

Preventing Low Level Felonies from Becoming High Level Habitual Felonies

Habitual Felon laws: a law that allows for greater punishment for “repeat offenders.”

No Big Deal!

If..... You just win the primary phase of trial



A Nationwide Trend

- Persistent offender laws to severely enhance sentences
- NC's habitual felon law is generally a "*fourth Strike*" situation
- "Primary purpose" is to "*deter repeat offenders*" and "*segregate that person from the rest of society for an extended period of time.*"

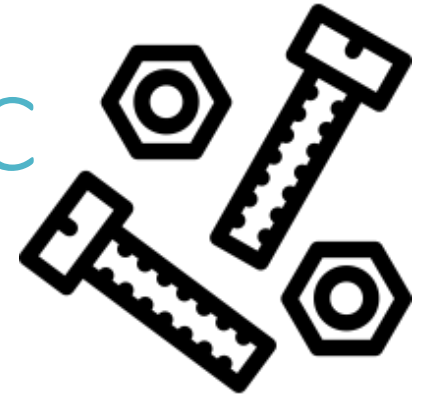
State v. Aldridge, 76 N.C. App. 638, 640 (1985)

Habitual Felons vs. Habitual Crimes

Habitual Felon is *different* from Habitual Crimes:

- Habitual DWI (3+ prior impaired driving) N.C.G.S. §20-138.5
- Habitual Larceny (4+ prior larcenies) N.C.G.S. §14.72
- Habitual Misdemeanor Assault (2+ prior assaults) N.C.G.S. §14-33.2
- Habitual Breaking and/or Entering (1+ prior B&E) N.C.G.S. §§14-7.25-7.31
- Armed Habitual Felon (1+ prior Firearm related felony) N.C.G.S. §§14.7.35-7.41

Habitual Felon Law in NC



Vanilla: Defendant has three (or more) felony convictions, Federal or State.

- If convicted, defendant will be sentenced at four classes higher
- Capped at “C”

Rocky Road: Violent habitual felon.

- Defendant has two previous A-E felony convictions and is convicted of a new A-E felony
- Life sentence

How Does It Work?

HF is a status, not a crime

- Three previous ***non-overlapping*** convictions
 - Felony convictions since 1967 (N.C.G.S. §14-7.1)
- HF status is for ***life***
- ***Alleged by indictment***
- Convictions do not have to be for similar offenses or similar to the newly charged offense
- Convictions must be felonies in NC or felonies under the laws of any sovereign jurisdiction where the convictions occurred
- Relevant consideration is the status of the offense at the time of conviction *State v. Hefner*, 289 N.C. App. 223 (2023), *State v. Mincey*, 292 N.C. App. 345 (2024)



How Does It Work?

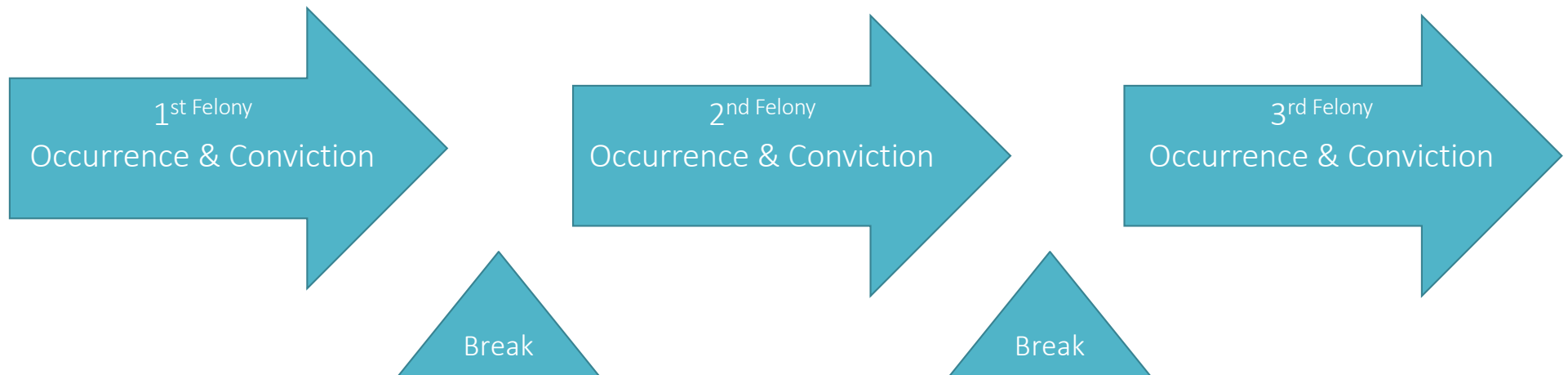
- Out of State Convictions can be used to determine HF Status
- To do that, a court must find by preponderance of the evidence that the out of state crime is “substantially similar to a North Carolina offense;”
- That is a legal determination which must be made by the trial court, it cannot be stipulated to, even by a client’s plea! *State v. Bunting*, 279 N.C. App. 636 (2021)

