was represented by counsel or waived counsel with respect to that prior conviction. A defendant may make a motion to suppress evidence of a prior conviction pursuant to Article 53 of this Chapter. If the motion is made for the first time during the sentencing stage of the criminal action, either the State or the defendant is entitled to a continuance of the sentencing hearing.

96. 309 N.C. at 424, 307 S.E.2d at 159.
counsel. "Not only is it preferable policy to require a defendant to object to or move to suppress the admission of evidence of a prior conviction in the sentencing stage of a criminal trial, such a requirement is consistent with our general procedural rules . . . ."97 The court held that pursuant to the Fair Sentencing Act, the initial burden of raising the issue rested with the defendant and if he elected to challenge the admissibility of evidence of his prior convictions he was to do so by a method which informed the court of the specific reason for his objection. If the defendant established a prima facie showing, then the burden would shift to the State to prove by a preponderance of the evidence that the challenged evidence was admissible.98 This ruling follows the procedural mandates of State v. Jones.99

The constitutionality of the aggravating factor that the defendant committed an offense while on pretrial release for another felony charge came before the supreme court in State v. Webb.100 Webb was convicted of second-degree murder and armed robbery. He contended that the trial court erred when it considered as an aggravating factor that he was on pretrial release on breaking or entering and larceny charges.101 The supreme court found no merit in this argument since Webb failed to support it with authority and the court itself could find none.102 The court reasoned that a defendant on pretrial release, whether guilty of that felony or not, would be particularly cautious to avoid committing another criminal offense. "One demonstrates disdain for the law by committing an offense while on release pending trial of an earlier charge, and this may indeed be considered an aggravating factor."103 An offender's status as a pretrial releasee in a pending case was a legitimate circumstance to be considered in imposing sentence, and the legislature could constitutionally require that it be so considered.104 The court found no error in Webb's sentence.

Finally, in State v. Lattimore,105 the supreme court looked at

97. Id. at 426, 307 S.E.2d at 160.
98. Id. at 428, 307 S.E.2d at 161.
101. Id. at 559, 308 S.E.2d at 258.
102. Id.
103. Id.
104. Id.
joinable offenses and leadership position in conjunction with the Fair Sentencing Act. Following his pleas of guilty, Lattimore was sentenced to forty years imprisonment for attempted robbery with a firearm, at the expiration of which he was to serve a life sentence for second-degree murder. In the robbery offense, the trial court found, among others, the statutory aggravating factor that Lattimore induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants. Lattimore argued that since the State had accepted his codefendant's plea to accessory after the fact, it had conceded that the codefendant was not involved in the actual commission of the offense and therefore he, Lattimore, could not have occupied a position of leadership over the codefendant. The supreme court explained that Lattimore's focus was incorrect. "The focus of North Carolina General Statutes Section 15A-1340.4(a)(1)(a) is not on the role of the 'participants' in the crime, but on the role of the defendant in inducing others to participate or in assuming a position of leadership." In this case, the evidence fully supported the finding of Lattimore's leadership position. The trial judge had found, however, as a nonstatutory aggravating factor that the defendant had committed a joinable offense. The court stated that to permit this finding would "virtually eviscerate the purpose and policy of the statutory prohibition." Both convictions were remanded for resentencing.

This lengthy overview of the majority of cases in which the North Carolina Supreme Court discussed various aggravating and mitigating factors as specified in the statute, together with the procedural rulings handed down, demonstrates the difficulties trial courts have experienced in applying the Fair Sentencing Act. However, the wealth of cases, both in the supreme court and the court of appeals, affords an opportunity to analyze the direction the appellate courts are likely to take when faced with challenges to the statutory aggravating and mitigating factors in the Act. This analysis can guide criminal defense attorneys in using the Act to protect their clients.

106. Id.
107. Id. at 299, 311 S.E.2d at 879.
108. Id.
109. Id. N.C. GEN. STAT. § 15A-1340.4(a)(1)(o) specifically prohibits, as an aggravating factor, the use of convictions for offenses joinable with the crime or crimes for which the defendant is currently being sentenced.
III. STATUTORY AGGRAVATING FACTORS.

A. The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.110

Most of the cases addressing this factor have held the evidence was insufficient to support it. Since every aggravating factor must be proved by a preponderance of the evidence, mere conjecture will not do. In State v. Gore111 the defendant had been convicted of felonious breaking or entering and felonious larceny. The State argued that the totality of the evidence supported the finding of the aggravating factor of leadership or dominance. The defendant, unlike some of his codefendants, was involved in all the break-ins, had a list of people living in the area whom he considered the most lucrative to rob, and gave a detailed statement to the police revealing how the offenses were perpetrated, who was involved in each and the location of approximately half of the stolen property. In the court of appeals' view, this was not enough to prove leadership or dominance. In addition, the record contained no direct evidence that the defendant was the leader or held dominance over the other participants. In State v. Coffey112 and State v. Thompson,113 the evidence was once again insufficient. The Thompson evidence tended to show only that the defendant was accompanied by a codefendant at the time he committed the robbery and that he told the codefendant of his intention to rob the victim prior to doing so. In State v. Brame,114 the evidence did not support the finding that the defendant induced a female who had no prior criminal record to participate in the commission of the offense. However, in State v. San Miguel,115 the evidence was sufficient to

support the finding of inducement of others to participate in the commission of a conspiracy to sell and deliver LSD and the sale and delivery of LSD, where it tended to show that one defendant brought in one other person and the second defendant brought in two others. Since the defendants were the initial movers behind the scheme, they necessarily were in a dominant, leadership position over persons who joined later.

