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ARTICLES

APPRENDI/BLAKELY: A PRIMER FOR PRACTITIONERS

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"This case turns on the seemingly simple question of what constitutes a 'crime.'"[1]
Justice Thomas concurring in *Apprendi*

"[T]oday's judgment has nothing to do with jury sentencing."[2]
Justice Scalia concurring in *Ring*

On July 24, 1993, the North Carolina General Assembly enacted the Structured Sentencing Act (SSA). The SSA was intended to reduce sentence disparities and increase the ability of the Department of Corrections to anticipate prison bed space needs, among other laudable goals. The heart of the SSA was an elaborate sentencing grid consisting of a vertical axis based on the severity of an offense and a horizontal axis based on a defendant's prior record level. (*See* Appendix A). The intent of the grid was to greatly constrain judicial discretion in sentencing and produce a more uniform set of criminal sentences across the state. The SSA quickly became known across the country as a model of efficient and predictable sentencing practices. However, the SSA had a problem: it was unconstitutional.

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1. Apprendi v. New Jersey, 530 U.S. 466, 499 (2000) (Thomas, J., concurring).
2. Ring v. Arizona, 536 U.S. 584, 612 (2002) (Scalia, J., concurring).

The United States Supreme Court's holdings in *Apprendi v. New Jersey*[3] and *Blakely v. Washington*[4] determined that "structured" sentencing systems like North Carolina's, which relied on judicial fact finding that greatly influenced the ultimate range of a defendant's potential sentence, violated a defendant's right to a jury trial secured by the Sixth[5] and Fourteenth[6] Amendments to the United States Constitution. On July 1, 2005, the North Carolina Supreme Court, in *State v. Allen,*[7] held that *Blakely* rendered the SSA unconstitutional as applied. The SSA's fatal flaw was the judge's ability to increase a defendant's sentence, above a possible sentence under a jury verdict or a guilty plea, through judicial fact finding based upon a mere preponderance of the evidence. However, curing the flaw by having a jury find such facts is like opening Pandora's box, unleashing a myriad of complex issues which go far beyond the particular issues presented in *Apprendi* and *Blakely.*

The purpose of this article is to explore some of these complex *Apprendi/Blakely* issues in a manner which is useful for the courtroom practitioner. The implications of *Apprendi/Blakely* are largely uncharted territory and some of the opinions expressed in this article have not been addressed by any appellate court. In some instances, there are North Carolina appellate decisions which the authors contend are inconsistent with the basic premise of the Sixth Amendment line of cases. The article is intended to broaden the view of *Apprendi/Blakely* to include concepts that extend far beyond sentencing. The article is divided into three parts and is geared toward the trial, appellate, and post-conviction lawyer. Part One is devoted to a discussion of the historical context of *Apprendi/Blakely* and the basic conceptual underpinnings of the Supreme Court's Sixth Amendment line of cases. Part Two presents a framework for analyzing *Apprendi/Blakely* issues arising under the SSA. Part Three, appearing in a later volume of the *North Carolina Central University Law Journal,* will deal exclusively with capital litigation and the Sixth Amendment line.

3. Apprendi, 530 U.S. 466 (2000).
4. Blakely v. Washington, 542 U.S. 296 (2004).
5. U.S. CONST. amend. VI.
6. U.S. CONST. amend. XIV.
7. State v. Allen, 359 N.C. 425. 615 S.E.2d 256 (2005), *abrogated by* State v. Allen, 360 N.C. 569, 635 S.E.2d 899 (2006).

PART ONE

Apprendi/Blakely *in the Historical Context of North Carolina Criminal Sentencing*

Apprendi/Blakely is very complicated and at the same time very simple. The best way to understand it is to place the Sixth Amendment jurisprudence in a historical context of what criminal sentencing was like in North Carolina before the enactment of the SSA's predecessor, the Fair Sentencing Act (FSA).

Until 1981, every crime carried with it a range of possible punishment from probation to a maximum sentence.[8] Sentencing was left completely to the unguided discretion of the trial judge. No sentence could exceed the maximum term set by the legislature, regardless of the defendant's prior record or any other fact.[9]

For example, felonious larceny was a Class H felony which carried a possible sentence of up to ten years in prison. Early release could be obtained through the parole system. A defense lawyer could argue that his or her client, with a conviction of felonious larceny and no prior convictions, should receive probation and a prosecutor could argue that the full ten years was appropriate for a recidivist.

Due to an increasing concern about geographic sentence disparity for the same crime and the issue of early release on parole, the legislature started to curtail the trial judge's discretion. The result was the enactment of the FSA, which basically established a "presumptive sentence" for each crime. A conviction for felonious larceny, nothing else appearing, carried a three-year sentence to be imposed by all judges. The sentencing judge could impose a minimum of probation or a maximum of up to ten years based on the existence or absence of considerations known as aggravating or mitigating factors.

The FSA retained the parole system in order to give inmates an incentive to behave in prison and to give the Executive Branch a method of controlling the total prison population. Upon entering prison, an inmate's sentence was cut in half and he was then eligible for parole consideration after serving one-fourth of the remaining sen-

8. *See* Act to Establish a Fair Sentencing System in North Carolina Criminal Courts, ch. 760, 1979 N.C. Sess. Laws 850 (1979) (codified as amended at N.C. Gen. Stat. § 14-87(a) (1981)) (highlighting one of a few exceptions that provided for a mandatory minimum sentence to be imposed, specifically armed robbery which imposed a minimum of seven years imprisonment (later amended to read as "Class D felony") to the maximum of life imprisonment).

9. *See* Rita v. United States, __ U.S. __, 127 S. Ct. 2456, 2484-85 (2007) (Souter, J., dissenting) ("[T]raditionally when a judge imposed a sentence at some point in the range, say, of 0-to-5 years specified by statute for some offense, every fact necessary to go as high as five years had been found by the jury (or admitted), even though the jury had not made particular or implicit findings of the facts the judge might consider in exercising discretion to set the sentence higher or lower *within* the 5-year range.") (emphasis added).

tence.[10] As a result of the perception of a "revolving door" prison system, prosecutors, judges, legislators and the general public became frustrated with the FSA.[11] The legislature responded by creating the Sentencing and Policy Advisory Commission and tasked it to develop a structured system of sentencing with emphasis on "truth in sentencing."[12] In other words, the goal was to ensure that if a judge imposed a sentence, he or she would be assured that the inmate would serve that term. In order to give inmates an incentive to not be disruptive, a schedule was established in which two sentences were given to each prisoner: (1) a maximum sentence by which the prisoner's release date was calculated; and (2) a minimum sentence to which the inmate could earn early release based on good behavior. Parole was abolished. This structured system became known as the SSA.

