LIMITATIONS ON A MORE SEVERE SENTENCE AFTER A SUCCESSFUL APPEAL OR COLLATERAL ATTACK

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I. Generally. Resentencing hearings after successful direct appeals and motions for appropriate relief are *de novo* as to the appropriate sentence. *See* State v. Hemby, 333 N.C. 331, 335 (1993); State v. Swimm, 316 N.C. 24, 31 (1986) (citing State v. Jones, 314 N.C. 644, 649 (1985)). That is, at resentencing, the judge "makes a new and fresh determination" regarding the presence of aggravating and mitigating factors and has discretion to give a factor more or less weight than may have been given at the original sentencing hearing. *Hemby*, 333 N.C. at 335 (quotation omitted). There are two caveats to this rule. First, if the appellate court squarely rules that the evidence does not support an aggravating or mitigating factor and the identical evidence is offered at the resentencing hearing to support the same factor, the trial court is bound by the appellate ruling. State v. Daye, 78 N.C. App. 753, 756 (1986). This caveat is not a "limitation on the *de novo* nature of the resentencing proceeding; rather, it is a recognition that the trial court's rulings are always governed by applicable appellate decisions." *Id.* The second caveat to the general rule is that when a conviction or sentence is set aside on direct appeal or collaterally through a motion for appropriate relief, both federal constitutional and state statutory rules limit the trial judge's authority to impose a more severe sentence at resentencing. This section explores these limitations.

II. Federal Constitutional Limitation—*North Carolina v. Pearce*. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), the United States Supreme Court explored the constitutional limitations on imposing a more severe punishment after conviction for the same offense in a new trial. *Pearce* involved two cases, one of which originated in North Carolina. In the North Carolina case, the defendant was convicted in state court and sentenced to prison for twelve to fifteen years. Later, the defendant initiated a post-conviction proceeding and obtained a new trial. The defendant then was retried, convicted, and sentenced to an eight-year term in prison. When the eight-year term was added to the time the defendant already spent in prison, it resulted in a sentence greater than the one initially imposed. The defendant challenged the more severe sentence on constitutional grounds.

The Court held that penalizing a defendant for having successfully pursued a right of appeal or collateral attack violates due process. *Id.* at 724. It continued, stating that due process "requires that vindictiveness against a defendant for having successfully attacked [a] first conviction must play no part" in the sentence imposed after a new trial and that a defendant must be "freed of [the] apprehension" of vindictiveness

that might "deter [his or her] exercise of the right to appeal or collaterally attack" a conviction. *Id.* at 725. Because of this, the Court concluded that "whenever a judge imposes a more severe sentence . . . after a new trial, the reasons for his doing so must affirmatively appear." *Id.* at 726. Those reasons must be based on "objective information" regarding "identifiable conduct" by the defendant after the original sentencing. *Id.* Thus, *Pearce* allows for a more severe sentence based on conduct that occurs after the initial sentencing, provided the reasons are clearly set forth in the record so that the reviewing court can verify that the increased sentence did not result from vindictiveness. Subsequent cases have restricted *Pearce's* application. For example, in *Alabama v. Smith*, 490 U.S. 794, 801-02 (1989), the Court held that *Pearce's* presumption of vindictiveness does not apply when the original sentence was entered after a guilty plea. Because North Carolina law provides protection greater than *Pearce's* constitutional floor, *see* Section III below, an extended discussion of the Court's subsequent limitations of *Pearce* is not included here. However, a full discussion of that topic can be found in WAYNE R. LAFAVE, ET AL., CRIMINAL PROCEDURE § 26.8 (3d ed. 2007).

