



North Carolina's Habitual Felon, Violent Habitual Felon, and Habitual Breaking and Entering Laws

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I. Introduction

The General Assembly has addressed the issue of criminal recidivism in several ways. For example, defendants with extensive criminal histories are subject to greater punishment under Structured Sentencing.¹ And specific statutes apply to defendants who repeatedly drive while impaired² or assault others.³

This bulletin, an updated and expanded version of one published in 2008,⁴ concerns three closely related statutory provisions that target repeat serious offenders: the habitual felon laws,⁵ the violent habitual felon laws,⁶ and the habitual breaking and entering laws.⁷ 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 in 1994. 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. Finally, the habitual breaking and entering laws were enacted in 2011. They provide for increased punishment for a defendant who, having already been convicted of one felony breaking and entering crime, commits a second.

The habitual felon, violent habitual felon, and habitual breaking and entering statutes do not define crimes. Rather, they are penalty enhancement provisions that apply to defendants who have achieved a specific status. Thus, a defendant cannot be prosecuted under these laws simply for having a qualifying criminal record. There must be a current offense to which the recidivist charge⁸ can attach.

According to the Administrative Office of the Courts, 3,183 habitual felon charges were brought in 2012. By contrast, just seventeen violent habitual felon charges were brought that year. Two-hundred fifty habitual breaking and entering charges were brought in 2012, though that was the first year it was possible to bring such charges, so it is not clear yet whether that figure is typical or is likely to rise as prosecutors and others become more familiar with the law.

The habitual offender 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,”⁹ “predicate felon[ies],”¹⁰ and “underlying felonies.”¹¹ Courts have used confusingly similar terms to refer to the new offense to which the recidivist charge attaches, describing

1. Section 15A-1340.14 of the North Carolina general Statutes (hereinafter G.S.) (rules for determining a felony defendant’s prior record level); 15A-1340.17 (chart setting out sentencing ranges for each offense class and prior record level).

2. G.S. 20-138.5 (habitual driving while impaired).

3. G.S. 14-33.2 (habitual misdemeanor assault).

4. Jeff Welty, *North Carolina’s Habitual Felon and Violent Habitual Felon Laws*, ADMIN. OF JUST. BULL. NO. 2008/04 (UNC School of Government, June 2008), <http://sogpubs.unc.edu/electronicversions/pdfs/aojb0804.pdf>.

5. G.S. 14-7.1 through -7.6

6. G.S. 14-7.7 through -7.12.

7. G.S. 14-7.25 through -7.31.

8. Because the habitual offender laws do not define crimes, it is arguably inaccurate to refer to, for example, a habitual felon “charge.” However, the usage is so convenient, and so universal, that it is adopted in this bulletin.

9. *State v. Cogdell*, 165 N.C. App. 368, 371 (2004).

10. *State v. Brewington*, 170 N.C. App. 264, 280 (2005).

11. *State v. Scott*, 167 N.C. App. 783, 786 (2005).

that offense as the “underlying felony,”¹² the “substantive felony,”¹³ the “underlying substantive felony,”¹⁴ and the “predicate substantive felony.”¹⁵ The habitual offender statutes refer to the new offense as the “principal felony.”¹⁶

For the sake of clarity, this bulletin generally will use the terms “previous felony,” “previous violent felony,” and “previous felony offense of breaking and entering” to describe the prior convictions that render the defendant a habitual offender. This bulletin generally will use the terms “substantive felony,” “substantive violent felony,” or “substantive offense” 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.

II. Substantive Offenses

This section describes the offenses that can, and cannot, serve as substantive offenses to which a habitual offender charge may attach.

A. Habitual Felon

Any offense that is a felony under state law can serve as a substantive felony to which a habitual felon charge may attach.¹⁷ This includes offenses that are felonies only by virtue of their own recidivist provisions, such as habitual driving while impaired,¹⁸ or habitual misdemeanor assault.¹⁹ It also includes felony speeding to elude arrest, even though speeding to elude arrest also can sometimes be a misdemeanor.²⁰ 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.²¹ However, a conviction of a felony breaking and entering offense that is elevated under the habitual breaking and entering statute likely cannot be further elevated under the habitual felon statute.²²

B. Violent Habitual Felon

The violent habitual felon statutes provide for enhanced punishment for certain defendants who commit a “violent felony.”²³ The statutes define “violent felony” to encompass all, and only, Class A through E felonies.²⁴ This excludes some felony offenses that might naturally be

12. *State v. Davis*, 186 N.C. App. 242, 248 (2007).

13. *Cogdell*, 165 N.C. App. at 373.

14. *State v. Glasco*, 160 N.C. App. 150, 160 (2003).

15. *Scott*, 167 N.C. App. at 786.

16. G.S. 14-7.3, -7.5, -7.6, -7.9, -7.11, -7.28, -7.30.

17. G.S. 14-7.2, -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.)

18. G.S. 20-138.5. *See also* *State v. Baldwin*, 117 N.C. App. 713 (1995).

19. G.S. 14-33.2. *See also* *State v. Holloway*, ___ N.C. App. ___, 720 S.E.2d 412 (2011); *State v. Smith*, 139 N.C. App. 209 (2000). However, convictions of habitual misdemeanor assault cannot serve as previous convictions for habitual felon purposes. *See State v. Shaw*, ___ N.C. App. ___, 737 S.E.2d 596 (2012), discussed *infra* note 49 and accompanying text.

20. *Scott*, 167 N.C. App. at 786–87. *See also* G.S. 20-141.5.

21. *See State v. Jones*, 358 N.C. 473 (2004).

22. *See infra* note 231 and accompanying text.

23. G.S. 14-7.12.

24. G.S. 14-7.7.

considered violent. For example, it excludes assault inflicting serious bodily injury,²⁵ assault by strangulation,²⁶ aggravated assault on a handicapped person,²⁷ elder abuse,²⁸ and assault on a law enforcement officer inflicting serious bodily injury.²⁹ The statutory definition also includes a number of offenses that might not naturally be considered violent, such as embezzlement of more than \$100,000,³⁰ obtaining more than \$100,000 by false pretenses,³¹ trafficking in stolen identities,³² making a false report about a weapon of mass destruction or perpetrating a hoax involving a false weapon of mass destruction,³³ and a variety of drug manufacturing and trafficking offenses, such as manufacturing methamphetamine,³⁴ trafficking in more than 10,000 pounds of marijuana,³⁵ more than 400 grams of cocaine,³⁶ more than 200 grams of methamphetamine,³⁷ more than 14 grams of heroin,³⁸ and so forth.

C. Habitual Breaking and Entering

The statute applies only to defendants who are charged with “a felony offense of breaking and entering.”³⁹ The statute defines “breaking and entering” to include:

- First-degree burglary, G.S. 14-51⁴⁰
- Second-degree burglary, G.S. 14-51⁴¹
- Breaking out of dwelling house burglary, G.S. 14-53⁴²
- Felony breaking or entering, G.S. 14-54(a)⁴³
- Breaking or entering a building that is a place of religious worship, G.S. 14-54.1⁴⁴
- Any repealed or superseded offense that is “substantially equivalent” to the above
- Any offense committed in another jurisdiction that is “substantially equivalent” to the above⁴⁵

25. G.S. 14-32.4(a) (Class F felony).

26. G.S. 14-32.4(b) (Class H felony).

27. G.S. 14-32.1(e) (Class F felony).

28. G.S. 14-32.3(a) (Class F or H felony, depending on seriousness of injury suffered by elder victim).

29. G.S. 14-34.7(a) (Class F felony).

30. G.S. 14-90 (Class C felony).

31. G.S. 14-100 (Class C felony).

32. G.S. 14-113.20A, -113.22(a1) (Class E felony).

33. G.S. 14-288.23, -288.24 (Class D felonies).

34. G.S. 90-95(b)(1a) (Class C felony).

35. G.S. 90-95(h)(1)d. (Class D felony).

36. G.S. 90-95(h)(3)c. (Class D felony).

37. G.S. 90-95(h)(3b)c. (Class C felony).

38. G.S. 90-95(h)(4)b., c. (Class C or E felony, depending on quantity).

39. G.S. 14-7.26, -7.27.

40. First-degree burglary is a Class D felony. G.S. 14-52.

41. Second-degree burglary is a Class G felony. G.S. 14-52.

42. This is a Class D felony. G.S. 14-53.

43. The reference to subsection (a) excludes misdemeanor breaking or entering under G.S. 14-54(b), consistent with the repeated statutory references to “felony offenses of breaking and entering.” *See, e.g.*, G.S. 14-7.27. Felony breaking or entering requires the intent to commit any felony or larceny in the building and is a Class H felony. G.S. 14-54(a).

44. This is a Class G felony. G.S. 14-54.1.

45. *See* G.S. 14-7.25(1). This list defines both which offenses may be used as a substantive breaking and entering offense and which offenses may be used as previous breaking and entering offenses. Obviously, the references to repealed, superseded, and out-of-state convictions are included so that such convictions

III. Previous Offenses

This section describes the offenses that can, and cannot, serve as previous offenses on which a habitual offender charge may be based.

