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North Carolina's Habitual Felon and Violent Habitual Felon Laws

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Introduction

The General Assembly has addressed the issue of criminal recidivism in several ways. Some of the provisions that address recidivism are general; that is, they apply to a wide variety of criminal offenses. For example, defendants with extensive criminal histories are subject to greater punishment under structured sentencing. *See* G.S. 15A-1340.14, 15A-1340.21. Other provisions are specific, such as the statutes governing habitual driving while impaired, G.S. 20-138.5, or habitual misdemeanor assault, G.S. 14-33.2.

This bulletin concerns two closely related provisions that specifically target repeat serious offenders: the habitual felon laws, G.S. 14-7.1 through 14-7.12, and the violent habitual felon laws, G.S. 14-7.7 through 14-7.6. The habitual felon laws were enacted in 1967. In simple terms, they provide for increased punishment for a defendant who, having already been convicted of three felonies, commits a fourth. The violent habitual felon laws were enacted separately, in 1994. In simple terms, they provide for a mandatory sentence of life in prison without the possibility of parole for a defendant who, having already been convicted of two violent felonies, commits a third.

The habitual felon and violent habitual felon statutes do not define crimes. Rather, they are penalty enhancement provisions. Thus being a habitual felon, or a violent habitual felon, is a status, not a crime, and a defendant cannot be prosecuted simply for being a habitual felon, or a violent habitual felon, without a substantive felony, or violent felony, to which the recidivist charge[1] can attach.

The habitual felon and violent habitual felon laws have created terminological confusion. Courts have referred to the prior convictions that render the defendant a habitual felon or a violent habitual felon as "previous felonies," *State v. Cogdell*, 165 N.C. App. 368, 371 (2004), "predicate felon[ies]," *State v. Brewington*, 170 N.C. App. 264, 280 (2005), and "underlying felonies," *State v. Scott*, 167 N.C. App. 783, 786 (2005). Courts have used confusingly similar terms to refer to the new offense to which the recidivist charge attaches, describing that offense as the "underlying felony," *State v. Davis*, __ N.C. App. __, 650 S.E.2d 612, 617 (2007), the "substantive felony," *State v. Cogdell*, 165 N.C. App. 368, 373 (2004), the "underlying substantive felony," *State v. Glasco*, 160 N.C. App. 150, 160 (2003), and the "predicate substantive felony," *State v. Scott*, 167 N.C. App. 783, 786 (2005).

For the sake of clarity, this bulletin will use the term "previous felony," or "previous violent felony," to describe the prior convictions that render the defendant a habitual felon or a violent habitual felon. This bulletin will use the term "substantive felony," or "substantive violent felony," to describe the new offense to which the recidivist charge attaches. This bulletin will not use, except when quoting court opinions, the terms "underlying" or "predicate," as those terms are ambiguous.

Qualifying Substantive Felonies and Violent Felonies

Any offense that is a felony under state law can serve as a substantive felony to which a habitual felon charge may attach. *See* G.S. 14-7.2, 14-7.6 ("When an habitual felon . . . commits any felony under the laws of the State of North Carolina," he or she must be sentenced under the habitual felon provisions.). This includes offenses that are felonies only by virtue of their own recidivist

1. Because the habitual felon laws do not define crimes, it is arguably inaccurate to refer to a habitual felon "charge." However, the usage is so convenient, and so universal, that it is adopted in this bulletin.

provisions, such as habitual driving while impaired, G.S. 20-138.5, *see State v. Baldwin*, 117 N.C. App. 713 (1995), or habitual misdemeanor assault, G.S. 14-33.2, *see State v. Smith* 139 N.C. App. 209 (2000).[2] It also includes felony speeding to elude arrest, G.S. 20-141.5, even though speeding to elude arrest also can sometimes be a misdemeanor. *See State v. Scott*, 167 N.C. App. 783, 786-87 (2005). And, although the Court of Appeals briefly held that simple possession of cocaine was a misdemeanor, the North Carolina Supreme Court has clarified that it, too, is a felony that can serve as a substantive felony. *See State v. Jones*, 358 N.C. 473 (2004).

The violent habitual felon statutes provide for enhanced punishment for certain defendants who commit "a violent felony." G.S. 14-7.12. The statutes define "violent felony" to encompass all, and only, Class A through E felonies. *See* G.S. 14-7.7. This excludes some felony offenses that might intuitively be considered violent. For example, it excludes a number of felony assaults, such as assault inflicting serious bodily injury, G.S. 14-32.4(a), assault by strangulation, G.S. 14-32.4(b), aggravated assault on a handicapped person, G.S. 14-32.1(e), elder abuse, G.S. 14-32.3, and assault on a law enforcement officer inflicting serious bodily injury, G.S. 14-34.7(a). The statutory definition also includes a number of offenses that might not intuitively be considered violent, such as embezzlement of more than $100,000, G.S. 14-90; obtaining more than $100,000 by false pretenses, G.S.14-100; trafficking in stolen identities, G.S. 14-113.20A, 14-113.22(a1); making a false report about a weapon of mass destruction, or perpetrating a hoax involving a false weapon of mass destruction, G.S. 14-288.23, 14-288.24; and a variety of drug manufacturing and trafficking offenses, such as manufacturing methamphetamine, G.S. 90-96(b)(1a), and trafficking in more than 10,000 pounds of marijuana, G.S. 90-95(h)(1)(d), more than 400 grams of cocaine, G.S. 90-95(h)(3)(c), more than 200 grams of methamphetamine, G.S. 90-95(h)(3b)(c), more than 14 grams of heroin, G.S. 90-95(h)(4)(b), and so forth.

Qualifying Previous Felonies and Violent Felonies

Previous Felonies

In general, a conviction constitutes a previous felony conviction if it is a conviction for "an offense which is a felony under the laws of the State or other sovereign" where the conviction took place, "regardless of the sentence actually imposed." G.S. 14-7.1. However, there are several exceptions to the general rule. The following are not qualifying previous felonies.

- Convictions for "federal offenses relating to the manufacture, possession, sale and kindred offenses involving intoxicating liquors." G.S. 14-7.1.
- Convictions for habitual misdemeanor assault under G.S. 14-33.2, usually.[3]

2. However, some convictions of habitual misdemeanor assault cannot serve as previous convictions for habitual felon purposes. *See infra* note 3 and accompanying text.

3. Convictions for habitual misdemeanor assault are felonies and so, without some other provision to the contrary, would qualify. However, in 2004, the habitual misdemeanor assault statute, G.S. 14-33.2, was amended to provide that "[a] conviction under this section shall not be used as a prior conviction for any other habitual offense statute." The ratification clause regarding that amendment states that it became "effective December 1, 2004, and applies to offenses committed on or after that date. Prosecutions for offenses committed before the effective date of this part are not abated or affected by this part, and the statutory provisions that would be applicable but for this part remain applicable to those prosecutions." SL 2004-186, Sec. 10.2. It is not entirely clear whether the "prosecutions" and "offenses" to which the ratifica-

- Convictions incurred prior to July 6, 1967. *See* G.S. 14-7.1.
- North Carolina convictions incurred prior to July 1, 1975, if based on a plea of no contest. *See State v. Petty*, 100 N.C. App. 465, 467-68 (1990).[4]
- Convictions that have been pardoned. *See* G.S. 14-7.1.

Questions might arise regarding at least three additional classes of cases:

- Out-of-state convictions for offenses that are felonies under the law of the foreign jurisdiction but that would be misdemeanors if committed in North Carolina.
- Offenses that were misdemeanors at the time of the previous convictions but now are felonies.
- Offenses that were felonies at the time of the previous convictions but now are misdemeanors.