Things to Watch For

- “Non-overlapping”
- Pardoned convictions
- NC convictions (prior to July 1, 1975) based on plea of no contest
- Convictions prior to July 6, 1967
- Convictions for habitual misdemeanor assaults (N.C.G.S. §14-33.2)
- Only one from before age 18 can be used



Non-Overlapping

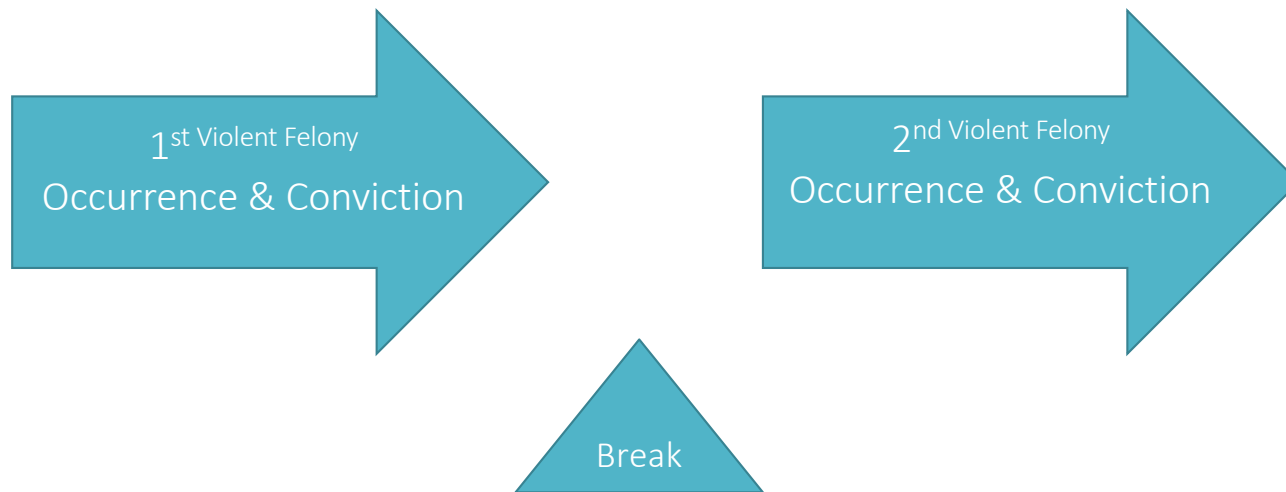




Eligibility for Violent HF

A defendant who:
Has been *convicted*,
Of two *violent felonies*,
Commits a third Class A through E felony

Non-Overlapping



Violent Habitual Felon

N.C.G.S. §14.7.7

- Any person with two (2) non-overlapping “violent felony” convictions
 - Any Class A through E felony convictions since 1967 in North Carolina
 - Any repealed or superseded offenses that are the substantial equivalent to a current Class A through E Felony in North Carolina
 - Any offense from another jurisdiction “substantially similar to” an A through E North Carolina offense
 - Need NOT be defined by “foreign sovereign” as felony
 - Even if a predicate offense was committed while the client was 16/17, it counts
State v. McDougald, 284 N.C. App. 695 (2022)
- **Note**: Excludes some felony offenses that might naturally be considered violent (assaults)

Punishment for Violent HF



When is Status Charged?