A. Habitual Felon

1. Offenses That May Be Used as 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.”⁴⁶ (The fact that the sentence does not matter suggests that a previous North Carolina felony that resulted in a prayer for judgment continued, or PJC, may be used as a previous felony.⁴⁷)

However, there are several exceptions to the general rule. The following do not qualify as previous felonies:

- Convictions for “federal offenses relating to the manufacture, possession, sale and kindred offenses involving intoxicating liquors”⁴⁸
- Convictions for habitual misdemeanor assault⁴⁹
- Convictions incurred prior to July 6, 1967⁵⁰
- North Carolina convictions incurred prior to July 1, 1975, if based on a plea of no contest⁵¹
- Convictions that have been pardoned⁵²

may be used as previous felonies, a topic discussed *infra* notes 81–82 and accompanying text. The substantive felony will always be a current North Carolina felony offense.

46. G.S. 14-7.1.

47. The fact that the conviction, rather than the sentence, is critical is illustrated by *State v. McGee*, 175 N.C. App. 586, 589 (2006). In *McGee*, the defendant was found guilty of his first felony before he committed his second, but he fled before sentencing, so judgment was continued; final judgment was entered only after he committed and was arrested for his second felony. This did not violate the requirement of non-overlapping felonies, discussed *infra* note 58 and accompanying text, because “the plain language of the statute refers to ‘conviction’ and not entry of judgment or sentencing.” Even if legally permissible, using a PJC as a previous conviction may create practical difficulties. For example, the usual way of proving the existence of a prior conviction is by introducing the judgment that embodies the conviction. But by definition, a conviction that results in a PJC does not result in a judgment. Depending on how the PJC was documented, this difficulty may not be insurmountable. The use of documents other than a judgment to prove a previous conviction is discussed *infra* notes 165–66 and accompanying text.

48. G.S. 14-7.1.

49. 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 court of appeals has since ruled that even habitual misdemeanor assault convictions incurred before the amendment may not be used as previous convictions in habitual felon proceedings. *State v. Shaw*, ___ N.C. App. ___, 737 S.E.2d 596 (2012).

50. G.S. 14-7.1.

51. *State v. Petty*, 100 N.C. App. 465, 467–68 (1990). 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.

52. G.S. 14-7.1 (“Any felony offense to which a pardon has been extended shall not for the purpose of this Article constitute a felony. The burden of proving such pardon shall rest with the defendant and the State shall not be required to disprove a pardon.”). North Carolina law recognizes several kinds

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 the issues raised by these three classes of cases. The first is the simplest to analyze, 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 in favor of using the classification of the jurisdiction in which the conviction was incurred.⁵³

The second and third classes of cases 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 current classification of the offense of which the defendant was previously convicted controls, not the classification at the time the previous conviction was incurred.⁵⁴ Second, when 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.⁵⁵ However, these parallels are undermined by 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,⁵⁶ and this appears to be the better view under North Carolina’s habitual felon statutes as well.

of pardons, any of which is likely to place the offense off limits for habitual felon purposes. *Cf. Booth v. State*, ___ N.C. App. ___, ___, 742 S.E.2d 637, 639, *temporary stay allowed*, 743 S.E.2d 644 (2013) (concluding that while “[i]t is true that there are different types of pardons,” the use of the word “pardon” without modification or limitation in the Felony Firearms Act, G.S. 14-415.1, means that “all types of pardons, whether they are denominated as unconditional, conditional, or of innocence,” are sufficient to remove a conviction from the scope of the Act).

53. 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).

54. G.S. 14-7.7(b)(2).

55. G.S. 15A-1340.14(c).

56. *See* Davis, *supra* note 53, § 5 (collecting cases).

2. Number

A habitual felon charge can only be brought against a defendant who has three previous felony convictions. In other words, it increases the punishment for a defendant's fourth "strike."⁵⁷

3. 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. 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.⁵⁸

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 charge 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."⁵⁹ 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.⁶⁰

4. Use of Offenses Committed Prior to Age 18

In habitual felon prosecutions, "felonies committed before a person attains the age of 18 years shall not constitute more than one felony."⁶¹ 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.

Because the statute requires that the defendant has "been convicted of or pled guilty to" the previous offense, the previous conviction must be an adult conviction, not a juvenile adjudication.⁶²

57. G.S. 14-7.1.

58. See *State v. McGee*, 175 N.C. App. 586, 589–90 (2006).

59. G.S. 14-7.1.

60. 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 §§ 7(c)–(d) (1992; 2008) (collecting cases).

61. G.S. 14-7.1.

62. *In re Jones*, 11 N.C. App. 437, 437 (1971) ("Juvenile proceedings in this State are not criminal prosecutions and a finding of delinquency in a juvenile proceeding is not synonymous with the conviction of a crime.").

5. 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.⁶³

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.⁶⁴ 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.⁶⁵

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.⁶⁶ The details of this prohibition are discussed below in the section of this bulletin regarding sentencing. Also discussed later in this bulletin⁶⁷ 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.

B. Violent Habitual Felon

1. Offenses That May Be Used as 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).”⁶⁸ A previous conviction as a habitual felon does not constitute a previous violent felony.⁶⁹

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 if committed at the time of the violent habitual felon proceeding, is a previous violent felony under the second prong of the definition, above.⁷⁰ Although there is no case law on point, the converse may also be true. That is, a

63. *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.”).

64. *State v. Misenheimer*, 123 N.C. App. 156, 157–58 (1996).

65. *See State v. Glasco*, 160 N.C. App. 150, 160 (2003); *State v. Crump*, 178 N.C. App. 717, 719–22 (2006).

66. G.S. 14-7.6.

67. *See infra* note 144 and accompanying text.

68. G.S. 14-7.7(b).

69. G.S. 14-7.7(a).

70. *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); *State v. Mason*, 126 N.C. App. 318, 323–24 (1997) (same, as to previous convictions for voluntary manslaughter

“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, might 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. An unpublished case suggests that substantial similarity should be determined using an “elements-based approach.”⁷¹

“Upgraded” out-of-state 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.⁷² Again, there is no case law on “downgraded” offenses, and they might be held not to qualify.

2. Number

A violent habitual felon charge can only be brought against a defendant who has two previous violent felony convictions.⁷³ In other words, it increases the punishment for a defendant’s third “strike.”

3. Timing

G.S. 14-7.7 provides that a defendant’s second violent felony cannot be used to support a violent habitual felon charge “unless it is committed after the conviction or plea of guilty or no contest to the first violent felony.” Thus, the requirement of non-overlapping felonies that is discussed above in connection with the habitual felon laws⁷⁴ also exists in the violent habitual felon context. And just as it is unclear in the habitual felon setting whether the final previous felony conviction must predate the defendant’s commission of the current felony, it is unclear in the violent habitual felon setting whether the final previous violent felony must predate the defendant’s commission of the current violent felony.⁷⁵

and assault with a deadly weapon inflicting serious injury; rejecting argument that this violates the Ex Post Facto Clause). 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 violent 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.

71. *State v. Snipes*, No. COA12-542, 2013 WL 432582, at *3 (N.C. Ct. App. Feb. 5, 2013) (unpublished), *appeal dismissed*, 743 S.E.2d 217 (2013) (using such an approach to find substantial similarity between the Pennsylvania offense of rape and the North Carolina offense of second-degree sexual offense).

72. *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 violent habitual felon proceeding; the conviction was properly counted as a previous violent felony).

73. G.S. 14-7.7.

74. *See supra* notes 58–60 and accompanying text.

75. *See supra* notes 59–60 and accompanying text.

4. Use of Offenses Committed Prior to Age 18

In habitual felon prosecutions, “felonies committed before a person attains the age of 18 years shall not constitute more than one felony.”⁷⁶ In other words, regardless of how many felonies a defendant committed prior to the age of 18, only one conviction for such conduct may be used as a previous felony. No similar language appears in the violent habitual felon statutes. Therefore, there is likely no limit to the number of convictions for offenses committed prior to the age of 18 that may be used as previous violent felonies.

As in the habitual felon context, the violent habitual felon statute requires that the defendant has been “convict[ed]” of each previous offense, meaning that juvenile adjudications cannot be used as previous violent felonies.⁷⁷

5. Convictions Used for Other Purposes

This issue is discussed above in connection with the habitual felon laws.⁷⁸ Although there are no violent habitual felon cases on point, the legal principles discussed there are equally applicable in the violent habitual felon context.

C. Habitual Breaking and Entering

1. Offenses That May Be Used as Previous Breaking and Entering Offenses

The statute applies to defendants who have been convicted⁷⁹ of “one or more prior felony offenses of breaking and entering in any federal court or state court in the United States.”⁸⁰ Thus, the defendant must have a prior conviction that is (1) a felony, presumably as classified by the jurisdiction where the conviction took place,⁸¹ and (2) for a crime within the definition of “breaking and entering” set out in G.S. 14-7.25 and discussed above.⁸²

2. Number

The defendant needs only one previous conviction to qualify as a habitual breaking and entering status offender.⁸³ The law may be described as a “two strikes and you’re out” law.

76. G.S. 14-7.1.

77. G.S. 14-7.7(a). See generally *supra* note 62 and accompanying text.

78. See *supra* notes 63–66 and accompanying text.

79. As to whether a previous conviction that resulted in a prayer for judgment continued may be used to support a habitual offender charge, see *supra* note 47 and accompanying text.