To prove this factor by the preponderance of the evidence, therefore, the prosecution must show something more than mere participation by a codefendant. Simple discussion of the crime, as illustrated in Thompson,116 will not support inducement. Real leadership or dominance must be shown. Therefore, defense attorneys can challenge this aggravating factor successfully on appeal where codefendants committed an offense together without one leading or inducing the other.

B. The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.117

Only three cases have been decided with respect to this factor in the time period under consideration. In State v. Thompson118 the aggravating factor finding was erroneous because the evidence did not disclose that the defendant was threatened with arrest at the time he committed the offense or that he was restrained in any way at any time. Conversely, in State v. Bethea,119 the evidence was sufficient to find the factor. The defendant was convicted for felonious assault with a firearm on a law enforcement officer performing a duty of his office. The officer testified he was going to arrest the defendant for the common law offense of going armed to the terror of the public. The defendant’s attack was an attempt to prevent his arrest.

This factor rests upon two elements: the defendant must know he is threatened with arrest and the arrest must be lawful. A defense attorney may find room to maneuver under either of these elements.

C. **The defendant was hired or paid to commit the offense.**

Of the many cases decided under this aggravating factor, the majority simply state that the evidence was insufficient to support the trial judge's finding. However, a few cases do shed some light on the matter. In *State v. Harris*, the defendant pled guilty to seventeen counts of conspiracy to commit larceny and eighteen counts of felonious larceny. The trial judge found as an aggravating factor that Harris had committed the offenses for pecuniary gain. The court of appeals held that this finding was error because pecuniary gain is an inherent element of the crime of larceny. The Fair Sentencing Act specifically prohibits finding aggravating factors where they are an element of the crime for which the defendant is being sentenced. Similarly, in *State v. Smith* the defend-
ant’s convictions for aiding and abetting felonious breaking or entering and felonious larceny were remanded for resentencing where the evidence did not support a finding that the offenses were committed for hire or pecuniary gain.

Defense attorneys should note that the amendment to the language of this aggravating factor was an effort to clarify it, and that now the prosecution must produce evidence which by its preponderance tends to show that the defendant was actually hired or paid to commit the crime. In all the cases considered during the period covered by this survey, not one exists in which the evidence was sufficient to support this factor.

D. The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.\textsuperscript{124}

In \textit{State v. Brown}\textsuperscript{125} the defendant was convicted of conspiracy to assault with a deadly weapon inflicting serious bodily injury, conspiracy to commit nonfelonious breaking or entering and two counts of solicitation to commit murder. The court of appeals held that the trial court properly used the same evidence to prove more than one aggravating factor where each crime was committed to hinder the enforcement of laws by disrupting the defendant’s prosecution. In addition, the intended victims of the murders were a law enforcement officer and a State’s witness against the defendant.

Under the facts of this case, the defense could not successfully challenge this aggravating factor on appeal. However, this was the only case found which considered the factor. Possibly, in another situation, sufficient mitigating factors (which the sentencing judge must find) might outweigh the aggravating factor to prevent the defendant from receiving more than the presumptive prison term.

E. The offense was committed against 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 his official duties or because of the exercise of his official duties.\textsuperscript{128}

In addition to \textit{State v. Brown},\textsuperscript{127} the court of appeals has addressed this factor in two other cases. In \textit{State v. Castleberry},\textsuperscript{128} the defendant was convicted for conspiracy to obtain property by false pretenses, obtaining property by false pretenses, and two counts of subornation of perjury. The court remanded for resentencing because the trial court had erroneously found in aggravation that the subornation of perjury offenses were committed against a deputy clerk of court while engaged in the performance of her official duties. The clerk was not the victim here. But in \textit{State v. Laney},\textsuperscript{129} where the defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury, the court of appeals found no error because sufficient evidence existed that the offense was committed against a witness adverse to him while she was engaged in the performance of her official duties or because of the exercise of her official duties.

Here, the \textit{person against whom the crime is committed} is the key. The person must be one of those enumerated in the statute, or the aggravating factor may not be found.

\textbf{F. The offense was especially heinous, atrocious, or cruel.}\textsuperscript{130}

The supreme court has extensively interpreted this factor. For

\begin{enumerate}
\item \textsuperscript{128} 73 N.C. App. 420, 326 S.E.2d 312 (1985), \textit{cert. denied}, 314 N.C. 670, 335 S.E.2d 497 (1985).
\item \textsuperscript{129} 74 N.C. App. 571, 328 S.E.2d 586 (1985).
\end{enumerate}
example, in *State v. Atkins*,131 the evidence showed that the defendant broke into the victim's home, placed a sheet and pillow over her head, and engaged in anal intercourse with her. This evidence did not support a finding that the crime was especially heinous, atrocious, or cruel. The supreme court stated that the focus should be on whether the facts disclose excessive brutality or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense. Consequently, in *State v. Payne*,132 where the defendant was convicted of second-degree murder, evidence that the victim was brutally beaten, kicked, and "body slammed" onto the floor, that injuries were extensive, that the victim suffered continuous and extreme pain and that death was not instantaneous (he died two and a half months after the assault) supported the finding of this aggravating factor. Again, in *State v. Hines*,133 a second-degree murder case, the trial court properly found this aggravating factor where the defendant confessed that he first slapped, then choked the victim with his hands, left him on the couch gasping for breath, and later returned with an extension cord and choked him five times with the cord before finally cutting off his air supply. The aggravating factor was also properly found in *State v. Bush*,134 where the defendant robbed his mother using a hatchet.

