



# HABITUAL FELON AND RELATED OFFENSES

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## Overview

- Habitual felon
  - Four strikes and you're "out"
  - Almost any felony is a strike
  - Increases penalty for current crime
    - Four classes higher (up to Class C)
- Violent habitual felon
  - Three strikes and you're "out"
  - Only defined "violent" felonies are strikes
  - Mandatory sentence of life without parole



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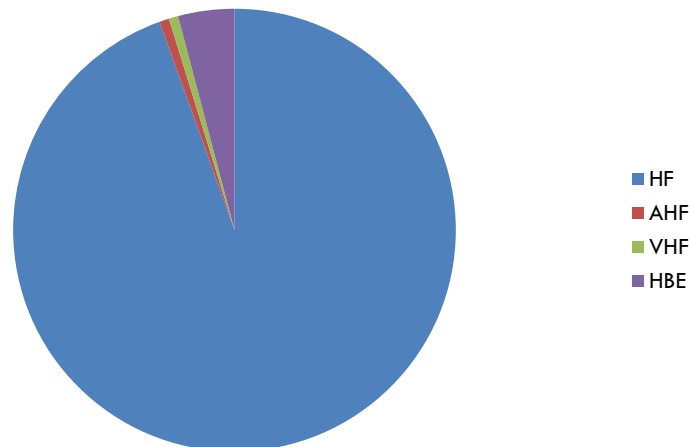
## Overview

- Habitual breaking and entering
  - Two strikes and you're "out"
  - Only listed offenses are strikes
  - Increases penalty for current crime
    - Class E
- Armed habitual felon
  - Two strikes and you're "out"
  - Firearm-related felonies are strikes
  - Increases penalty for current crime
    - Class C, minimum 120 months active



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## 2023 HF, AHF, VHF, and HBE Charges



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## Not Part of This Class

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- Habitual MDM assault, G.S. 14-33.2
- Habitual MDM larceny, G.S. 14-72(b)(6)
- Habitual DWI, G.S. 20-138.5

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## Habitual Felon

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## Previous Felonies: What Counts?

- NC felonies
- Federal felonies
- Felonies in other states that are “substantially similar to” NC felonies
- Offenses in other jurisdictions that are not felonies if
  - ▣ Other jurisdiction does not classify offenses as felonies
  - ▣ “Substantially similar to” NC felonies
  - ▣ Punishable by >1 year in prison



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## Previous Felonies: What Counts?

- Felonies used to support a prior habitual felon conviction
  - ▣ But not an acquittal
- Felonies necessary to the current felony
  - ▣ Example: Current felony is felon in possession of a firearm. A prior drug felony can support both the felon in possession and the habitual felon.
  - ▣ Example: Current felony is HDWI. A prior conviction of HDWI may support both the current HDWI and HF.

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## Previous Felonies: What Counts?

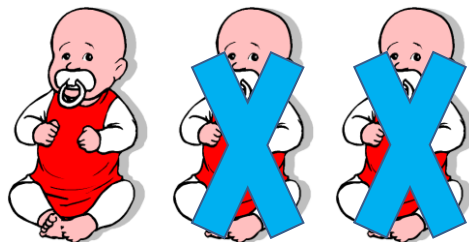
- Some very old convictions
  - ▣ All convictions incurred before 7/6/67
  - ▣ North Carolina convictions based on no contest pleas before 12/1/75
- Pardoned convictions
- Certain federal alcohol offenses
- Habitual misdemeanor assault
  - ▣ Conviction “shall not be used as a prior conviction for any other habitual offense statute”

Doesn't

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## Previous Felonies: Other Rules

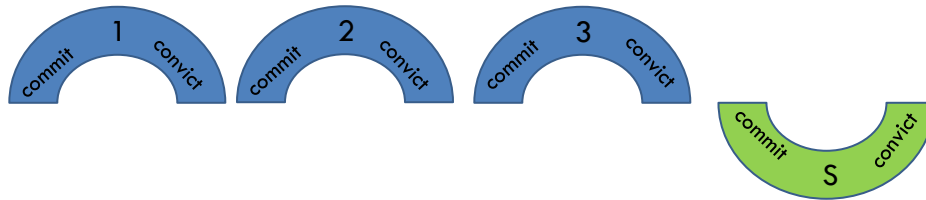
- No more than one of the previous felonies may have been “committed before [the defendant] attain[ed] the age of 18 years”
  - ▣ G.S. 14-7.1



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## Previous Felonies: Other Rules

- **Previous felonies must not overlap.**
  - ▣ Each must have been “committed after the conviction of” the previous felony
    - G.S. 14-7.1
  - ▣ May substantive felony overlap the third previous felony?