There are no North Carolina appellate decisions on point as to any of these issues. The first is the simplest, for G.S. 14-7.1 refers to the classification of the offense "under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned." There is no suggestion that the offense needs to be compared or analogized to North Carolina law, unlike, for example, the provisions in G.S. 14-7.7(b) that apply to violent habitual felon proceedings. (Those provisions are discussed below.) Thus, the language of G.S. 14-7.1 weighs strongly in favor of using the classification of the jurisdiction in which the conviction was incurred.[5]

The second and third issues both involve convictions of offenses that have been reclassified since the conviction—either "upgraded" from misdemeanors to felonies, or "downgraded" from felonies to misdemeanors. The text of G.S. 14-7.1 is less clear on these points, and again, there are no appellate cases on point. The argument for judging a previous conviction by the present classification of the offense is twofold. First, as explained below, in the violent habitual felon context, the classification of the previous conviction at the time of the violent habitual felon proceeding controls, not the classification at the time the previous conviction was incurred. *See* G.S. 14-7.7(b)(2). Second, in the different context of calculating a defendant's prior record level under structured sentencing, the current classification of previous convictions controls the number of points assigned to the convictions. *See* G.S. 15A-1340.14(c). However, these parallels are undermined by

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tion clause refers are habitual misdemeanor assault offenses (in which case convictions for habitual misdemeanor assaults that were committed prior to December 1, 2004, may still be used to support habitual felon allegations) or substantive felony offenses that result in habitual felon prosecutions (in which case convictions for habitual misdemeanor assaults—regardless of when the assaults were committed—may not be used to support a habitual felon allegation unless the substantive felony was committed prior to December 1, 2004). The North Carolina appellate courts have not considered an appropriate test case, which would involve a substantive felony committed after December 1, 2004, but a conviction for a habitual misdemeanor assault committed before December 1, 2004. The cases that are closest to this issue do not settle it. *See State v. Leeper,* 356 N.C. 55 (2002); *State v. Artis,* 181 N.C. App. 601, 602 n.1 (2007); *State v. Stephens,* No. COA05-1218, 2006 WL 1879207, at *8 (N.C. Ct. App. July 5, 2006) (unpublished); *State v. McGee*, No. COA-05-1069, 2006 WL 389796, at *1-2 (N.C. Ct. App. Feb. 21, 2006) (unpublished).

4. The reason for the distinction is that, prior to the 1975 enactment of G.S. 15A-1022(c), a no contest plea resulted in the imposition of a sentence without an adjudication of guilt. Afterwards, however, a court accepting a no contest plea was required to establish a factual basis for the plea, and upon acceptance of the plea adjudicated the guilt of the defendant. *See Petty,* 100 N.C. App. at 467-68.

5. The rule is otherwise in some other states, *see, e.g.*, 6 Wayne R. LaFave, et al., *Criminal Procedure* § 26.6(b) (3d ed. 2007), but the result in each jurisdiction is dictated by "the phraseology of the [recidivist] statute" in question, R. P. Davis, Annotation, *Determination of Character of Former Crime as a Felony, so as to Warrant Punishment of an Accused as a Second Offender,* 19 A.L.R.2d 227 (1951-2005).

the fact that both the violent habitual felon and the structured sentencing laws contain specific statutory provisions that mandate judging a previous conviction by the present classification of the offense; that stands in stark contrast to G.S. 14-7.1, which contains no comparable language. The majority of cases in other jurisdictions support judging a conviction by its classification at the time it was incurred, *see* Davis, *supra* note 5, § 5 (collecting cases), and this appears to be the better view under North Carolina's habitual felon statutes as well.

Previous Violent Felonies

Previous violent felonies are defined by statute to include: "(1) All Class A through Class E felonies[,] (2) Any repealed or superseded offense substantially equivalent to the offenses listed in subdivision (1)[, and] (3) Any offense committed in another jurisdiction substantially similar to the offenses set forth in subdivision (1) or (2)." G.S. 14-7.7(b). A previous conviction as a habitual felon does not constitute a previous violent felony. *See* G.S. 14-7.7(a).

The simplest case is an in-state conviction that was Class E or higher when incurred and that remains Class E or higher at the time of the violent habitual felon proceeding; such a conviction plainly qualifies as a previous violent felony. "Upgraded" in-state convictions likewise qualify. In other words, an in-state conviction that was lower than Class E when incurred, but that, as a result of statutory amendment, would be Class E or higher at the time of the habitual felon proceeding, is a previous violent felony, under the second prong of the definition. *See State v. Wolfe*, 157 N.C. App. 22, 37 (2003) (holding that conviction for voluntary manslaughter, which was a Class F felony at the time the conviction was incurred, but which was a Class D felony at the time of the violent habitual felon proceeding, was a conviction of a "superseded offense substantially equivalent to" a current Class D felony, and therefore was a qualifying previous violent felony)[6]; *State v. Mason*, 126 N.C. App. 318, 323-24 (1997) (same, as to previous convictions for voluntary manslaughter and assault with a deadly weapon inflicting serious injury; rejecting argument that this violates the Ex Post Facto Clause). Although there is no case law on point, the converse is likely also true; a "downgraded" offense that was Class E or higher at the time of conviction but that was lower than Class E at the time of the violent habitual felon proceeding would likely be held to be a "repealed or superseded offense" that is *not* "substantially equivalent to" a current Class E or higher felony, and therefore not a qualifying previous violent felony.

Out-of-state convictions work the same way. The simplest case is an out-of-state conviction for an offense that is substantially similar to a North Carolina offense that was Class E or higher when the out-of-state conviction was incurred and that remained Class E or higher at the time of the violent habitual felon proceeding; such a conviction would qualify as a previous violent felony. "Upgraded" offenses also qualify; that is, if the analogous North Carolina offense was lower than Class E when the out-of-state conviction was incurred, but was Class E or higher at the time of the violent habitual felon proceeding, the out-of-state conviction qualifies as a previous violent felony under the third prong of the definition. *See State v. Stevenson*, 136 N.C. App. 235, 245 (1999) (concerning a California conviction for assault with the intent to commit oral copulation; the analogous North Carolina offense is attempt to commit second-degree sex offense, which was a Class H felony at the time the conviction was incurred, but a Class D felony at the time of the vio-

6. Although *Wolfe* refers to the classification of the conviction "at the time the [violent habitual felon] case went to trial." 157 N.C. App. at 37, it is doubtful that a habitual felon charge could be predicated on a previous conviction that was Class E or higher at the time of the violent habitual felon trial but that was lower than Class E at the time when the substantive felony was committed.

lent habitual felon proceeding; the conviction was properly counted as a previous violent felony). Again, there is no case law on "downgraded" offenses, but they likely would likely be held not to qualify.

Number, Timing, and Other Issues Regarding Previous Felonies and Violent Felonies

Number

A habitual felon charge can only be brought against a defendant who has three previous felony convictions. *See* G.S. 14-7.1. In other words, it increases the punishment for a defendant's fourth "strike." A violent habitual felon charge can only be brought against a defendant who has two previous violent felony convictions. *See* G.S. 14-7.7. In other words, it increases the punishment for a defendant's third "strike."

Timing

For purposes of habitual felon proceedings, under G.S. 14-7.1, "[t]he commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony," and the third previous felony likewise must have been committed after the defendant was convicted of the second. Similar language appears in G.S. 14-7.7 regarding previous violent felonies. This requirement is sometimes called the requirement of non-overlapping felonies.

For purposes of the requirement of non-overlapping felonies, the date of conviction is the date of the plea or verdict, not the date of sentencing. *See State v. McGee*, 175 N.C. App. 586, 589-90 (2006).

The statute does not explicitly address the situation where a defendant's third previous felony conviction is not obtained until after the defendant has committed a fourth felony offense. For example, suppose a defendant commits a fourth felony while the third felony is pending; is subsequently convicted of the third felony; and only later is arrested, charged, and convicted of the fourth felony. Reasonable arguments can be made both ways regarding the propriety of a habitual felon charge in such a case. The defendant might argue that a habitual felon charge would be improper, first because it would be anomalous for the requirement of non-overlapping felonies to apply to previous felonies but not to the substantive felony, and second because G.S. 14-7.6 provides for enhanced punishment when "an habitual felon . . . commits any felony," which arguably suggests that a defendant must already have obtained habitual felon status, by virtue of three convictions, prior to the commission of the substantive felony. The State might argue that a habitual felon charge is proper because, at the time of the conviction of the substantive felony, the defendant has "been convicted of . . . three felony offenses." G.S. 14-7.1. There is no North Carolina appellate case on point, and the case law from other states is mixed and heavily dependent on the wording of the specific statute at issue. *See generally* Cynthia L. Sletto, Annotation, *Chronological or Procedural Sequence of Former Convictions as Affecting Enhancement of Penalty under Habitual Offender Statutes*, 7 A.L.R.5th 263 (1992-2008) § 7(c)-(d) (collecting cases).