At the heart of the new system was a grid composed of a vertical axis representing the severity of the crime and a horizontal axis pegged to the defendant's prior record level.[13] The vertical axis contained nine categories of felonies (denoted as offense classifications) and the horizontal axis contained six prior record levels, depending upon the number and severity of the defendant's prior convictions. The intersection of the vertical and horizontal axes determined the range of possible minimum sentences which was further broken down into three ranges: a presumptive range, an aggravated range, and a mitigated range. A defendant was ultimately sentenced from within one of the three ranges based on a balancing of aggravating and mitigating factors which were enumerated by the legislature as reasons to increase or decrease a sentence.

The constitutional Achilles' heel of the SSA was the grid's rigidity, which had two effects. First, the large number of mandatory minimum active sentences shifted the balance of power from judges to prosecutors in deciding, in a very real sense, what sentence a defendant actually receives. Second, and of critical relevance to *Apprendi/Blakely* issues, the line between the presumptive range of sentences and the aggravated range of sentences in each block could be exceeded only through judicial fact finding based on a preponderance of the evidence. It was this aspect of the sentencing grid that made the SSA vulnerable to the Sixth Amendment.

10. *See generally* Debra L. Dailey, *Summary of the 1998 Annual Conference of the National Association of Sentencing Commissions*, 11 Fed. Sent'g Rep. 89 (1998).

11. *Id.*

12. *Id.*

13. *See* N.C. GEN. STAT. § 15A-1340.17 (2005), *see infra* App. A.

The Sixth Amendment

The Sixth Amendment secures the right of every person to have a jury determine whether or not he or she has committed a crime. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."[14] The jury trial right was one of the least controversial provisions placed in the Bill of Rights by the Founding Fathers.[15] The new country had just fought a war to be free from an oppressive monarch and great faith was placed in "We the People." The jury trial right was not bestowed upon citizens by their government, but rather was considered an "unalienable" right "endowed by their Creator."[16] Defendants enjoyed the right because they had been "endowed by their Creator" with the right of having "the 'truth of every accusation . . . be confirmed by the unanimous suffrage of twelve of his equals and neighbors.'"[17]

Dogs and Tails

Justice Scalia, principal architect of the *Apprendi/Blakely* revolution, has described any tampering with the right to a jury trial as being analogous to "operating on the spinal column of American democracy."[18] The jury trial right was not tampered with until the seventies and eighties, when state legislatures began a foray into the details of criminal sentencing. The federal government led the way in micromanaging sentencing with the establishment of the Federal Sentencing Guidelines.

The Supreme Court approved minor tampering with the jury trial right in 1986. Over the spirited dissent of Justice Stevens, the Court, in *McMillan v. Pennsylvania*,[19] let stand a Pennsylvania statute which provided for a mandatory minimum five year sentence for crimes in which the defendant possessed a gun. The law provided that the determination of visible possession of a gun was merely a "sentencing factor" which could be found by a judge by a preponderance of the evidence, not an element of a substantive crime which must be found by a jury beyond a reasonable doubt.[20]

Chief Justice Rehnquist's majority opinion in *McMillan* imposed a vague limitation on the power of the legislature to draw a line be-

14. U.S. Const. amend. VI.

15. Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J. concurring).

16. THE DECLARATION OF INDEPENDENCE paras. 2, 20 (U.S. 1776)

17. Blakely v. Washington, 542 U.S. 296, 301 (2004) (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *343).

18. Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part, dissenting in part).

19. McMillan v. Pennsylvania, 477 U.S. 79 (1986).

20. *Id.* at 85-86.

tween criminal elements and sentencing factors by stating, "[I]n certain limited circumstances *Winship's*[21] reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged."[22] However, the *McMillan* majority could only define such "limitations" in the most uncertain of terms. "The [Pennsylvania] statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense."[23] In other words, if judicial fact finding increased punishment by a little bit, but not too much, the courts would be bound by the characterizations placed on those facts by the legislature.

In his majority opinion in *Blakely*, written eighteen years after *McMillan* and four years after *Apprendi*, Justice Scalia unmercifully criticized the use of such a loose standard to decide when a defendant's jury trial rights have been violated.

> To be sure, Justice Breyer and the other dissenters would forbid those increases of sentence that violate the constitutional principle that tail shall not wag dog. The source of this principle is entirely unclear. Its precise effect, if precise effect it has, is presumably to require that the ratio of sentencing factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine with the longest tail. Or perhaps no greater than the average such ratio for all breeds. Or perhaps the median. Regrettably, *Apprendi* has prevented full development of this line of jurisprudence.[24]

In the post *Apprendi/Blakely* world, we think Justice Scalia would say all dogs are without tails. Any addition protruding from the level of punishment to which the defendant is exposed upon conviction of the basic crime is part of the punishment for a *new* crime, not extra punishment attached to the original crime. In Justice Stevens's *McMillan* dissent, he foreshadowed his majority opinion in *Apprendi*, saying, "Once a State defines a criminal offense, the Due Process Clause requires it to prove any component of the prohibited transaction that gives rise to both a special stigma and a special punishment beyond a reasonable doubt."[25]

Apprendi v. New Jersey

Apprendi vindicated Justice Stevens's dissent in *McMillan*. Charles Apprendi, Jr. was indicted in a New Jersey court on twenty-three charges including four separate shooting offenses and unlawful pos-

21. In *In re Winship*, 397 U.S. 358 (1970), the Court held that all elements of crime must be found by a jury beyond a reasonable doubt.

22. *McMillan*, 477 U.S. at 86.

23. *Id.* at 88.

24. Blakely v. Washington, 542 U.S. 296, 312 n.13 (2004).

25. *McMillan*, 447 U.S. at 96.

session of various weapons.[26] Based on his guilty plea to two counts of second degree possession of a firearm for an unlawful purpose, the most severe sentence he faced was 10 years.[27] Under the plea the State reserved the right to request the court to enhance one of the two counts on the ground that the offense was committed with a biased purpose.[28] The judge found by a preponderance of the evidence that Apprendi's act was motivated by racial bias.[29] Based on that finding, the trial judge increased the sentence to 12 years.[30]

On June 24, 2000, in a 5 to 4 decision, the Supreme Court held that Apprendi's right to a jury trial as guaranteed by the Sixth Amendment had been violated. The Court declared what is now known as the *Apprendi* Rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[31]

Although not specifically overruling *McMillan*, the Court held that how the legislature labels a crime no longer made a difference. "[T]he relevant inquiry is one not of form, but of effect . . . ."[32] Justice Scalia, concurring in *Ring v. Arizona*, made clear how irrelevant labels are when the right to a jury trial is as stake.

