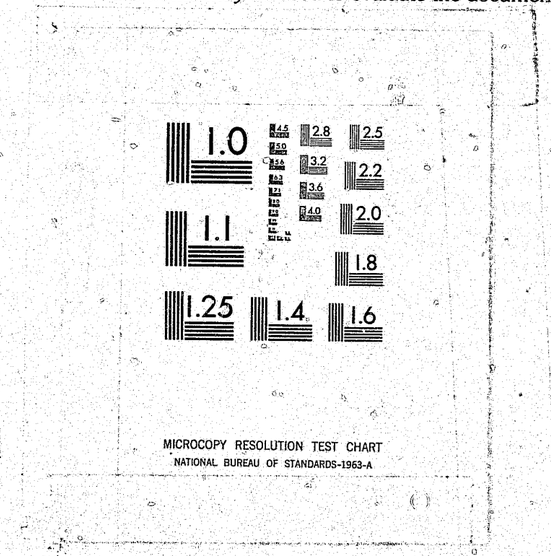

**** DISCUSSION DRAFT ****

EXECUTIVE SUMMARY

NORTH CAROLINA'S DETERMINATE SENTENCING LEGISLATION: AN EVALUATION OF THE FIRST YEAR'S EXPERIENCE

Prepared for the National Institute of Justice

July 1984

Stevens H. Clarke

Institute of Government

The University of North Carolina at Chapel Hill

NORTH CAROLINA'S EXPERIENCE WITH DETERMINATE SENTENCING LEGISLATION

I. The North Carolina Fair Sentencing Act

A. Summary of the Act

In 1979, the North Carolina General Assembly enacted legislation called the Fair Sentencing Act (hereinafter the FSA) that was intended to reduce unjustified variation in sentences for felonies and to make such sentences more predictable but not necessarily more severe.[1] In its final amended form, the FSA

--Applied only to felonies committed on or after July 1, 1981.

--Left former wide ranges in possible prison terms unchanged for most felonies (example: zero to ten years for felonious larceny).

--Set a presumptive--i.e., standard--prison term for each felony (example: three years for felonious larceny).

--Established certain criteria (aggravating and mitigating factors) that the judge must consider in deciding whether to impose a nonpresumptive prison term.

--Required the sentencing judge either to impose the presumptive prison term or to give reasons in writing for imposing a different term unless the sentence is imposed pursuant to a plea bargain approved by the judge. The judge's reasons could be drawn from the statutory aggravating and mitigating factors, and could also be any circumstance relevant to just punishment, rehabilitation or incapacitation of the offender, or deterrence of crime.

--Allowed the judge to do any of the following without giving written reasons: suspend the prison term with or without probation supervision, impose consecutive prison terms for multiple convictions, and grant CYO (committed youthful offender) status to a felon under age 21[2] with eligibility for immediate discretionary parole.

--Provided a right of appellate review of a prison term longer than the presumptive term if it was not imposed pursuant to a plea bargain, and facilitated appellate review by requiring a record of reasons for nonpresumptive prison terms. (No such record had been required under previous law.)

--Eliminated discretionary parole except for CYOs.

--Provided for deductions of "good time" and "gain time"[3] from the prison sentence at fixed statutory rates, subject to less discretion by prison officials than former law allowed.

B. Weaknesses of the Act

The closer one looks at the provisions of the FSA, the more surprising it is that the legislation had the effect that it apparently had--as explained in Section III of this summary--on variation in sentencing. The FSA was a bundle of compromises and contradictions. It set presumptive sentences for each class of felonies, but did not narrow the existing wide ranges of possible prison terms, nor did it attempt to deal with very broad definitions of crimes that made it difficult to legislate penalties commensurate with harmfulness. It listed a variety of aggravating and mitigating factors--such as prior convictions, creating a great risk of death to more than one person by means of a weapon, and a mental or physical condition that reduced the defendant's culpability--but did not indicate the weight to be attached to the various factors, nor did it create any practical guidelines for applying them.

The FSA had nothing to say about sentencing procedure. It led to the development of a judgment form with a list of the statutory aggravating and mitigating factors to be checked off by the sentencing judge. Although space is left for judges to write in other factors, they seldom do so. No new procedures were provided for giving the sentencing judge information relevant to sentencing. The FSA left presentence investigations entirely up to the sentencing judge, and written presentence reports remained rare.

Plea bargaining, which has so much influence on sentencing,[4] was not dealt with by the FSA. In fact, sentences imposed pursuant to a plea bargain were specifically exempted from the FSA's most important requirement: that the judge make written findings to justify a non-presumptive prison term.

The FSA said very little about the scope of appellate review--only that the issue on appeal was whether the "sentence imposed ... is not supported by evidence introduced at the trial and sentencing hearing"[5]--with the result that the state's appellate courts have not reviewed sentences for proportionality,[6] although they have reversed a number of sentences because of erroneously applied aggravating and mitigating factors. The absence of proportionality review limits the effect on consistency of sentencing that the FSA was intended to have.

Perhaps the major defect of the FSA was that it attempted to regulate only the length of active prison terms. It did not limit in any ways the judge's complete discretion to (1) suspend the prison sentence (with or without probation supervision), (2) impose consecutive prison terms for multiple offenses, and (3) impose "committed youthful offender" status making a prisoner eligible for immediate discretionary parole. This deficiency led to the result that, while a judge must make written findings to support any active prison

term different from the presumptive, he need not make any written findings to suspend the prison term altogether.

II. History of the FSA

The movement toward determinate sentencing legislation in North Carolina, as in other states,[7] began with concern about disparity in sentencing and the perception that prisoners were suffering from the uncertainty of parole. But also, from the beginning of the legislative process in 1974 until the legislation became effective in 1981, there was concern about North Carolina's large and growing prison population.