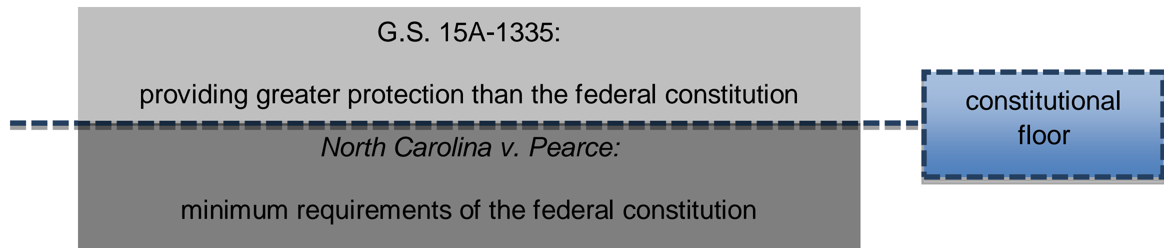
III. State Statutory Limitation—G.S. 15A-1335

Figure 1. Text of G.S. 15A-1335.

> **§ 15A-1335. Resentencing after appellate review.**
> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served. This section shall not apply when a defendant, on direct review or collateral attack, succeeds in having a plea of guilty vacated.

A. **Generally.** G.S. 15A-1335 provides that when a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, that is more severe than the prior sentence less the portion of the prior sentence previously served. *See Hemby,* 333 N.C. at 335; *Swimm,* 316 N.C. at 31. This provision generally embodies the rule of *North Carolina v. Pearce*, but is more restrictive than the rule set out in that case. G.S. 15A-1335 is a blanket prohibition on the imposition of a more severe sentence. Thus, while *Pearce* permits a more severe sentence to be imposed if articulated factors would support it, G.S. 15A-1335 does not. This means that North Carolina statutory law offers greater protection to defendants than does federal constitutional law. Official Commentary to G.S. 15A-1335 (recognizing this point); State v. Mitchell, 67 N.C. App. 549, 551 (1984) ("North Carolina has changed that part of … [*Pearce*] which would have allowed a more severe sentence").

Figure 2. Comparing *Pearce* and G.S. 15A-1335



B. To What Sentences Does the Statute Apply? G.S. 15A-1335 applies when the original conviction resulted from a guilty verdict rendered by a jury. It does not apply:

- When the original sentence was imposed pursuant to a guilty plea. G.S. 15A-1335 (this was a 2013 legislative change, S.L. 2013-385, sec. 3 that overrides earlier case law holding that the statute applies to such convictions, *see, e.g.,* State v. Wagner, 356 N.C. 599, 602 (2002)). As discussed in Section II above, *Pearce* offers no protection when the original sentence was entered pursuant to a guilty plea; in this respect the *Pearce* rule and the state statute now provide parallel (non)protection.
- To a *de novo* appeal from district to superior court. *See* State v. Burbank, 59 N.C. App. 543, 546-47 (1982). Note that there is no *constitutional* impediment to imposing a more severe sentence when a defendant appeals from a conviction in district court and is convicted in superior court. *See* Colten v. Kentucky, 407 U.S. 104, 116 (1972) (*Pearce* presumption of vindictiveness not appropriate in two-tier de novo court system). This is a second area of parallel (non)protection by the federal constitution and the state statute. *But see* State v. Midgett, 78 N.C. App. 387, 392 (1985) (not mentioning *Colten* and incorrectly citing *Wasman v. United States*, 468 U.S. 559 (1984), to support its statement that a presumption of vindictiveness can arise when a defendant receives an increased sentence in superior court after a trial *de novo*; because the statement in *Midgett* is contrary to *Colten*, it should be considered erroneous).
- When a prayer for judgment results in a sentence for an offense for which the court previously had arrested judgment. *See* State v. Pakulski, 106 N.C. App. 444, 452-53 (1992) (State prayed for judgment on felonies that constituted predicate offenses for felony-murder conviction after murder conviction was overturned and State opted not to retry the defendants for murder; imposition of punishment for these offenses "[did] not constitute a resentencing within the meaning of G.S. 15A-1335"). For more about prayer for judgment continued, see the Benchbook chapter here.