The key for defense attorneys is whether the defendant's actions went beyond what is normally present in the particular crime, be it armed robbery or murder. The fact that the victim


died in pain will not support a finding of especially heinous, atro-
cious, or cruel, since death is normally painful and all murder vic-
tims die. If the defendant's actions prolonged the victim's suffer-
ing, physical or mental, the appellate court is likely to find no
error. The line over which the defendant must not step appears to
be fairly clear since, of the cases surveyed, the majority were re-
mended for resentencing because the evidence did not support the
finding of this factor. However, defense attorneys should be aware
that the factor is written in the disjunctive in the statute so that
courts can find a crime was especially heinous, or especially atro-
cious or especially cruel, and not necessarily all three.

G. 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 per-
son.\textsuperscript{135}

In \textit{State v. Benfield},\textsuperscript{136} the defendant was convicted of two
counts of assault with a deadly weapon with intent to inflict seri-
ous injury, felonious breaking or entering, and discharging a fire-
arm into an occupied dwelling. The court of appeals remanded the
case for resentencing because the trial court had found this aggra-
vating factor. The court held that the legislature must have consid-
ered the factor in setting the presumptive term for this particular
offense and therefore the trial judge could not enhance the sen-
tence. In \textit{State v. Bethea},\textsuperscript{137} the court considered the nature of a
hazardous weapon or device, and concluded that the legislature in-
tended this aggravating factor to be limited to those weapons or
devices which are \textit{indiscriminate} in their fire power, such as ma-
chine guns or bombs. A rifle, even in a metropolitan setting, as was
the case in \textit{Bethea},\textsuperscript{138} is not normally hazardous to the lives of
more than one person, even if it might be sometimes. And in \textit{State
v. Jones},\textsuperscript{139} the supreme court ordered a new sentencing hearing
for the defendant who had been convicted of attempting to burn a

\textsuperscript{135} State v. Bethea, 71 N.C. App. 125, 321 S.E.2d 520 (1984); State v. Jones,
68 N.C. App. 514, 315 S.E.2d 491 (1984); State v. Benfield, 67 N.C. App. 490, 313
\textsuperscript{137} 71 N.C. App. 125, 321 S.E.2d 520 (1984).
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} 68 N.C. App. 514, 315 S.E.2d 491 (1984).
hotel. The court declined to define burning as a device which would normally be hazardous to the lives of more than one person.

As the court of appeals pointed out, the element to look for is the indiscriminate nature of the weapon or device. A rifle, handgun or shotgun will not support a finding of this factor. Nor will an attempt to burn a house to collect the insurance—although a conflagration begun in a tightly packed urban area might.

H. The defendant held public office at the time of the offense, and the offense related to the conduct of the office.

No cases address this factor.

I. The defendant was armed with or used a deadly weapon at the time of the crime.140

Provided that being armed with or using a deadly weapon is not an essential element of the crime for which the defendant is being sentenced, this aggravating factor may properly be used to enhance the defendant's sentence. In State v. Toomer,141 for example, the trial court properly found this as an aggravating factor of the defendant’s first-degree burglary sentence because the evidence tended to show that he was armed with or used a deadly weapon at the time of the breaking or entering. Even though the same evidence was necessary to prove an essential element of the joinable crime of first-degree sexual offense for which the defendant was also convicted, it was not an essential element of first-degree bur-
glary. In *State v. Corley*, on the other hand, no evidence existed to support the finding that the defendant “used” a gun during the kidnapping for which he was convicted. In *State v. Blackwelder*, the supreme court laid down the “per se” rule: when the facts justify an inference of malice arising only from the use of a deadly weapon, evidence concerning the use of that deadly weapon may not be used to support an aggravating factor at sentencing.

Analysis of these and other cases show that only where either the use of a deadly weapon is an essential element of the crime, or the inference of malice is dependent on the use of a deadly weapon, will the appellate courts find this aggravating factor improper. The defense attorney, therefore, is thrown back on the possibility that sufficient mitigating factors will be present in his client’s case to outweigh or at least reduce the impact of this aggravating factor.

J. The victim was very young, very old, or mentally or physically infirm.

In *State v. Hines*, the supreme court held that the trial court erred in finding as an aggravating factor that a sixty-two year-old victim of a second-degree murder was very old, where the victim had been a brickmason until he retired five years before his death. His retirement was due to a disability that was not age-re-

144. *Id.* at 417.

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lated, he maintained a business selling drinks after his retirement, and occasionally went fishing. The court stated that a victim’s age does not make a defendant more blameworthy unless the victim’s age causes him to be more vulnerable to the crimes committed.

Again, in State v. Long, the trial court erred in finding as aggravating factors that the two child victims of the defendant’s assault were very young. The supreme court found that the children, at the ages of eleven and fourteen, were not at the beginning of the age spectrum. In addition, the State failed to present evidence that the children were more vulnerable to the defendant’s assault than the average person would be by reason of their ages. The court of appeals remanded State v. Lewis for resentencing on a second-degree sexual offense and a first-degree kidnapping where the trial court had found this aggravating factor. The victim was seventeen years old but was not so extremely young as to make her age reasonably related to the purposes of sentencing. However, in State v. Sampson, this aggravating factor was properly found because the two child victims of the kidnappings and murders were only three and two years old. Finally, in State v. Williams, the defendant’s convictions for first-degree rape and first-degree burglary were affirmed where the supreme court had stated that the victim was eighty-one years old. This was sufficient to support the aggravating factor.