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## Current Felonies

- **Any felony.** “[A]ny felony under the laws of North Carolina” can serve as the current felony.
  - ▣ G.S. 14-7.6
- **Recidivist offenses.** Even recidivist offenses like HDWI and HMA count as current felonies.
- **Class 1 misdemeanor drug possession.** A defendant with a prior drug conviction may be “punished as a Class I felon,” G.S. 90-95(e)(3), and so may serve as a current felony. State v. Howell, 370 N.C. 647 (2018).

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## Charging: Generally

- **Discretion.** “The district attorney, in his or her discretion, may charge . . .”
- **Must be charged by indictment.** Or information?
- **Cannot stand alone.** Must attach to a substantive felony.
- **Separate indictment.** Typically charged in a separate indictment from the substantive felony.

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## Charging: Attachment Rules

- **Timing.** Habitual felon indictment may be returned before, along with, or after the indictment for the current felony.
- **Attachment.**
  - ▣ Automatically attaches to all pending felonies
  - ▣ Automatically attaches to all subsequently charged felonies
    - Except felonies that the defendant hadn’t committed at the time the habitual indictment was returned
    - Only until all pending felonies are “adjudicated,” by conviction, plea, dismissal, or acquittal, even if sentencing has not yet occurred; subsequent charges require a new habitual felon indictment

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## Charging: Formal Requirements

### □ **Requirements.**

- Name of previous felony (?)
- Case number (?)
- Date previous felony committed
- Name of state or other sovereign
- Date of conviction
- Court of conviction



### □ **Extra convictions.**

- May allege more than three previous felonies
- Insurance in case one is later invalidated
- Can't use any of them for prior record level

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## Charging: Amendments, Etc.

### □ **Amendment.** May correct many errors.

- Date of a previous felony
- County in which a previous felony took place
- Incorrect digit in case number of previous felony

### □ **Changing previous felonies.**

- Substituting one previous felony for another cannot be done by amendment (must be done by superseding indictment)

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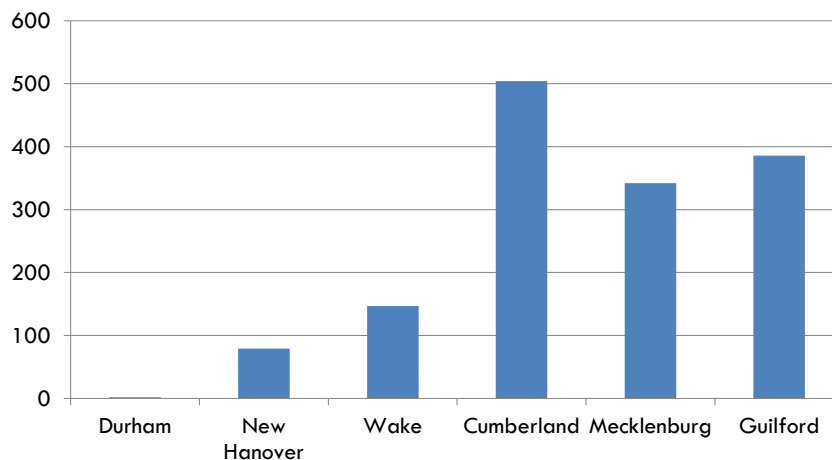


## Charging: Withdrawing Charges

- The State may “withdraw [the] habitual felon indictment as to some or all of the underlying felony charges . . . up until the time that the jury returns a verdict” in the habitual felon stage.
  - State v. Murphy, 193 N.C. App. 236 (2008).