80. G.S. 14-7.26.

81. Some question might arise about an out-of-state previous conviction that was a misdemeanor where it was incurred but that was for an offense that is substantially equivalent to a North Carolina felony.

82. See *supra* notes 39–45 and accompanying text. Recall that an out-of-state conviction may be used if it is for an offense that is “substantially equivalent” to a qualifying North Carolina crime. The statute does not say how substantial equivalence is to be determined. Courts might look to the Structured Sentencing context, where G.S. 15A-1340.14(e) sets out rules for assigning prior record level points to previous out-of-state convictions that are “substantially similar” to North Carolina offenses. The court of appeals has ruled that this determination is to be made by comparing the elements of the out-of-state and North Carolina crimes. See, e.g., *State v. Sanders*, ___ N.C. App. ___, 736 S.E.2d 238 (2013) (citing *State v. Fortney*, 201 N.C. App. 662 (2010)); *State v. Burgess*, ___ N.C. App. ___, ___, 715 S.E.2d 867, 870 (2011) (“Whether an out-of-state offense is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense.”).

83. G.S. 14-27.26.

3. Timing

The current offense must have been committed “after the conviction of the first felony offense of breaking and entering.”⁸⁴ Because the habitual breaking and entering statute specifies that there can be no overlap between the previous conviction and the commission of the current offense, it is clearer than the habitual felon and violent habitual felon laws.⁸⁵

4. Use of Offenses Committed Prior to Age 18

The statute states that “offenses of breaking and entering committed before the person is 18 years of age shall not constitute more than one felony of breaking and entering.”⁸⁶ Because only one previous conviction is needed, as long as the defendant was at least 18 years old at the time he or she committed the current offense, the statute will be satisfied.

Because the statute requires that the defendant has “been convicted of or pled guilty to” the previous offense, the previous conviction must be an adult conviction, not a juvenile adjudication.⁸⁷

5. Convictions Used for Other Purposes

This issue is discussed above in connection with the habitual felon laws.⁸⁸ Although there are no habitual breaking and entering cases on point, the legal principles discussed there are equally applicable in the habitual breaking and entering context.

IV. Charging

A. Who May Charge

The Justice Reinvestment Act of 2011 amended the habitual felon statute to provide that whether to charge a defendant as a habitual felon is a decision to be made by “[t]he district attorney, in his or her discretion.”⁸⁹ Similar language is present in the habitual breaking and entering statute.⁹⁰ The violent habitual felon statute does not contain similar language, but given the close relationship between the habitual offender statutes, the decision whether to charge the defendant as a violent habitual felon should also be made by the district attorney.

Because the charging decision must be made by the district attorney, it is not appropriate for a magistrate to charge a defendant in an arrest warrant or a magistrate’s order with being a habitual felon, a violent habitual felon, or a habitual breaking and entering status offender, even if the magistrate is aware that the defendant’s criminal record renders him or her eligible for such a charge. Furthermore, arrest warrants and magistrates’ orders may only be used to charge “crimes,”⁹¹ while the recidivist offender statutes define statuses. Finally, each relevant statute

84. *Id.*

85. See the discussion of those statutes *supra* at notes 58–60 and 74–75 and accompanying text.

86. G.S. 14-7.26.

87. See *supra* notes 61–62 and accompanying text (discussing this issue in the habitual felon context).

88. See *supra* notes 63–66 and accompanying text.

89. S.L. 2011-192, sec. 3(c), codified at G.S. 14-7.3. The use of the term “district attorney” instead of “prosecutor” or “district attorney or assistant district attorney” could be read to require the district attorney’s personal involvement in the decision. *Cf.* G.S. 15A-101 (defining “district attorney” and “prosecutor”), though it seems unlikely that the General Assembly intended that result.

90. G.S. 14-7.28(a).

91. G.S. 15A-304 (arrest warrants); 15A-511(c) (magistrates’ orders).

refers only to charges in the form of an “indictment,”⁹² further solidifying the conclusion that charging decisions must be made by the district attorney rather than by a magistrate or other judicial official.⁹³

B. Prosecutorial Discretion Regarding Whether to Charge and Which Previous Convictions to Include

As noted above, each district attorney has the discretion to charge, or not to charge, an eligible defendant with being a habitual offender. Different district attorneys exercise this discretion in different ways.⁹⁴ The fact that some prosecutors are more inclined to bring recidivist charges than others does not violate a defendant’s equal protection rights, nor does it amount to selective prosecution.⁹⁵ Nor does a district attorney fail to exercise his or her discretion if he or she adopts a policy of charging all eligible defendants as habitual offenders.⁹⁶

A prosecutor also has discretion concerning which previous felonies to include in the habitual offender indictment. When a defendant has more than the minimum number of previous convictions, the State is not required to list all of them in the habitual offender 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.⁹⁷

C. Contents of Charging Document

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.⁹⁸

The violent habitual felon statute and the habitual breaking and entering statutes contain nearly identical language.⁹⁹ Thus, the statutes require 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.

92. G.S. 14-7.3; 14-7.9; 14-7.28. As to the possibility of using an information in lieu of an indictment, see *infra* note 189 and accompanying text.

93. With the defendant’s consent, it would probably also be permissible to charge a defendant with habitual status using an information. See *State v. Bradley*, 175 N.C. App. 234 (2005) (referencing the possibility in passing).

94. Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 *CRIME & JUST.* 211 (2012) (noting that in some offices, the district attorney brings habitual felon charges against all eligible defendants, while other prosecutors “use the habitual felon law more selectively”).

95. See *infra* notes 236–37 and accompanying text.

96. See, e.g., *State v. Williams*, 149 N.C. App. 795, 802 (2002).

97. See *State v. Cates*, 154 N.C. App. 737, 739–40 (2002). As discussed in detail below, previous convictions used to establish a defendant’s habitual offender status may not be used when calculating a defendant’s prior record level.

98. G.S. 14-7.3.

99. G.S. 14-7.9; 14-7.28(b).

The appellate courts have not required strict compliance with these statutory requirements. Instead, the courts have focused on whether the indictment gives the defendant adequate notice of the previous felonies on which the State seeks to rely.

As to item (1), the court of appeals ruled that an inaccurate date was not a fatal defect in *State v. Spruill*.¹⁰⁰ The appellate courts have also repeatedly ruled that the State may amend a habitual felon indictment to correct an error regarding the date that a previous felony was committed.¹⁰¹ It is possible that a court would view an inaccurate or missing date as a more serious problem if it were combined with other errors that made it difficult to identify the previous conviction with certainty.

As to item (2), the court of appeals held in *State v. Mason* that “the name of the state need not be expressly stated if the indictment sufficiently indicates the state against whom the felonies were committed.”¹⁰² 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*,¹⁰³ 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.¹⁰⁴

As to item (3), the court of appeals has ruled repeatedly that the State may amend the date on which the defendant was convicted of the previous felony.¹⁰⁵

As to item (4), the court of appeals likewise has held that so long as the indictment provides sufficient notice, technical defects in an indictment concerning the court in which a defendant's previous conviction took place may be corrected or overlooked.¹⁰⁶

The statute does not require that the habitual felon indictment set forth the nature of the previous felony, that is, the name of the crime of which the defendant was previously convicted. That information may be helpful in giving the defendant proper notice, and it is routinely included in habitual felon indictments as a matter of practice. However, several unpublished decisions suggest that the omission of such information, or the inclusion of ambiguous or erroneous information, is not fatal to a habitual felon indictment.¹⁰⁷ Likewise, though it is common

100. 89 N.C. App. 580 (1988) (finding no fatal variance between the indictment, which alleged that a previous felony was committed on October 28, 1977, and the proof, which showed that it was committed on October 7, 1977).

101. See *infra* notes 112–15 and accompanying text.

102. 126 N.C. App. 318, 323 (1997).

103. 137 N.C. App. 495 (2000).

104. 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).

105. See *infra* note 116 and accompanying text.

106. See *infra* note 117 and accompanying text.

107. 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

for a habitual felon indictment to include the case number associated with each of the defendant's previous convictions, that information is not required by statute.¹⁰⁸ Nor is it necessary to allege the defendant's age at the time of each of his or her previous convictions.¹⁰⁹ Finally, the special pleading requirements of G.S. 15A-928 do not apply to habitual felon indictments.¹¹⁰

D. Amending and Superseding Habitual Felon or Violent Habitual Felon Indictments

When an error in a habitual felon indictment is discovered, the State may seek to amend or supersede the 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 generally are prohibited by G.S. 15A-923(e), which states that "[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."¹¹¹ Thus, the State may amend the indictment so long as the amendment does not substantially alter the charge.

Amendments to the date on which a previous felony was committed generally are permissible. In *State v. Taylor*,¹¹² the court of appeals considered a case in which the habitual felon indictment alleged that the defendant committed a previous felony on December 8, 1992, while in fact he had done so on December 18, 1992. The court ruled that "the discrepancy regarding the date of commission of defendant's prior felony offense is not material"¹¹³ and did not render the indictment fatally defective. In fact, the court suggested that omitting the date completely would not be a fatal defect,¹¹⁴ and it permitted the State to amend the indictment. Similarly, *State v. Locklear* concluded that "it was the fact that another felony was committed, not its

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 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). See also *State v. Briggs*, 137 N.C. App. 125, 128 (2000) (the habitual felon charge referred to the defendant's previous conviction of "the felony of breaking and entering buildings"; although breaking or entering is a misdemeanor absent the intent to commit a felony therein, and the habitual felon indictment did not include the intent language, 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).