The decision to charge an individual as a HF or a Violent HF is *entirely within the prosecutor's discretion*

State v. Parks, 146 N.C. App. 568 (2001)

"Oooo that sounds a bit harsh, let me put a "haha" at the end to soften the blow."



**PROSECUTORIAL
DISCRETION**

HF Indictment

N.C.G.S. §14-7.3

- Must be separate from the principal felony Indictments (can be separate count) – ALSO there must be pending felony prosecution to attach to, can't be filed prior

State v. Smith 2024 N.C. App. LEXIS 978, *State v. Garmon*, 296 N.C. App, 725 (2024)

- **Must** include the following (*for each of the 3 felonies*):
 1. Date of the commission;
 2. Date of the conviction; (MUST have 1+2, *State v. Forte*, 260 NC App. 245 (2018)
 3. State or sovereign against which the felony was committed; *and*
 4. Identity of the court in which the conviction took place

State v. Langley, 371 N.C. 389 (2018)

STATE OF NORTH CAROLINA
County of Mecklenburg

The State of North Carolina

vs.

W/M DOB: January 26, [REDACTED]

Charlotte, North Carolina 28208
Defendant.

File #
Film #

In The General Court of Justice
Superior Court Division

December 11, 2017

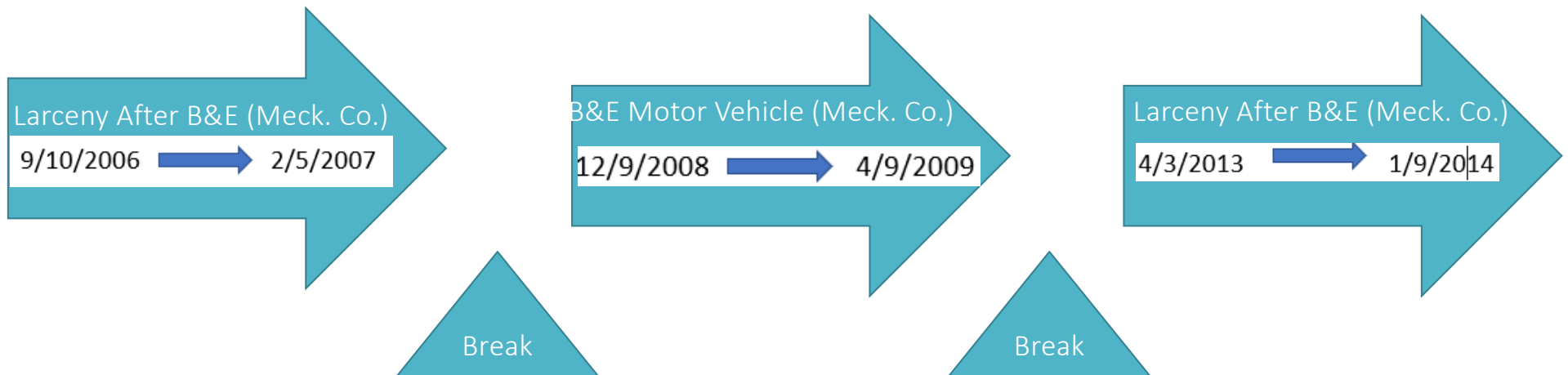
HABITUAL FELON G.S. 14-7.1

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that [REDACTED] is an habitual felon in that on or about September 10, 2006, [REDACTED] did commit the felony of Larceny after Breaking and or Entering, and that on or about February 5, 2007, [REDACTED] was convicted of the felony of Larceny after Breaking and or Entering in the Superior Court of Mecklenburg County, North Carolina; and that on or about December 9, 2008, [REDACTED] did commit the felony of Breaking and or Entering a Motor Vehicle, and that on or about April 9, 2009, [REDACTED] was convicted of the felony of Breaking and or Entering a Motor Vehicle in the Superior Court of Mecklenburg County, North Carolina; and that on or about April 3, 2013, [REDACTED] did commit the felony of Larceny after Breaking and or Entering, and that on or about January 9, 2014, [REDACTED] was convicted of the felony of Larceny after Breaking and or Entering in the Superior Court of Mecklenburg County, North Carolina, against the form of the statute in such case made and provided and against the peace and dignity of the State.