Convictions for Offenses Committed Prior to Eighteen Years of Age

In habitual felon prosecutions, "felonies committed before a person attains the age of 18 years shall not constitute more than one felony." G.S. 14-7.1. In other words, regardless of how many felonies a defendant committed prior to the age of eighteen, only one conviction for such conduct may be used as a previous felony. No similar language appears in G.S. 14-7.7; therefore there is likely no limit to the number of convictions for offenses committed prior to the age of eighteen that may be used as previous violent felonies.

Convictions Used for Other Purposes

If a defendant is prosecuted and convicted as a habitual felon, the previous felonies used to support the habitual felon conviction are not "used up." In other words, if the same defendant, after release from prison, commits another felony offense, the same previous felonies may be used to support the new habitual felon charge. *See State v. Smith*, 112 N.C. App. 512, 517 (1993) ("[B]eing an habitual felon is a status, that once attained is never lost. If the legislature had wanted to require the State to show proof of three new underlying felonies before a new habitual felon indictment could issue, then the legislature could have easily stated such.").

Indeed, it is generally true that previous felonies used for some other purpose may also be used to support a habitual felon charge. Thus, previous convictions of habitual DWI may be used both to support a current charge of habitual DWI and to support a habitual felon charge for which the habitual DWI is the substantive felony. *See State v. Misenheimer*, 123 N.C. App. 156, 157-58 (1996). Likewise, the same previous conviction may be used to support a current charge of felon in possession of a firearm and to support a habitual felon charge for which the felon in possession charge is the substantive felony. *See State v. Glasco*, 160 N.C. App. 150, 160 (2003); *State v. Crump*, 178 N.C. App. 717, 719-22 (2006).

However, previous felonies used to support a habitual felon charge may not be used when determining a defendant's prior record level under structured sentencing. *See* G.S. 14-7.6. The details of this prohibition are discussed below in the section of this bulletin regarding sentencing. Also discussed later in this bulletin is the effect of an acquittal on a habitual felon charge; such an acquittal precludes the State from bringing a subsequent habitual felon charge based on the same previous felonies.

Charging Habitual Felon and Violent Habitual Felon

Relationship of Habitual Felon or Violent Habitual Felon Indictments to Indictments for Substantive Felonies or Violent Felonies

The habitual felon statues provide:

> An indictment which charges a person who is an habitual felon . . . with the commission of any felony . . . must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony.

G.S. 14-7.3. The violent habitual felon statutes contain nearly identical language. *See* G.S. 14-7.9. The statutes seem to suggest both that a *single* indictment should charge both the substantive

felony and the habitual felon charge ("[a]n indictment . . . must . . . also charge that said person is an habitual felon") and that the two charges should be in *separate* indictments ("[t] indictment charging the defendant as an habitual felon shall be separate"). This has prompted the Court of Appeals to recognize the statute's "obvious internal inconsistencies," *State v. Smith*, 112 N.C. App. 512, 514 (1993).

The appellate courts have approved a variety of attempts to comply with these conflicting requirements. In *State v. Young*, 120 N.C. App. 456, 459-60 (1995), the State obtained a single indictment that charged the substantive felony in one count and the habitual felony charge in a separate count, and the Court of Appeals approved the arrangement. In *Smith*, the State obtained an indictment numbered 89 CRS 77510(A) for the substantive felony, and a separate indictment numbered 89 CRS 77510(B) for the habitual felon charge. Again, the Court of Appeals determined that this complied with the statute. *See* 112 N.C. App. at 514. In *State v. Allen*, 292 N.C. 431, 433 (1977), the North Carolina Supreme Court stated that, "[p]roperly construed [the habitual felon statute] clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon." *See also State v. Peoples*, 167 N.C. App. 63 (2004) (approving use of separate indictment to bring habitual felon charge); *State v. Hodge*, 112 N.C. App. 462 (1993) (same). These decisions indicate that the State may bring a habitual felon charge as a separate count in the same indictment as the substantive felony charge, or in a separate indictment with a "B" case number, or in a completely separate indictment with its own case number. However, dicta in *State v. Patton*, 342 N.C. 633, 635 (1996), suggests that the habitual felon charge must be brought in "a separate document," and the overwhelming practice today is to bring a habitual felon charge in a completely separate indictment with its own case number.

Not only may the habitual felon indictment be a separate document from the indictment for the substantive felony, it need not be filed at the same time. The habitual felon indictment may be filed before, together with, or after the indictment for the substantive felony. *See State v. Blakney*, 156 N.C. App. 671, 674-75 (2003) ("The Habitual Felons Act requires two separate indictments, the substantive felony indictment and the habitual felon indictment, but does not state the order in which they must be issued.") However, there are some constraints on the timing of the habitual felon charge. It cannot stand alone; it must be ancillary to a substantive felony. *See State v. Allen*, 292 N.C. 431 (1977). Because it must be ancillary to a substantive felony charge, it may not be brought after the defendant has been convicted of, or pled guilty to, the substantive felony. *See id.*; *see also State v. Bradley*, 175 N.C. App. 234 (2005) (defendant pled guilty to substantive felonies and to habitual felon charge, but sentencing was deferred; prior to sentencing, defendant committed a new felony and agreed to plead guilty to it; improper to sentence defendant as a habitual felon on the new felony, because the habitual felon charge was ancillary to the original substantive felonies and those substantive felonies had been resolved when defendant pled guilty to them).[7]

Although the habitual felon or violent habitual felon indictment must be ancillary to a substantive felony charge, the habitual felon or violent habitual felon indictment need not refer to or specify the substantive felony charge. *See, e.g., State v. Smith*, 160 N.C. App. 107, 124 (2003); *State*

7. There is some tension between *Bradley* and *Blakney*. If, as *Blakney* holds, a habitual felon indictment may be returned prior to the indictment for the substantive felony, it would seem that the habitual felon charge in *Bradley* might be viewed as ancillary to the new felony as well as the original felonies. Perhaps the distinction is that, in *Bradley*, the habitual felon charge was brought before the defendant even committed the new felony, and it is difficult to see how a habitual felon charge could properly be ancillary to a crime that had not yet been committed.

v. Cheek, 339 N.C. 725, 728 (1995) ("Nothing in the plain wording of N.C.G.S. § 14-7.3 requires a specific reference to the predicate substantive felony in the habitual felon indictment. The statute requires that the State give defendant notice of the felonies on which it is relying to support the habitual felon charge; nowhere in the statute does it mention the predicate substantive felony or require it to be included in the indictment."). If the habitual felon indictment does specify the substantive felony charge, such language is mere surplusage; even if the defendant is ultimately convicted of a different felony, he or she may be sentenced as a habitual felon. *See State v. Bowens*, 140 N.C. App. 217, 224-25 (2000) (defendant charged with three substantive felonies; habitual felon charge referred only to one of them; that substantive felony charge was dismissed, but defendant was convicted of the other two; defendant was properly sentenced as a habitual felon because the inclusion of the first substantive felony in the habitual felon indictment was surplusage and defendant was on notice of the State's intent to convict him as a recidivist). Indeed, the habitual felon indictment need not even allege that the defendant committed a substantive felony. *See State v. Roberts*, 135 N.C. App. 690 (1999). Conversely, the indictment for the substantive felony need not state that the defendant is being prosecuted as a habitual felon. *See State v. Sanders*, 95 N.C. App. 494 (1989).