The key element in this aggravating factor is vulnerability. Vulnerability is found at the two extremes of the age spectrum, such as two and eighty-one. Therefore, if the victim’s age lies somewhere in the middle range of the spectrum, the defendant’s sentence will probably not be enhanced by use of this factor.

151. 74 N.C. App. 574, 328 S.E.2d 775 (1985).
152. “A part of the record of this case in the court below was the decision of the Supreme Court on defendant’s previous appeal in which it is stated that the victim of defendant’s crime is 81 years old. This is basis enough for the trial judge’s finding that she was very old.” Id. at 575, 328 S.E.2d at 776.
K. The defendant committed the offense while on pretrial release on another felony charge.153

Only three cases have addressed this factor. In all three, the defendants' sentences were affirmed. As discussed earlier, in conjunction with State v. Webb,154 the appellate courts frown on the disdain for the law demonstrated by a defendant who commits an offense while on release pending trial of an earlier charge. The supreme court stated that the trial judge may indeed consider this as an aggravating circumstance.

L. The defendant involved a person under the age of 16 in the commission of the crime.

No cases address this factor.

M. 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.155

In State v. Thompson,156 the defendant pled guilty to an indictment alleging he took property valued at $3,177.40. Based on this allegation, the trial court found as an aggravating factor that the offense involved the taking of property of great monetary value. The supreme court found no error. The court held that where a defendant pleads guilty to an indictment which contains factual allegations which could be the basis for the finding of an aggravating circumstance and fails to challenge or present any evi-


dence to rebut these factual allegations, they are deemed admitted and may be utilized to establish the existence of the aggravating factor. But in *State v. Harris*,\(^{157}\) the court of appeals held that the trial court could not use this factor to enhance the defendant's sentence where the only evidence of value was that used to show felonious larcenies had been committed.

In *State v. Thompson*,\(^{158}\) the court of appeals remanded for resentencing because the only basis for this aggravating factor was that the defendant had stolen some car keys. And in *State v. Malone*,\(^{159}\) where the defendant pled guilty to felonious escape, his sentence could not be enhanced by use of this factor because although damage causing great monetary loss had been inflicted, the defendant himself had not inflicted such damage. Finally, in *State v. Coffey*,\(^{160}\) in which the defendant had been convicted for keeping and maintaining an aircraft for the purpose of keeping or selling marijuana and for felonious trafficking in marijuana, based on his possession of more than 100 pounds but less than 2,000 pounds of the drug, the trial court erred in finding this aggravating factor because the amount was an element of the offense.

Under this factor, the actual monetary value of the stolen property or contraband must be fairly high and the property itself must be stolen, rather than simply the means of access to that property. The supreme court decision in *State v. Thompson*\(^ {161}\) warns defense attorneys that if a value is alleged in the indictment, the defendant must, if possible, come forward with evidence to rebut the allegation. If he does so, and the trial court still uses this factor in aggravation, a good chance exists for remand for resentencing on appeal.

N. The defendant took advantage of a position of trust or confidence to commit the offense.\(^ {162}\)

No cases to reach the supreme court have addressed this fac-

\(^{159}\) 73 N.C. App. 323, 326 S.E.2d 302 (1985).
tor. But in *State v. Baucom*, the court of appeals remanded for resentencing where the trial court had relied solely on the fact that the defendant and the victim were brothers to support a finding of this aggravating factor. In *State v. Hitchcock*, the court found no error in the defendant’s sentence for second-degree murder where the State relied on evidence that the victim suffered from battered child syndrome to obtain the conviction. In this case, the defendant lived with the child’s mother. The trial court properly found the aggravating factor.

The relationship between the defendant and the victim of the crime must be such that real trust or confidence exists. Blood relations would normally be expected to generate such trust or confidence, but as *Baucom* demonstrates, that fact alone is not sufficient to support this aggravating factor.

O. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement.

Of the many cases which have addressed this aggravating factor:

tor, a synopsis of several will illustrate its use. In *State v. Brown*, a second-degree murder case, the supreme court held that a plea of nolo contendere could be used by the trial court to establish this aggravating factor. But in *State v. Harris*, where the defendant pled guilty to seventeen counts of conspiracy to commit larceny and eighteen counts of felonious larceny, the court of appeals held that the trial court erred in considering the defendant’s prior convictions where the only proof of those convictions was a statement by the district attorney. However, in *State v. Atkins*, the defendant’s convictions for felonious breaking or entering and second-degree sex offense were affirmed where this aggravating factor was used but the defendant did not object to the admission of evidence of his prior convictions and did not raise the issue of indigency or lack of counsel. And in *State v. Smith*, the factor was properly used where the defendant admitted his prior convictions on cross examination. Also, in *State v. Wester*, it was properly used where the prior convictions were based on a Police Information Network computer printout. But in *State v. Southern*, the court of appeals remanded the defendant’s conviction of involun-

tary manslaughter for resentencing where his prayer for judgment was continued. The court held that this was not a prior conviction. In State v. Malone, the defendant pled guilty to felonious escape, the court of appeals again remanded because the trial court had improperly found this aggravating factor based on the conviction for which the defendant was already in custody. In State v. Stamps, the defendant was convicted for involuntary manslaughter. His sentence was affirmed because the trial court had properly found this aggravating factor based on a crime that had occurred after the crime for which the defendant was currently being sentenced. The court of appeals explained that the Fair Sentencing Act excludes only those crimes which are joinable with the crime for which the defendant is currently receiving sentence. Finally, in State v. McLean, the court of appeals once again remanded the defendant's conviction for assault with a deadly weapon inflicting serious injury for resentencing because the trial court had used the same evidence for two aggravating factors. While the legislature intended a defendant's past record to be used as an aggravating factor, it can only be used once.