C. "Same Offense" or "Different Offense Based on the Same Conduct." By its terms, G.S. 15A-1335 applies when the defendant is being resentenced "for the same offense[] or for a different offense based on the same conduct." Thus, when a defendant is sentenced at his or her first trial for possession with intent to sell or deliver cocaine (PWISD) and after a successful appeal later receives a higher sentence for sale of cocaine, no violation occurs; the offenses are neither the

same nor based on the same conduct. State v. Wray, __ N.C. App. __, 747 S.E.2d 133, 137 (2013). This is true even if both offenses are elevated to a Class C under the state's (now modified) habitual felon law. *Id.* (no violation where at the first trial, the defendant was found guilty of PWISD (Class H felony), to have attained habitual felon status, and sentenced, under then applicable habitual felon law, as a Class C felon to 136–173 months; on retrial after a successful appeal, he was found guilty of PWISD and sale of cocaine (Class G felony) and of having attained habitual felon status; the trial court consolidated the drug offenses so that the Class G more serious felony controlled, applied habitual felon status, and sentenced the defendant to 142–180 months; although the defendant was sentenced as a Class C habitual felon at both trials and the second sentence was longer than the first, no violation of G.S. 15A-1335 occurred: "when the trial court sentenced defendant for the sale of cocaine at the second trial, it was the first time defendant received a sentence for the sale of cocaine. [G.S.] 15A-1335 does not apply here because the trial court did not impose a more severe sentence for 'the same offense'").

D. Determining Whether the New Sentence is More Severe

1. **Generally.** In most cases, determining whether the new sentence is more severe than the original sentence is a simple matter. In *State v. Holt*, 144 N.C. App. 112, 116-17 (2001), for example, the court of appeals easily concluded that imposition of a life sentence was more severe than the original sentence of 196–245 months in prison.
2. **Life Sentences.** Any number of life sentences, even if imposed consecutively, cannot be considered more severe than a single death sentence. State v. Goode, 211 N.C. App. 637, 640 (2011) (no violation of G.S. 15A-1335 when after the defendant's two death sentences for murder were vacated the trial judge imposed two consecutive life sentences); State v. Oliver, 155 N.C. App. 209, 212 (2002) (same).
3. **Multiple Sentences**
   a. **Generally.** Even when multiple sentences are involved, the application of the rule is generally straightforward: The statute bars imposing an increased sentence for any of the convictions, even if the total term of imprisonment does not exceed that of the original sentence. State v. Daniels, 203 N.C. App. 350, 352-54 (2010) (the defendant was sentenced to consecutive terms of 307–378 months for first-degree rape and 133–169 months for first-degree kidnapping; after a successful appeal, the trial court resentenced the defendant to 370–453 months for first-degree rape and to a consecutive term of 46–65 months for second-degree kidnapping; the resentencing violated G.S. 15A-1335 because the trial court imposed a more severe sentence for the rape conviction; the court rejected the State's argument that when applying G.S. 15A-1335, the court should consider whether the new aggregated sentences are greater than the aggregated original sentences); *see also Oliver*, 155 N.C. App. at ("When multiple sentences are involved [G.S.] 15A-1335 bars the trial court from imposing an increased sentence for any of the convictions, even if the total term of imprisonment does not exceed that of the original sentence.").
   b. **Replacing Concurrent or Consolidated Sentences with Consecutive Sentences.** The mere fact that the resentencing

judge replaces concurrent sentences with consecutive sentences does not automatically render the new sentence more severe, provided neither the individual sentences nor the aggregate sentence exceeds that originally imposed. *Oliver,* 155 N.C. App. at 211 (no violation occurred when the original sentence included concurrent death sentences and the new sentence consisted of consecutive life sentences); State v. Ransom, 80 N.C. App. 711, 713-14 (1986) (the defendant initially received a consolidated sentence of twenty years for multiple offenses; after that sentence was overturned, the court sentenced him to six consecutive three-year sentences, for a total of eighteen years; the new sentence did not violate G.S. 15A-1335).

c. **Other Changes to Consolidated Sentences.** Nothing prevents the resentencing court from changing the way the convictions originally were consolidated, provided that the defendant is not sentenced more severely. *See Ransom*, 80 N.C. App. at 713 ("While G.S. 15A-1335 prohibits trial courts from imposing stiffer sentences upon remand than originally imposed, nothing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand.").