108. In *State v. Oakley*, No. COA12-325, 2012 WL 6017952, at *3, *4 (N.C. Ct. App. Dec. 4, 2012) (unpublished), *discretionary review denied*, 739 S.E.2d 847 (2013), the court of appeals ruled that the State was properly permitted to "amend the indictment to reflect the proper file number for the [previous] conviction," which was off by one digit. The court noted that there was no requirement to include the number at all, making it "mere surplusage."

109. *State v. Holcombe*, No. COA09-147, 2009 WL 2370734 (N.C. Ct. App. Aug. 4, 2009) (unpublished) (apparently so holding).

110. See *State v. Marshburn*, 173 N.C. App. 749, 750 (2005). G.S. 15A-928 applies when "the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade," as is the case with, for example, habitual misdemeanor assault.

111. *State v. Price*, 310 N.C. 596, 598 (1984).

112. 203 N.C. App. 448 (2010).

113. *Id.* at 454.

114. The court approvingly cited and discussed *State v. Inman*, 174 N.C. App. 567 (2005) (ruling that although G.S. 14-415.1 states that an indictment charging a defendant with possession of a firearm after conviction of a felony "must set forth . . . the date that the defendant was convicted" of his or her previous felony, that requirement is directory rather than mandatory, and the omission of the date did not create a fatal defect).

specific date, which was the essential question in the habitual felon indictment,” so the State was properly permitted to amend the indictment to reflect the correct date.¹¹⁵

The appellate courts have also ruled that the State may amend the date on which the defendant was convicted of a previous felony.¹¹⁶

Changes to the jurisdiction in which a previous felony conviction was incurred have also been deemed not to be substantial alterations,¹¹⁷ as have changes to the number of previous convictions alleged to have been incurred before the defendant reached age 18.¹¹⁸

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.¹¹⁹ Making a substantial alteration by amendment is improper even with the defendant's consent.¹²⁰

If it is otherwise proper, an amendment may be permitted as late as the close of the evidence on the habitual offender charge.¹²¹

If the State desires to make a substantial change to a habitual offender 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.¹²²

115. 117 N.C. App. 255, 260 (1994).

116. *State v. Hargett*, 148 N.C. App. 688 (2002) (trial court did not err in allowing the State to amend the date of the defendant's previous conviction, citing *Locklear*, 117 N.C. App. at 260 (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”). *See also State v. Lowry*, No. COA10-165, 2010 WL 4292052 (N.C. Ct. App. Nov. 2, 2010) (unpublished) (same), *cert. denied*, 731 S.E.2d 833 (2011); *State v. Martin*, No. COA05-579, 2006 WL 539376 (N.C. Ct. App. Mar. 7, 2006) (unpublished) (same); *State v. Whittenburg*, No. COA03-1267, 2004 WL 2585176 (N.C. Ct. App. Nov. 16, 2004) (unpublished) (same); *State v. Cook*, No. COA03-50, 2004 WL 1725156 (N.C. Ct. App. Aug. 3, 2004) (unpublished) (same).

117. *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; the indictment “sufficiently notified defendant of the particular conviction that was being used to support his status as an habitual felon”); *State v. Coltrane*, 188 N.C. App. 498, 500–03 (2008) (no substantial alteration to felon-in-possession indictment where indictment amended to reflect correct county in which previous felony conviction was sustained). *See also supra* note 108 and accompanying text (discussing contents of charging documents); *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).

118. *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 was the result of felonies committed prior to age eighteen).

119. *See State v. Little*, 126 N.C. App. 262 (1997).

120. *State v. De la Sancha Cobos*, 211 N.C. App. 536, 542 (2011) (“Even if Defendant's acquiescence could be construed as consenting to the amendment, which was required to establish the trial court's jurisdiction, a party cannot consent to subject matter jurisdiction.”).

121. *See, 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 (2005) (allowing amendment of armed robbery indictment at the close of the State's evidence).

122. *Compare Little*, 126 N.C. App. 262 (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 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, it 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.¹²³

E. Relationship of Habitual Offender Indictments to Indictments for Substantive Offenses

The habitual felon statutes 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.¹²⁴

The violent habitual felon statutes contain nearly identical language.¹²⁵ 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]he indictment charging the defendant as an habitual felon shall be separate”). This has prompted the court of appeals to recognize the statutes’ “obvious internal inconsistencies.”¹²⁶

The habitual breaking and entering statutes are clearer. They state that “[t]he indictment charging the defendant as a status offender shall be separate from the indictment charging the person with the principal felony offense of breaking and entering.”¹²⁷

Using separate indictments to charge the substantive offense and the recidivist offense is also the best practice for the habitual felon and violent habitual felon contexts. In *State v. Allen*,¹²⁸ 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

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. App. 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).

123. *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).

124. G.S. 14-7.3.

125. G.S. 14-7.9.

126. *State v. Smith*, 112 N.C. App. 512, 515 (1993).

127. G.S. 14-7.28(a).

128. 292 N.C. 431 (1977).

separate bill as being an habitual felon.”¹²⁹ The use of a separate indictment is the overwhelming practice today, though other arrangements have been used successfully in the past.¹³⁰

Not only may the habitual offender indictment be a separate document from the indictment for the substantive felony, it need not be filed at the same time. The habitual offender indictment may be filed before, together with, or after the indictment for the substantive felony.¹³¹ However, there are some constraints on the timing of the habitual offender charge. It cannot stand alone; it must be ancillary to a substantive felony.¹³² 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.¹³³ And, a habitual offender charge cannot be “ancillary to felonies that had not yet occurred” when it was returned.¹³⁴ Therefore, if a defendant commits a new eligible offense after being charged as a habitual offender, a new habitual offender indictment must be obtained if the defendant is to be sentenced as a habitual offender in connection with the new crimes.

Although the habitual offender indictment must be ancillary to a substantive felony charge, the habitual offender indictment need not refer to or specify the substantive felony charge.¹³⁵ If the habitual offender 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 offender.¹³⁶ Indeed, the habitual offender indictment need not even

129. *Id.* at 433. See also *State v. Peoples*, 167 N.C. App. 63 (2004) (approving use of separate indictment to bring habitual felon charge); *State v. Patton*, 342 N.C. 633, 635 (1996) (suggesting in dicta that the habitual felon charge must be brought in “a separate document”); *State v. Hodge*, 112 N.C. App. 462 (1993) (similar).

130. The appellate courts previously approved a variety of attempts to comply with the conflicting requirements of the habitual felon and violent habitual felon statutes. In *State v. Young*, 120 N.C. App. 456, 459–61 (1995), the State obtained a single indictment that charged the substantive felony in one count and habitual felon in a separate count, and the court of appeals approved the arrangement. In *Smith*, 112 N.C. App. at 515–16, 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.

131. *State v. Blakney*, 156 N.C. App. 671, 674 (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.”).

132. *Allen*, 292 N.C. 431.

133. See *id.*; see also *State v. Bradley*, 175 N.C. App. 234 (2005) (defendant pled guilty to substantive felonies and to a 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).

134. *State v. Flint*, 199 N.C. App. 709, 718 (2009). See also *State v. Ross*, ___ N.C. App. ___, 727 S.E.2d 370 (citing *Flint*), *temporary stay allowed*, 727 S.E.2d 285 (2012), *discretionary review denied*, 738 S.E.2d 369 (2013).

135. See, e.g., *State v. Smith*, 160 N.C. App. 107, 124 (2003); *State 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.”).

136. 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,

allege that the defendant committed a substantive felony.¹³⁷ Similarly, the indictment for the substantive felony need not state that the defendant is being prosecuted as a habitual offender.¹³⁸

Because a habitual offender indictment need not specify the substantive felony charge to which it applies, a single habitual offender indictment can apply to an unlimited number of substantive felony charges.¹³⁹ Alternatively, the State may elect to bring a habitual offender charge for each substantive felony charge,¹⁴⁰ although the court of appeals has suggested that this may create a confusingly large array of charges.¹⁴¹ When the State uses a single habitual offender indictment in connection with multiple substantive offenses, it may “withdraw [the] habitual [offender] indictment as to some or all of the underlying felony charges . . . up until the time that the jury returns a verdict” at the habitual offender stage of the trial.¹⁴²

F. Second and Subsequent Habitual Offender Indictments

As noted above, previous felonies used to support a habitual offender charge are not “used up,” and thus they can be used to support a second or subsequent recidivist charge.¹⁴³ However, if a defendant is acquitted of a habitual offender charge, he or she cannot later be indicted as a habitual offender 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 offender issue once, is collaterally estopped from re-litigating it.¹⁴⁴ Collateral

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).

137. *State v. Roberts*, 135 N.C. App. 690 (1999).

138. *State v. Sanders*, 95 N.C. App. 494 (1989).

