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Relief from (Un?)Fair Sentencing

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One of our loyal readers asked for our take on the provision in the motion for appropriate relief (MAR) statute that allows a defendant to seek relief at any time when "[t]here has been a significant change in law, either substantive or procedural, applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of

the changed legal standard is required." G.S. 15A-1415(b)(7). In particular, the reader asked us to consider whether that provision allows relief for an inmate who received a much longer sentence under Fair Sentencing than he would have received for the same crime under Structured Sentencing. A discussion of an illustrative case can be found here.

When an appellate court decision creates a new rule of law, the question of whether that rule applies retroactively can be a complicated one. Fortunately for all of us, my colleague Jessica Smith wrote a really helpful paper on how to apply *Teague v. Lane* or *State v. Rivens* to determine whether a judge-made rule applies retroactively. When a new rule is created by statute, the retroactivity analysis is at least a little easier—it is essentially a question of statutory interpretation. With respect to Structured Sentencing, G.S. 15A-1340.10 says the law applies to offenses that occur on or after October 1, 1994, and the session law enacting Structured Sentencing, S.L. 1993-538, expressly said that "[p]rosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

So, it seems clear enough that retroactive application is not required as a matter of law. But could the final clause of G.S. 15A-1415(b)(7), "retroactive application of the changed legal standard *is*

required," be interpreted to mean something like "is required" *in the interests of justice*? It could, but the commentary from the Criminal Code Commission suggests that it should not. The commentary says this ground for an MAR should "be used when *other decisions or statutes* impose the requirement of retroactivity, it does not create such a requirement" (emphasis added).

The General Assembly has indicated its realization that some Fair Sentencing sentences are harsher than their Structured Sentencing analogues. In the 2005 Appropriations Act the legislature called on the Post-Release Supervision and Parole Commission to report on the total number of parole-eligible Fair Sentencing and Pre–Fair Sentencing inmates and to compare their time serviced to comparable inmates sentenced under Structured Sentencing. S.L. 2005-276, Sec. 17.24. They put it to an even finer point in 2007, requiring the Parole Commission to "reinitiate the parole review process for each offender who has served more time than that person would have under Structured Sentencing." S.L. 2007-323, Sec. 17.11(c). But even as they highlight the issue, to a certain degree these mandates reinforce the notion that any remedy for long-serving Fair Sentencing inmates rests within the power of the executive branch, not the judiciary.