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## 2023 HF Charges by County



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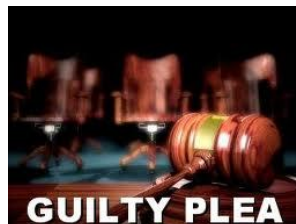
## Procedure: OFAs and Bond

- **Bond.**
  - ▣ Return of a habitual indictment is relevant to bond
  - ▣ Probably improper to set a separate bond for a habitual charge
  - ▣ Instead, modify bond on the substantive felony
- **Service/order for arrest.**
  - ▣ Probably not proper to issue an OFA upon return of habitual indictment
  - ▣ Instead, give notice of indictment per G.S. 15A-630

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## Procedure: Pleas

- **May plead guilty.** The defendant may plead guilty to habitual felon whether he pled guilty to the current felony or was convicted at trial.
- **Full colloquy.** The judge must conduct a full plea colloquy under G.S. 15A-1022.
  - ▣ An acknowledgement or stipulation by the defendant is insufficient



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## Procedure: Trials

- **Bifurcated.**
  - Jury should not be informed of habitual felon indictment during trial of current felony
  - Same jury
- **Full-fledged trial.** “[T]he proceedings shall be as if the issue of habitual felon were a principal charge.”
  - G.S. 14-7.5
- **Timing.** Can’t start trial on habitual felon allegation until at least 20 days after habitual felon indictment.

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## Proving Previous Felonies

- **Ways to prove.**
  - Stipulation
  - Original or certified copy of judgment
  - Faxed copy of judgment
    - State v. Wall, 141 N.C. App. 529 (2000)
  - ACIS printout
    - State v. Waycaster, 375 N.C. 232 (2020)
- **Prima facie evidence.** Original or certified copy of judgment, with substantially identical name, is prima facie evidence that the conviction is the defendant’s.
  - G.S. 14-7.4; State v. Petty, 100 N.C. App. 465 (1990)

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## Sentencing

- **Sentence the current felony.**
  - Not the habitual felon charge
  - Four classes higher, up to Class C
  - Unless it is already a higher class
- **Consecutive sentencing required.**
  - Sentence must “run consecutively with . . . any sentence being served” at the time of sentencing
  - May run concurrent with, or be consolidated with, other sentences imposed at the same time, including other habitual felon sentences
  - How does this work with probation?

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## Sentencing

- **No double counting.**
  - Previous convictions listed in habitual felon indictment may not be used when calculating prior record level
  - May use convictions consolidated with listed prior convictions
  - May use listed prior convictions for “bonus points”

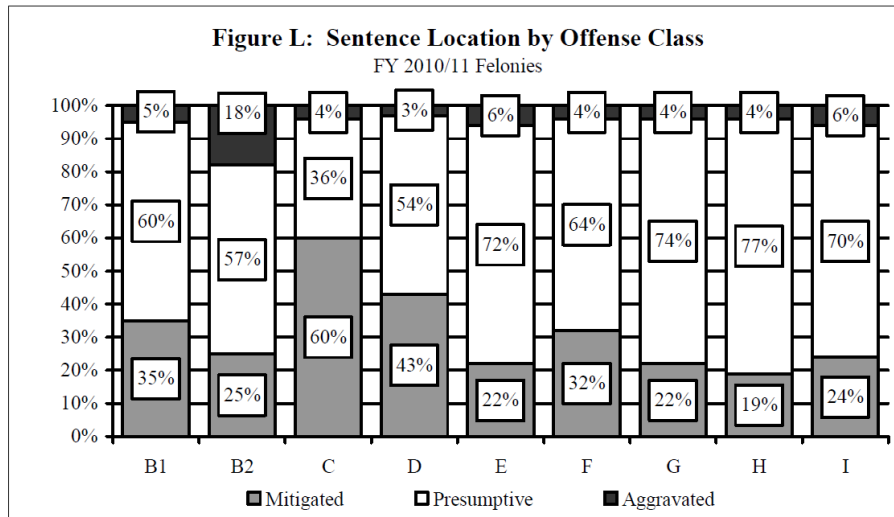
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# Sentencing

- **Habitual felon status can sometimes benefit the defendant**
  - ▣ Sentencing a Class C felon as a habitual felon will often result in a lower sentence
  - ▣ Sentencing a Class D felon as a habitual felon will sometimes result in a lower sentence
  - ▣ Sentencing a drug trafficking defendant as a habitual felon will sometimes result in a lower sentence