139. *State v. Patton*, 342 N.C. 633, 635 (1996) (“[A] separate habitual felon indictment is not required for each substantive felony indictment.”)

140. *State v. Taylor*, 156 N.C. App. 172, 174 (2003) (stating that “the State may choose to use multiple habitual felon indictments”).

141. *Id.*

142. *State v. Murphy*, 193 N.C. App. 236, 239 (2008). In *Murphy*, the defendant was charged with armed robbery, attempted armed robbery, and possession of a firearm by a felon and was also indicted as a habitual felon. He was convicted of all three substantive offenses. Sentencing him as a habitual felon on the armed robbery and attempted armed robbery charges would have resulted in a shorter sentence than sentencing him under the usual Structured Sentencing rules: as a habitual felon, he would have been a Prior Record Level I, Class C offender, while under Structured Sentencing without the habitual felon charge, he would have been a Prior Record Level IV, Class D offender. The State therefore informed the trial judge before the habitual felon stage of the trial began that it did not wish to pursue the habitual felon charge as to the robbery offenses. The trial judge agreed, and the defendant was eventually sentenced as a habitual felon only as to the firearm offense. The court of appeals affirmed but noted that if the State does not withdraw the habitual felon charge as it relates to a substantive felony before the jury returns a verdict at the habitual offender phase of the proceedings, “the court must sentence the defendant as an habitual felon.”

143. 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 be prosecuted as a habitual felon or a violent habitual felon.

144. *State v. Safrit*, 145 N.C. App. 541 (2001). 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 State v. Safrit*, 154 N.C. App. 727, 729 (2002) (appeal following new sentencing hearing).

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.”¹⁴⁵ In criminal cases, defendants are entitled to rely on collateral estoppel because it is part of the Fifth Amendment’s double jeopardy guarantee.¹⁴⁶

Of course, the State would be free to bring a new habitual offender charge based on completely different previous felonies, as the issue of whether those convictions can support a habitual offender conviction would never have “been determined by a valid and final judgment.” It is less clear whether there would be a collateral estoppel problem if a defendant were to have been acquitted of being a habitual offender, and then later were to be charged with being a habitual offender based on *some but not all* of the previous felonies used in the earlier habitual offender 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 open question is whether a defendant, previously found to be a habitual offender, is collaterally estopped from re-litigating his or her status as a habitual offender 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 some authority for it in North Carolina, though not in the habitual felon context.¹⁴⁷ Other jurisdictions are split.¹⁴⁸ The United States Supreme Court has twice suggested, but never held, that collateral estoppel cannot be used against criminal defendants.¹⁴⁹ As a practical matter, prosecutors would be wise not to attempt to use collateral estoppel to establish a defendant’s status as a habitual offender unless and until the North Carolina appellate courts approve such an approach.

V. Procedure

A. Issuance of an Order for Arrest

Suppose that a defendant has been arrested for, and charged with, robbery. He is released on bond. The prosecutor subsequently determines that the defendant is a habitual felon and obtains an indictment charging him as such. May the clerk or a judge issue an order for arrest based on the return of the habitual felon indictment?

In some parts of the state, the issuance of an order for arrest in these circumstances is automatic or nearly so. Despite being widespread, however, this practice is legally questionable.

145. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

146. *See id.* at 445.

147. *State v. Cornelius*, ___ N.C. App. ___, 723 S.E.2d 783 (2012) (regarding element of burglary in prosecution for felony murder); *State v. Dial*, 122 N.C. App. 298 (1996) (regarding jurisdiction to prosecute defendant for first-degree murder).

148. *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, 21–22 (8th Cir. 1975) (may).

149. *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).

There are two possible justifications for the procedure. First, an order for arrest may be issued when “[a] grand jury has returned a true bill of indictment against a defendant who is not in custody and who has not been released [on bail] to answer to the charges in the bill of indictment.”¹⁵⁰ When an indictment for a habitual offense is returned, one could argue, the defendant has not been released on bail to answer the habitual charge, so it is appropriate for the defendant to be arrested and for a magistrate to set conditions of release for the habitual charge.¹⁵¹

Second, an order for arrest may be issued whenever “it becomes necessary to take the defendant into custody.”¹⁵² One could argue that it is necessary to take a defendant into custody when she is charged with a recidivist offense because she has a new incentive to flee, making it necessary to apprehend her in order to reconsider her conditions of release.

The difficulty with both arguments is that they assume that a magistrate may set new release conditions for a defendant who is arrested on a habitual offender indictment. As explained in the section of this bulletin immediately below, that is probably incorrect. And if a magistrate cannot set new release conditions as a result of the return of a habitual offender indictment, ordering that the defendant be arrested accomplishes little except to put the magistrate in a position of uncertainty. Instead, the habitual offender indictment could simply be “mailed or otherwise given to the defendant” or his or her attorney,¹⁵³ with any changes to the defendant’s release conditions made upon the State’s motion, as discussed below.

B. Bond

In setting bond, a court must consider “the nature and circumstances of the offense charged.”¹⁵⁴ Whether a defendant has been charged as a habitual offender is obviously a relevant consideration. For example, a court might reasonably determine that a defendant facing a habitual offender charge is more likely to flee, and therefore the court might impose more stringent release conditions. But should the existence of a habitual offender charge be taken into account when determining the release conditions for the substantive felony, or may a separate release order be entered in connection with a habitual offender charge?

The better practice is not to set separate conditions of release in connection with the habitual offender charge. Generally, release conditions may be set only in connection with a criminal offense,¹⁵⁵ and being a habitual offender is a status, not a crime.

There are arguments to the contrary. For example, a probation violation is not a crime either, yet an alleged probation violation clearly supports the imposition of a bond.¹⁵⁶ And while the state’s appellate courts have not confronted this issue directly, the court of appeals has dealt

150. G.S. 15A-305(b)(1).

151. This argument involves a broad interpretation of the word “charge.” As noted above, the habitual felon, violent habitual felon, and habitual breaking and entering statutes define statuses, not crimes, and it is not clear that the word “charge” in the order for arrest statute should be read to include habitual offender status allegations. One point in favor of interpreting the statute that way is that the habitual offender statutes themselves refer to “charg[ing]” a person as a recidivist. *See, e.g.*, G.S. 14-7.1 (a defendant “may be charged as a status offender”); 14-7.3 (a prosecutor “may charge a person as an habitual felon”).

152. G.S. 15A-305(b)(5).

153. G.S. 15A-630.

154. G.S. 15A-534(c).

155. *See generally* G.S. 15A-533, -534 (referring repeatedly to the “offense” and the “offense charged”).

156. G.S. 15A-1345(b). However, there is express statutory authorization for the imposition of release conditions in this context, unlike the habitual offender context.

with a case involving a separate bond for a habitual felon charge, and it did not comment negatively on the procedure.¹⁵⁷

Still, the surest course is to adjust the defendant's release conditions in connection with the substantive felony, not to impose separate release conditions for the habitual offender charge. So, for example, if the State believes that an increase in a defendant's bond is appropriate in light of a habitual felon indictment, it should move to modify the conditions of release imposed in connection with the substantive felony.

C. Timing

"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."¹⁵⁸ Similar language is present in the violent habitual felon¹⁵⁹ and habitual breaking and entering¹⁶⁰ statutes.

Issues regarding the twenty-day period arise most frequently when the defendant is at first charged only with a substantive felony, with a habitual felon charge following later. It is clear from the text of the statutes that the twenty-day period begins on the date of the habitual offender 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 offender indictment, so long as at least twenty days elapse before the trial on the recidivist charge begins.¹⁶¹ There is nothing in the statutes that compels the trial court to begin the habitual felon, violent habitual felon, or habitual breaking and entering 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 offender phase if necessary.

D. 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."¹⁶² Similar language appears in the violent habitual felon¹⁶³ and habitual breaking and entering¹⁶⁴ statutes. The court of appeals has held that the methods of proof listed in the statutes are not exclusive and that, for example, a faxed copy of a certified judgment is an appropriate method of proof.¹⁶⁵ A "true" copy, if different from a certified copy, may also be used.¹⁶⁶ 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."¹⁶⁷

157. *See* *State v. Lane*, 163 N.C. App. 495 (2004).

158. G.S. 14-7.3.

159. G.S. 14-7.9.

160. G.S. 14-7.28(b).

161. *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.").

162. G.S. 14-7.4.

163. G.S. 14-7.10.

164. G.S. 14-7.29.

165. *State v. Brewington*, 170 N.C. App. 264, 281–82 (2005); *State v. Wall*, 141 N.C. App. 529 (2000).

166. *State v. Gant*, 153 N.C. App. 136, 143 (2002).