9/10/2006	→	2/5/2007	Larceny After B&E (Meck. Co.)
12/9/2008	→	4/9/2009	B&E Motor Vehicle (Meck. Co.)
4/3/2013	→	1/9/2014	Larceny After B&E (Meck. Co.)

Sample HF Indictment

Non-Overlapping



How is HF Status Proven?

Stipulation of both parties (N.C.G.S. §14-7.4)

-OR-

The original or certified copy of the court record of the prior convictions

-OR- EVEN AN ACIS PRINTOUT CERTIFIED BY A CLERK!
(State v. Waycaster, NC Supreme Court, 8/14/20)

Note: The original or certified copy of the court record of conviction is *prima facie* evidence of that prior conviction.





Don't Fall Asleep Behind the Wheel!

Late Identification of HF Status by DA

- A client might not be identified as a HF until *after* Bond Hearing or Probable Cause Hearing date in District Court
- You may become aware of your client's HF status before the prosecutor does
 - Perhaps it's time to plead quick?
 - A habitual felon indictment must be part of a prosecution "for which no judgment" has yet been entered.
- Until that happens the State can obtain and prosecute a new habitual felon indictment
- The judge can even continue the case to allow the state time to secure the new indictment (even with a fatal error!)
State v. Hodge, 270 NC. App. 110 (2020)



No OFA



HF is a **status** and not a standalone offense

Therefore, a HF Indictment *should not result in a new bond or Order for Arrest*

Indictment generally served at Scheduling Conference date in Mecklenburg

Rapidly Escalating Severity

Misdemeanors can become HF cases!

Example: Client charged with Misd. Larceny in District Court. Prosecutor could indict client for Habitual Larceny, Class H, which could serve as the principal felony for a HF indictment



But! Attempts NOT included: *State v. Irvins*, 277 NC App. 101 (2021)

Drug misdemeanors elevated to felonies pursuant to 90-95(e)(3) can also be habitualized! (repeat class 1 offense)

State v. Howell 370 N.C. 647 (2018)

Key Guilty Plea Considerations

Most HF cases are resolved with non-habitual guilty pleas and sentences

- Ask your DA
- Write a letter of support
- Negotiate!
 - Two class H to run consecutive
 - Class I to E, rather than the offered H to D
 - Programs
- If the judge alters the terms of the written plea, you can withdraw it

State v. Wentz 284 N.C. App. 736 (2022)



Sample Non-HF Plea Transcript

STATE VERSUS		File No. NON-HABITUAL
Name Of Defendant JOHN DOE		
20. Have you agreed to plead ☒ guilty ☐ guilty pursuant to <i>Alford</i> ☐ no contest as part of a plea arrangement? (if so, review the terms of the plea arrangement as listed in No. 21 below with the defendant.)		(20) YES
21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:		
PLEA ARRANGEMENT		
Defendant enters this plea of guilty to the following:		
(1) Amended Larceny from the Person, 18CRS000010 and		
(2) Amended Misdemeanor Assault Inflicting Serious Injury, 18CRS000011.		
The State will dismiss the charges set out on page two, side two, of this transcript, which includes the habitual felon status. The sentence will be consolidated under the Amended Larceny from the Person charge, (18CRS000010). The defendant will receive 14-26 months, Active.		
Pursuant to mitigating factors in 15A-1340.16(e), the defendant has accepted responsibility for the defendant's criminal conduct, #15.		
☒ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.		
☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).		
22. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as		(22) YES