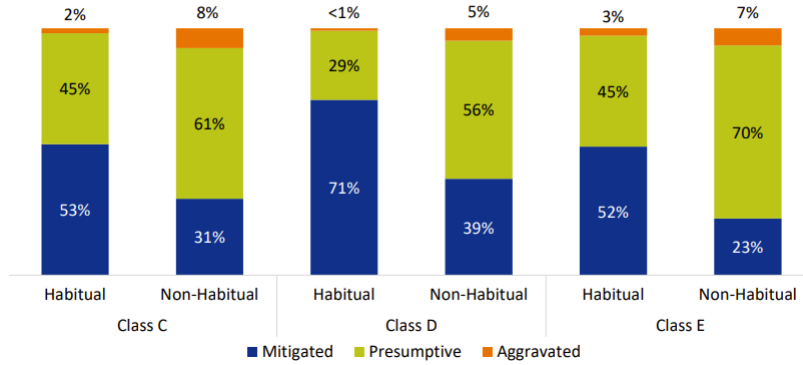


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**Figure 19: Sentencing Range by Offense Class for Habitual and Non-Habitual Felons  
Active Sentences Only**



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<b>STATE OF NORTH CAROLINA</b>		File No. _____	
County _____ Seat of Court _____		In The General Court Of Justice <input type="checkbox"/> District <input type="checkbox"/> Superior Court Division	
<b>STATE VERSUS</b>		<b>JUDGMENT AND COMMITMENT ACTIVE PUNISHMENT - FELONY (STRUCTURED SENTENCING)</b> (For Convictions On Or After Jan. 1, 2012) G.S. 15A-1301. -1340.13	
Name Of Defendant _____		Attorney For Defendant _____	
Race _____	Sex _____	Date Of Birth _____	Appointed <input type="checkbox"/> Retained <input type="checkbox"/> Cr Rptr Initials _____
Attorney For State _____		Def. Found Not Indigent <input type="checkbox"/> Def. Waived Attorney <input type="checkbox"/>	
The defendant was found guilty/responsible, pursuant to <input type="checkbox"/> plea ( <input type="checkbox"/> pursuant to <i>Alford</i> ) ( <input type="checkbox"/> of no contest) <input type="checkbox"/> trial by judge <input type="checkbox"/> trial by jury, of			
File No.(s)	Off.	Offense Description	Offense Date G.S. No. F/M CL. *Pun. CL.
*NOTE: Enter punishment class if different from underlying offense class (punishment class represents a status or enhancement).			
The Court: <input type="checkbox"/> 1. has determined, pursuant to G.S. 15A-1340.14, the prior record points of the defendant to be _____ Any prior record level point under G.S. 15A-1340.14(b)(7) is based on the jury's determination of this issue beyond a reasonable doubt or the defendant's admission to this issue.		PRIOR RECORD <input type="checkbox"/> I <input type="checkbox"/> III <input type="checkbox"/> V LEVEL: <input type="checkbox"/> II <input type="checkbox"/> IV <input type="checkbox"/> VI	
<input type="checkbox"/> 2. makes no prior record level finding because none is required for Class A felony, violent habitual felon, or drug trafficking offenses.			
The Court (NOTE: Block 1 or 2 MUST be checked):			
<input type="checkbox"/> 1. makes no written findings because the term imposed is: <input type="checkbox"/> (a) in the presumptive range. <input type="checkbox"/> (b) for a Class A felony. <input type="checkbox"/> (c) for adjudication as a violent habitual felon, G.S. 14-7.12. <input type="checkbox"/> (d) for drug trafficking. <input type="checkbox"/> for which the Court finds the defendant provided substantial assistance, G.S. 90-95(h)(5). <input type="checkbox"/> (e) in the aggravated range, pursuant to G.S. 20-141.4(b)(1a).			
<input type="checkbox"/> 2. finds <input type="checkbox"/> the Determination of aggravating and mitigating factors on the attached AOC-CR-605. <input type="checkbox"/> egregious aggravation under G.S. 14-27.2A, 14-27.4A, 14-27.23, or 14-27.28, on the attached AOC-CR-618, which requires a sentence in excess of that authorized by G.S. 15A-1340.17.			
<input type="checkbox"/> 3. adjudges the defendant to be a habitual felon to be sentenced <input type="checkbox"/> (offenses committed before Dec. 1, 2011) as a Class C felon. <input type="checkbox"/> (offenses committed on or after Dec. 1, 2011) four classes higher than the principal felony (no higher than Class C).			
<input type="checkbox"/> 4. adjudges the defendant to be a habitual breaking and entering status offender, to be sentenced as a Class E felon.			
<input type="checkbox"/> 5. adjudges the defendant to be an armed habitual felon to be sentenced as a Class C felon (unless sentenced herein as a Class A, B1, or B2 felon) and with a minimum term of imprisonment of no less than 120 months.			