167. *State v. Ross*, 207 N.C. App. 379, 399 (2010) (transcript of plea for previous conviction should have been redacted to conceal defendant's acknowledgement of alcohol or drug use, as that information was irrelevant to the fact of conviction; but not prejudicial); *State v. Stitt*, 147 N.C. App. 77, 83–84 (2001)

However, care should be taken to redact consolidated judgments, multiple-count indictments, or other documents that could reveal to the jury charges or convictions other than the previous convictions on which the habitual offender charge is based; the use of unredacted documents could be unfairly prejudicial to the defendant.¹⁶⁸

The several statutes further provide 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.”¹⁶⁹ The constitutionality of this provision has been challenged and upheld.¹⁷⁰ The court of appeals has held that the prima facie evidence rule applies notwithstanding minor variations in the name.¹⁷¹ 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.¹⁷²

When evidence concerning one of a defendant’s previous convictions is introduced during the trial of a substantive felony—as when the substantive felony is a sex offender registration offense, or possession of a firearm by a convicted felon—“[t]he evidence presented during the

(transcript of plea forms for the defendant’s three previous felonies were admitted; defendant failed to explain how this was prejudicial); *State v. Massey*, 195 N.C. App. 423 (2009) (not error to admit indictments for the defendant’s three previous felonies; the prohibition on reading an indictment to the jury, G.S. 15A-1221(b), applies only to the indictment for the current charge); *State v. Ore*, No. COA11-1033, 2012 WL 379342 (N.C. Ct. App. Feb. 7, 2012) (unpublished) (transcript of plea together with unsigned copy of judgment sufficient to prove a defendant’s previous conviction); *State v. Chavis*, No. COA11-388, 2011 WL 6046205, at *2 (N.C. Ct. App. Dec. 6, 2011) (unpublished) (if it was error to admit “a print-out of Defendant’s criminal history and a proposed sentencing worksheet” in addition to copies of the judgments for his previous convictions, it was not prejudicial, as the judgments sufficed to establish the defendant’s habitual status); *State v. Buck*, No. COA07-471, 2008 WL 2735871 (N.C. Ct. App. July 15, 2008) (unpublished) (the transcript of plea form, and the plea agreement that it contained, were properly admitted as part of the State’s proof that the defendant had been convicted of a previous felony).

168. *Ross*, 207 N.C. App. at 399–400 (transcript of plea should have been redacted to conceal defendant’s acknowledgement of alcohol or drug use, but not prejudicial in this case); *State v. Lotharp*, 148 N.C. App. 435, *rev’d on other grounds*, 356 N.C. 420 (2002) (documents disclosing felony convictions beyond those forming the basis of the habitual felon charge should have been redacted or excluded as irrelevant, but not prejudicial in this case); *State v. Walker*, No. COA11-1093, 2012 WL 1116001 (N.C. Ct. App. Apr. 3, 2012) (unpublished) (the State introduced judgments that showed convictions in addition to the convictions on which the State relied to establish the defendant’s habitual status; this information was irrelevant and should have been redacted; but the error was not prejudicial in light of the strong evidence of the defendant’s status, so it was not plain error).

169. G.S. 14-7.4 (habitual felon); 14-7.10 (violent habitual felon); 14-7.29 (habitual breaking and entering).

170. *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).

171. *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).

172. *See State v. Tyson*, 189 N.C. App. 408 (2008) (discrepancy of exactly one year regarding defendant’s date of birth in the judgment for one of defendant’s previous convictions did not preclude its use as prima facie evidence); *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).

trial for the [substantive felony] can be used to prove the habitual felon charge.”¹⁷³ It need not be reintroduced during the habitual offender proceeding.

E. Proof That a Previous Conviction Was a Felony

Sometimes the issue is not the existence of a previous conviction, but whether the conviction was for a felony offense. This appears to be a matter of law for the court, not the jury, to decide.¹⁷⁴

Controversies will rarely arise with North Carolina convictions, as both attorneys and judges are familiar with the classification of North Carolina offenses. But difficulties frequently crop up concerning out-of-state convictions, particularly from New Jersey. New Jersey classifies offenses as “crimes” and “disorderly persons offenses” rather than felonies and misdemeanors. Because the habitual felon statute requires that each of the defendant’s previous convictions be for “an offense which is a felony under the laws of the State or other sovereign” where the conviction was incurred,¹⁷⁵ there is a plausible argument that previous convictions from New Jersey simply cannot be used to support a charge of habitual felon. Indeed, in several cases, the court of appeals has found insufficient evidence that a previous conviction from New Jersey was for a felony offense.¹⁷⁶ However, the court has never closed the door entirely to the use of New Jersey

173. *State v. Hoskins*, ___ N.C. App. ___, 736 S.E.2d 631, *discretionary review denied*, 739 S.E.2d 847 (2013).

174. The habitual offender statutes are ambiguous on this point, stating only that “[i]f the jury finds that the defendant is an habitual felon,” or a violent habitual felon, or a habitual breaking and entering status offender, the defendant should be sentenced accordingly. G.S. 14-7.5; 14-7.11; 14-7.30(c). The statutes do not say whether the jury should decide whether the defendant’s previous convictions were for felony offenses, or whether it should focus only on whether the convictions were incurred by the defendant. As a matter of institutional competence, whether a previous conviction is a felony is a matter of law that a judge is better positioned to address than a jury. Because it is a matter of law, and because it involves a prior conviction, having a judge determine the issue does not violate a defendant’s right to a jury trial as interpreted in the line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and the federal courts uniformly assign similar decisions to the court rather than to the jury. *See United States v. Broadnax*, 601 F.3d 336, 345 (5th Cir. 2010) (footnote, citations, internal quotation marks omitted) (“[T]he question whether a . . . conviction may serve as a predicate offense for a prosecution for being a felon in possession of a firearm . . . is purely a legal one.”); *United States v. Thompson*, 421 F.3d 278, 281 (4th Cir. 2005) (whether the defendant’s “three prior convictions were ‘violent felonies’” was a legal question “inherent [to] the conviction[s]” that constitutionally could be, and properly was, decided by a judge rather than the jury). The habitual felon North Carolina Pattern Jury Instructions appear to contemplate the judge determining, prior to submitting them to the jury, whether the defendant’s previous convictions were for felony offenses, as the instructions ask the jury only whether it finds that the defendant was convicted of “the felony of (name felony).” N.C.P.I.—CRIM. 203.10.

175. G.S. 14-7.1.

176. *See State v. Carpenter*, 155 N.C. App. 35, 51 (2002) (citations, internal quotation marks omitted) (similar to *Lindsey*, immediately *infra*; the court of appeals was unmoved by the State’s 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”); *State v. Lindsey*, 118 N.C. App. 549, 553 (1995) (defendant had a New Jersey conviction for receiving stolen property; neither the judgment nor the indictment stated that the offense was a felony; the North Carolina Court of Appeals found the evidence insufficient, noting 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

convictions, and New Jersey itself recognizes that its “crimes” are the functional equivalent of felonies. Furthermore, precluding their use altogether would create a windfall for defendants who happen to have a prior conviction from New Jersey instead of a jurisdiction that uses the conventional distinction between felonies and misdemeanors. New Jersey’s statutory scheme, relevant decisions from the North Carolina Court of Appeals, and ways in which the State might try to comply with the opinions’ dictates while using a defendant’s previous conviction from New Jersey to support a habitual felon charge are discussed in detail elsewhere.¹⁷⁷

The foregoing is not a problem in violent habitual felon cases because the violent habitual felon statute allows the use of out-of-state convictions that are “substantially similar” to qualifying North Carolina offenses, with no limitation on how the offense of conviction is classified in the other state.¹⁷⁸ The habitual breaking and entering statute is unclear on this point, but it may be more like the habitual felon statute than the violent habitual felon statute.¹⁷⁹

F. Guilty Pleas

A defendant may plead guilty to a habitual offender charge.¹⁸⁰ A no contest plea is likewise permissible.¹⁸¹ However, the mere fact that a defendant is willing to stipulate to the existence of the necessary number of qualifying previous felonies, or indeed is willing to stipulate to his or her status as a habitual offender, 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-1022.¹⁸² If the trial court completes an appropriate colloquy, the fact that the defendant does not expressly

of defendant’s sentence (two to three years) that the offense was a felony in New Jersey”). *Cf.* *State v. Moncree*, 188 N.C. App. 221 (2008) (the defendant had a prior conviction from New Jersey; on appeal, it was undisputed that it was the equivalent of a misdemeanor, not a felony; the court of appeals found that the habitual felon indictment was fatally defective because it alleged only two felonies, and that the trial court therefore lacked jurisdiction over the habitual felon charge).

177. See Jeff Welty, *Habitual Felon and Previous Convictions from New Jersey*, N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (Feb. 11, 2013), <http://nccriminallaw.sog.unc.edu/?p=4092>. The comments to this blog post, including several from experienced defense attorneys, are worth reading and present a point of view that contrasts with the one expressed in the post itself.

178. G.S. 14-7.7.

179. G.S. 14-7.25 defines “breaking and entering” as including “any of the following felony offenses: . . . Any offense committed in another jurisdiction substantially similar to [enumerated North Carolina offenses].” The reference to “[a]ny offense committed in another jurisdiction” does not require that the offense be a felony in the other state. However, the prefatory reference to “any of the following felony offenses” may do so. Further, G.S. 14-7.26 defines a habitual breaking and entering status offender as a person who has been convicted of “one or more prior felony offenses of breaking and entering in any federal court or state court.” The reference to “felony” in this part of the statute may reinforce the idea that the previous conviction must be for an offense that was a felony where it was incurred.

180. *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 choose to enter a guilty plea to such a charge.”).

181. 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.”).