If the defendant is to question this aggravating factor, he must challenge the admissibility of evidence as to any prior convictions at trial. He must also raise the issue of indigency or lack of counsel in those prior convictions—if he does not do so, the appellate courts will deem the convictions admitted. If he elects to take the stand, the defense attorney must carefully prepare the defendant for cross examination. While a Police Information Network record is sufficient evidence of prior convictions, a mere statement by the prosecution that such convictions exist is insufficient to support the factor.

P. The offense involved the sale or delivery of a controlled substance to a minor.

No cases address this factor.

IV. STATUTORY MITIGATING FACTORS.

A. The defendant has no record of criminal convictions or a re-
ord consisting solely of misdemeanors punishable by not more than 60 days confinement. 176

In *State v. Albert*, 177 the district attorney, in response to a question from the trial court, stated that only a codefendant, not the defendant, had a criminal record. 178 The supreme court held the trial court had erred by failing to consider this mitigating factor since the State established the defendant’s claim by admitting the truth of the basic facts on which the claim rested. 179 In contrast, the court of appeals affirmed the defendant’s enhanced sentence for a conviction of common law robbery in *State v. Nichols*, 180 where the only evidence to support this mitigating factor was the defense attorney’s unsworn statement. But the same court remanded for a new sentencing hearing in *State v. Robinson*, 181 because the trial court had failed to find this mitigating factor where no evidence existed that the defendant had a record of criminal convictions.

The Fair Sentencing Act requires the sentencing judge to find factors in mitigation where the preponderance of the evidence supports them, even if not requested to do so by the defendant. The appellate courts will always remand for resentencing on this basis. But the better practice is to show as many mitigating factors as possible in a particular case supported by as much evidence as possible. All that this mitigating factor requires is some legwork supported by documentation, since an unsworn statement will not suffice if made by the movant.

B. The defendant committed the offense under duress, coercion, threat, or compulsion which was insufficient to constitute a de-

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178. *Id.* at 579, 324 S.E.2d at 241.

179. In *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983), the supreme court recognized that, “evidence is credible as a matter of law when the ‘nonmovant establishes proponent’s case by admitting the truth of the basic facts upon which the claim of the proponent rests.’” *Id.* at 220, 306 S.E.2d at 455.


fense but significantly reduced his culpability.\textsuperscript{182}

In \textit{State v. Brooks},\textsuperscript{183} the defendant’s conviction for discharging a firearm into occupied property was remanded for resentencing because the court of appeals held that, as a matter of law, the trial court could not refuse to consider this mitigating factor after the jury had found the defendant guilty. But in \textit{State v. Matthews},\textsuperscript{184} the defendant’s conviction for assault with a deadly weapon inflicting serious injury was affirmed because unsworn statements by defense counsel as to this mitigating factor were insufficient. Similarly, the court of appeals found no error in \textit{State v. Simpson},\textsuperscript{185} where the trial court had failed to find this mitigating factor because the evidence to support it was neither uncontradicted nor manifestly credible.

For the defendant to have this factor considered in the weighing process, the evidence must be uncontradicted and it must be properly proven. An unsworn statement will not suffice. This factor is one that could be used with some success by defense attorneys where the facts support it, because it involves the defendant’s state of mind at the time of the offense. If the defense attorney can show uncontradicted evidence that his client was coerced or threatened, the trial court has no choice but to consider this factor in mitigation.


C. The defendant was a passive participant or played a minor role in the commission of the offense.186

In the second-degree murder case of State v. Brown,187 the supreme court could find no abuse of discretion on the part of the trial court in failing to find this mitigating factor where the defendant, as part of a prearranged plan, lured the victim into the bedroom, helped bind, gag and rob him and helped dispose of the body. Neither did the court find error in State v. Parker,188 where the defendant did nothing to discourage his accomplices from stabbing the victim and dragging him into the woods; where he took no action to counteract the ultimate effect of his accomplices' actions; where evidence existed that he was pleased with the result because he bore ill will against the victim and where he participated to the extent that he was a lookout, covered up blood in the road and disarmed the victim after the stabbing when the victim gained control of the knife. And as in mitigating factors A and B the court of appeals found no error in State v. Seagroves,189 where the defendant's conviction for conspiring to provide drugs to an inmate was enhanced. This mitigating factor was insufficiently supported by defense counsel's unsworn statement that the defendant played a minor role in the commission of the offense.

From an analysis of the cases considering this factor, passive participation appears to mean no unilateral affirmative action to support accomplices in the crime. Parker190 appears to state implicitly that if the defendant either takes some action to discourage accomplices or to counteract their actions or does nothing to encourage them, then the factor may properly be considered in mitigation. Simply driving the getaway car, or acting as lookout, standing alone, would probably qualify as a minor role, and would necessitate the trial judge's consideration of this factor.

D. The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense.\textsuperscript{191}

The trial court was not required to find this mitigating factor where the evidence with respect to any connection between the crime (murder) and the alleged mental problems of the defendant were conflicting and inconclusive. So ruled the supreme court in \textit{State v. Watson}.\textsuperscript{192} In \textit{State v. Upright},\textsuperscript{193} the court of appeals found no error in the defendants’ consolidated trials and convictions for second-degree murder and accessory after the fact to second-degree murder. Since no evidence existed that one defendant was in such a state of inebriation as to impair his ability to understand the consequences of his conduct, the trial court correctly refused to find this mitigating factor in his favor.