Before the FSA, North Carolina had a typical indeterminate sentencing law. Ranges of prison terms were wide for broadly defined crimes (e.g., zero to ten years for felonious breaking and entering of buildings). No criteria for sentencing were set by statute, court decision, or court rules. The Parole Commission had the discretion to release a prisoner during most of his prison term, with only very general statutory criteria for the parole decision.[8]

In the early 1970s, the North Carolina Bar Association, in two influential reports, criticized the disparity of prison sentences imposed in like cases,[9] and called for a study "not only of disparities in sentences, but of the entire problem of sentencing, the philososphy underlying it, and the procedures used in effecting it."[10] At the same time there was growing concern about the state's prison population, which had begun to increase very rapidly.[11] This concern was heightened by the publication in 1974 of the new national statistics showing that North Carolina, at least since 1971, had had the highest per capita imprisonment rate of any state.[12]

The development of what became the FSA began in 1974 when General Assembly created what was popularly known as the Knox Commission,[13] named for its chairman, Eddie Knox, then a State Senator. The 1974 General Assembly resolution creating the Knox Commission began by noting the large and increasing prison population and the shortage of sentencing alternatives. It charged the Commission with studying sentencing, probation, parole, "good time," and alternatives to prison sentences, with the goal of "reducing the prison population of the State ... and its heavy economic burden, consistent with the well-being and security of the general population...."[14]

Costs were a major concern in 1974 and 1975, years of economic downturn and shortfalls in state revenues. The state Department of Correction, which predicted an increase in prison population from about 13,000 in 1975 to 17,000 by 1983, was calling for large appropriations for prison construction. But the General Assembly was not inclined to increase its already substantial program of expanding prison facilities to meet these newly projected needs.

The Knox Commission members, under the 1974 resolution, included four members of the State House of Representatives, four state senators, five persons appointed by the Governor, and four persons appointed by the N.C. Bar Association. Eight of the Commission's members had earlier been members of the Bar Association's study committee that had called for a sentencing study in 1971; these included two well-respected superior court judges, one of whom became the pre-eminent shaper of the Commission's sentencing legislation.[15] A number of the members were in private criminal defense practice. While several prosecutors and correctional officials spoke at Commission meetings, none were members.

In its first year of work, the Knox Commission did not deal comprehensively with sentencing. It produced a patchwork of bills, some of which passed in 1975, intended to liberalize parole and work release and to

encourage probation. As an afterthought, it also drafted a bill classifying all felonies for punishment purposes, whose purpose was "to limit the number of authorized sanctions and to incorporate a general sentencing philosophy into ... North Carolina law."[16] The classification bill died in committee in 1975.

In 1975, the General Assembly extended the Knox Commission's existence to 1976, and directed it to develop a "coordinated state policy on correctional programs" and a "basic philosophical approach toward inmate rehabilitation."[17] The General Assembly's 1975 resolution showed that it intended the Commission to study treatment and activities in prison as well as the need for physical facilities. But this was not what the Commission concentrated on in 1975-76. It spent most of its time drafting what eventually became the FSA. The Commission's reasoning was that in order to develop a clear philosophy of the criminal justice system, covering sentencing, prison, and release from prison, a revision of sentencing laws was needed.[18] Perhaps it was not only the Commission's philosophical concerns that led it to sentencing legislation; in 1975-76, it may have been more attractive to work on sentencing laws than to plan new and expensive correctional programs and facilities, since state funds were low.

In addressing the subject of sentencing, the Knox Commission began with concern about disparity in sentencing, which had been expressed earlier by the Bar Association Penal System Study Committee. The Commission also addressed the perceived need to improve public confidence in the justice system and reduce the chance of prison rebellion. The Commission believed, based on what it read and heard, that more crime could be prevented if criminal sanctions were imposed more even-handedly.

The Commission dipped into the rapid currents of sentencing reform ideas that were appearing in the mid-1970s, including the work of Marvin Frankel,[17] David Fogel,[18] Norval Morris,[19] and James Q. Wilson[20]. Probably the most

important source for the Commission was the Twentieth Century Fund Task Force on Sentencing,[21] which contributed the idea of a presumptive, or standard, sentence for each crime. The other important ideas of the Task Force--narrowing the range of prison terms, and allowing departures from the presumptive prison term only in accord with specific, weighted criteria--were never adopted by the Knox Commission. There were two reasons for this: (1) the Commission evidently feared that lowering the (concededly high) maximum prison terms for felonies would doom its legislation by making it seem too lenient; and (2) the Commission decided not to take on the task (which was already being worked on by another group, the Criminal Code Commission) of breaking down broad crime definitions into various grades, which would have been required for narrowing sentence ranges.

The idea of a sentencing guidelines commission, which had not yet been endorsed by the American Bar Association,[24] was briefly considered by the Knox Commission, but was rejected because the Commission was far along with its proposal for legislatively set, rather than administratively set, sentencing criteria, and also did not want to recommend the creation of any new government agencies. The idea of a sentencing review board also was floated briefly by a State Supreme Court justice, but was not sympathetically received by the Governor, who by then was well along in getting the FSA enacted.

The Knox Commission's felony presumptive sentencing bill,[25] prepared in 1976 and introduced in the 1977 General Assembly session, was quite similar to the FSA that passed in 1979. The purpose of sentencing was limited to punishment commensurate with the crime. Five classes of felonies were established for sentencing purposes. Nothing was said about specific sentencing procedures or about the scope of appellate review of sentences.