182. 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). Failure to conduct a complete plea colloquy with a defendant who wishes to admit his or her status as a habitual offender is an extremely common error. For a long list of cases reversed on this basis, see Jeff Welty, “*Stipulating to Habitual Felon Status*,” N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (Feb. 12, 2013), <http://nccriminallaw.sog.unc.edu/?p=4095>.

admit his or her status is immaterial; it suffices that the defendant knowingly and voluntarily agrees to be sentenced as a habitual offender and to waive his or her right to a jury trial on the issue.¹⁸³

As part of the plea colloquy, the judge is required to “inform[the defendant] of the maximum possible sentence” he or she may receive.¹⁸⁴ When a defendant pleads guilty to being a habitual offender, the defendant must be informed of the maximum sentence he or she faces *as a habitual offender*, because the enhanced sentence is a “direct consequence of [the defendant’s] plea.”¹⁸⁵ A failure to advise the defendant properly may violate the constitutional principles outlined in *Boykin v. Alabama*,¹⁸⁶ in addition to contravening the statute. Exactly what the “maximum possible sentence” means isn’t completely clear, but as discussed at length elsewhere,¹⁸⁷ the safest course appears to be to advise the defendant of the maximum sentence that corresponds to the highest minimum sentence in the aggravated range of prior record level VI for the enhanced offense class. For example, a habitual felon who is to be sentenced as a Class C offender based on a recent substantive felony should be instructed that the maximum possible sentence is 231 months, because that is the maximum term that corresponds to a 182-month minimum term, which is the top of the aggravated range for Class C, prior record level VI.

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.¹⁸⁸ Although G.S. 14-7.3, -7.9, and -7.28 refer exclusively to “indictment[s],” a defendant may presumably waive indictment and plead guilty pursuant to a criminal information.¹⁸⁹ By pleading guilty, a defendant waives his or her right to raise a wide range of issues on direct appeal.¹⁹⁰

G. 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,

183. See *State v. Williams*, 133 N.C. App. 326, 329–30 (1999).

184. G.S. 15A-1022(a)(6).

185. *State v. McNeill*, 158 N.C. App. 96, 104 (2003). See also *Bailey*, 157 N.C. App. at 88 (“[A] trial court may not accept a defendant’s plea of guilty as an habitual felon without first addressing the defendant personally and making the . . . inquiries of that defendant as required by” G.S. 15A-1022, including regarding the maximum possible sentence).

186. 395 U.S. 238 (1969).

187. Jeff Welty, *Advising a Defendant of the Maximum Possible Sentence During a Habitual Felon Plea*, N.C. CRIM. L., UNC SCH. OF GOV’T BLOG (June 12, 2013), <http://nccriminallaw.sog.unc.edu/?p=4307>.

188. See *State v. Bivens*, 155 N.C. App. 645, 647 (2002). Cf. *State v. Gaddy*, No. COA09-1013, 2010 WL 522704, at *3 (N.C. Ct. App. Feb. 16, 2010) (unpublished) (inadequate factual basis where “the only independent evidence provided to the trial court was the [prior record level] worksheet, which list[ed] only two prior felony convictions”).

189. 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).

190. 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).

that he or she wishes to contest.¹⁹¹ 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.¹⁹² The United States Constitution requires that defendants be permitted to raise such claims through collateral attack because the complete denial of counsel is a “unique constitutional defect.”¹⁹³ A defendant may raise the issue by filing a motion to suppress the previous conviction under G.S. 15A-980.¹⁹⁴

The 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 him or her in connection with a previous felony was ineffective.¹⁹⁵ Nor may a defendant claim, during a habitual offender proceeding, that the court in which his or her previous felony conviction took place lacked jurisdiction over felony offenses.¹⁹⁶ 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.¹⁹⁷ Nonetheless, some judges permit such collateral attacks, on the theory that it promotes judicial economy to address them on the “front end” of the habitual offender proceeding, rather than requiring the defendant to file one or more motions for appropriate relief after the fact.

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 *State v. Hensley*,¹⁹⁸ 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 reasonably 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 failing to appear.”¹⁹⁹ It therefore found that the defendant’s argument was an improper collateral attack.

191. See *State v. Creason*, 123 N.C. App. 495, 501–02 (1996).

192. *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.

193. *Custis v. United States*, 511 U.S. 485, 496 (1994).

194. See generally *State v. Fulp*, 355 N.C. 171 (2002).

195. See *State v. Hensley*, 156 N.C. App. 634, 637–38 (2003).

196. See *State v. Flemming*, 171 N.C. App. 413, 417 (2005).

197. See, e.g., *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).

198. 156 N.C. App. 634 (2003).

199. *Id.* at 638.

VI. Sentencing

A. Habitual Felon

The Justice Reinvestment Act (JRA) made changes to the habitual felon statute, effective for substantive offenses committed on or after December 1, 2011. Because the courts are still processing a significant number of offenses before that date, this bulletin summarizes the law both before and after the Act.

The JRA provided that “[p]rosecutions for offenses committed before the effective date of this act are not abated or affected by this act.”²⁰⁰ Therefore, defendants sentenced under the former provisions of the habitual felon statutes are not entitled to be resentenced under the provisions of the amended law.²⁰¹

1. Substantive Offenses Committed on or After December 1, 2011

When a defendant is convicted of a habitual felon charge, he or she is sentenced as if the substantive felony were four offense classes higher, but no higher than Class C.²⁰² However, if the substantive felony is a Class A, B1, or B2 offense, the defendant is sentenced according to the classification of the substantive felony.²⁰³ The chart below summarizes the effect of the habitual felon statute on substantive felonies of each class.

Class of Substantive Felony	Sentencing Class under the Habitual Felon Statute
A	A
B1	B1
B2	B2
C	C
D	C
E	C
F	C
G	C
H	D
I	E

2. Substantive Felonies Committed Prior to December 1, 2011

Under the pre-JRA version of the habitual felon statute, when a defendant is convicted of a habitual felon charge, he or she is sentenced as if the substantive felony were a Class C felony, unless the substantive felony is a Class A, B1, or B2 offense, in which case the defendant is sentenced according to the usual classification of the substantive felony.

200. S.L. 2011-192, sec. 10.

201. *Cf.* State v. Whitehead, 365 N.C. 444 (2012) (interpreting similar language in the bill that created Structured Sentencing to prohibit relief for defendants sentenced before Structured Sentencing to longer prison terms than they would have received under Structured Sentencing). *See also infra* note 235 (discussing a related issue).

202. G.S. 14-7.6.

203. *Id.*

3. Principles That Apply Regardless of the Date of the Substantive Felony

When a defendant is convicted of multiple substantive felonies to which a habitual felon indictment attaches, each is elevated according to the rules above, 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.²⁰⁴ 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, at least where the defendant pleads guilty to being a habitual felon.²⁰⁵ However, as noted above, 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.²⁰⁶ 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.²⁰⁷ 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) (add one point if all the elements of the present offense are included in any prior offense) and G.S. 15A-1340.14(b)(7) (add one point if the present offense was committed while the defendant was on probation, parole, post-release supervision, and so forth).²⁰⁸

A sentence imposed under the habitual felon statute must run consecutive to any sentence that the defendant is already serving.²⁰⁹ However, a habitual felon sentence may be consolidated with or run concurrent with other sentences imposed at the same time, including other habitual felon sentences²¹⁰ and probably including other active sentences that result from probation

204. *Id.*

205. *State v. Lee*, 150 N.C. App. 701, 702–03 (2002). In *Lee*, the State listed five felonies in the habitual felon indictment, and the defendant pled guilty. The court of appeals ruled that none of the five listed felonies could be used in determining the defendant's prior record level. It is not clear how the court would rule on a case in which more than three felonies were listed in the indictment, but the habitual felon issue went to trial and only three felonies were submitted to the jury. The State could attempt to distinguish *Lee* by arguing that any felonies that were listed in the indictment but not submitted to the jury were not "used to establish [the defendant's] status as an habitual felon," G.S. 14-7.6, and so could be counted for prior record level purposes.

206. *See supra* note 97 and accompanying text; *State v. Cates*, 154 N.C. App. 737, 739–40 (2002).

207. *See, e.g., State v. Truesdale*, 123 N.C. App. 639, 642 (1996) (emphasis in original) ("[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.").

208. *See State v. Bethea*, 122 N.C. App. 623, 627–28 (1996).

209. *See G.S. 14-7.6; State v. Watkins*, 189 N.C. App. 784 (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).