Because a habitual felon or violent habitual felon indictment need not specify the substantive felony charge to which it applies, a single habitual felon or violent habitual felon indictment can apply to an unlimited number of substantive felony charges. *See State v. Patton,* 342 N.C. 633, 634 (1996) ("[A] separate habitual felon indictment is not required for each substantive felony indictment.") Alternatively, the State may elect to bring a habitual felon charge for each substantive felony charge. *See State v. Taylor*, 156 N.C. App. 172, 174 (2003) (stating that "the State may choose to use multiple habitual felon indictments"). Although the Court of Appeals has suggested that the latter procedure may create a confusingly large array of charges, *see id.*, the former can also be awkward. For example, if a defendant is charged with several substantive felonies and the State procures a single habitual felon indictment covering all of them, and if the parties then enter into a plea agreement under which the defendant will plead guilty to all of the substantive felonies but will only be treated as a habitual felon as to one of them, the status of the habitual felon indictment is unclear. It cannot be dismissed, as it is needed with respect to one of the substantive felonies. Yet it must somehow become detached from all but one of the substantive felonies. In effect, the State is fractionally dismissing the habitual felon indictment (dismissing it as to most of the substantive felonies while retaining it as to one), a somewhat unusual procedure as a theoretical matter but one that works in practice.

Contents of Habitual Felon or Violent Habitual Felon Indictments

A habitual felon indictment must set forth:

> [T]he date that prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place.

G.S. 14-7.3.

The violent habitual felon statute contains nearly identical language. *See* G.S. 14-7.9. Thus the statute requires that four facts be alleged in the indictment as to each previous felony:

(1) the date that the previous felony was committed,

(2) the name of the state or other sovereign against whom it was committed,
(3) the date of conviction of the previous felony, and
(4) the court in which the conviction took place.

The appellate courts have not required strict compliance with these statutory requirements. Instead, the courts have focused on whether the habitual felon indictment gives the defendant adequate notice of the previous felonies on which the State seeks to rely. As to (1), *State v. Spruill*, 89 N.C. App. 580 (1988), holds that a variance between the indictment, which in that case alleged that the previous felony was committed on October 28, 1977, and the proof, which in that case was the defendant's stipulation that it took place on October 7, 1977, is not fatal. Of course, if the date in the indictment is so inaccurate that it becomes hard to identify the previous conviction at issue, the courts would likely reach a different result.

As to (2), the Court of Appeals has held that "the name of the state need not be expressly stated if the indictment sufficiently indicates the state against whom the felonies were committed." *State v. Mason*, 126 N.C. App. 318, 323 (1997). In *Mason*, the habitual felon indictment stated that the first previous felony was committed in "Wake County, North Carolina," but as to the second previous felony, stated only that it was committed in "Wake County." The Court of Appeals held that the defendant was put on adequate notice that the second felony was committed in North Carolina because Wake County was linked to North Carolina with respect to the first felony. Likewise, in *State v. Montford*, 137 N.C. App. 495 (2000), the defendant was charged with a substantive felony and as a habitual felon in Carteret County, North Carolina. The habitual felon indictment stated that the previous felonies were committed in Carteret County, but did not specify that they were committed in North Carolina. Again, the Court of Appeals held that the defendant was put on adequate notice. *See also State v. Williams*, 99 N.C. App. 333 (1990) (adequate notice provided where the habitual felon indictment stated that each previous felony was committed in violation of the North Carolina General Statutes, although the indictment did not specifically state that the previous felonies were committed in North Carolina).

As to (3), the Court of Appeals has held on several occasions that the date of conviction of the previous felony is not an essential element of the habitual felon charge. *See*, *e.g.*, *State v. Locklear*, 117 N.C. App. 255, 260 (1994) (upholding amendment of habitual felon indictment and noting that "it was the fact that another felony was committed, not its specific date, which was the essential question in the habitual felon indictment"); *State v. Hargett*, 148 N.C. App. 688 (2002) (same).

As to (4), the Court of Appeals has likewise held that so long as the indictment provides sufficient notice, technical defects in the indictment may be overlooked. *See State v. Lewis*, 162 N.C. App. 277 (2004) (upholding amendment of habitual felon indictment to reflect county of conviction of previous felony, rather than county in which the defendant's probation had been revoked). *Cf. State v. Coltrane*, __ N.C. App. __, 656 S.E.2d 322 (2008) (upholding amendment of felon-in-possession indictment to show that previous felony conviction was obtained in Guilford County Superior Court, not Montgomery County Superior Court, and stating that the defendant was put on adequate notice of the previous felony); *State v. Forte*, No. COA06-595, 2007 WL 817439 at *1-2 (N.C. Ct. App. Mar. 20, 2007) (unpublished) (although the jury was asked to find only that the defendant had been convicted in "Mecklenburg County," rather than "Mecklenburg County Superior Court," that was sufficient to satisfy the statute).

Interestingly, the statute does not expressly require that the habitual felon indictment set forth the nature of the previous felony, that is, the crime of which the defendant was previously convicted. That information is plainly helpful in giving the defendant proper notice, and it is routinely included in habitual felon indictments as a matter of practice. However, several unpublished deci-

sions suggest that the omission of such information, or the inclusion of erroneous information, is not necessarily fatal to a habitual felon indictment. *See State v. Woods,* No. COA05-671, 2005 WL 3291346 at *2 (N.C. Ct. App. Dec. 6, 2005) (unpublished) ("N.C. Gen. Stat. § 14-7.3 does not specifically require the prior convictions be identified in the indictment," so there was no fatal variance where the State alleged that the defendant's previous conviction was for felony breaking and entering but in fact it was for felony breaking and entering a motor vehicle); *State v. Ball*, No. COA04-1582, 2005 WL 1669755 at *3 (N.C. Ct. App. July 19, 2005) (unpublished) (amending indictment to reflect that one previous felony conviction was for drug possession rather than for habitual DWI was permissible because it did not substantially alter the nature of the recidivist charge and the other information in the indictment put the defendant on sufficient notice of the basis of the charge).

Particularly when out-of-state convictions are used as previous felonies, issues may arise regarding whether a particular prior conviction was for a felony offense. The cases are inconsistent as to whether such issues are best addressed as issues regarding the sufficiency of the indictment (which would be jurisdictional issues, best addressed by the trial court before beginning a trial or accepting a plea on the habitual felon charge), or as issues regarding the sufficiency of the evidence (which would be factual issues, to be addressed by a motion to dismiss or resolved by the jury). This issue is discussed at length below, in the section of this bulletin regarding proof of previous felony convictions.

The special pleading requirements of G.S. 15A-928 do not apply to habitual felon indictments. *See State v. Marshburn*, 173 N.C. App. 749 (2005).

Amending and Superseding Habitual Felon or Violent Habitual Felon Indictments

From time to time, the State may seek to amend, or to supersede, a habitual felon indictment. Whether the State may do so depends on whether or not the change that the State seeks to make is a substantial alteration and on the timing of the change.

Amendments would seem to be prohibited by G.S. 15A-923(e) ("A bill of indictment may not be amended."). However, this has been interpreted to prohibit only amendments that "substantially alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598 (1984). Thus the State may amend the indictment so long as the amendment does not substantially alter the charge. Changes to the date, location, and so forth, of the previous felony convictions have generally been held not to be substantial alterations. *See*, *e.g.*, *State v. Lewis*, 162 N.C. App. 277 (2004) (amending date and county of previous conviction did not substantially alter the charge); *State v. Hicks*, 125 N.C. App. 158 (1997) (no substantial alteration where habitual felon indictment amended to state that one, rather than none, of the defendant's previous felony convictions were the result of felonies committed prior to age eighteen); *cf. State v. Coltrane*, __ N.C. App. __, 656 S.E.2d 322, 325-26 (2008) (no substantial alteration to felon-in-possession indictment where indictment amended to reflect correct county in which previous felony conviction was sustained). However, changes to the previous felony convictions themselves, that is, the substitution of one previous conviction for another, have been held to be substantial alterations and therefore not the proper subject of an amendment. *See State v. Little*, 126 N.C. App. 262 (1997).