In 1976, Lt. Governor James B. Hunt, Jr., who was running for Governor (he was elected and eventually served two four-year terms), incorporated in his

campaign platform the sentencing proposals of the Knox Commission, whose chairman was co-manager of his campaign. The presumptive sentencing bill, coupled with Hunt's proposal for a Speedy Trial Law,[26] was intended to reduce crime by making punishment more "swift and certain"--the certainty to be provided by presumptive sentencing, and the swiftness to be contributed by the Speedy Trial Law.

The presumptive sentencing bill died in committee, partly because the General Assembly was busy with another major criminal procedure bill,[27] and partly because there was much resistance to the idea of presumptive sentencing. A number of lawyers and judges seemed to believe that the bill would establish "fixed" sentencing, removing all judicial discretion. When the 1977 session ended, Governor Hunt, recognizing the opposition to the bill, challenged the State Bar Association to re-draft the bill so as to be acceptable to its members. The Bar Association responded by creating a Special Committee on Sentencing which began to meet in 1978. The Special Committee included several members of the former Knox Commission, including the judge who was the intellectual leader in drafting the presumptive sentencing bill and had also been a member of the influential Bar Association Penal System Study Committee.

The Special Committee discussed major changes in the bill, but its revised version, which was endorsed by the Bar Association Board of Governors at the end of 1978, was very similar in concept to the 1977 Knox Commission bill. The number of felony punishment classes was increased from five to ten. To the "automatic" good behavior credit provisions of the 1977 bill, the Special Committee added gain time--credit that could be granted in the Department of Correction's discretion for prisoners' work and meritorious conduct. (The Department of Correction, whose representatives appeared regularly at the 1978 committee's meetings, argued strongly for this change, and succeeded in retaining an existing power which it believed to be essential in prisoner

management.) The Special Committee, unable to agree on a re-draft of the aggravating and mitigating factors of the 1977 bill, finally agreed on removing the list of factors but requiring the judge to give written reasons for a non-presumptive prison term, which must be relevant to the purposes of sentencing. These purposes were expanded to include not only punishment commensurate with the injury caused by the crime (as in the 1977 bill), but also deterrence of crime and restraint of dangerous offenders.[28]

Before the Special Committee's bill was introduced in 1979, the Governor's office made some changes: it re-inserted a list of specific aggravating and mitigating factors, and set fourteen-year minimum prison terms for armed robbery, common law burglary, and a repeated felony involving a deadly weapon (these fourteen-year terms would be reduced to seven years by the bill's good time provisions and the result would be to conform to earlier law that had set a seven-year minimum). In the 1979 session, further changes were made. Rehabilitation of the offender was added as a purpose of sentencing.[29] Prisoners serving life sentences (authorized for first degree murder, rape, and sexual offense) were made eligible for discretionary parole after serving twenty years. Rates of gain time were set specifically in the bill, which had the effect of freezing into law the existing administrative practice of the Department of Correction. Entering into a plea bargain was made a mitigating factor.

The 1979 Fair Sentencing Act[30] initially was made effective July 1, 1980, although it was later postponed one year. The Governor saw a need to plan for the implementation of the Act and also a need to allow trial judges--many of whom were still strongly opposed to the Act--more opportunity to contribute to the process of sentencing reform. He created a Sentencing Procedures Committee for this purpose in early 1980 with the consent of the Chief Justice of the Supreme Court. The Procedures Committee, consisting mostly of trial

judges who had not been on the Knox Commission, plus one district attorney, were directed by the Governor's order[31] to develop detailed procedures and guidelines for sentencing consistent with the provisions of the FSA, and also to monitor the implementation of the FSA as it went into effect so that any problems could be dealt with quickly. But the Procedures Committee addressed itself to drafting amendments rather than to implementation of the FSA. It decided against developing sentencing procedures, including procedures for providing relevant information to the sentencing judge so that he could apply the FSA's criteria, since most of the Procedures Committee's members were strongly opposed to written presentence reports and indeed to adding any paperwork to the criminal process.

The Procedures Committee drafted some clarifying amendments to the FSA, including postponing its effective date to 1981, a revision of the aggravating and mitigating factors, a downgrading of prior convictions which made them just one of a list of aggravating factors (formerly they had carried special weight), and setting a "preponderance of the evidence" standard of proof for aggravating and mitigating factors; these amendments passed in the 1980 and 1981 sessions.[32] The Committee also sought to protect a hallowed practice by making plea-bargained sentences exempt from the FSA's written findings requirements (this amendment passed), and to eliminate the right to appellate review of a sentence (this amendment failed); in fact, the 1981 General Assembly expanded the right to appellate review).

The most important 1981 amendment to the FSA was the reduction of most presumptive prison terms (Classes C through H) by about 25 per cent. This last change was thought necessary to prevent a short-term exacerbation of the ongoing rapid increase in the state prison population that, according to the latest Department of Correction projections, might otherwise be caused by the FSA. This amendment was in part the result of a lobbying effort begun by a

privately-funded group, the Citizens' Commission on Alternatives to Incarceration,[33] to reduce imprisonment of law-risk offenders. It was also in part the result of the General Assembly's growing awareness of rising prison population and associated costs.

Governor Hunt's strong advocacy of the FSA has been an important part of its history and has probably been essential to its effectiveness. As mentioned earlier, the FSA was a prominent part of the anti-crime theme of his 1976 election campaign; it also was emphasized in his first address to the General Assembly. The Governor continued to seek passage of the presumptive sentencing bill after the 1977 version's failure. He was well represented in all efforts to re-draft the bill and in consideration of the bill by various General Assembly committees. After the FSA's passage in 1979, he continued to advocate the determinate sentencing philosophy. Perhaps the most important influence of the Governor was exerted by his appointment of judges. (In North Carolina, the Governor appoints replacements for superior court [felony trial court] judges who die or retire; such appointments are effective only until the next general election, but most appointees are elected.) By the time the FSA went into effect (July 1, 1981), the Governor had appointed about 30 of the 68 superior court judges on the bench. While the Governor cannot control any judge's official actions, it is a fair assumption that candidates for judgeships who were openly opposed to the FSA were unlikely to be appointed. Also, judges who were replaced by Gov. Hunt's appointees undoubtedly included some of those most opposed to the FSA.