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be found by the jury beyond a reasonable doubt.[33]

In a real sense, *Apprendi* is a reaffirmation of the bedrock principle of judicial supremacy first announced in *Marbury v. Madison*.[34] It makes no difference whether a majority of the popularly elected legislature enacts a statute which labels a fact a certain way. If under the Constitution, as interpreted by the Supreme Court, the fact is in reality something else, the will of the legislature is trumped. If something looks like an element and acts like an element, no matter what the legislature calls it (including Mary Jane), it is an element.

Justice Thomas cast the critical fifth vote in *Apprendi*. Thomas begins his concurring opinion with a succinct explanation of what is at stake: "This case turns on the seemingly simple question of what con-

26. Apprendi v. New Jersey, 530 U.S. 466, 469 (2000).
27. *Id.* at 470.
28. *Id.* at 470.
29. *Id.* at 471.
30. *Id.*
31. *Id.* at 490.
32. *Id.* at 494.
33. Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).
34. Marbury v. Madison, 5 U.S. 137 (1803).

stitutes a 'crime.'"[35] This statement puts into sharp focus that the Sixth Amendment line is not about sentencing. The specific holdings of *Apprendi/Blakely* are about answering two questions: (1) what is a crime? and (2) who convicts people of crimes? As to the second question, a jury convicts people of a crime beyond a reasonable doubt. As to the first question, the answer will be the subject of litigation for years to come as the nooks and crannies of *Apprendi/Blakely* are sorted out.

A second sentence in Justice Thomas's *Apprendi* opinion deserves highlighting.

> Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact - of whatever sort, including the fact of a prior conviction - the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. *The aggravating fact is an element of the aggravated crime.*[36]

From Justice Thomas's perspective, *Apprendi* and *Blakely* set forth a simple proposition: *the Sixth Amendment prohibits a bench trial for a greater crime after a jury trial for a lesser crime.*

Two Apprendi *Rule Ambiguities*

The *Apprendi* Rule[37] contains two ambiguous phrases which have created some problems. What does the word "penalty" in the Rule mean? And, what is "the prescribed statutory maximum?"

Justice Stevens did not define "penalty" in his *Apprendi* opinion so we are left with two possible definitions. One is that "penalty" means the actual sentence which is imposed on the defendant by the judge. The other is that "penalty" means the range of possible punishments to which the defendant is exposed, regardless of what is actually imposed. Those two interpretations are very different when it comes to deciding when the Sixth Amendment is violated. If penalty means actual sentence imposed there can be a violation of the jury trial right only if the sentence received by the defendant is above the prescribed statutory maximum. If penalty means sentence to which the defendant is exposed, a mitigated range sentence can violate *Apprendi.*

In *State v. Norris,*[38] the North Carolina Supreme Court held that "penalty" means the actual sentence imposed. In *Norris*, the defen-

35. *Apprendi*, 530 U.S. at 499 (Thomas, J., concurring).
36. *Id.* at 501 (emphasis added) (Thomas, J., concurring).
37. *Id.*, at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").
38. State v. Norris, 360 N.C. 507, 630 S.E.2d 915 (2006).

dant was found guilty of first degree arson.[39] The state's evidence showed that Nathan Norris, Jr. had filled a plastic bottle with gasoline then poured the gasoline onto his mother-in-law's trailer. He then set fire to the trailer.[40] The trial court found the aggravating factor that Norris had "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."[41] After finding mitigating factors, the trial judge sentenced Norris from the presumptive range of sentences.[42] The North Carolina Supreme Court stated, "[J]udicial fact-finding does not trigger the Sixth Amendment right to jury trial so long as trial courts sentence inside the presumptive or, *a fortiori*, the mitigated range."[43] *Norris*, therefore, condones judicial fact-finding as long as the sentence the judge actually imposes is not in the aggravated range.

The United States Supreme Court made clear, in *Cunningham v. California,*[44] that *Norris* was wrongly decided. In *Cunningham*, the Court struck down California's sentencing system which involved three possible punishments for each crime, with a judge determining the facts justifying an upper level punishment. Justice Ginsburg, writing for the majority, stated, "This Court has repeatedly held that, under the Sixth Amendment, any fact that *exposes* a defendant to a greater *potential* sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence."[45]

Since it is extremely unlikely that any trial judges in North Carolina will be making findings of aggravating factors, this issue is not of great consequence to trial lawyers.[46] However, the meaning of "penalty" could be of significance to post-conviction lawyers preparing Motions for Appropriate Relief for defendants sentenced after *Blakely* where a judge found an aggravator, regardless of whether the sentence was in the mitigated, presumptive, or aggravated range.

The second ambiguity involves the meaning of the phrase, "prescribed statutory maximum." If judicial fact finding does not increase the potential sentence above the prescribed statutory maximum, there is no Sixth Amendment violation.

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39. *Id.* at 509, 630 S.E.2d at 916.
40. *Id.* at 508, 630 S.E.2d at 916.
41. *Id.* at 509, 630 S.E.2d at 916 (*quoting* N.C. GEN. STAT. § 15A-1340.16(d)(8) (2005)).
42. *Norris*, 360 N.C. at 509, 630 S.E.2d at 916.
43. *Id.* at 516, 630 S.E.2d at 920.
44. Cunningham v. California, __ U.S. __, 127 S. Ct. 856 (2007).
45. *Id.* at 863-64 (emphasis added).
46. *See* N.C. GEN. STAT. § 15A-1340.16(a1) (2005) ("If the defendant does not so admit, only a jury may determine if an aggravating factor is present in an offense.").

In *State v. Lucas*, the North Carolina Supreme Court held that *Apprendi* had no effect on the SSA because the prescribed statutory maximum was the top of the aggravated range of sentences for Prior Record Level VI offenders.[47]

Blakely v. Washington held that our Supreme Court was wrong. *Blakely* holds that the phrase "prescribed statutory maximum" in the *Apprendi* Rule is the greatest sentence to which a defendant is exposed based upon the jury verdict or guilty plea alone.[48] "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[49]

Without additional findings, the worst that can happen to a defendant in North Carolina is a sentence at the top of the presumptive range in prior record level one. Prior convictions, which are exempt from the *Apprendi* Rule, can move a defendant horizontally across the grid. Therefore, following *Blakely*, the phrase "prescribed statutory maximum" in North Carolina means the top of the presumptive range in the defendant's prior record level.