Sample HF Plea Transcript

STATE VERSUS		File No.	HABITUAL	
Name Of Defendant JOHN DOE				
20. Have you agreed to plead		☒ guilty	☐ guilty pursuant to <i>Alford</i>	☐ no contest as part of a plea arrangement? (if so, review the terms of the plea arrangement as listed in No. 21 below with the defendant.)
				(20) YES
21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:				
PLEA ARRANGEMENT				
Defendant enters this plea of guilty to the following:				
(1) PWISD cocaine, 18CRS000010 and admit to habitual Felon Status, 18CRS000074, class "D" offense; and				
(2) Possession of Firearm by Felon, 18CRS000011.				
The State will dismiss the charges set out on page two, side two, of this transcript. The sentence will be consolidated under the PWISD cocaine charge(18CRS000010). The defendant will receive 77-105 months, Active.				
Pursuant to mitigating factors in 15A-1340.16(e), the defendant has accepted responsibility for the defendant's criminal conduct, #15.				
☒ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript.				
☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).				
22. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as			(22)	YES

Habitual Status Plea During Trial

A colloquy MUST be administered to any client admitting (pleading guilty) to Habitual Felon Status during trial before sentencing.

Failure to do so is reversible error! *State v. Williamson* 272 N.C. App. 204 (2020)

BACK 2 BACK



Must Run Consecutive

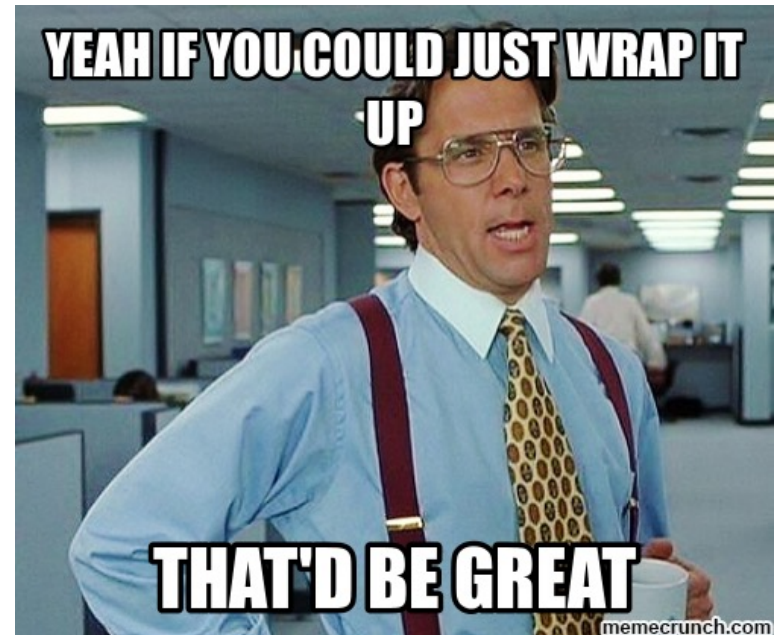
Consecutive Sentence Prospects

If client is serving time already or has multiple pending cases, try to wrap them up

- Work with out of county attorneys
- Work with other units (Especially PV)
- Check pending

If the defendant is not currently serving a term of imprisonment, the trial court may exercise its discretion in determining whether to impose concurrent or consecutive sentences

State v. Duffie, 241 N.C. App. 88 (2015)



Critique Every HF Indictment



Look for irregularities in HF indictment:

- Overlapping prior felonies
- Court records mistaken or missing
- Priors were not actually felonies
- Different names or date of birth in court records

BUT you won't get far: *State v. Singleton*, 386 N.C. 183 (2024) - bills of indictment that contain non-jurisdictional deficiencies will no longer be cast aside by reason of any informality when they expressed the crime charged in “a plain, intelligible, and explicit manner”

Suggestion: Make it a habit to obtain copies of the alleged prior judgments and transcripts prior to trial, or the underlying misdemeanors for a elevated felony

DOUBLE DIPPING IS BAD



MMKAY?

memegenerator.net

Prior Record Level: No Double-Dipping

STATE OF NORTH CAROLINA

05/21/2018 0000 A

MECKLENBURG County

In The General Court Of Justice
☒ District ☐ Superior Court Division

STATE VERSUS

Name And Address Of Defendant

CHARLOTTE NC 28204-8204

Social Security No.