III. Results of the FSA as Shown by a Recent Study

The Institute of Government of the University of North Carolina recently completed a study that assessed the effects of the FSA by comparing the first year of experience under the FSA with experience in previous years. The study was done for the Governor's Crime Commission with a grant from the National Institute of Justice.[34] This section summarizes its results.[35]

The Institute interviewed a number of prosecutors, judges, and defense attorneys concerning the FSA and its expected and actual effects. Those interviewed made a variety of assertions about the FSA's effects that were tested as hypotheses in the study. Besides the interviews, four sources of data were used: (1) a sample from twelve representative counties, which provided information on court processing of felony defendants--1,325 before the FSA and 1,193 after the FSA; (2) the Department of Correction (DOC) statewide felony sentence sample, which included 9,752 felons convicted in 1979 and 5,707 convicted in 1981-82 subject to the FSA; (3) the release cohort data--information on time served by felons released from prison (1,634 in 1977-78; 1,569 in 1980; 2,030 in 1981); and (4) the statewide judgment sample, consisting of information from felony judgments issued under the FSA during August 1981-January 1982 for 1,457 convicted felons.

The study investigated the possible direct effects of the FSA on: (1) sentencing procedures; (2) sentencing practices including suspension (probation), imposition of consecutive prison terms for multiple offenses, and granting of CYO (committed youthful offender) status; (3) the frequency of appeals and postconviction motions; (4) severity of sentence; and (5) the state prison population. Because the prosecutor could have evaded the policies of the FSA by exercising his or her discretion to file multiple charges, dismiss and reduce charges, and engage in plea bargaining (including bargaining about

the sentence), the study also examined multiple charging, dismissal and reduction of charges, and plea bargaining. Court delay was measured to see whether it increased after the FSA. Finally, statistical tests were made to determine whether any changes occurred after the FSA in the effects of certain other factors that had been shown to affect court disposition and sentences before the FSA, such as: the amount of harm caused by the crime; the defendant's prior criminal record, race, age, and sex; how long the defendant spent in detention (jail) awaiting disposition; the type of attorney he had (privately paid or court-appointed); and whether he pleaded guilty or opted for a jury trial.

A. Multiple Charging

In a sense, the FSA provided an incentive (albeit unintentional) to file multiple felony charges against a defendant: no written findings must be made by the judge (nor evidence furnished by the prosecutor to support them) to impose consecutive presumptive sentences for each charge, although to impose a longer-than-presumptive sentence for any single charge required findings and supporting evidence. But felony charges per defendant did not increase after the FSA in the twelve counties; in fact, they decreased from 1.90 to 1.56 for reasons unknown to us. The use of consecutive active sentences increased, but this did not result in longer total sentences after the FSA than before.

B. Trial Court Dispositions

Some court officials thought that the FSA, by setting what they considered rather low presumptive prison terms for felonies, would remove some of the incentive to plead guilty, because defendants would believe that these presumptive terms would limit what they might receive if they gambled on a jury trial and were convicted. But this did not occur. The twelve-county data

indicated that jury trials dropped from 5.7 per cent of all defendants' dispositions to 3.2 per cent; virtually all of the decrease occurred in felony convictions by the jury (see Table 1). The rate of guilty pleas remained almost constant (59 per cent pre-FSA, 58 per cent post-FSA), but a shift occurred after the FSA toward pleading guilty with a formal (recorded) plea bargain (the latter rate increased from 33 to 39 per cent) rather than pleading guilty to the original charge or pleading guilty with an "informal" bargain or understanding. Meanwhile, the rate of dismissal of all charges increased slightly--from 34 to 37 per cent. To the extent that these changes in trials, plea bargains, and dismissals are attributable to changes in the behavior of prosecutors, defense attorneys, and judges, what may have happened is that some defendants who formerly would have gone to trial and been convicted of felonies by juries were, after the FSA, pleading guilty pursuant to formal plea bargains.

Some knowledgeable observers had predicted that sentence bargaining--negotiation of plea bargains in which the prosecutor agrees to make a sentence recommendation desired by the defendant--would increase after the FSA, because imposing the plea-bargained sentence requires no support in written findings. This prediction also did not come true; in fact, sentence bargaining became less frequent after the FSA. Among defendants who pleaded guilty to felonies pursuant to a formal plea bargain, the percentage who obtained a prosecutor's promise of any sort of sentence recommendation decreased from 59 to 45 per cent.

The results suggest--although they do not conclusively prove--that some defendants who would have formerly have gone to a jury trial and been convicted of felonies were, after the FSA, pleading guilty pursuant to a formal plea bargain. They also suggest that felony defendants were more willing, after the FSA, to plead guilty to felony charges without the assurance of a prosecutor's

sentence recommendation; this result may have been due to the increased predictability of sentence lengths under the FSA.

Examination of disposition patterns among twelve counties indicated that, while the counties retained the individual differences observed before the FSA, they generally experienced the same overall shifts: jury trials became less frequent, with most of the decrease occurring in felony guilty verdicts, written plea bargains increased, other guilty pleas declined, and dismissal rates generally increased somewhat.