Blakely did not modify *Apprendi* but merely clarified the *Apprendi* Rule, so *Apprendi* is the landmark case.[50] On the other hand, the effect of *Apprendi* was not felt in North Carolina until *Blakely* overruled *Lucas*.

Blakely v. Washington *Clarifies* Apprendi

Ralph Blakely was charged with kidnapping.[51] Upon conviction of that crime he was eligible to receive a sentence of up to 53 months.[52] However, due to judicial fact finding that Blakely acted with deliberate cruelty, the sentence was increased.[53] The Supreme Court held the Washington State sentencing law unconstitutional because the judge found Blakely guilty of a greater crime than the crime for which he was convicted by the jury.

47. State v. Lucas, 353 N.C. 568, 596, 548 S.E.2d 712, 731 (2001), *overruled in part by* State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005).

48. Blakely v. Washington, 542 U.S. 296, 303 (2004).

49. *Id.* at 303-04.

50. *See* Rita v. United States, __ U.S. __, __, 127 S. Ct. 2456, 2487 (2007) (Souter, J., dissenting) ("If *Blakely* had come out the other way, the significance of *Apprendi* itself would be in jeopardy: a legislature would be free to bypass *Apprendi* by providing an abnormally spacious sentencing range for any basic crime (theoretically exposing a defendant to the highest sentence just by the jury's guilty verdict), then leaving it to a judge to make supplementary findings not only appropriate but necessary for a sentence in a subrange at the high end. That would spell the end of *Apprendi* and diminish the real significance of jury protection that *Apprendi* had shored up.").

51. *Id.* at 298, 124 S. Ct. at 2534.

52. *Id.*

53. *Id.* at 296, 124 S. Ct. at 2533.

Justice Scalia wrote the majority opinion in *Blakely*, which left no doubt about the Court's commitment to the *Apprendi* principle. In one of the most important sentences in the entire Sixth Amendment line, Justice Scalia said, "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish."[54]

Justice Scalia sees *Apprendi/Blakely* as "reversionary," not revolutionary. In his view, the Court is simply honoring the exalted position of the jury, not a judge – a "lone employee of the state" – to decide if someone committed a crime.[55] "The founders of the American Republic were not prepared to leave [criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient, but it has always been free."[56]

North Carolina's Blakely *Bill*[57]

North Carolina had two responses to the overruling of *Lucas* by *Blakely*: one legislative and the other judicial. The legislature tasked the North Carolina Sentencing and Policy Advisory Commission with the job of coming up with a response to *Blakely*.[58] There were two possible options: (1) comply with *Blakely* by requiring a jury trial of any fact which increased a defendant's exposure to punishment or (2) avoid the effect of *Blakely* by increasing the prescribed statutory maximum.[59]

Sentencing Commission member Judge Ronald Payne proposed a *Blakely* avoidance solution of "dotting the line" between the top of the presumptive range and the bottom of the aggravated range in each block on the sentencing grid.[60] In other words, the maximum possible sentence to which a defendant would be exposed upon a verdict of guilty would be the top of the aggravated range. The second option

54. *Id.* at 306-07.

55. *Id.* at 314.

56. Apprendi v. New Jersey, 530 U.S. 466, 498 (2000).

57. In the wake of *Blakely*, the North Carolina General Assembly enacted Act of June 30, 2005, ch. 145, 2005 N.C. Sess. Laws 253 (codified by N.C. GEN. STAT. §§ 15A-1340.16, -1340.14, -924, -1022.1 (2005)).

58. Studies Act of 2004, ch. 161, § 44.1, 2004 N.C. Sess. Laws 546 (authorizing the North Carolina Sentencing and Policy Advisory Commission to study the North Carolina Structured Sentencing Act).

59. Minutes from Blakely Subcommittee Meeting, N.C. Sentencing & Policy Advisory Comm'n (Oct. 8, 2004) (on file with author).

60. *Id.*

would be to simply prohibit an aggravated range sentence unless a jury determined the existence of at least one aggravating factor.[61]

The statistics showed that the number of aggravated range sentences actually imposed in criminal cases was relatively small,[62] and a recommendation was made to the legislature to comply with *Blakely* rather than avoid it.[63] However, another Sentencing Commission member, District Attorney Ronald Moore of Buncombe County, expressed concern about the manpower required in prosecutors' offices to include all aggravators in all felony bills of indictment, particularly since over ninety percent of cases end in guilty pleas.[64]

Assistant Attorney General William Hart proposed a compromise which maintained the position of *Blakely* compliance but gave prosecutors some relief from possibly unnecessary paperwork. Mr. Hart proposed that the General Assembly enact a statute similar to the short form murder indictment, which automatically incorporates by reference all statutory aggravating factors into all felony indictments.[65]

In order to comply with the Due Process requirement that a defendant is entitled to notice of "the crime the state actually seeks to punish," a 30-day notice provision was placed in the statute requiring the prosecutor to inform a defendant at least 30 days before trial of what aggravators the State will be seeking.[66] The Hart compromise was adopted by the Commission and passed by the General Assembly.[67]

There are two common misconceptions about the *Blakely* Bill to clarify at the outset. First, the *Blakely* Bill did not confer onto defendants the right to have a jury determine the existence of an *Apprendi* fact. Second, the *Blakely* Bill did not establish a procedure for the trial of aggravated crimes. As to the first misconception, a defendant's right to have a jury decide if he is guilty of a crime is an

61. Minutes from Blakely Subcommittee Meeting, N.C. Sentencing & Policy Advisory Comm'n (Dec. 3, 2004) (on file with author).

62. N.C. SENTENCING & POLICY ADVISORY COMM'N, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES & MISDEMEANORS - FISCAL YEAR 2004/05 (JULY 1, 2004 - JUNE 30, 2005) 7 (2006), *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/2004-05statisticalreport.pdf.

63. Minutes from Blakely Subcommittee Meeting, N.C. Sentencing & Policy Advisory Comm'm (Sept. 10, 2004) (on file with author).

64. *Id.*

65. Minutes from Blakely Subcommittee Meeting, N.C. Sentencing & Policy Advisory Comm'm (Oct. 8, 2004) (on file with author); *see also* N.C. GEN. STAT. § 15-144 (2005) (bill of indictment for homicide).

66. N.C. GEN. STAT. § 15A-1340.16(a6) (2005); *see also* Hodgson v. Vermont, 168 U.S. 262, 269 (1897) ("[I]t is insisted that in all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him; that in no case can there be, in criminal proceedings, due process of law, where the accused is not thus informed, and that the information which he is to receive is that which will acquaint him with the essential particulars of the offense . . . .").