If it is otherwise proper, an amendment may be permitted as late as the close of the evidence on the habitual felon charge. *Cf.*, *e.g.*, *State v. Hill*, 362 N.C. 169 (2008) (allowing amendment of sex offense indictments at the close of the evidence); *State v. Van Trusell*, 170 N.C. App. 33 (2003) (allowing amendment of armed robbery indictment at the close of the State's evidence).

If the State desires to make a substantial change to a habitual felon indictment, such as replacing an allegation regarding one previous conviction with another, it must do so by superseding the original indictment. This must be done before the trial of the substantive felony begins, or before the court accepts a guilty plea to the substantive felony. *Compare State v. Little*, 126 N.C. App. 262 (1997) (reversing habitual felon conviction because the State procured a superseding indictment that replaced one previous conviction with another after the defendant had been found guilty of several substantive felonies; the Court of Appeals held that superseding after the substantive felony charges had been resolved deprived the defendant of fair notice; "the defendant is entitled to rely, at the time he enters his plea on the substantive felony, on the allegations contained in the habitual felon indictment in place at that time in evaluating the State's likelihood of success on the habitual felon indictment"), *with State v. Cogdell*, 165 N.C. 368, 371-74 (2004) (holding that the State may procure a superseding indictment that contains a substantial alteration after the defendant has been arraigned on the substantive felony, so long as the new indictment is returned before the trial of the substantive felony begins, or before the court accepts a guilty plea to the substantive felony).

The State may also make a minor change by obtaining a superseding indictment, although an amendment is usually more expedient for this purpose. If the State chooses to supersede with a minor change, the State may do so even after the trial of the substantive felony begins, or after the court accepts a guilty plea to the substantive felony, for the defendant was placed on adequate notice by the original indictment. *See State v. Gant*, 153 N.C. App. 136 (2002) (no error in allowing State's motion to continue judgment after the defendant was convicted on the substantive felony, in order for State to seek superseding indictment to correct the date on which one of the previous felonies was committed); *State v. Mewborn*, 131 N.C. App. 495 (1998); *State v. Oakes*, 113 N.C. App. 332 (1994).

Second and Subsequent Habitual Felon or Violent Habitual Felon Indictments

As noted above, previous felonies used to support a charge of habitual felon or violent habitual felon are not "used up," and can be used to support a second or subsequent recidivist charge.[8] However, if a defendant is acquitted of a charge of habitual felon or violent habitual felon, he or she cannot later be indicted as a habitual felon or violent habitual felon based on the same previous felonies. The rationale is not that the previous felonies were "used up"—indeed, they would not have been used at all—but rather that the State, having lost the habitual felon issue once, is collaterally estopped from re-litigating it. *See State v. Safrit*, 145 N.C. App. 541 (2001).[9] Collateral estoppel, or issue preclusion, "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). In criminal cases, defendants are entitled to rely on collateral estoppel because it is part of the Fifth Amendment's double jeopardy guarantee. *See id.* at 445.

Of course, the State would be free to bring a new habitual felon charge based on three different previous felonies, as the issue of whether those convictions can support a habitual felon conviction

8. Of course, because a conviction as a violent habitual felon entails a mandatory life sentence, it would be quite unusual for a defendant to be convicted as a violent habitual felon and later to be prosecuted as a habitual felon or a violent habitual felon.

9. However, the State may use the previous felonies to determine the defendant's prior record level. It is not collaterally estopped from doing so, in part because the standard of proof under which the jury failed to find the three previous felonies is a higher standard than the standard a judge must use at sentencing. *See id.* at 729.

has never "been determined by a valid and final judgment." It is less clear whether there is a collateral estoppel problem if a defendant is acquitted of being a habitual felon, and later the defendant is charged with being a habitual felon based on *some but not all* of the previous felonies used in the earlier habitual felon proceeding. The answer in most circumstances should be no, as any change in the combination of previous felonies would remove the identity of issues that is a requirement for the operation of collateral estoppel. However, the answer could be otherwise if, for example, the jury in the first proceeding returned special verdicts as to each of the previous felonies and found in the defendant's favor as to one of the previous felonies that the State sought to re-use.

Another question left open by *Safrit*—the leading case on collateral estoppel—is whether a defendant, previously found to be a habitual felon, is collaterally estopped from re-litigating his or her status as a habitual felon if he or she is later charged with being a habitual felon using the same previous felonies. Whether collateral estoppel may be used "offensively" against criminal defendants is a point of considerable controversy. There is no North Carolina authority on point and other jurisdictions are split. *Compare*, *e.g.*, *United States v. Pelullo*, 14 F.3d 881, 889 (3d Cir. 1994) (may not), *with*, *e.g.*, *Hernandez-Uribe v. United States*, 515 F.2d 20 (8th Cir. 1975) (may). The United States Supreme Court has twice suggested, but not held, that collateral estoppel cannot be used against criminal defendants. *See United States v. Dixon*, 509 U.S. 688, 710 n. 15 (1993) ("[A] conviction in the first prosecution would not excuse the Government from proving the same facts a second time."); *Simpson v. Florida*, 403 U.S. 384, 386 (1971). As a practical matter, prosecutors would be wise not to attempt to use collateral estoppel to establish a defendant's status as a habitual felon or violent habitual felon unless and until the North Carolina appellate courts approve such an approach.

Procedure

The basic procedure for habitual felon and violent habitual felon prosecutions is set forth in G.S. 14-7.5 and G.S. 14-7.11, respectively. First, the court proceeds on the substantive felony. During this phase of the case, the jury may not be informed of the habitual felon or violent habitual felon charge, *see* G.S. 14-7.5, 14-7.11, nor may the jury be told that the defendant may be sentenced as a Class C felon (or to life, in the case of violent habitual felon) if convicted. *See State v. Wilson*, 139 N.C. App. 544, 547-48 (2000). This is so even if the defendant has previously been convicted as a habitual felon. *See State v. Dammons*, 159 N.C. App. 284, 295-96 (2003).

If the jury finds the defendant guilty of the substantive felony (or if the defendant pleads guilty), the court then proceeds on the habitual felon indictment. The same jury may be used, *see* G.S. 14-7.5, 14-7.11,[10] and if it is used, it need not be re-empaneled, *see State v. Todd*, 313 N.C. 110, 120 (1985); *State v. Keyes*, 56 N.C. App. 75, 78-79 (1982). The case proceeds "as if the issue of habitual felon were a principal charge." G.S. 14-7.5. *See also* G.S. 14-7.11 (similar, as to violent habitual felon). If the defendant is convicted, the court enters judgment on the substantive felony and imposes a Class C sentence, to "run consecutively with . . . any sentence being served" by the defendant, G.S. 14-7.5, or a life sentence, in the case of violent habitual felon, *see* G.S. 14-7.11. If the defendant

10. The fact that the same jury may be used, combined with the fact that the jury may not be informed of the recidivist charge prior to the conclusion of the trial on the substantive felony, places the parties in a difficult situation during jury selection. The parties may wish to ask prospective jurors specific questions about their ability to be fair in evaluating recidivist charges, but doing so would effectively disclose the existence of a recidivist charge.

is acquitted of the recidivist charge, the court enters judgment on the substantive felony under the usual provisions of structured sentencing.

Timing of the Habitual Felon or Violent Habitual Felon Proceeding

"No defendant charged with being an habitual felon in a bill of indictment shall be required to go to trial on said charge within 20 days of the finding of a true bill by the grand jury; provided, the defendant may waive this 20-day period." G.S. 14-7.3; *see also* G.S. 14-7.9 (similar, as to violent habitual felon). Issues regarding the twenty-day period arise most frequently when the defendant is at first charged only with a substantive felony and a habitual felon charge is brought later. It is clear from the text of the statute that the twenty-day period begins on the date of the habitual felon indictment, not on the date of the indictment for the substantive felony. The trial on the substantive felony may begin fewer than twenty days after the return of the habitual felon or violent habitual felon indictment, so long as at least twenty days elapse before the trial on the recidivist charge begins. *See State v. Adams*, 156 N.C. App. 318, 322-23 (2003) ("There is no language in the statute which bars trial of the underlying felony charges within twenty days of the habitual felon indictment."). There is nothing in the statutes that compels the trial court to begin the habitual felon or violent habitual felon trial immediately upon the completion of the trial of the substantive felony; thus, it would seem that the court could enforce compliance with the twenty-day rule by delaying the start of the habitual felon or violent habitual felon trial, if necessary.