C. Trial Court Delay

Concern was expressed before the FSA went into effect that it would increase the time necessary to dispose of felony cases in trial courts, both by making sentencing procedure more complicated and by removing some of the defendant's incentive to plead guilty. In reality, disposition times in trial court decreased in the twelve counties studied. The median time from arrest to disposition declined from 58 days pre-FSA to 48 days post-FSA, and the 75th percentile decreased from 117 days to 104 days. This speeding up of dispositions may have resulted from the reduction in the frequency of jury trials after the FSA plus the slight increase in dismissals. Sentencing procedure apparently did not become much more time-consuming, probably because judicial findings were rarely required to support sentences.

D. Sentencing Procedure

The statewide judgment sample indicated that after the FSA, judges gave written reasons to support the sentences of only 17 per cent of all defendants convicted of felonies. Fifty-four per cent of defendants convicted of felonies received presumptive prison terms, and another 22 per cent were sentenced according to a plea bargain; these kinds of sentences do not require judges to

give reasons. Sentences of another 5 per cent of the felons were unsupported by judicial findings without any explanation stated on the judgment. When judges did give reasons, aggravating circumstances outweighed mitigating factors somewhat more often than the reverse. Judges, when they did make written findings, tended to cite as reasons for their sentences the defendant's prior convictions (or absence thereof), his voluntary acknowledgment of wrongdoing to a police officer, the fact that he committed the offense for hire or pecuniary gain, a mitigating mental or physical condition, and good character or reputation--all of which were specifically listed in the FSA and could be cited simply by checking appropriate boxes on the judgment form. In about 20 per cent of the sentences in which written findings were made, judges exercised their discretion to find aggravating or mitigating circumstances not specifically listed in the new legislation.

Judges had been expected to order written presentence reports by probation officers more frequently after the FSA, because of the FSA's emphasis on the effect of certain specific aggravating and mitigating circumstances on sentencing. But the twelve-county data indicated that presentence reports became less frequent, dropping from 7 per cent of cases in which defendants were convicted of felonies to only 1 per cent. Court-ordered presentence diagnostic commitments to prison for psychiatric examination also continued to be rare after the FSA. Perhaps judges saw no need for sentencing information other than what the prosecution and defense provided, or perhaps they had little confidence in presentence investigations.

E. Probation, Consecutive Prison Terms, and CYO Commitment

Since the FSA does not require written reasons for (a) imposing probation (i.e., suspending a prison sentence), (b) imposing consecutive prison terms for multiple felonies, and (c) sentencing the offender to prison as a CYO with

immediate eligibility for discretionary parole, many observers thought that these options might be exercised more frequently after the FSA as a way of avoiding FSA presumptive prison terms and the abolition of discretionary parole for non-CYOs. In reality, probation did not increase. Supervised probation with no active time to serve dropped from 45 per cent to 37 per cent of those convicted of felonies, and "special probation" (with a short period of time to serve as a condition of suspending a longer prison term) remained at 4 per cent. (These and other results derived from the DOC statewide sentence sample do not include the felons--estimated at no more than 10 per cent of the total convicted--who received neither active prison sentences nor supervised probation.) CYO commitments also did not increase; they continued to be imposed in 49 per cent of the sentences to prison of felons under 21. Consecutive sentences did increase substantially, according to the twelve-county data--from 18 per cent before the FSA among felons who received multiple active sentences to 32 per cent after the FSA. But total sentence lengths generally did not increase after the FSA (in fact, they become shorter), and multivariate analysis of the DOC data indicated that the number of felony convictions for which the defendant was sentenced influenced his total prison term no more after the FSA than it had before. Consecutive sentencing may have been used to a greater extent after he FSA to circumvent the act's requirement of written findings to support nonpresumptive prison sentences, but it did not generally result in greater severity of sentence.

F. Severity and Variation in Sentencing

1. Prison versus probation. The twelve-county data indicated that there was no increase after the FSA in the likelihood that defendants charged with felonies who were convicted of some charge (half the time a misdemeanor) would receive an active (i.e., unsuspended) prison sentence. But for defendants

convicted of felonies statewide, the DOC data indicated that the chance of receiving an active prison sentence (rather than supervised probation) increased from 55 per cent in 1979 (pre-FSA) to 63 per cent in 1981-82 (post-FSA). Multiple regression analysis indicated that the post-FSA increase in felony active sentences persisted when other variables (such as type of offense and prior convictions) that might have been responsible for the change were controlled for. Whether the increase in active sentencing was attributable to the FSA is open to question, because the FSA left the decision to suspend a prison sentence completely up to the judge. The increase in active sentences may have resulted from some change in judicial attitudes that had nothing to to with the FSA, or it may have been a psychological result of the FSA's presumptive prison terms for felonies, which judges may have regarded as legislative recommendations for active prison terms.

A regression analysis of the statewide DOC felony sentencing data indicated that the chance of receiving active time for violent felonies actually dropped somewhat (compared with the chance of receiving an active sentence for theft-type felonies) after the FSA went into effec. Some changes may have occurred in the effects of age, sex, and race, but these could not be confirmed by tests of statistical significance. Defendants under 21 and female defendants, who before the FSA were significantly less likely than older defendants and male defendants (respectively) to receive active sentences, were closer to those defendants in the probability that they would receive an active sentence after the FSA. Black defendants, who were significantly more likely than whites to receive active time before the FSA, were still more likely than whites to receive active time after the FSA, but not to as great an extent.

2. Length of active prison terms. With regard to the length of active prison terms imposed for felonies, sentencing became generally less severe after the FSA, and it also varied less (see Figure 1). Before the FSA, total

active maximum prison terms had a mean of 121 months and a median of 60 months; after the FSA, total active prison terms had a mean of 82 months and a median of 36 months. The interquartile range (25th to 75th percentile) dropped from 36-120 months before the FSA to 24-72 months after the FSA, indicating a reduction in variation. Similar reductions in means, medians, and interquartile ranges were found for most of the common specific felonies. The median sentence length imposed under the FSA was equal to the presumptive prison term in most cases. The drop in length of active sentence for felonies was confirmed by multiple regression analyses of the DOC data, both when only active sentences were included and when supervised probation sentences were added and treated as having zero length.