The trickiest issues regarding determining whether the new sentence is more severe deal with consolidated sentences imposed under the Fair Sentencing Act (FSA). *See* State v. Hemby, 333 N.C. 331 (1993) (holding that G.S. 15A-1335 was violated in a case involving multiple offenses and consolidation under the FSA); State v. Nixon, 119 N.C. App. 571 (1995) (similar). However most of the FSA cases already have cycled through the system. Also, the FSA cases proved tricky because of then-effective provisions regarding sentencing for consolidated offenses. Because Structured Sentencing requires that when consolidating convictions, punishment for the most serious of the consolidated offenses controls, G.S. 15A-1340.15(b) (felonies); G.S. 15A-1340.22(b) (misdemeanors), similar issues are unlikely to arise under current sentencing law. Thus, while the relevant cases have been cited in this paragraph, they receive no extended treatment here.

4. **Finding New Sentencing Factors.** The fact that a resentencing judge found new aggravating factors does not make the new sentence more severe, so long as those findings are not used to impose a longer sentence. *See Hemby*, 333 N.C. at 334 ("Although a trial judge may find altogether new aggravating and mitigating circumstances at a resentencing hearing …, such findings cannot justify a sentence which is more severe than the original sentence imposed on the same offense[]."); *see also* State v. Swimm, 316 N.C. 24, 32-33 (1986) (the defendant's good behavior while in prison during the interval between initial incarceration and resentencing may constitute a mitigating factor; the defendant's bad conduct during this period may be found as an aggravating factor to be used in determining whether to impose a sentence not greater than the one originally imposed); State v. Smith, 73 N.C. App. 637, 639 (1985) ("the restriction on resentencing is not against

finding new factors in aggravation, but on imposing a more severe sentence than before").

5. **Imposing Same Sentence When Fewer Aggravating Factors Found.** The fact that the resentencing judge imposed the same sentence after finding fewer aggravating factors than were found at the original sentencing hearing does not run afoul of the statute. *See* State v. Mitchell, 67 N.C. App. 549, 551-53 (1984) (rejecting the defendant's argument that it was error for the trial judge to impose an identical sentence on resentencing when six aggravating factors were originally found and only two were found at resentencing).

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

E. **Exception: The Statutorily Mandated Sentence.** G.S. 15A-1335 does not apply when the higher sentence is statutorily mandated. State v. Williams, 74 N.C. App. 728, 729-30 (1985) (in this armed robbery case, after a new trial was ordered and the defendant again was convicted, the trial judge imposed a 14-year sentence, two years more than the original sentence; the court held that G.S. 15A-1335 did not apply because the statute then in effect provided that an armed robbery conviction had a mandatory minimum term of at least 14 years; thus, the trial judge had no discretion to impose a sentence of less than 14 years); State v. Kirkpatrick, 89 N.C. App. 353, 354-55 (1988) (after being convicted of felonious possession of stolen property and of having achieved habitual felon status, the trial court sentenced the defendant to three years for possession and to 15 years for being a habitual felon; after the appellate court held that the trial court erred by separately sentencing the defendant for being a habitual felon, the trial court resentenced the defendant to 15 years for felonious possession while being a habitual felon; on a second appeal, the court citied *Williams* and held that the new felony possession sentence did not violate G.S. 15A-1335 because the habitual felon statute required sentencing as a Class C felony and that under the law then in effect, the presumptive sentence at that Class was 15 years).