Proof of Previous Convictions

The habitual felon statute provides that "[a] prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction." G.S. 14-7.4. The Court of Appeals has held that the methods of proof listed in the statute are not exclusive and that, for example, a faxed copy of a certified judgment is an appropriate method of proof. *See State v. Brewington*, 170 N.C. App. 264, 281-82 (2005); *State v. Wall*, 141 N.C. App. 529 (2000). A "true" copy, if different from a certified copy, may also be used. *See State v. Gant*, 153 N.C. App. 136, 143 (2002). The Court of Appeals has also held that it is not error, or at least not prejudicial error, to introduce documents such as plea transcripts in addition to criminal judgments as "record[s] of the prior conviction." *See State v. Stitt*, 147 N.C. App. 77, 83-84 (2001). Finally, in guilty plea cases, the State's oral recitation of the defendant's previous convictions provides an adequate factual basis for the plea. *See State v. Bivens*, 155 N.C. App. 645 (2002).

The statute further provides that "[t]he original or a certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein." G.S. 14-7.4. The constitutionality of this provision has been challenged and upheld. *See State v. Hairston*, 137 N.C. App. 352, 355-56 (2000) (holding that the statute creates a permissive presumption that does not allow the jury to convict on less than proof beyond a reasonable doubt). The Court of Appeals has held that the prima facie evidence rule applies notwithstanding minor variations in the name. *See id.* at 354-55 (rule applies notwithstanding the fact that the defendant's name was sometimes appended with "Jr.," and sometimes not); *State v. Petty*, 100 N.C. App. 465, 469-70 (1990) (holding that "absolute identity of name is not required under this statute," and that "Martin Bernard Petty" and "Martin Petty" are sufficiently similar for purposes of the prima facie showing). So long as the name matches, the fact that there are other notations on the court records that do not match the defendant does not preclude the

records from serving as prima facie evidence of the previous conviction. *See Petty*, 100 N.C. App. at 469-70 (difference in age goes to the weight of the evidence, not its admissibility); *State v. Wolfe*, 157 N.C. App. 22, 36 (2003) (same, as to difference in race).

Sometimes the issue is not the existence of a previous conviction, but whether the conviction was for a felony offense. Such issues will rarely arise with North Carolina convictions, as both attorneys and judges are familiar with the classification of North Carolina offenses. However, in *State v. Briggs*, 137 N.C. App. 125 (2000), the Court of Appeals considered a case in which the habitual felon charge referred to the defendant's previous conviction of "the felony of breaking and entering buildings." *Id.* at 130. Of course, breaking or entering is a misdemeanor absent the intent to commit a felony therein, *see* G.S. 14-54, but the court held that the use of the word "felony" put the defendant on notice that the basis of the habitual felon charge was felony breaking or entering, despite the omission of the intent language from the habitual felon indictment. Likewise, presumably, a habitual felon indictment that referred to "the felony of larceny" would suffice even without reference to the fact that elevated larceny to a felony.

Out-of-state convictions are more likely to create problems. A series of decisions by the Court of Appeals deals with out-of-state convictions that the defendants alleged were not felonies. First, in *State v. Lindsey*, 118 N.C. App. 549 (1995), the court considered a case in which one of the defendant's previous felonies was a New Jersey conviction for receiving stolen property. The State introduced the indictment and the judgment in the previous case, but neither document stated that the offense was a felony. The defendant moved to dismiss the habitual felon charge for insufficient evidence, the trial judge overruled the motion, and the Court of Appeals reversed. It noted that the court documents did not state that the offense was a felony, that "[t]here was no certification from any official that the offense . . . was a felony in New Jersey," and that the court could not "conclude from the length of defendant's sentence (two to three years) that the offense was a felony in New Jersey." *Id.* at 553.

The Court of Appeals went a step further in the next case, *State v. Carpenter*, 155 N.C. App. 35 (2002). The facts of *Carpenter* are virtually identical to those of *Lindsey*, but the State made an important additional argument: "that defendant could have received sentences exceeding one year for each of his two New Jersey convictions and that under New Jersey law, offenses punishable by more than one year in prison constitute common-law felonies." *Id.* at 51. The Court of Appeals held that this was still not enough to establish the felony status of the previous convictions, relying on the language in *Lindsey* that the length of a defendant's sentence, alone, is insufficient to establish the felony status of a previous conviction. This logic is questionable because, unlike in *Lindsey*, the State in *Carpenter* did not rely on sentence length alone, but rather on sentence length plus the legal definition of a felony as an offense punishable by sentences of a certain length. Absent a reason to believe that an illegal sentence was imposed, this would seem to be sufficient proof of the offense's felony status. Nonetheless, *Carpenter* remains good law.

Finally, in *State v. Moncree*, __ N.C. App. __, 655 S.E.2d 464 (N.C. Ct. App. 2008), the Court of Appeals considered a case in which the defendant pled guilty to being a habitual felon. On appeal, he argued that one of his previous convictions—again from New Jersey—was in fact a misdemeanor, and it appears from the opinion that this was not disputed by the State. Because there had been no trial, the defendant could not argue evidentiary insufficiency, so he couched the issue in jurisdictional terms. He contended that the habitual felon indictment was defective on its face for failing to allege three prior *felony* convictions and that the trial court therefore lacked subject-

matter jurisdiction over the habitual felon charge. The Court of Appeals agreed, notwithstanding the State's argument that any problem with the indictment was not a facial problem.[11]

Summarizing the lessons of these three cases, when the State seeks to rely on an out-of-state previous conviction, it should first confirm that the offense of conviction is in fact a felony in the relevant jurisdiction. Then, it should obtain the charging document and the judgment connected to the conviction. If either reflects the felony status of the offense, the State should present the document(s) to the jury. If neither reflects the felony status of the offense, the State might consider seeking a stipulation from the defense about the status of the offense.[12] If the State chooses not to seek such a stipulation, or if the defense will not stipulate, it appears that the State may obtain "certification from an[] official" that the offense is a felony, *Lindsey*, 118 N.C. App. at 553, but the Court of Appeals has not provided any guidance as to what sort of certification would be acceptable. Alternatively, the State might seek to introduce evidence of the foreign state's law under G.S. 8-3 or ask the trial judge to take judicial notice of the felony status of the previous conviction under G.S. 8-4.

In the end, both the existence of a previous conviction and its felony status are likely jury questions. However, in most cases, the trial judge should be able to review the evidence and, if a previous conviction is a misdemeanor, dismiss the habitual felon charge based on insufficiency of the evidence. In other words, the trial judge should serve as a *de facto* gatekeeper.

Guilty Pleas

A defendant may plead guilty to a habitual felon or violent habitual felon charge. *See State v. Bailey*, 157 N.C. App. 80, 88 (2003) ("[A]lthough a defendant's status as an habitual felon should be determined by a jury, a defendant may chose to enter a guilty plea to such a charge."). A no contest plea is likewise permissible. *See State v. Jones*, 151 N.C. App 317, 330 (2002) ("[T]he trial court did not err in accepting defendant's plea of no contest to being an habitual felon."). However, the mere fact that a defendant is willing to stipulate to the existence of three prior felonies, or indeed, is willing to stipulate to his or her status as a habitual felon, does not in itself constitute a guilty plea. Rather, the trial court must go through a full plea colloquy in keeping with the requirements of G.S. 15A-1022. *See State v. Gilmore*, 142 N.C. App. 465, 471 (2001) ("Although Defendant did stipulate to his habitual felon status, such stipulation, in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea."); *State v. Edwards*, 150 N.C. App. 544, 549-50 (2002). If the trial court completes an appropriate colloquy, the fact that the defendant does not expressly admit guilt is immaterial; it suffices that the defendant knowingly and voluntarily agrees to be sentenced as a habitual felon and to waive his or her right to a jury trial on the issue. *See State v. Williams*, 133 N.C. App. 326, 329-30 (1999).