The regression analysis of the statewide DOC felony sentence data indicated that drug felony sentences became longer (relative to theft felony sentences) after the FSA. (This change may be due, at least in part, to legislation effective July 1, 1980, which set very long minimum sentences for "trafficking" offenses--those involving large amounts of drugs.) The disadvantage of black defendants with respect to active sentence length apparently nearly disappeared after the FSA. Before the FSA, the felony active sentences of blacks were estimated to be 7.8 months longer than whites' sentences; the difference dropped to nearly nothing after the FSA (this change was significant only at the .10 level). Time spent in pretrial detention, which was positively associated with length of active sentence, showed a slightly decreased effect after the FSA.

3. Time actually served in prison. Because the law regarding service of prison terms was changed by the FSA--discretionary parole was abolished except for CYOs, and good time and gain time were made statutory--separate analyses were made that compared the time actually served by felons released from prison in 1977-78, 1980, and 1981 with estimates of time served on FSA active

sentences imposed in 1981-82. Considering the 20 most frequent felonies of conviction, time served in prison will generally decrease and vary less for those sentenced after the FSA than for those sentenced under prior law, although the changes are in most cases are not confirmed by statistical significance tests. For two felonies--second-degree murder and armed robbery--time served will apparently increase and vary more after the FSA, but this fact probably results from legislative changes that preceded the FSA rather than from the FSA itself.

4. Effects of administrative variables. The FSA apparently did not change the influences on sentencing of how long the defendant spent in pretrial detention and whether he had a court-appointed attorney, but it may have changed the influence on sentencing of a guilty plea. (These administrative variables were tested in multiple regression models using the twelve-county data, which included felony defendants who were convicted of reduced misdemeanor charge as well as those convicted of felonies.) That the FSA had little effect on the influence of pretrial detention and type of attorney is not surprising, because the legislation did not attempt to change pretrial release or defense of indigents.

Both before and after the FSA, the longer a defendant spent in pretrial detention, other things being equal, the greater were the odds that he would receive an active prison sentence and the longer his "overall" active sentence was likely to be. ("Overall" sentence length includes probation sentences as having length zero.) For example, for defendants convicted of felonies under the FSA who received active prison sentences, the regression model estimated that the length of the active sentence increased by about two months for each additional ten days spent in pretrial detention. Time in pretrial detention varied a great deal among defendants and apparently had very little to do with the seriousness of their charges, their prior criminal records, and other "risk

factors" in their cases--at least insofar as these factors could be measured from available data. One reasonable explanation of the observed correlation between pretrial detention time and severity of sentence is that spending time in detention made defendants less able to help their attorneys in their defense and prepare arguments for a nonprison sentence, less able to maintain employment and otherwise favorably impress the sentencing judge, and more willing to accept an unfavorable plea bargain offered by the prosecution.

Among theft felony defendants who were convicted of some charge, those with court-appointed counsel continued after the FSA to be more likely to receive active sentences and to receive much longer overall sentences than those who paid their attorneys themselves. Pleading guilty rather than going to trial continued to be advantageous for theft felony defendants after the FSA, as it had been before the FSA, in that it was associated with shorter overall active sentences when other relevant factors were controlled for statistically. But for violent felony defendants, the differential in overall length of sentence between those who pleaded guilty and those who went to trial apparently disappeared after the FSA, although the change was significant only at the .10 level. This change may have been due to the decline in formal plea bargains concerning the sentence that occurred after the FSA.

G. Effects on Prison Population

In looking for possible effects of the FSA on the state's already rapidly increasing prison population, the study addressed this question: Given the number of persons convicted of felonies, how will the FSA affect their contribution to the prison population? Two trends had to be reconciled: (1) the probability of receiving an active prison sentence for a felony rose after the FSA (this increase was not a strictly legal effect of the FSA, but it may have been a psychological effect); and (2) the length of active prison

sentences and estimated time served in prison generally decreased. Times served for several common felonies under pre-FSA law (adjusted for the pre-FSA active sentence rates) were compared with estimated times served under the FSA (adjusted for the higher active sentence rates now generally prevailing). The comparisons indicated that those convicted will contribute less to the prison population under the FSA than they would have contributed if they had been sentenced under former law. A similar analysis was done for all felonies taken together, with the same result.

The DOC has recently completed two forecasts of the prison population. One uses the estimated times served under the FSA, and the other uses the longer times served under previous law. They indicate that by 1986, the prison population will be about 900 inmates less with the FSA in effect than it would have been if previous laws and parole practices had remained in place. These estimates and forecasts indicate that the FSA will probably not increase the felon prison population and may even reduce it somewhat.

On balance, it is fair to conclude from this study that the FSA accomplished at least some of what it was intended to accomplish--and without creating the problems that critics predicted it would create. Length of active sentence for felonies clearly varied less after the FSA. The fact that the FSA presumptive prison term was generally the median length of active sentence is strong evidence that the reduced variation was due to the FSA. Further evidence of adherence to the FSA'a presumptive prison terms is the fact that judges tended to impose these terms even though they were generally well below the pre-FSA median and mean prison terms. Thus, although much variation remained in sentence lengths, the tendency was toward greater consistency.