67. N.C. GEN. STAT. § 15A-1340.16(a4) (2005).

"unalienable right" which he has by virtue of being born. It is not given to a defendant by the legislature but rather by his "Creator." There would have been no impediment to the State including an allegation of an aggravator in an indictment, empanelling a jury and then trying a defendant for an aggravated crime, regardless of whether the *Blakely* Bill had been passed or not. As to the second misconception, the *Blakely* Bill did not establish a "procedure" by which aggravated crimes would be tried. That procedure already existed in Chapter 15A of the North Carolina General Statutes.

State v. Allen

The *Blakely* Bill became effective on June 30, 2005.[68] It legislatively acknowledged that *Apprendi/Blakely* applied to the SSA. The next day, July 1, 2005, the North Carolina Supreme Court held that *Allen* overruled Lucas, and the SSA, as applied, was unconstitutional.[69] "Applied to North Carolina's structured sentencing scheme, the rule of Apprendi and Blakely is: Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed presumptive range must be submitted to a jury and proved beyond a reasonable doubt."[70]

Allen[71] applied the fundamental Sixth Amendment principles set forth in *Apprendi* to North Carolina. It does not matter that the legislature said it was adopting a Structured Sentencing Act. As a matter of "effect not form," the legislature in reality was enacting a statute which contained both a sentencing component and a substantive crimes component. The SSA was, in the eyes of the Constitution, a "hybrid" or "composite" statute which both defined new crimes and then provided for the punishment of those crimes. The new crimes consisted of, as Justice Thomas explained, a core crime and an aggravating fact. The determination of the aggravating fact, or the *Apprendi* fact, was therefore governed by the same principles as the trial of any crime. Then, once the jury found a defendant guilty of the aggravated crime beyond a reasonable doubt, the dictates of the Con-

68. Act of June 30, 2005, ch. 145, 2005 N.C. Sess. Laws 253 (codified by N.C. GEN. STAT. §§ 15A-1340.16, -1340.14, -924, -1022.1 (2005)).

69. State v. Allen, 359 N.C. 425, 437, 615 S.E.2d 256, 264-65 (2005) (internal citations omitted), *withdrawn*, State v. Allen, 360 N.C. 569, 635 S.E.2d 899 (2006).

70. *Id.*

71. The *Allen* opinion was later withdrawn in State v. Allen, 360 N.C. 569, 635 S.E.2d 899 (2006), following the United States Supreme Court opinion in Recuenco v. Washington, 126 S. Ct. 2546 (2006). In *Allen*, the North Carolina Supreme Court found that *Blakely* errors were structural in nature, requiring reversal in every case of *Blakely* error. *Allen*, 359 N.C. at 426, 615 S.E.2d at 258 (2005). *Recuenco* held that *Blakely* errors could be examined under harmless error review, which does not require automatic remand for resentencing. *Recuenco*, 126 S. Ct. at 2553.

stitution were satisfied and the sentencing component of the SSA became operative to establish the parameters of the final sentence.

PART TWO

In Part Two, this article proceeds to discuss in detail the impact of *Apprendi/Blakely* on the SSA. Essential to an understanding of Part Two is the acceptance of the notion that what was originally designated by the legislature as a sentencing statute is now a combination of a statute which creates new crimes and a statute which prescribes the ranges of punishments for those new, aggravated crimes.

In the first part of this article, we discussed the two basic questions presented in the *Apprendi/Blakely* line and proposed the following answers to those questions. To the question, "What is a crime?" the Court has held that a crime is defined as the set of essential facts which supports the level of punishment to which the defendant is exposed, or which *entitles* the prosecutor to ask for a certain punishment.[72] The definition of a crime can be analogized to the Roman fasces, the axe surrounded by a bundle of sticks which was the symbol of power of the Roman Empire. Each crime is composed of a particular number of sticks. Without all of the necessary sticks being proven by the state beyond a reasonable doubt, the defendant may not be punished for that crime. In other words, each stick represents an "element" of a crime. A bundle may contain sticks in addition to the essential sticks which define the crime and those sticks (or sentencing factors) may be taken into account by a judge in setting the appropriate sentence. As a matter of federal constitutional law, those extra sticks may also be found by the judge by a preponderance of the evidence.

For example, Felonious Larceny has four sticks: (a) carrying away property of another, (b) valued at more than one thousand dollars, (c) without the consent of the owner, and (d) with the intent to deprive the owner of the property permanently.[73] *Apprendi/Blakely* stand for the proposition that it does not make any difference what name the State gives to those four sticks. If those sticks must be found for the defendant to be exposed to punishment for Felonious Larceny, they are elements of a crime.

Part Two will discuss how to analyze *Apprendi/Blakely* issues. However, the issues to be examined will be termed "second genera-

72. "If a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecution's entitlement—it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.)" Apprendi v. New Jersey, 530 U.S. 466, 521 (2000) (Thomas, J., concurring).

73. N.C. GEN. STAT. § 14-72.

tion" issues. That is, Part Two looks at questions other than the two set forth above, because it is very unlikely that judges will be finding the existence of aggravators in North Carolina after *Blakely*, *Allen*[74] and the *Blakely* Bill. Rather, the intriguing questions emanate from the basic notion that *Apprendi/Blakely* is about crimes, not about sentencing.

The Crime the State Actually Seeks to Punish

Reference has already been made to the critical sentence by Justice Scalia in *Blakely* where the jury is likened to a "circuitbreaker in the State's machinery of justice" and the Sixth Amendment prohibits a "judicial inquisition" into the facts of the "crime the State *actually* seeks to punish."[75] Therefore, the stepping off point is to identify exactly what crime the state is actually prosecuting the defendant for.

Identifying the crime the state actually seeks to punish is helpful in spotting challenges which can be made by the defendant to insulate himself from punishment for some conduct which, under the United States Constitution, cannot form the basis of a substantive crime.

There are two ways to describe the crime at issue. One is to simply attach the word "Aggravated" before the basic, or core, crime. Such as, Aggravated Felonious Larceny, if the prosecutor is seeking to expose the defendant to an aggravated range sentence for the core offense of Felonious Larceny. The second method is to actually name the aggravator which differentiates the greater crime of Aggravated Felonious Larceny from the lesser crime of Felonious Larceny. An example could be, "Felonious Larceny by a Person who Possessed a Gun at the Time of the Crime."

In terms of spotting issues, the inclusion of the aggravator in the name of the crime is the more helpful because sometimes simply stating the name of the crime exposes the flaw. For example, it is inconceivable that in North Carolina there is such a crime as "Felonious Larceny by a Person who Does Not Support his Children," although failure to support a defendant's family is an aggravating factor enumerated in N.C. Gen. Stat. § 15A-1340.16(d)(18).