S&D No.

Race B Sex M DOB 07/21/1996

WORKSHEET PRIOR RECORD
LEVEL FOR FELONY SENTENCING
AND PRIOR CONVICTION LEVEL
FOR MISDEMEANOR SENTENCING
(STRUCTURED SENTENCING)

(For Offenses Committed On Or After Dec. 1, 2009)

G.S. 15A-1340.14, 15A-1340.21

I. SCORING PRIOR RECORD/FELONY SENTENCING

NUMBER	TYPE	FACTORS	POINTS
	Prior Felony Class A Conviction	X 10	
	Prior Felony Class B1 Conviction	X 9	
	Prior Felony Class B2 or C or D Conviction	X 6	
	Prior Felony Class E or F or G Conviction	X 4	
3	Prior Felony Class H or I Conviction	X 2	6
1	Prior Class A1 or 1 Misdemeanor Conviction (see note on reverse)	X 1	1
SUBTOTAL			7

Defendant's Current Charge(s):

If all the elements of the present offense are included in any prior offense whether or not the prior offenses were used in determining prior record level.

+ 1

1

If the offense was committed while the offender was:

☒ on supervised or unsupervised probation, parole, or post-release supervision;☐ serving a sentence of imprisonment; or ☐ on escape from a correctional institution.

+ 1

1

County Mecklenburg File No. 17 CR5 State (if other than NC)

TOTAL 9 2 5

II. CLASSIFYING PRIOR RECORD/CONVICTION LEVEL

MISDEMEANOR

NOTE: If sentencing for a misdemeanor, total the number of prior conviction(s) listed on the reverse and select the corresponding prior conviction level.

No. Of Prior Convictions	Level
0	I
1 - 4	II
5+	III

PRIOR
CONVICTION
LEVEL☐ The Court has determined the number of prior convictions to be and the level to be as shown above.☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.

FELONY

NOTE: If sentencing for a felony, locate the prior record level which corresponds to the total points determined in Section I above.

Points	Level
0 - 1	I
2 - 5	II
6 - 9	III
10 - 13	IV
14 - 17	V
18+	VI

PRIOR
RECORD
LEVEL

III

☐ The Court finds the prior convictions, prior record points and the prior record level of the defendant to be as shown herein.☐ In making this determination, the Court has relied upon the State's evidence of the defendant's prior convictions from a computer printout of DCI-CCH.☐ In finding a prior record level point under G.S. 15A-1340.14(b)(7).

Sample Record

Page 1

V. PRIOR CONVICTION

NOTE: Federal law precludes making computer printout of DCI-CCH (rap sheet) part of permanent public court record.

NOTE: The only misdemeanor offenses under Chapter 20 that are assigned points for determining prior record level for felony sentencing are misdemeanor death by vehicle [G.S. 20-141.4(a2)] and, for sentencing for felony offenses committed on or after December 1, 1997, impaired driving [G.S. 20-138.1] and commercial impaired driving [G.S. 20-138.2]. First Degree Rape and First Degree Sexual Offense convictions prior to October 1, 1994, are Class B1 convictions.

Source Code	Offenses	File No.	Date Of Conviction	County (Name of State if not NC)	Class
	MISDEMEANOR LARCENY	17CRS [REDACTED]	04/07/2017	MECKLENBURG	1
	BREAK OR ENTER A MOTOR VEHICLE	17CRS [REDACTED]	04/07/2017 ✓	MECKLENBURG	1
	BREAK OR ENTER A MOTOR VEHICLE	16CRS [REDACTED]	05/06/2016 ✓	MECKLENBURG	1
	LARCENY AFTER BREAK/ENTER	15CRS [REDACTED]	09/08/2015 ✓	MECKLENBURG	H
	BREAKING AND OR ENTERING (F)	15CRS [REDACTED]	09/08/2015	MECKLENBURG	H
	POSS STOLEN GOODS/PROP (M)	14CRS [REDACTED]	10/10/2014	MECKLENBURG	1
	ATTEMPT BREAK/ENTER MOTOR VEH	14CRS [REDACTED]	10/10/2014	MECKLENBURG	1
	TAMPERING WITH VEHICLE	12CRS [REDACTED]	12/11/2012	MECKLENBURG	2