\textsuperscript{192} 311 N.C. 252, 316 S.E.2d 293 (1984).

In *State v. Barranco*, the defendant was convicted for larceny from the person. The trial court found in mitigation that his intoxication was a mental condition which reduced his culpability. The court of appeals affirmed the sentence, finding no merit in the defendant’s argument that his intoxication was also a physical condition reducing his culpability. In *State v. Benfield*, the court of appeals remanded for resentencing. The defendant was convicted of two counts of assault with a deadly weapon with intent to kill, inflicting serious injury, one count of felonious breaking or entering, one count of assault with a deadly weapon and one count of discharging a firearm into an occupied dwelling. With regard to this mitigating factor, however, the court held that where the defendant was wounded after he initiated the shootout, his culpability was not reduced by this factor. Finally, in *State v. Bush*, the defendant could not claim this mitigating factor where his use of marijuana failed to reduce his culpability.

Drugs, drink or prior physical injury are the elements to concentrate upon in an effort to have this mitigating factor considered at sentencing. But each one must have had sufficient impact upon the defendant so as to reduce his ability to perceive the consequences of his actions. Total intoxication, total inebriation or a physical condition such that overwhelming pain colored the defendant’s actions will probably suffice to have the trial court consider this factor in mitigation.

E. The defendant’s immaturity or his limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense.

Most of the cases addressing this factor simply state that the

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evidence was insufficient to support its finding. As with other factors, in *State v. Torres*,\(^ {198} \) the defense attorney’s unsworn statement that his client was of limited mental capacity was not enough to find the factor.

However, if the defendant has a documented history of limited mental capacity, or has been tested prior to trial for the same reason, the required supporting evidence could easily be presented. The cases do not clarify whether immaturity means youthfulness or immaturity when compared to others of the same age. This may possibly give a defense attorney room to maneuver.

**F. The defendant has made substantial or full restitution to the victim.**\(^ {199} \)

In *State v. Harris*,\(^ {200} \) the defendant pled guilty to conspiracy to commit larceny and felonious larceny. The court of appeals remanded the case for resentencing where the trial court erred in failing to find this factor in mitigation. The evidence that the defendant had made restitution was unrefuted. But in *State v. Matthews*,\(^ {201} \) the court affirmed the defendant’s conviction for assault with a deadly weapon because the defense attorney had simply made an unsworn statement that the defendant had made restitution to the victim.

Properly authenticated evidence or, at the least, a sworn statement are necessary if the defense attorney wants this mitigating factor considered at his client’s sentencing hearing.

**G. The victim was more than 16 years of age and was a voluntary participant in the defendant’s conduct or consented to it.**\(^ {203} \)

*State v. Elliott*\(^ {202} \) is the only case to consider this factor during the period covered by this Survey. There, the defendant was convicted of incest. The court of appeals held that the trial court

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\(^ {198} \) 77 N.C. App. 345, 335 S.E.2d 34 (1985).
\(^ {200} \) 65 N.C. App. 816, 310 S.E.2d 120 (1984).
\(^ {203} \) Id.
was not required to find this mitigating factor merely because the charges of rape and sexual offense against the defendant were dismissed.

The age element is straightforward, but the problem of proof lies in the voluntary participation or consent aspects. Depending on the offense involved, one can only speculate on the approach the appellate courts might take. For example, the courts would probably be more stringent as to the “preponderance” standard in a rape case than they would in a felonious larceny case.

H. The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.204

Only one decision from the supreme court has addressed this factor. In *State v. Jones*,205 the defendant pled guilty to second-degree murder, armed robbery, conspiracy to commit armed robbery and felonious larceny. He argued that the trial court should have considered this factor in mitigation. But the supreme court held that he had failed to show aid in apprehension of another felon because he and his companions in the crime were all apprehended by the Georgia police at the same time. In addition, although the defendant agreed to testify against a codefendant as part of his plea bargain, he was never actually called upon to do so and therefore he did not testify truthfully as the statute requires.

Since this mitigating factor is written in the disjunctive, either prong, if satisfied, will be sufficient to compel consideration during the sentencing phase. However, the actions as set out in the statute must actually be taken—an agreement to testify if needed will not suffice.

I. The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.206

A wealth of cases have addressed this factor. In *State v. Tay-


http://scholarship.law.campbell.edu/clr/vol9/iss1/6
lor,"207 the defendant pled guilty to the second-degree murder of his wife and sister-in-law. He received a life sentence for the latter murder. Although the trial judge found this mitigating factor in the wife's murder, he did not do so in the sister-in-law's murder. The supreme court held that the evidence in support of this factor for the sister-in-law's murder, "was so meager as to be almost non-existent," where the defendant had entered the house to look for his wife, heard a noise behind him, turned and fired his gun twice at his sister-in-law. The defendant simply failed to carry his burden of persuasion. In State v. Michael,208 the court found insufficient the evidence that the relationship between the defendant-son and the victim-father was strained even though they argued, and on the day of the murder the victim spanked the defendant with a belt and banged his head on the corner of the bed. This evidence did not compel a finding that the relationship was extenuating. In fact, in State v. Watson,209 the court stated that a relationship between husband and wife, including past marital difficulties, is insufficient, standing alone, to support this mitigating factor. In State v. Cameron,210 the evidence showed that the defendant's wife