As Justice Thomas said in *Apprendi*, "the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny."[76] Therefore, we should adjust our terminology to always differentiate the aggravated crime by name if the prosecutor is seeking to expose the defendant to a greater potential sentence.

74. Remember *Allen* was withdrawn after *Recuenco*.
75. Blakely v. Washington, 542 U.S. 296, 306-07 (2004).
76. Apprendi, 530 U.S. at 501.

Identify the Apprendi *Fact*

Except for a few particular crimes, there is only one *Apprendi* fact which differentiates the aggravated form of a crime from the basic form of the crime.[77] The second step in analyzing *Apprendi/Blakely* claims should be to identify the *Apprendi* fact, which is the fact that serves to separate the aggravated crime from the core crime.

Once a single *Apprendi* fact is found, as a matter of federal constitutional law, other aggravators may be found by the judge by a preponderance of the evidence because the second or third aggravator does not increase punishment above the level allowed by the verdict or the guilty plea.[78] No North Carolina case has dealt with the issue of how many *Apprendi* facts there are in a single case, but the Supreme Court of Arizona in *State v. Martinez*,[79] the Supreme Court of Colorado in *Lopez v. People*,[80] and the Supreme Court of California in *People v. Black* (*Black II*)[81] have addressed the issue. Those cases concluded that a jury need only find one aggravating factor.

In *Black II*, the California Supreme Court re-evaluated Black's claims in light of the United States Supreme Court opinion in *Cunningham v. California*.[82] In *Black*, the jury found special allegations pertaining to the Defendant's parole eligibility.[83] Based on the findings by the jury, the defendant was eligible for the upper term of punishment under California's Determinative Sentencing Law.[84] The court stated:

> [S]o long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with the Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury.[85]

The court went on to observe:

77. For example, Level I DWI, N.C. GEN. STAT. § 20-179(c) (2005), and Felonious Speeding to Elude Arrest, N.C. GEN. STAT. § 20-141.5(b) (2005), both require two aggravating factors.

78. As a matter of statutory law in North Carolina, a very strong argument can be made that all aggravators, whether they are elements of crime or sentencing factors, must be found by a jury. *See* N.C. GEN. STAT. § 15A-1340.16 (2005).

79. State v. Martinez, 115 P.3d 618 (Ariz. 2005).

80. Lopez v. People, 113 P.3d 713 (Colo. 2005), *cert. denied sub nom.* Lopez v. Colorado, 546 U.S. 1017 (2005).

81. People v. Black, 161 P.3d 1130 (Cal. 2007).

82. *Id.* at 1133.

83. People v. Black, 113 P.3d 534, 553 (Cal. 2005) (Kennard, J., dissenting), *vacated sub nom.* Black v. California, 127 S. Ct. 1210 (2007).

84. *Black*, 161 P.3d at 1141.

85. *Id.* at 1138.

> [*Apprendi*] did not prohibit a judge from making findings on a sentencing factor, which it described as 'a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense.'[86]

The aggravating factor found by the jury permits the imposition of an aggravated range punishment.[87] Under North Carolina's sentencing scheme, there is a range of sentences from which the judge may choose a minimum sentence.[88] Under *Blakely*, the top of the aggravated range is the prescribed statutory maximum once a single aggravator has been found by the jury. The trial court may take into account aggravating factors other than the one found by the jury when deciding which minimum sentence the defendant should receive. The Sixth Amendment is not implicated by this judicial fact finding because the jury has already found the elements necessary to convict the defendant of an *aggravated crime*, which entitles the judge to impose a sentence in the aggravated range of minimum sentences. The precise sentence within this range has always been in the court's discretion and remains there following *Blakely*.

It is helpful to consider the *Apprendi* fact as the additional stick that is added to the fasces which increases the power of the judge to impose a sentence. That stick then becomes part of the greater crime. In turn, conviction for that greater crime justifies imposition of a greater sentence.

Is the Apprendi *fact "statutory" or "non-statutory?"*

The legislature set out a list of particular facts which "aggravate the sentence" for a core crime in the SSA.[89] It is imprecise to say that *Apprendi/Blakely* "converted aggravators into elements of greater crimes." Rather, *Apprendi/Blakely* made the finding of one aggravator an element of the aggravated form of the core crime.

North Carolina General Statute § 15A-1340.16(d)(20) established a "catch-all" aggravator, which was left to the ingenuity of either the prosecutor or the judge to articulate. For example, non-statutory aggravators submitted by the state have included, "Defendant attempted to dispose of evidence in that he gave the 9mm handgun used to commit this offense to [a friend] immediately after commission of the of-

86. *Id.* at 1137 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).

87. N.C. GEN. STAT. § 15A-1340.16(d) (2005).

88. N.C. GEN. STAT. § 15A-1340.17(c).

89. N.C. GEN. STAT. § 15A-1340.16. Of course, there is no such thing any longer as an aggravated sentence for a crime which is greater than the maximum allowed for the core crime standing alone. All sentences are "within" the limit allowed by the jury verdict, never greater than the limit allowed. We now speak in terms of aggravated crimes, not aggravated sentences.

fense,"[90] even though there were no officers present at that time, and the defendant has "knowingly devoted himself to criminal activity."[91]

We submit that only statutory aggravators may serve as *Apprendi* facts. To do otherwise would, in our opinion, violate the separation of powers clause of the North Carolina Constitution, Art. I, sec. 6. Only the legislature can create a crime.[92] If the prosecutor suggests an aggravator which is tailor-made for the case or the defendant at hand, then in a real sense, the prosecutor is creating a crime which is applicable to just one person. The fundamental notion underlying the Bill of Attainder clause[93] is that in the United States, we do not have "customized crimes" which are aimed at punishing a defendant for who he is rather than for what he has done. Therefore, if the state attempts to use a non-statutory aggravator to increase potential punishment, the defendant should file a motion to prohibit exposure to an aggravated range sentence pursuant to the separation of powers clause of the state constitution.

If there are two aggravators in a case, one statutory and the other non-statutory, then there is nothing wrong with the non-statutory aggravator being used to elevate the defendant's punishment within the limit set by the finding of the statutory aggravator. Because the finding of the non-statutory aggravator does not increase the penalty above the level allowed by the finding of the statutory aggravator, it is not an *Apprendi* fact.

Is the Apprendi *Fact an Offense Characteristic or an Offender Characteristic?*

Offense characteristics are facts related to the commission of the crime being prosecuted. Offender characteristics are facts related to the defendant, separate and apart from the commission of the crime. It is submitted that only aggravators which are considered characteristics of the offense may be used as an *Apprendi* fact to convict a defendant of a greater offense than the core crime.