	Prior Felony Class A Conviction	X 10		
	Prior Felony Class B1 Conviction	X 9		
	Prior Felony Class B2 or C or D Conviction	X 6		
	Prior Felony Class E or F or G Conviction	X 4		
3	Prior Felony Class H or I Conviction	X 2	6	2
1	Prior Class A1 or 1 Misdemeanor Conviction (see note on reverse)	X 1	1	1
		SUBTOTAL	7	3
Defendant's Current Charge(s):				
If all the elements of the present offense are included in any prior offense whether or not the prior offenses were used in determining prior record level:				
		+ 1	1	
If the offense was committed while the offender was:		+ 1	1	
☒ on supervised or unsupervised probation, parole, or post-release supervision;				
☐ serving a sentence of imprisonment; or ☐ on escape from a correctional institution.				
County	File No.	State (if other than NC)		
Mecklenburg	17CRS [REDACTED]			
		TOTAL	9	5

Sample Record

Page 2

Pre-Trial Issues

Anti-Collateral Attack Rule

- Don't wait until trial to challenge validity of prior felony conviction if you know it's mistaken
 - If a predicate felony conviction could be attacked, it must be done with an MAR prior to trial (*State v. Creason*, 123 N.C. App. 495 (1996))
- Exception:
 - A *Motion to Suppress* the prior conviction due to lack of counsel is viable at any time (N.C.G.S. §15A-980)

***Some judges may permit such collateral attacks on the theory that it promotes judicial economy

Improper Collateral Attacks

My lawyer was ineffective

Court that took conviction lacked jurisdiction

Guilty plea was not knowing and/or voluntarily made





I WILL LET THE GODS DECIDE
MY FATE, I DEMAND A TRIAL
BY COMBAT

Going to Trial



Habitual Felon trials are bifurcated.

Phase One, Phase Two, & perhaps Phase Three

PHASE ONE

The guilt/innocence determination of the principal felony

Jury should not hear about HF status during Phase One (N.C.G.S. §14-7.5)

You may refer to the sentence your client might receive for the principal felony but
NOT to the sentence as a HF

PHASE ONE

NOT GUILTY

NOT GUILTY

If jury acquits or principal charge dismissed:

- HF status has no effect and must be dismissed
- Status cannot stand alone
- Winner! Winner! Winner!

NOT GUILTY



PHASE TWO



If convicted:

- **HF status** is a penalty enhancement
 - HF status will elevate the felony punishment four (4) classes
 - Capped at "C"
- **Violent Habitual Felon** (N.C.G.S. §14-7.12):
 - If defendant is convicted of the principal Class A-E felony, sentence is Life without Parole

Should You Pass Go?

- If you get a Guilty verdict on the principal felony, don't give up!
- You have leverage:
 - Conference the case with the judge and the prosecutor
 - Ask for a mitigated range sentence or a bottom of the presumptive range sentence in exchange for a stipulation to the HF status
 - **Client must agree and execute a HF plea transcript that admits HF status



Sample HF Plea Transcript at Phase Two

STATE VERSUS		File No. HABITUAL (PHASE TWO)
Name Of Defendant JOHN DOE		
20. Have you agreed to plead ☒ guilty ☐ guilty pursuant to <i>Alford</i> ☐ no contest as part of a plea arrangement? <i>(if so, review the terms of the plea arrangement as listed in No. 21 below with the defendant.)</i> (20) YES 21. The prosecutor, your lawyer and you have informed the Court that these are all the terms and conditions of your plea:		
PLEA ARRANGEMENT		
The Defendant will plead guilty to the Habitual Felon status. The Defendant is a prior record level IV for Habitual Sentencing, pleading to a Class "C" felony. That the sentence will be in the court's discretion.		
☒ The State dismisses the charge(s) set out on Page Two, Side Two, of this transcript. ☐ The defendant stipulates to restitution to the party(ies) in the amounts set out on "Restitution Worksheet, Notice And Order (Initial Sentencing)" (AOC-CR-611).		
22. Is the plea arrangement as set forth within this transcript and as I have just described it to you correct as		(22) YES