In keeping with G.S. 15A-1022, the trial judge must find a factual basis for the plea. The State's oral recitation of a defendant's prior convictions is sufficient. *See State v. Bivens*, 155 N.C. App.

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11. The court employed an elastic concept of facial defect in *Moncree*. Alternatively, it could have held that the defendant's guilty plea lacked an adequate factual basis. This would have required the court to construe the appeal as a petition for a writ of certiorari, *see State v. Bolinger,* 320 N.C. 596, 601 (1987), but would have been more consistent with *Lindsey* and *Carpenter*, in which the court found that the State had failed in its proof, not in its pleadings.

12. In *Moncree*, the Court of Appeals noted that parties generally "may not stipulate as to what the law is." __ N.C. App. at __, 655 S.E.2d at 472. However, that was in the context of a stipulation that an offense that was actually a misdemeanor was a felony, i.e., an inaccurate stipulation.

645, 647 (2002). Although G.S. 14-7.3 and G.S. 14-7.9 refer exclusively to "indictment[s]," a defendant may presumably waive indictment and plead guilty pursuant to a criminal information.[13] By pleading guilty, a defendant waives his or her right to raise a wide range of issues on direct appeal. *See*, *e.g.*, *State v. McGee*, 175 N.C. App. 586 (2006) (guilty plea waives claim regarding purported inaccuracy in date of previous conviction); *State v. Jamerson*, 161 N.C. App. 527 (2003) (guilty plea waives right to appeal whether the substantive felony was actually a felony, and whether the sentence imposed constituted cruel and unusual punishment; these issues must be raised in a motion for appropriate relief, if at all).

Collateral Attacks on Previous Convictions

A defendant facing a habitual felon charge may wish to contest the validity of one or more of the previous convictions that form the basis for the charge. In general, the defendant must do so by filing a motion for appropriate relief in connection with the previous conviction, or convictions, that he or she wishes to contest. *See State v. Creason*, 123 N.C. App. 495, 500 (1996). Collateral attacks, that is, attempts to contest the validity of a previous conviction during the habitual felon proceeding itself, are allowed only when the defendant asserts that he or she was denied counsel altogether in connection with his or her previous conviction.[14] The U.S. Constitution requires that defendants be permitted to raise such claims through collateral attack because the complete denial of counsel is a "unique constitutional defect." *Custis v. United States*, 511 U.S. 485, 496 (1994). A defendant may raise the issue by filing a motion to suppress the previous conviction under G.S. 15A-980. *See generally State v. Fulp*, 355 N.C. 171 (2002).

The state's appellate courts have consistently rejected defendants' attempts to raise other issues through collateral attack. For example, a defendant may not argue that the lawyer who represented the defendant in connection with a previous felony was ineffective. *See State v. Hensley*, 156 N.C. App. 634, 637-38 (2003). Nor may a defendant claim, during a habitual felon proceeding, that the court in which the defendant's previous felony conviction took place lacked jurisdiction over felony offenses. *See State v. Flemming*, 171 N.C. App. 413, 417 (2005). Likewise, a defendant may not collaterally attack a previous felony conviction by arguing that a guilty plea to the previous felony was not knowing and voluntary. *Cf. State v. Stafford*, 114 N.C. App. 101, 104 (1994) (holding, in a habitual DWI case, that a defendant may not challenge the validity of a previous conviction based on his assertion that his guilty plea in the earlier case was not knowing and voluntary).

Although it will usually be clear whether the defendant seeks to allege a complete denial of counsel or ineffective assistance of counsel, this is not always so. In *Hensley*, the defendant alleged that he received appointed counsel in connection with a previous felony conviction, but that the lawyer later withdrew. The defendant then waived appointed counsel and retained a lawyer, but the retained lawyer failed to show up for court when the defendant was convicted and sentenced. This might conceivably have been viewed as a complete denial of counsel, but the Court of Appeals held otherwise: "The essence of defendant's claim is not that the State failed to appoint counsel but, rather, that the counsel procured by defendant provided ineffective assistance by

13. No reported case expressly so holds, but the right to indictment generally may be waived by represented defendants in noncapital cases. *See* G.S. 15A-642(b). Furthermore, the Court of Appeals has reviewed, without comment, cases in which habitual felon convictions were obtained using informations. *See, e.g., State v. Bradley,* 175 N.C. App. 234 (2005).

14. *Creason* might be read to hold that even the complete denial of counsel cannot be raised by collateral attack, but this is clearly incorrect, as explained immediately below.

failing to appear." *Id.* at 638. It therefore found that the defendant's argument was an improper collateral attack.

Bond Issues

In setting bond, a court should consider whether a defendant has been charged as a habitual felon. *See* G.S. 15A-534(c) (court should consider "the nature and circumstances of the offense charged"). For example, a court might determine that a defendant facing a habitual felon charge is more likely to flee, and therefore it might impose a higher bond.

However, it is not clear whether the existence of a habitual felon charge should be taken into account in the bond for the substantive felony, or whether a separate bond may be set in connection with a habitual felon charge. The argument for the former is that a bond may be set only in connection with a criminal offense, *see generally* G.S. 15A-533, 15A-534, and that being a habitual felon is a status, not a crime.

On the other hand, a probation violation is not a crime either, yet an alleged probation violation clearly supports the imposition of a bond. *See* G.S. 15A-1345(b). Furthermore, while the state's appellate courts have not confronted this issue directly, the Court of Appeals has dealt with a case involving a separate bond for a habitual felon charge, and it did not comment negatively on the procedure. *See State v. Lane*, 163 N.C. App. 495 (2004).

Although the issue is not free from doubt, the better view is that a separate bond should not be imposed because a habitual felon indictment does not charge a crime. While this is also true of probation violations, there is explicit statutory authorization for arrest of the defendant and the imposition of a bond in connection with probation violations; there is nothing comparable for habitual felon charges. Instead, if the State believes that an increase in the defendant's bond is appropriate in light of a subsequent habitual felon indictment, it should move to modify the conditions of release imposed in connection with the substantive felony.

Sentencing

When a defendant is convicted of a habitual felon charge, he or she is sentenced as if the substantive felony were a Class C offense. *See* G.S. 14-7.6. The only exception to this rule is when the substantive felony is a Class A, B1, or B2 offense, in which case the defendant is sentenced according to the classification of the substantive felony. *See id.* When a defendant is convicted of multiple substantive felonies, each is elevated to Class C, unless there is a reason to do otherwise, such as a plea agreement stipulating that one or more of the substantive felonies will not be elevated.

The previous felonies alleged in support of the habitual felon charge may not be used in determining the defendant's prior record level under structured sentencing. *See* G.S. 14-7.6. This is so even if the State alleges more than three previous felonies, that is, if the State alleges five previous felonies in the habitual felon indictment, all five are off-limits for purposes of determining the defendant's prior record level. *See State v. Lee*, 150 N.C. App. 701, 702-03 (2003). However, when a defendant has more than three previous felonies, the State is not required to list all of them in the habitual felon indictment. It may elect which to allege and is free to allege the least serious felonies in the indictment, leaving the most serious felonies available for prior record level purposes. *See State v. Cates*, 154 N.C. App. 737, 739-40 (2002). Furthermore, when a previous felony conviction listed in a habitual felon indictment was consolidated with another conviction, the other conviction may be used to determine the defendant's prior record level. *See, e.g., State v. Truesdale*, 123

N.C. App. 639, 642 (1996) ("[W]e find nothing in these statutes to prohibit the court from using one conviction obtained in a single calendar week to establish habitual felon status and using another *separate* conviction obtained the same week to determine prior record level."). Finally, a previous felony conviction listed in a habitual felon indictment may nonetheless be used to support the imposition of prior record level points under G.S. 15A-1340.14(b)(6) (one point if all the elements of the present offense are included in any prior offense) and G.S. 15A-1340.14(b)(7) (one point if the present offense was committed while the defendant was on probation, parole, post-release supervision, and so forth). *See State v. Bethea*, 122 N.C. App. 623, 627-28 (1996).