Offender-based aggravating factors can not be elements of a crime and, therefore, cannot be an *Apprendi* fact. It is fundamental in the United States that people are punished for what they do, not who they are.[94] Therefore, aggravators which simply describe the status of a defendant when committing a crime cannot serve as an element of a

90. State v. Rollins, 131 N.C. App. 601, 603, 508 S.E.2d 554, 556 (1998).
91. State v. Partridge, 66 N.C. App. 427, 430, 311 S.E.2d 53, 56 (1984).
92. State v. Vert, 39 N.C. App. 26, 32, 249 S.E.2d 476, 479 (1978).
93. U.S. CONST. art. I, § 9, cl. 3.
94. *See* Robinson v. California, 370 U.S. 660 (1962) (striking down a California statute which made being a drug addict criminal).

new crime. For example, N.C. Gen. Stat. § 15A-1340.16(d)(12) provides the following as an aggravating factor, "The defendant was on pretrial release for another crime at the time of the offense." That aggravating factor may have been perfectly acceptable as a sentencing factor in the pre-*Blakely* days. A judge could consider that fact as a reason to increase a defendant's sentence. But it is respectfully submitted, regardless of whether the North Carolina Court of Appeals agrees in several pending cases presenting this issue,[95] that a defendant being on pretrial release cannot be an element of a crime. The prejudice of allowing the prosecutor to try someone for Felonious Larceny by a Person on Pretrial Release for Another Crime is obvious. Not only does that aggravator inform the jury of another charge, its use erodes the presumption of innocence.

The first question that should be asked in evaluating aggravating factors is whether "the defendant behaved in a manner that increases his culpability for the offense."[96] Generally, offender based aggravators do not increase the defendant's culpability for a crime; they show only that he is a bad guy. In the case of the pretrial release aggravator, the evidence will only show that the defendant *may* have committed a bad act. Many courts have discussed the danger of prior records being brought to the attention of juries during a trial. It is the general rule that such evidence may not come in because it prejudices the jury and causes a risk that the jury will convict based only on the fact that the offender is a "bad guy."[97] The same logic applies when considering other factors that tend to show the defendant as a bad guy. Their use as an element of a greater crime runs the risk of a jury verdict that is based on prejudice and the status of the defendant as a bad guy, not on any objective criteria which increases his culpability for the present offense.

Offense characteristics do not generally encounter the same problems of prejudice. They serve the function of distinguishing those offenses which are truly deserving of greater punishment. Our society deems that children should be protected and places greater blameworthiness on those who take actions to corrupt children. For these reasons, the legislature included "the offense involved the sale or delivery of a controlled substance to a minor," as an aggravating circum-

95. *See* State v. Watts, 648 S.E.2d 862, 862 (N.C. Ct. App. 2007) (holding an aggravating factor that Defendant committed an offense while on pretrial release on another charge was harmless), *petition for discretionary review filed*, (N.C. Sept. 24, 2007) (No. 449P05-2), *denied* (N.C. Nov. 8, 2007).

96. State v. Rogers, 157 N.C. App. 127, 129, 577 S.E.2d 666, 668 (2003) (citing State v. Bates, 76 N.C. App. 676, 678, 334 S.E.2d 73, 74 (1985)).

97. *See* Old Chief v. United States, 519 U.S. 172, 180 (1997) (discussing the problem of prior convictions being introduced to the jury).

stance.[98] Such actions increase the culpability of the defendant and are objectively verifiable. The basic question of whether the defendant's culpability for the *offense committed* is increased by the additional element is answered in the affirmative.

Offender characteristics do not relate to the crime committed and as such can not properly increase the culpability of the defendant in committing the act. Because our criminal justice system seeks to punish people for actions, and not for who they are, offender based characteristics can not serve as *Apprendi* facts. If the prosecutor uses an offender characteristic to try to increase punishment, the defendant should file a motion to dismiss the aggravated form of the core crime. (*See* Appendix B for a chart of all aggravators and a description of those aggravators.) However, offense characteristics are not beyond scrutiny as other problems may arise in their use. Identifying whether the aggravator is offender or offense based is only one step.

Is the Apprendi *Fact Unconstitutionally Vague if Used as an Element?*

N.C. Gen. Stat. § 1340.16 enumerates some aggravators which may have passed vagueness muster as a sentencing factor, but cannot survive a vagueness challenge as an element. Suppose the legislature enacted a crime of assault on a very young person. How does a judge tell a jury what the phrase, "very young" means? Or how does the judge explain the meaning of Felonious Larceny from a Very Old Person? To determine whether a statute is unconstitutionally vague, the question is whether it: (1) fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, or (2) fails to provide explicit standards for those who apply the law.[99] Under this standard it is easy to see how the example statutes would fail. What is very young or very old to an eighteen year old juror would vary substantially to what is very young or very old to a sixty year old juror. There is nothing in the statute to guide them in determining whether this element is truly met. Therefore, it is submitted that although some factors have withstood vagueness challenges as sentencing factors, they can not withstand the increased scrutiny of being an element of a greater offense than the core crime.

A chart analyzing the aggravating factors listed in N.C. Gen. Stat. § 15A-1340.16 is found in Appendix B, *infra.*

98. N.C. GEN. STAT. § 15A-1340.16(d)(16).

99. State v. Sanford Video & News, Inc., 146 N.C. App. 554, 556, 553 S.E.2d 217, 218 (2001) (*citing* State v. Green, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998)) (determining that a statute was not unconstitutional on vagueness grounds).

SUMMARY

The authors contend that aggravating circumstances may serve as elements of a greater crime only if they are statutory, offense characteristics and pass vagueness muster. Applying such a test to the SSA leaves very few aggravators which can increase potential punishment above the *Blakely* limit. A look at the list of aggravators in Appendix B reveals that only a remnant of the SSA can withstand scrutiny under the Sixth Amendment line.

It may not happen soon, but we believe the SSA cannot survive the *Apprendi/Blakely* onslaught when it comes to exposing defendants to aggravated range sentences. Justice Scalia has commented that the only way he can give the Sixth Amendment "intelligible content"[100] is to subscribe to the majority's view and "buy a ticket to *Apprendi*-land."[101] *Apprendi*-land is not some recent invention. It is the state of things as they existed at the founding of our country. In order to effectively represent our clients, we must set aside the procedures and the mindset which have become familiar over the past twelve years under the SSA because *Apprendi/Blakely* did not simply substitute the jury for the judge in determining aggravating factors. As Justice Thomas succinctly stated, it decided, "What is a crime?"