PHASE TWO

Jury trial for HF Status

- Beyond reasonable doubt
- Three (3) prior non-overlapping felony convictions
- The main evidence typically is a certified court records
- Permissible Closing Arguments in Phase 2:
 - May now refer to the enhanced sentence your HF client is exposed to
 - Watch for different names or dates of birth
 - Exploit sloppy judgments
 - When the stakes are this high, discrepancies like that are unacceptable

PHASE 3



If aggravating factors have been alleged, the jury could be asked to deliberate a **third** time on whether aggravating factors have been proven beyond a reasonable doubt.

Habitual Felon Sentencing

Class of Substantive Felony	Will Be Enhanced to	Habitual Felon Class
Class I	→	Class E
Class H	→	Class D
Class G	→	Class C
Class F	→	Class C
Class E	→	Class C
Class D	→	Class C
Class A, Class B1, Class B2	→	Class A, Class B1, Class B2

***Except pre-2011

Violent Habitual Felon Sentencing

Class of Substantive Felony	Will Be Enhanced to	Habitual Felon Class
Class I	→	Not Applicable
Class H	→	Not Applicable
Class G	→	Not Applicable
Class F	→	Not Applicable
Class E	→	Life
Class D	→	Life
Class A, Class B1, Class B2	→	Life

HF & Prior Record Level Points

- Felony convictions used to establish the client's HF status cannot count toward the prior record level point system (N.C.G.S. §14-7.6)
- BUT...
 - If convicted of multiple felonies in one session of court, one of those felony convictions may be used as a predicate conviction toward HF status, and a second one can be used toward the prior record level (N.C.G.S. §14-7.12)
- **Special consideration:** PDP (cocaine vs. marijuana), in Habitual Crimes consider attempts vs. completed crimes (larceny, assault)



Special Client Concerns

- Unwillingness or inability to process or accept HF sentence
- Myths regarding priors
- Dangerous decision-making
 - Resist any urge to sugarcoat the news
 - Suppression motion? Great! But you are HF for life.
 - Give the worst
 - Visit clients early and often: build trust
 - Communicate offer is better than alternative
 - Should a non-habitual offer be taken?





Constitutional Issues

Generally, these claims have been rejected:

Double Jeopardy

Equal Protection

Selective Prosecution

Separation of Powers

Gives DA the legislative power to define sentence for crimes

Cruel and Unusual Punishment





This is real. They can do it. They are doing it.

Can I Get a HF offer?

Sometimes, a HF status client will face more time on a non-habitual plea or conviction

When being sentenced as a HF can benefit your client:

- (1) Defendants with a Class C or a Class D felony
- (2) Drug trafficking offenses

Can I get a reduction in prior record level?



N.C.G.S

- § 14-7.1 Persons defined as habitual felons.
- § 14-7.2 Punishment.
- § 14-7.3 Charge of habitual felon
- § 14-7.4 Evidence of prior convictions of felony offenses
- § 14-7.5 Verdict and judgment
- § 14-7.6 Sentencing of habitual felons
- § 14-7.7 Persons defined as violent habitual felons
- § 14-7.8 Punishment
- § 14-7.9 Charge of Violent Habitual Felon
- § 14-7.10 Evidence of prior convictions of violent felonies
- § 14-7.11 Verdict and judgement
- § 14-7.12 Sentencing of violent habitual felons



"Your Honor, we feel the trial failed to deliver on its pretrial publicity."

HF cases are regular cases with the only difference being the amount of time your client faces.