Because the previous felonies alleged in support of the habitual felon charge may not be used in determining the defendant's prior record level, there are times when a habitual felon charge would work to the defendant's advantage. This is possible only when a defendant is charged with a Class D felony,[15] but it will very often be true for such defendants. For example, suppose that the defendant is charged with voluntary manslaughter, a Class D felony. The defendant has previous convictions for felony larceny (Class H, two prior record level points under structured sentencing), common-law robbery (Class G, four points), and assault inflicting serious bodily injury (Class F, four points). A conviction without a habitual felon charge would result in a presumptive range of minimum sentences of 94 to 117 months (Class D, prior record level IV, based on ten prior record points). A conviction with a habitual felon charge would increase the offense class to C, but would remove the prior record points, resulting in a presumptive range of minimum sentences of 58 to 73 months. *See generally* G.S. 15A-1340.14-17.

Of course, a habitual felon charge will not always reduce the defendant's exposure in Class D cases. For example, a defendant with a lengthy prior record, who would be in prior record level VI even without the previous felonies used to support the habitual felon charge, would face an increased sentence if convicted of a habitual felon charge.

A sentence imposed under the habitual felon statute must run consecutive to any sentence that the defendant is already serving. *See* G.S. 14-7.6; *State v. Watkins*, __ N.C. App. __, 659 S.E.2d 58 (N.C. Ct. App. 2008) (holding that the trial court erred in ordering a habitual felon sentence to run concurrent with a federal sentence that the defendant was then serving). However, a habitual felon sentence may run concurrent with other sentences imposed at the same time, including other habitual felon sentences.[16]

When a defendant who has been convicted as a habitual felon is released from prison, commits a new offense, and is convicted, the defendant is not treated as having a previous Class C conviction for purposes of determining his or her prior record level. Rather, the defendant's prior record level is determined using the classification of the substantive felony on which the habitual felon

15. A number of common felonies are Class D offenses, including voluntary manslaughter, *see* G.S. 14-18; discharging a firearm into an occupied dwelling, *see* G.S. 14-34.1(b); first-degree burglary, *see* G.S. 14-51; first-degree arson, *see* G.S. 14-58; armed robbery, *see* G.S. 14-87; and first-degree sexual exploitation of a minor, *see* G.S. 14-190.16.

16. A sentence imposed at the same time as a habitual felon sentence is not "being served" at the time of the habitual felon sentence, G.S. 14-7.6, so there is no statutory bar to concurrent sentencing. Although no appellate case expressly holds that concurrent sentences are permitted, a number of cases involving concurrent sentences have been affirmed without comment. *See, e.g., State v. King*, 158 N.C. App. 60, 62 (2003) (affirming a case in which "[t]he trial court sentenced defendant as an habitual felon to three concurrent sentences of 120 to 153 months"). Similar statutory language in other contexts has been interpreted in this way. *See, e.g., State v. Thomas,* 85 N.C. App. 319 (1987).

conviction was based, because the substantive felony is a crime while being a habitual felon is not. *See State v. Vaughn*, 130 N.C. App. 456, 459-60 (1998).[17]

Violent habitual felon sentencing is simple. A defendant who is convicted as a violent habitual felon must be sentenced to life without parole. *See* G.S. 14-7.12. The sentence must run consecutive to any sentence then being served by the defendant, though this provision has no practical effect. *See id.*

When a habitual felon charge is brought in a separate indictment with a separate case number from the substantive felony, the proper procedure is to enter judgment on the substantive felony alone. *See*, *e.g.*, *State v. Taylor*, 156 N.C. App. 172, 175-76 (2003). No judgment should be entered in the habitual felon case file.

Constitutional Issues

A variety of constitutional challenges have been raised regarding the habitual felon and violent habitual felon laws. First, some have argued that the habitual felon laws violate double jeopardy because, by increasing a defendant's sentence for the substantive felony, they effectively punish the defendant a second time for previous convictions. This argument has regularly been rejected by the state's appellate courts. *See*, *e.g.*, *State v. Todd*, 313 N.C. 110, 117-18 (1985); *State v. Artis*, 181 N.C. App. 601, 601 (2007). *See also Monge v. California*, 524 U.S. 721, 728 (1998) ("An enhanced sentence imposed on a persistent offender thus is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes but as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." (internal quotation marks omitted)). Likewise, the state's appellate courts have held that the combination of the habitual felon laws and structured sentencing do not violate double jeopardy by twice increasing a defendant's sentence based on his or her prior record. *See State v. Brown,* 146 N.C. App. 299, 302 (2001) ("[T]he Habitual Felons Act used in conjunction with structured sentencing [does] not violate . . . double jeopardy protections.").[18]

Second, it has been argued that the habitual felon laws violate equal protection, or permit selective prosecution, because a prosecutor may choose whether to seek habitual felon charges against a defendant, and some prosecutors will seek habitual felon charges more readily than others. These arguments, too, have been rejected. *See*, *e.g.*, *State v. Williams*, 149 N.C. App. 795, 801 (2002).

Third, it has been argued that prosecutors who have a policy of charging all eligible defendants as habitual felons are failing to exercise their discretion and therefore are violating the separation of powers. This argument has also been repudiated by the state's appellate courts. *See*, *e.g.*, *id.* at 802.

Fourth, the violent habitual felon laws have been attacked on ex post facto grounds, because the statutes allow previous convictions back to 1967 to form the basis of a violent habitual felon charge, yet the violent habitual felon statutes were not enacted until 1994. Thus, defendants who committed violent felonies between 1967 and 1994 did so without knowing that they were moving

17. Although habitual felon convictions are ignored for prior record level purposes, the state's appellate courts have nonetheless held that a defendant who takes the stand may be cross-examined about a prior habitual felon conviction as part of his or her criminal record. *See State v. Owens*, 160 N.C. App. 494, 502 (2003).

18. Other double jeopardy arguments and statutory limitations concerning the use of a single previous felony conviction for multiple purposes are discussed above. *See supra* pp. 8-9.

towards violent habitual felon status. This argument has failed. *See State v. Wolfe*, 157 N.C. App. 22, 37 (2003) ("Because defendant's violent habitual felon status will only enhance his punishment for the [substantive violent felony], and not his punishment for the [previous violent felonies], there is no violation of the ex post facto clauses.").

Fifth, many have argued that the habitual felon laws, because they often require lengthy sentences, violate the Eighth Amendment's prohibition against cruel and unusual punishment. The U.S. Supreme Court has interpreted the Eighth Amendment to include a proportionality principle, which it has applied in one instance to invalidate a sentence imposed pursuant to a state recidivist statute. *See Solem v. Helm*, 463 U.S. 27 (1983) (holding that a sentence of life in prison without parole, imposed under South Dakota's recidivist statute, was a cruel and unusual punishment for the offense of writing a no-account check for $100, even though the defendant had six prior felony convictions). However, the Supreme Court has otherwise rejected Eighth Amendment arguments of this type, even on seemingly favorable facts, and has emphasized the limited nature of proportionality review. *See*, *e.g.*, *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Ewing v. California*, 538 U.S. 11 (2003); *Rummel v. Estelle*, 445 U.S. 263 (1980). North Carolina's appellate courts have never invalidated a habitual felon or violent habitual felon sentence on Eighth Amendment grounds, and have rejected Eighth Amendment challenges many times. *See*, *e.g.*, *State v. Hensley*, 156 N.C. App. 634 (2003) (finding no Eighth Amendment violation where defendant was sentenced as a habitual felon to 90 to 117 months for obtaining a $100 item by false pretenses). *But see State v. Starkey*, 177 N.C. App. 264 (2006) (describing, but not reviewing, trial court's sua sponte holding that a habitual felon sentence of 70 to 93 months for possession of 0.1 grams of cocaine was cruel and unusual punishment).

Conclusion

The habitual felon and violent habitual felon laws have created some confusion—and much litigation—since they were first enacted. Many of the questions raised by the statutes have now been answered by the courts. Hopefully, this bulletin will help judges and lawyers to locate the answers in a timely fashion and to recognize cases that pose unanswered questions.

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