told the defendant she was in love with another man, but it was conflicting concerning alleged taunting telephone calls by the lover. The evidence also showed that the defendant broke his wife's jaw after a session with a marriage counselor and had a love affair of his own. The supreme court decided that all this evidence was simply too conflicting to compel a single, rational conclusion and, therefore, the trial court had not erred in failing to find this mitigating factor. Similarly, in State v. Clark, the trial court did not err in failing to find this mitigating factor in a second-degree murder. The trial testimony and an earlier statement by the defendant's estranged wife contradicted a statement she gave to defense counsel that the deceased previously had pulled a pistol on the defendant, had slapped the defendant's minor daughter, and had tried to run the defendant's car off the road. Moreover, "[t]he defendant's contention that he acted under strong provocation by reason of his belief that the deceased was going for a gun was contradicted by his wife's testimony and discounted by his own statement that he did not see a gun." In State v. Martin, the court of appeals held that the relationship between the defendant and the victim was not extenuating where the evidence showed only that the defendant and the victim were separated and the victim had custody of their child. The same court held in State v. Benfield, that this mitigating factor was inappropriate where the defendant assaulted an innocent bystander. The evidence was also insufficient to support the factor in State v. Braswell, where the victim was drunk and twice tripped over the defendant's girlfriend, so that the defendant became "mad" and shot the victim.

The evidence must be uncontradicted and manifestly credible to support this mitigating factor. In addition, the relationship, to be extenuating, must be more than for example, a marriage between the defendant and victim. The cases are unclear as to what relationship the courts would consider extenuating. The best prognosis may be grounded on a combination of the elements in the factor: if the defendant and victim are related by blood or law and evidence of provoking behavior on the part of the victim is uncontradicted, then the factor will be found.

212. Id. at 842, 336 S.E.2d at 85.
J. The defendant could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.\(^{216}\)

In *State v. Jones*,\(^{217}\) the defendant argued that this factor should have been found in mitigation. The supreme court disagreed. Since the defendant had gone with the codefendant to a store and had participated in the conspiracy, larceny and robbery during which the codefendant used a gun to subdue the store clerk, his protest when the codefendant returned to the store to murder the clerk was insufficient to prove that he exercised caution to avoid the threat of serious bodily harm or fear with respect to the murder. His overall behavior did not mandate a finding of this mitigating factor. In *State v. Puckett*,\(^{218}\) where the defendant had been convicted of second degree murder and assault with a deadly weapon with intent to kill, the court of appeals held that the trial court was not required to find this factor because the Fair Sentencing Act does not refer to attempts by a criminal defendant to restrain himself from committing the criminal act. In *State v. Kornegay*,\(^{219}\) the defendant had been convicted of five counts of felonious breaking or entering and felonious larceny. During his trial, he had escaped. The court of appeals stated that this mitigating factor is not available to an offender who merely chooses to commit lesser crimes.

Here, the defendant's overall behavior seems to be the key. If he makes no real effort to stop an accomplice from causing serious bodily harm or fear to others, the factor will be unavailable. This factor is the opposite to mitigating factor C in that strong unilateral action may afford the defendant the protection of this factor, but unilateral action there will deny him protection.


K. The defendant reasonably believed that his conduct was legal.\(^{220}\)

Only two cases have reached the appellate courts where this factor was at issue. In *State v. Jones*,\(^{221}\) the defendant pled guilty to shooting into an occupied vehicle and misdemeanor assault with a deadly weapon. The court of appeals remanded for resentencing, but on the basis that although the trial court found this mitigating factor, it had failed to properly weigh the factor against the aggravating factor it had also found. In *State v. Lane*,\(^{222}\) the defendant was convicted of involuntary manslaughter. The court of appeals found no error where the trial court failed to find the factor because the evidence was contradicted.

These two cases give little direction to defense attorneys. Mistake is obviously an element in this mitigating factor. Also, an interpretation of what is "reasonable" may afford some help.

L. 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.\(^{223}\)

So many cases have addressed this factor that discussion of a


\(^{221}\) 73 N.C. App. 578, 327 S.E.2d 54 (1985).

\(^{222}\) 77 N.C. App. 741, 336 S.E.2d 410 (1985).

few examples from the supreme court will illustrate its interpretation. In *State v. Lattimore*, the defendant admitted in his first statement to the police that he entered a convenience store with the intent to rob it and that he shot the clerk, although he contended the shooting was accidental. The court held that the trial court had erred in failing to find this mitigating factor. In *State v. Gardner*, the trial court again erred in not finding the factor, even though the defendant did not request the finding, when all of the substantial, uncontradicted and manifestly credible evidence supported such a finding. However, where the defendant makes a confession after arrest, he is not absolutely entitled to a finding of this mitigating circumstance. Instead, the trial judge, in his discretion, may decide whether the statement was made at a sufficiently early stage of the criminal process to qualify for this factor. The court so held in *State v. Hayes*. In *State v. Brown*, the trial court did not abuse its discretion when sentencing the defendant for second-degree murder by refusing to find this mitigating factor because officers extracted the defendant's inculpatory statement only after substantial time and effort and repeated refusals on the defendant's part to admit wrongdoing in connection with the offense. In *State v. Thompson*, the court held that where the defendant did not present any evidence regarding the timing of his confession in relation to the criminal process, he failed to show that the trial court abused its discretion in not finding the factor. Finally, in *State v. Clark*, where the defendant admitted that he killed the victim but denied culpability by contending that he shot in self-defense, the trial court did not err in failing to find the factor.

