Spot Sentencing

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Every cell on the felony sentencing grid is divided into three ranges of permissible minimum sentences—mitigated, presumptive, and aggravated. Most defendants (69 percent) are sentenced in the presumptive range, about a quarter (27 percent) are sentenced in the mitigated range, and the remaining 4 percent are sentenced in the aggravated range. At the low end of the grid the difference between the ranges is not great in terms of total time to be served. For a first-time offender convicted of a Class I felony, for instance, the difference between the shortest and longest possible minimum sentences is 5 months. Farther up the grid, however, the difference is vast. Four years separate the low end of the mitigated range from the high end of the aggravated range for a Class C, Prior Record Level I defendant. Put another way, when you look across all three sentencing ranges there are 49 permissible minimum sentences available to the judge in that cell of the grid.

Despite the availability of so many permissible minimum sentences, the Sentencing Commission has long noted an interesting phenomenon with respect to sentence selection. Over three-quarters of all active sentences are located on one of four particular "spots" on the grid: the lowest spot of the mitigated range (18.5 percent); the lowest spot of the presumptive range (29.1 percent); the highest spot of the presumptive range (28.3 percent); and the highest spot of the aggravated range (3.1 percent). Amy Craddock & Tamara Flinchum, *Structured Sentencing Statistical Report for Felonies and Misdemeanors, Fiscal Year 2009/10*, N.C. Sentencing & Policy Advisory Comm'n (Jan. 2011), at 21–22.

That sentences tend to congregate on the edges of the presumptive range is not surprising. Many such sentences are the product of a plea agreement, and the outer extremes of the presumptive range serve natural anchors in the negotiation. (There's a rich literature on "anchoring" and "framing" in the context of plea bargaining and judicial decisionmaking. *See, e.g.*, Stephen Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2512–19 (2004).) The edges of the presumptive range likewise have a certain gravitational pull when sentencing is left in the court's discretion, especially when you consider that those bookends have a one-month overlap with the top and bottom of the mitigated and aggravated ranges, respectively. It's easier to order a top-of-the-presumptive-range sentence than it is to order the equivalent low-end aggravated sentence; no additional findings are required for sentences in the presumptive range, meaning there's no need to worry about additional forms or troublesome *Blakely* issues.

On that last point, defendants have over the years argued that a sentence at the very top of the presumptive range is, in light of the overlap between the ranges, essentially an aggravated sentence and thus may not be imposed without findings in aggravation. Our courts have universally rejected that argument, most recently in *State v. Twitty*, __ N.C. App. __ (May 17, 2011), in which the court said it "borders on the frivolous." *See also* State v. Ramirez, 156 N.C. App. 249 (2003) ("The fact that the trial court could have found aggravating factors and sentenced defendant to the same term does not create an error in defendant's sentence."). That issue is well settled.

One final thought that comes to mind is that sentences of the same length from two different sentencing ranges are not identical in every respect. For example, when a defendant's probation is revoked a judge has authority to reduce the defendant's suspended within the grid cell *and within the sentencing range* used for the initial suspended sentence. G.S. 15A-1344(d1). So a defendant initially sentenced to the top of the mitigated range would, upon revocation of probation, be eligible for a sentence reduction to the bottom of the mitigated range, while a defendant with the

equivalent bottom-of-the-presumptive-range sentence could go no lower.