This exception sometimes arises when the first judge sentences the defendant using the wrong sentencing grid, *see* G.S. 15A-1340.17 (setting out the sentencing grid), or in the wrong cell on the grid, *id.,* resulting in a sentence that is too short given the felony class of the offense of conviction and the defendant's prior record level. Correcting this error on resentencing does not run afoul of G.S. 15A-1335 because the proper sentence is statutorily mandated. *See* State v. Cook, __ N.C. App. __, 738 S.E.2d 773, 775 (2013) (the trial court did not violate G.S. 15A-1335 when on remand it sentenced the defendant to a term that was longer than he originally received; the trial court initially imposed an illegal term, sentencing the defendant to a presumptive range sentence of 120–153 months; the correct presumptive range sentence for the defendant's class of offense and prior record level was 135–171 months; when the trial court imposed a presumptive range of 135–171 months on remand, it was imposing a statutorily mandated sentence); State v. Powell, __ N.C. App. __,

750 S.E.2d 899, 901-02 (2013) (in a case where the trial court initially sentenced the defendant correctly but then erroneously thought it had used the wrong sentencing grid and re-sentenced the defendant to a lighter sentence using the wrong grid, the court remanded for imposition of the initial correct but more severe sentence; the court noted that G.S. 15A-1335 did not apply because the higher initial sentence was statutorily mandated).

When cases are consolidated under Structured Sentencing, the most serious offense controls. G.S. 15A-1340.15(b) (felonies); G.S. 15A-1340.22(b) (misdemeanors). Although a judge is never statutorily mandated to consolidate sentences, when he or she does so, the sentence for the most serious offense consolidated is considered to be statutorily mandated for purposes of G.S. 15A-1335. This rule holds even if fewer offenses are consolidated in the resentencing. State v. Skipper, 214 N.C. App. 556, 557-59 (2011) (after the defendant was convicted of felony breaking and entering, larceny, and possession of stolen goods and found to be a habitual felon, the trial court consolidated the offenses and gave the defendant a sentence of 125—159 months; the appellate court vacated the larceny conviction and remanded for resentencing; at resentencing the trial court consolidated the offenses and sentenced the defendant to 125—159 months; the court rejected the defendant's argument that because he received the same sentence even after one of the convictions was vacated G.S. 15A-1335 was violated; the court reasoned that having consolidated the sentences, the trial court was required to sentence the defendant for the most serious offense, which it did at the initial sentencing and the resentencing).

Case law suggests that a sentence is not statutorily mandated if a judge had discretion impose a sentence that is equal to or lighter than the original sentence. In *State v. Holt,* 144 N.C. App. 112, 113 (2001), the defendant was convicted of second-degree murder. At her first sentencing, the trial judge found two aggravating factors, one mitigating factor, and that the aggravating factors outweighed the mitigating factor. *Id.* The judge sentenced the defendant in the aggravated range under Structured Sentencing (SSA) as a Class B2 felon to a term of imprisonment of 196—245 months. *Id.* The defendant appealed and the court of appeals held that because of the date of the offense, the FSA, not the SSA applied. *Id.* The case then was remanded for resentencing under the FSA. At the resentencing, the trial court found two aggravating factors and five mitigating factors, but again determined that the aggravating factors outweighed the mitigating factors. *Id.* at 114. The trial court sentenced the defendant in the aggravated range as a Class C felon under the FSA to a term of life imprisonment. The defendant challenged her new sentence, contending that it violated G.S. 15A-1335. *Id.* at 116. The court of appeals concluded that the sentence imposed on resentencing—life imprisonment—was not statutorily mandated. The court noted that under the FSA, "the presumptive sentence for a Class C felony was fifteen years" but a Class C felon could have been punished by imprisonment up to 50 years or life, by a fine, or by both imprisonment and a fine. *Id.* at 117. Thus, it concluded, "life imprisonment was not a statutorily mandated sentence." *Id.* Because the life sentence exceeded the original sentence of 196—245 months, the court vacated and remanded for a new sentencing hearing.

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