Whether the confession is made at a sufficiently early stage of the criminal process rests in the trial court's discretion. But certainly, if the defendant confesses in his first statement to the police, provided this has been extracted without great exertion on the part of the police, this factor should be found. Once again, the evidence of such voluntary acknowledgement must be uncontradicted

and manifestly credible.

M. The defendant has been a person of good character or has had a good reputation in the community in which he lives.\textsuperscript{231}

In \textit{State v. Taylor},\textsuperscript{232} the second-degree murder case discussed in other sections of this survey, the defendant claimed the protection of this mitigating factor. His character witnesses, except for one, admitted that their knowledge of the defendant's character and reputation was limited to their knowledge of him in a local pool room. None of his witnesses claimed familiarity with the community where defendant lived nor with his reputation in that community. These difficulties, the supreme court pointed out, detracted from the credibility of the defendant's evidence. The testimony was simply not of such quality and definiteness as to be overwhelmingly persuasive on the question of the defendant's good character and reputation in the community where he lived. The supreme court concluded that the trial court had the prerogative to accept or reject this testimony, and found no error in the trial court's failure to find the mitigating factor. In \textit{State v. Brown},\textsuperscript{233} evidence that the defendant was a high school student of good standing and that the mother of his child said she had never known him to be mean and that he was a "nice guy" was insufficient to compel a finding of this mitigating factor.

Obviously, the better qualified the character witness as to the defendant's reputation in the community where he lives, the better chance of gaining consideration of this factor. Character witnesses who are friends are likely to carry less weight than those who are disinterested. None of the cases surveyed found sufficient evidence to support this factor. Therefore, the astute defense attorney will ensure that he has done whatever possible to meet the "community" and the "disinterested" elements of this factor.


\textsuperscript{232} 309 N.C. 570, 308 S.E.2d 302 (1983).

\textsuperscript{233} 314 N.C. 588, 336 S.E.2d 388 (1985).
N. The defendant is a minor and has reliable supervision available.

No cases address this factor.

O. The defendant has been honorably discharged from the United States Armed Services.234

In the four cases addressing this factor, the defendants received remands for resentencing because the courts failed to consider their honorable discharges. In State v. Hanes,235 the defendant pled guilty to six felony counts of cocaine possession. The court of appeals held that the trial court erred in refusing to consider this mitigating factor because it did not have a copy of the discharge.

The better practice is to produce a copy of the defendant’s honorable discharge, but in all cases where such discharge is truly honorable, the trial court must consider this mitigating factor.

V. Conclusion

The Fair Sentencing Act236 is a comprehensive statute, covering those aggravating and mitigating factors which are most often present in the felonies to which the Act applies.237 Both the North Carolina Supreme Court and the North Carolina Court of Appeals have extensively interpreted the Act’s provisions. As a result, certain common denominators in each aggravating and mitigating factor are discernible, which provide a starting point for the attorney who must work within the statutory confines.

No, we do not live in Utopia, but by careful use of the tools provided by the Fair Sentencing Act and the interpretive case law, North Carolina criminal defense attorneys may ensure that their clients are sentenced in the fairest possible manner.

Valerie B. Spalding

237. The Act applies to all felonies, other than Class A and Class B felonies, committed on or after July 1, 1981. Id.
Appendix

NORTH CAROLINA GENERAL STATUTES SECTION 15A-1340.4(a) (1983).

(1) Aggravating factors:

a. The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.

b. The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

c. The defendant was hired or paid to commit the offense.

d. The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

e. The offense was committed against 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 his official duties or because of the exercise of his official duties.

f. The offense was especially heinous, atrocious, or cruel.

g. 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.

h. The defendant held public office at the time of the offense and the offense related to the conduct of the office.

i. The defendant was armed with or used a deadly weapon at the time of the crime.

j. The victim was very young, or very old, or mentally or physically infirm.

k. The defendant committed the offense while on pretrial release on another felony charge.

l. The defendant involved a person under the age of 16 in the commission of the crime.

m. 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.
The defendant took advantage of a position of trust or confidence to commit the offense.

The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days’ confinement. Such convictions include those occurring in North Carolina courts and courts of other states, the District of Columbia, and the United States, provided that any crime for which the defendant was convicted in a jurisdiction other than North Carolina would have been a crime if committed in this State. Such prior convictions do not include any crime that is joinable, under G.S. Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced.

The offense involved the sale or delivery of a controlled substance to a minor. Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation. The judge may not consider as an aggravating factor the fact that the defendant exercised his right to a jury trial.

(2) Mitigating factors:

a. The defendant has no record of criminal convictions or a record consisting solely of misdemeanors punishable by not more than 60 days’ imprisonment.

b. The defendant committed the offense under duress, coercion, threat or compulsion which was insufficient to constitute a defense but significantly reduced his culpability.

c. The defendant was a passive participant or played a minor role in the commission of the offense.

d. The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability for the offense.

e. The defendant’s immaturity or his limited mental capacity at the time of commission of the offense significantly reduced his culpability for the offense.

f. The defendant has made substantial or full restitution to the victim.

g. The victim was more than 16 years of age and was a voluntary participant in the defendant’s conduct or consented to it.
h. The defendant aided in the apprehension of another felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

i. The defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating.

j. The defendant could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or the defendant exercised caution to avoid such consequences.

k. The defendant reasonably believed that his conduct was legal.

l. 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.

m. The defendant has been a person of good character or has had a good reputation in the community in which he lives.

n. The defendant is a minor and has reliable supervision available.

o. The defendant has been honorably discharged from the United States armed services.