While judges varied less in the length of active sentence for felonies, according to the statistical analysis they did not become more sensitive to aggravating factors emphasized by the FSA, such as prior convictions, degree of

physical injury, and amount of property loss. Perhaps it was unrealistic to expect judges to comply equally with the two somewhat conflicting directives that the FSA gave them. In effect the FSA told judges: (1) adhere to standard sentences and justify nonstandard sentences in writing; but (2) pay more attention to certain specific aggravating and mitigating circumstances. Judges were apparently better able to implement the first directive than the second. The use of presentence investigations, which were expected to increase under the FSA because of the emphasis on aggravating and mitigating factors, in fact declined. (There are no reliable data on whether the prosecution and defense supplied better sentencing information to judges when the FSA went into effect.) In only 17 per cent of the felony sentences did judges actually state in writing aggravating or mitigating circumstances to support the sentence, owing to both the frequent use of presumptives and sentence bargaining. But 17 per cent can also be regarded as better than nothing. Before the FSA, judges were never required to support their sentences with reasons--and in fact did so at their peril, since recorded reasons invited appellate review and reversal.

The study results with regard to race were encouraging: there were indications that the disadvantages of black defendants in sentencing declined or disappeared after the FSA. Perhaps these disadvantages had less influence on severity of sentence simply because sentences varied less.

The FSA left intact much prosecutorial and judicial discretion, which provided much opportunity to evade the policies of the legislation. But by and large, little evasion seems to have taken place. For example, multiple charging did not increase (despite the incentive the FSA supplies for multiple charging by not requiring written justification for consecutive sentences). Consecutive prison sentences did increase among those with multiple convictions, but the total number of charges did not have an increased effect on length of sentence after the FSA, and total length of sentence did not

increase. Although the FSA did supply an opportunity to evade the FSA's provisions by determination of felony sentences in plea bargaining, this practice actually decreased significantly after the FSA. After the FSA, plea bargaining was more often formal (that is, recorded), but also fewer bargains involved sentence concessions. The FSA, by making sentences more predictable, may have encouraged some defendants to plead guilty without prosecutorial promises of lenient sentences.

Suspension of sentences and imposition of CYO status were two other ways of getting around the FSA's provisions; however, CYO commitments did not increase in frequency after the FSA, and suspension of sentences actually became less frequent. Contrary to the expectations of some, trial court arrest-to-disposition time did not increase after the FSA; in fact, it decreased, probably because jury trials (which are very time-consuming) became even rarer after the FSA than formerly and dismissals increased slightly. Also, sentencing procedure under the FSA generally did not become as onerous as some critics had feared; the frequent use of presumptive sentences and the persistence of sentence bargaining (though at a reduced rate) obviated judicial findings for most felony sentences.

The FSA apparently is not adding to the increase in the prison population, despite fears that it would. Although the probability of active imprisonment increased after the FSA, the length of time to be served in prison generally was reduced by the fact that most active sentences were grouped around the presumptive level. The net effect of the FSA may actually be to reduce the prison population slightly compared with the level it would otherwise have reached by 1990.

The picture of the FSA that emerges from this study is that felony sentencing has become more predictable and perhaps even fairer (in the sense of lessened racial disparity). Furthermore, there have apparently been no

widespread efforts to undermine the legislation by administrative tactics and no deleterious consequences for trial court efficiency and the prison population. The study's results should be interpreted cautiously. They concern only the first year of the operation of the FSA, and criminal justice officials' response to the legislation may change. (The study is now being continued using 1983 data.) But for the present, it is fair to conclude that the FSA has brought change in the direction desired by its proponents.

Footnotes

1. N.C. Gen. Stat. §§ 14-1.1, 15A-1021, 15A-1340.1 through -1340.7, 15A-1380.1, 15A-1380.2, 15A-1414, 15A-1415, 15A-1442, 148-13. See S. Clarke and B. Rubinsky, North Carolina's Fair Sentencing Act (Chapel Hill, N.C.: Institute of Government, UNC, 1981).

2. After this study was completed, the General Assembly raised the CYO age limit to 25 for certain offenders; N.C. Gen. Stat. § 148-49.11.

3. Under the FSA, "good time" is a deduction of one day of the prison term for each day spent in prison without major misconduct, and "gain time" is a deduction at various rates set by statute for various work assignments or "meritorius conduct." N.C. Gen. Stat. §§ 148-13, 15A-1340.7.

4. See S. Clarke and S. Kurtz, "The Importance of Interim Decisions to Felony Trial Court Dispositions," 74 J. Crim. L. & Criminol. 476 (1983); but cf. W Rhodes, "Plea Bargaining: Its Effect on Sentencing and Convictions in the District of Columbia," 70 J. Crim. L. & Criminol. 360 (1979).

5. N.C. Gen. Stat. § 15A-1442(5a).

6. State v. Ahearn, 307 N.C. 584, ____, 300 S.E.2d 689, 697, quoting State v. Davis, 58 N.C. App. 330, 333-34, 293 S.E.2d 658, 661 (1982).

7. See S. Clarke, "Determinate Sentencing," in S. Kadish, ed., Encyclopedia of Crime and Justice, IV, 1440 (New York: The Free Press, 1983).

8. See N.C. Gen. Stat. Ch. 148, Art. 4, §§ 148-58 et seq., Replacement Volume 3C, 1974 and 1978; also State v. Pope, 257 N.C. 326, 333-34, 126 S.E.2d 126, 132-33 (1962).

9. N.C. Bar Association, Penal System Study Committee, Interim Report 17 (Raleigh, N.C.: March 1971).

10. N.C. Bar Association, Penal System Study Committee, Second Interim Report 14 (Raleigh, N.C.: December 1972).

11. See S. Clarke and W. Pope, "Recent Developments in North Carolina's Prison Population," 48 Popular Government, No. 1, 1 (Summer 1982).