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## Habitual Felon MARs

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- **Retroactivity.**
  - 2011 JRA changes are prospective only
  - 8<sup>th</sup> Amendment doesn't require retroactivity
  - G.S. 15A-1415(b)(7) doesn't require retroactivity
- **Challenges to previous felonies.**
  - When a previous felony goes bad

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## Violent Habitual Felon

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## Violent Habitual Felon

- **Not common.**
  - No more than 35 charges statewide in any recent year
  - No more than 8 convictions statewide in any recent year
- **Qualifying substantive and previous felonies.**
  - “All Class A through E felonies” or substantially similar crimes from other jurisdictions
    - G.S. 14-7.7
  - Underinclusive and overinclusive

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## Violent Habitual Felon

- Same requirement of non-overlap
- Only need two previous felonies
- Can both be <18
- Procedure is similar to habitual felon
- LWOP

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## Violent Habitual Felon

- The State may charge both HF and VHF
  - Example
    - D charged with Class E felony child abuse (serious bodily injury)
    - State fears that jury may return Class F felony child abuse (serious physical injury)
    - D has two previous Class E assault convictions and a PWISD cocaine conviction
  - Bifurcate? Trifurcate?

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## Habitual Breaking and Entering

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## Habitual Breaking/Entering

### □ Qualifying previous and current felonies

1 <sup>st</sup> Degree Burglary	Class D
2 <sup>nd</sup> Degree Burglary	Class G
Breaking Out Burglary	Class D
Felony Breaking or Entering	Class H
B/E with Intent to Terrorize	Class H
Breaking or Entering Church, Etc.	Class G
Similar Repeated Offenses	n/a
Similar Out-of-State Offenses	n/a

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## Habitual Breaking/Entering

- **Age.** Previous felony can be <18, current felony must be ≥ 18.
- **Procedure.** Mirrors habitual felon.
- **Punishment.**
  - Class E, so probation is possible at PRL I and II
  - Consecutive sentencing required, as with habitual felon
- **Relationship to habitual felon.**
  - HBE can't itself be a previous felony for HF purposes
  - HBE can't be further enhanced (H to E to C) under HF
  - Unlikely to have HF and HBE charged together

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## Armed Habitual Felon



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## Armed Habitual Felon

- **Previous felonies.** Felonies in which:
  - D used or displayed a gun, and
  - The use of the gun was necessary to prove an element or to establish an aggravator or enhancement
- **Substantive felonies.**
  - Felony where jury finds D personally possessed gun and used or displayed it
  - The gun does not need to be necessary to prove an element or to establish an aggravator or enhancement

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## Armed Habitual Felon

- **Same general structure as HF.**
- **Confusing provisions.**
  - ▣ Statute sometimes refers to crimes involving “use or display” of gun, sometimes to “use, display, or threatened use or display”
  - ▣ Statute sometimes refers to firearms, sometimes to “firearm or deadly weapon”

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## Armed Habitual Felon

- **Requires useless (?) findings.**

(NOTE: If offense(s) is not also a reportable conviction in No. 8 above, this finding requires no further action by the court.)

10. finds that a  motor vehicle  commercial motor vehicle was used in the commission of the offense and that it shall be reported to DMV.

11. finds this is an offense involving assault, communicating a threat, or an act defined by G.S. 50B-1(a), and the defendant had a personal relationship as defined by G.S. 50B-1(b) with the victim.

12. (offenses committed on or after Dec. 1, 2008, only) finds the above designated offense(s) involved criminal street gang activity. G.S. 14-50.25.

13. did not grant a conditional discharge under G.S. 90-96(a) because (check all that apply)  the defendant refused to consent.  (offenses committed on or after Dec. 1, 2013, only) the Court finds, with the agreement of the District Attorney, that the offender is inappropriate for a conditional discharge for factors related to the offense.

14. finds that the defendant used or displayed a firearm while committing the felony. G.S. 15A-1382.2.

- **AHF, VHF, and HF together?**

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## Questions?



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## Gang Enhancement

- G.S. 15A-1340.16E
  - Applies to felonies Class C or lower
  - If committed “as part of criminal gang activity”
    - Sentenced one class higher
  - If D was a “leader or organizer”
    - Sentenced two classes higher
  - No sentence higher than Class C
  - Sentence must run consecutive to sentences being served
  - Enhancement must be alleged in an indictment