Part Three of this article, forthcoming in Issue 2 of Volume 30 of the *North Carolina Central Law Review*, will address that fundamental question in the context of capital litigation. The authors submit that *Apprendi/Blakely* will revolutionize the trial of death penalty cases in North Carolina.

100. *See* Blakely v. Washington, 542 U.S. 296, 305 (2004).
101. *See* Ring v. Arizona, 536 U.S. 584, 612 (2002) (Scalia, J., concurring).

APPENDIX A: N.C. GEN STAT. § 15A-1340.17(C) (2007).
PUNISHMENT LIMITS FOR EACH CLASS OF OFFENSE AND PRIOR RECORD LEVEL.

PRIOR RECORD LEVEL

A refers to active punishment (jail time) is authorized for the offense level; I to intermediate punishment authorized, and C to community punishment is authorized. LIWP/D means Life imprisonment for the rest of the prisoner's natural life or Death as authorized by statute. Thus, a defendant with a prior record level of III, convicted of a B2 felony sentenced in the presumptive range would be subject to 176-220 months of active confinement; active because of the letter A located in the box at the intersection of III and B2 and 176-220 months because that is the sentence in the presumptive range (line 3 of the box).

Offense Classification	I 0 Pts.	II 1-4 Pts.	III 5-8 Pts.	IV 9-14 Pts.	V 15-18 Pts.	VI 19+ pts.	
A	Life Imprisonment Without Parole or Death as Established by Statute						
B1	A 240-300 192-240 144-192	A 288-360 230-288 173-230	A 336-420 269-336 202-269	A 384-480 307-384 230-307	A LIWP/D 346-433 260-346	A LIWP/D 384-480 288-384	DISPOSITION Aggravated PRESUMPTIVE Mitigated
B2	A 157-196 125-157 94-125	A 189-237 151-189 114-151	A 220-276 176-220 132-176	A 251-313 201-251 151-201	A 282-353 225-282 169-225	A 313-392 251-313 188-251	DISPOSITION Aggravated PRESUMPTIVE Mitigated
C	A 73-92 58-73 44-58	A 100-125 80-100 60-80	A 116-145 93-116 70-93	A 133-167 107-133 80-107	A 151-188 121-151 90-121	A 168-210 135-168 101-135	DISPOSITION Aggravated PRESUMPTIVE Mitigated
D	A 64-80 51-64 38-51	A 77-95 61-77 46-61	A 103-129 82-103 61-82	A 117-146 94-117 71-94	A 133-167 107-133 80-107	A 146-183 117-146 88-117	DISPOSITION Aggravated PRESUMPTIVE Mitigated
E	I/A 25-31 20-25 15-20	I/A 29-36 23-29 17-23	A 34-42 27-34 20-27	A 46-58 37-46 28-37	A 53-66 42-53 32-42	A 59-74 47-59 35-47	DISPOSITION Aggravated PRESUMPTIVE Mitigated
F	I/A 16-20 13-16 10-13	I/A 19-24 15-19 11-15	I/A 21-26 17-21 13-17	A 25-31 20-25 15-20	A 34-42 27-34 20-27	A 39-40 31-39 23-31	DISPOSITION Aggravated PRESUMPTIVE Mitigated
G	I/A 13-16 10-13 8-10	I/A 15-19 12-15 9-12	I/A 16-20 13-16 10-13	I/A 20-25 16-20 12-16	A 21-26 17-21 13-17	A 29-36 23-29 17-23	DISPOSITION Aggravated PRESUMPTIVE Mitigated
H	C/I/A 6-8 5-6 4-5	I/A 8-10 6-8 4-6	I/A 10-12 8-10 6-8	I/A 11-14 9-11 7-9	I/A 15-19 12-15 9-12	A 20-25 16-20 12-16	DISPOSITION Aggravated PRESUMPTIVE Mitigated
I	C 6-8 4-6 3-4	C/I 6-8 4-6 3-4	I 6-8 5-6 4-5	I/A 8-10 6-8 4-6	I/A 9-11 7-9 5-7	I/A 10-12 8-10 6-8	DISPOSITION Aggravated PRESUMPTIVE Mitigated

APPENDIX B: ANALYZING AGGRAVATORS

This chart analyzes the aggravating factors listed in N.C. GEN. STAT. § 15A-1340.16 (2007) using the analysis discussed in the article.

Aggravating Factor	Offender or Offense Based?	Can it be an *Apprendi* fact? Why?
(1) The defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants.	Offense	Yes. Offense based aggregating factor which is concrete and increases the defendant's culpability.
(2) The defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.	Offense	No. Separation of Powers issue because prosecution can manipulate the charges to either charge an additional crime or to increase punishment. Also a possible diminished responsibility of the jury issue because it would be implied to the jury that the defendant already received a break by not being charged with conspiracy.
(2a) The offense was committed for the benefit of, or at the direction of, any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, and the defendant was not charged with committing a conspiracy. A "criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of felony or violent misdemeanor offenses, or delinquent acts that would be felonies or violent misdemeanors if committed by an adult, and having a common name or common identifying sign, colors, or symbols.	Offense	No. Separation of Powers issue because prosecution can manipulate the charges to either charge an additional crime or to increase punishment. Also a possible diminished responsibility of the jury issue because it would be implied to the jury that the defendant already received a break by not being charged with conspiracy.
(3) The offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.	Offense	In part. Preventing arrest is valid as an *Apprendi* fact. As to custody, there is a problem because the jury would be informed that the defendant was in custody which is prejudicial.
(4) The defendant was hired or paid to commit the offense.	Offense	Yes. Concrete facts that are not elements of the underlying crime which increase culpability.
(5) The offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.	Offense	Yes.

(6) The offense was committed against or proximately caused serious injury to a present or former law enforcement officer, employee of the Department of Correction, jailer, fireman, emergency medical technician, ambulance attendant, social worker, justice or judge, clerk or assistant or deputy clerk of court, magistrate, prosecutor, juror, or witness against the defendant, while engaged in the performance of that person's official duties or because of the exercise of that person's official duties.	Offense	Yes.
(7) The offense was especially heinous, atrocious, or cruel.	Offense	No. Unconstitutionally vague when evaluated as an element of a crime.
(8) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.	Offense	Maybe. Under some circumstances, it may be unconstitutionally vague when evaluated as an element of a crime.
(9) The defendant held public office at the time of the offense and the offense related to the conduct of the office.	Offender and Offense	Maybe. It is constitutional so long as the defendant is not charged with an offense for which these facts are elements of the offense.