12. This rate is defined as number of prisoners sentenced annually to more than one year, per 100,000 general population; see U.S. Department of Justice, Law Enforcement Assistance Administration, National Prisoner Statistics Bulletin, Prisoners in State and Federal Institutions on December 31, 1975 at 5, 16 (Washington, D.C.: U.S. Government Printing Office, 1976). By the end of 1983, North Carolina's rate (223) had fallen to ninth place among the states, but its rate was still well above the national rate (167) in state prisons. U.S. Dept. of Justice, Bureau of Justice Statistics, Prisoners in 1983, p. 4 (Washington, D.C.: 1984).

13. The Knox Commission's formal name in 1974-75 was the Commission on Sentencing, Criminal Punishment, and Rehabilitation; its name was changed to the Commission on Correctional Programs in 1975.

14. N.C. Sess. Laws 1973, 2nd Sess. 1974, Res. 184 (April 13, 1974).

15. N.C. Bar Association, op. cit. supra, note 9, p. 2.

16. N.C. Gen. Assembly, 1975 Sess., H.B. 491-S.B. 290.

17. N.C. Sess. Laws 1975, Res. 120.

18. Commission on Correctional Programs, Final Report (Raleigh, N.C.: N.C. General Assembly, February 1977).

19. M Frankel, Criminal Sentences.

20. D. Fogel, ". . We are the Living Proof . .": The Justice Model for Corrections.

21. N. Morris, The Future of Imprisonment.

22. J. Wilson, Thinking About Crime.

23. Twentieth Century Fund, Task Force on Criminal Sentencing, Fair and Certain Punishment (New York: McGraw-Hill, 1976).

24. ABA Standards Relating to the Administration of Criminal Justice, 2d ed., Ch. 18, Sentencing Alternatives and Procedures, Part III (1979).

25. N.C. Gen. Assembly, 1977 Sess., H.B 441-S.B. 799.

26. Eventually enacted as N.C. Sess. Laws 1977, Ch. 787.

27. The other major criminal procedure legislation was the Trial and Appellate Procedure Act, now codified as N.C. Gen. Stat. Ch. 15A, Arts. 59-91. This Act (N.C. Gen. Stat. Ch. 15A, Art. 85) kept discretionary parole, but increased the sentencing judge's power to specify the minimum period of time the offender must serve in prison before parole. Drafting of this Act had begun well before the Knox Commission bill was drafted.

28. N.C. Gen. Assembly, 1979 Sess., H.B. 869-S.B. 560.

29. N.C. Gen. Assembly, 1979 Sess., Amendment to S.B. 560, adopted May 1, 1979.

30. N.C. Sess. Laws, 1979, 2nd Sess., Ch. 760.

31. Governor of North Carolina, Executive Order No. 47, 1980 (March 19, 1980).

32. N.C. Sess. Laws, 1979, 2nd Sess. 1980, Ch. 1360; N.C. Sess. Laws, 1981, Ch. 179.

33. See Citizens' Commission on Alterntavies to Incarceration, Report (Durham, N.C.: Fall 1982).

34. Neither of these agencies is responsible for any of the statements made in this article.

35. For a more detailed treatment of the study, see S. Clarke et al., North Carolina's Determinate Sentencing Legislation: An Evaluation of the First Year's Experience (Chapel Hill, N.C.: Institute of Government, Univ. of N.C., October 1983).

Table 1

Twelve counties: Court Dispositions of
Felony Defendants* Before and After Passage of the Fair Sentencing Act

	Before FSA (1970-80) Percentage	N	After FSA (1981-82) Percentage	N
District Court				
Dismissed, PJC, or deferred prosecution	26.68%	(346)	31.09%	(369)
Voluntary dismissal by prosecutor	19.51	(253)	23.84	(283)
Dismissal with leave by prosecutor	0.93	(12)	.42	(5)
Dismissal by judge	6.17	(80)	4.97	(59)
PJC	0.08	(1)	0.42	(5)
Deferred prosecution	0.00	(0)	1.43	(17)
Pleaded guilty to misdemeanor	21.28	(276)	20.89	(248)
Plea bargain on record	5.63	(73)	7.92	(94)
Other guilty plea	15.65	(203)	12.97	(154)
District court trial	1.08	(14)	0.76	(9)
Acquittal	0.54	(7)	0.25	(3)
Misdemeanor conviction	0.54	(7)	0.51	(6)
Grand Jury				
"No true bill"	0.62	(8)	0.51	(6)
Went to superior court	50.35	(635)	46.76	(555)
Superior Court				
Dismissed, PJC, or deferred prosecution	7.09	(92)	6.40	(76)
Voluntary dismissal by prosecutor	5.47	(71)	4.97	(59)
Dismissal with leave by prosecutor	0.85	(11)	0.42	(5)
Dismissal by judge	0.62	(8)	0.34	(4)
PJC	0.15	(2)	0.59	(7)
Deferred prosecution	0.00	(0)	0.08	(1)
Pleaded guilty	37.55	(487)	37.15	(441)
Plea bargain on record	26.45	(343)	31.26	(371)
Pleaded guilty to misdemeanor	8.17	(106)	8.26	(98)
Pleaded guilty to felony	18.27	(237)	23.00	(273)
Other guilty plea	11.10	(144)	5.90	(70)
Pleaded guilty to misdemeanor	2.08	(27)	0.93	(11)
Pleaded guilty to felony	9.02	(117)	4.97	(59)
Superior court trial	5.71	(74)	3.20	(38)
Acquittal or mistrial	1.08	(14)	1.01	(12)
Conviction	4.63	(60)	2.19	(26)
Misdemeanor conviction	0.31	(4)	0.34	(4)
Felony conviction	4.32	(56)	1.85	(22)
Total Felony Defendants	100.0%	(1,297)	100.0%	(1,187)

*Includes defendants whose cases began by arrest or summons; excludes those whose cases began by direct indictment or transfer from juvenile court.

END