210. 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. *See generally State v. Haymond*, 203 N.C. App. 151 (2010) (consolidating multiple convictions as a habitual felon permissible); *State v. Walston*, 193 N.C. App. 134 (interpreting similar language in the drug trafficking

being revoked simultaneously with the entry of the habitual felon judgment.²¹¹ Some habitual felon defendants who committed their substantive felonies on or after December 1, 2011, might receive probationary sentences. (The Structured Sentencing grid permits such sentences for Class E felons with Prior Record Levels I or II.) “Any suspended sentence ordered [under these circumstances] probably must be set to run at the expiration of any other sentence being served by the defendant in the event of revocation.”²¹²

When a defendant who has previously been convicted as a habitual felon is convicted of a new felony offense, it becomes necessary to calculate the defendant's prior record level. The felony for which the defendant was previously sentenced as a habitual felon is assigned prior record level points based on the classification of the substantive felony, not based on the elevated offense class under which the defendant was sentenced, because the substantive felony is a crime while being a habitual felon is not.²¹³

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. No judgment should be entered in the habitual felon case file.²¹⁴

4. When Being Sentenced as a Habitual Felon Benefits the Defendant

There are two types of cases in which a defendant might benefit from being sentenced as a habitual felon. The first involves Class C and D felonies, and the second involves drug trafficking offenses. Prosecutors should be aware of each situation and should consider withdrawing or dismissing a habitual felon charge if a habitual felon conviction would result in a reduction of the defendant's sentence.

a. Certain Defendants Convicted of Class C and Class D Felonies. Because the previous felonies used to support the habitual felon charge may not be used in determining the defendant's prior record level, a defendant who is charged with a Class C or a Class D felony will often benefit from being sentenced as a habitual felon because of a reduction in his or her prior record level.²¹⁵

statute to allow concurrent sentences); *State v. Thomas*, 85 N.C. App. 319 (1987) (similar, interpreting former provision concerning armed robbery). Further, a number of cases involving concurrent sentences have been affirmed without comment. *See, e.g., State v. King*, 158 N.C. App. 60, 62–63 (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”).

211. Although one could argue that the probationary sentence was “being served” prior to the defendant's conviction as a habitual felon and that consecutive time is therefore required, the Division of Adult Correction reportedly takes the position that because the suspended sentence was not activated prior to the imposition of the habitual felon sentence, concurrent sentencing is permissible. The Division's viewpoint, of course, is not binding on a court and there is no case law on this issue.

212. James M. Markham, *The North Carolina Justice Reinvestment Act 28–29* (UNC School of Government, 2012).

213. *See State v. Vaughn*, 130 N.C. App. 456, 459–60 (1998). 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).

214. *See, e.g., State v. Taylor*, 156 N.C. App. 172, 175–76 (2003).

215. 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, -52; first-degree arson, *see* G.S. 14-58; and armed robbery, *see* G.S. 14-87.

This is obvious with respect to Class C felonies, where being sentenced as a habitual felon does not increase the offense class at all, but may decrease the defendant's prior record level. This is exactly what happened in *State v. Wells*.²¹⁶ The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) and other offenses after shooting another man. He pled guilty to being a habitual felon. The judge entered several judgments against the defendant, including one for AWDWIKISI, a Class C felony. In that judgment, the trial court sentenced the defendant as a prior record level IV offender, counting all of the defendant's previous convictions. However, the court of appeals ruled that "the trial court was required to sentence defendant as an habitual felon" because the defendant had been indicted as such and the State had never withdrawn the habitual felon charge in connection with the assault. Therefore, the judge should have calculated the defendant's prior record level without including the convictions used to qualify the defendant as a habitual felon.

Class D felonies are sentenced as Class C felonies under the habitual felon laws. Sometimes that one-class increase is more than offset by the reduction in the defendant's prior record level that results from not counting the previous convictions that are used to support the habitual felon charge. Suppose that a defendant is charged with voluntary manslaughter, a Class D offense. 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). Under the current version of the sentencing grid, a conviction without a habitual felon charge would result in a presumptive range of minimum sentences of 78 to 97 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 all of the prior record points, resulting in a presumptive range of minimum sentences of 58 to 73 months.²¹⁷

b. Certain Defendants Convicted of Drug Trafficking. A defendant charged with drug trafficking may be convicted and sentenced as a habitual felon.²¹⁸ For many drug trafficking defendants, this will result in a shorter sentence than they would otherwise receive under the trafficking laws. For example, a defendant convicted of trafficking more than 10,000 pounds of marijuana normally would be sentenced "as a Class D felon . . . to a minimum term of 175 months and a maximum term

216. 196 N.C. App. 498 (2009).

217. See generally G.S. 15A-1340.17. Sentencing a Class D offender as a habitual felon does not always result in a lower sentence. 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 as a habitual felon.

218. G.S. 90-95(h) states that "[n]otwithstanding any other provision of law," defendants convicted of drug trafficking shall be sentenced as provided in that subsection. Any uncertainty about whether that provision trumped the habitual felon laws was removed in *State v. Eaton*, 210 N.C. App. 142, 150, 151-52 (2011), where the court of appeals rejected the defendant's argument that "individuals convicted of drug trafficking offenses are not subject to enhanced sentencing as habitual felons." The court stated that "a drug trafficker who has also attained habitual felon status [is] subject to even more enhanced sentencing pursuant to [the habitual felon laws]," reasoning that "[a] contrary holding could lead to the absurd result that a defendant convicted of simple possession of a controlled substance and of having attained the status of an habitual felon could receive a significantly longer sentence than an habitual felon convicted of drug trafficking on the basis of an act involving the same controlled substance. Furthermore, as a matter of public policy, it is reasonable to assume that the legislature intended to further enhance the sentences of drug traffickers who are also habitual felons rather than ignoring their habitual felon status for sentencing purposes."

of 222 months.”²¹⁹ Under the habitual felon laws, however, the defendant would be sentenced as a Class C offender. The only way for a Class C offender to receive a sentence as long as the Class D trafficking sentence is for the defendant to be sentenced in the aggravated range with prior record level VI; all other Class C sentencing ranges are shorter than the Class D trafficking sentence, and many are less than half as long. Of course, for many other trafficking defendants, being sentenced as a habitual felon will result in an increased sentence.

B. Violent Habitual Felon

Violent habitual felon sentencing is simple. A defendant who is convicted as a violent habitual felon must be sentenced to life without parole.²²⁰ The sentence must run consecutive to any sentence then being served by the defendant, though this provision has little if any practical effect.²²¹ A violent habitual felon sentence may be consolidated with or run concurrent with another sentence that is imposed at the same time.²²²

C. Habitual Breaking and Entering

A defendant who is convicted of habitual breaking and entering is sentenced as a Class E offender.²²³ Therefore, defendants whose current offense is first-degree burglary or breaking out of dwelling house burglary, both Class D offenses, would benefit from being sentenced as habitual breaking and entering offenders, and it presumably will be rare for prosecutors to invoke the habitual breaking and entering statutes for such defendants.

As is the case with a habitual felon, “[i]n determining the prior record level, any conviction used to establish a person’s status as a status offender shall not be used.”²²⁴ A court probably should apply the rule from the habitual felon context that any previous conviction listed in the indictment is off-limits for prior record level purposes, even when the indictment lists more than the minimum number of one previous conviction.²²⁵ A court probably also should apply the rule that other convictions incurred in the same week as the previous conviction listed in the habitual indictment *may* be used when calculating prior record level.²²⁶ And, a court should probably apply the rule that previous convictions listed in the habitual indictment *may* be used for purposes of the “bonus points” in G.S. 15A-1340.14(b)(6)–(7).²²⁷

The habitual breaking and entering statutes provide that “[s]entences imposed under this Article shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section.”²²⁸ Similar language in other statutes has been interpreted to allow consolidated or concurrent sentences for convictions sentenced at the

219. G.S. 90-95(h)(1)d.

220. G.S. 14-7.12.

221. *Id.*

222. This issue is discussed above in connection with the habitual felon laws. *See supra* notes 209–12 and accompanying text.

223. G.S. 14-7.31(a).

224. G.S. 14-7.31(b).

225. *See supra* note 205 for a discussion of this rule and whether it applies to previous convictions that are listed in a habitual offender indictment but that are not submitted to the jury.

226. *State v. Truesdale*, 123 N.C. App. 639 (1996).

227. *State v. Bethea*, 122 N.C. App. 623 (1996).

228. G.S. 14-7.31(b).

same time.²²⁹ When a judge imposes a probationary sentence on a habitual breaking and entering defendant, the suspended sentence likely must be ordered to run consecutively with any sentence being served by the defendant in the event of revocation.²³⁰

The statutes also state that “[a] conviction as a status offender . . . shall not constitute commission of a felony for the purpose of [the habitual felon or violent habitual felon laws].”²³¹ The apparent meaning of this provision is that the State may not habitualize the defendant twice, taking, for example, a Class H felony breaking or entering and elevating it to Class E under the habitual breaking and entering statute, then taking that Class E and further elevating it to a Class C under the habitual felon statute.

VII. Constitutional Issues

A variety of constitutional challenges have been raised regarding the habitual felon and violent habitual felon laws. (There are not yet any appellate decisions involving the habitual breaking and entering statutes.) Generally, these claims have been rejected.

A. Double Jeopardy

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 his or her previous convictions. This argument has regularly been rejected by the state’s appellate courts.²³² 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.²³³

B. Equal Protection and Selective Prosecution

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.²³⁴

After the Justice Reinvestment Act (JRA) ameliorated the habitual felon laws, some defendants convicted and sentenced after December 1, 2011, based on substantive felonies committed before December 1, 2011, have argued that applying the harsher pre-JRA habitual felon laws to

229. See *supra* notes 210–11 and accompanying text.

230. See *supra* note 212 and accompanying text (discussing this issue in the habitual felon context).

231. G.S. 14-7.31(c).

232. 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.” (citations, internal quotation marks omitted)).

233. 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.”). Other double jeopardy arguments and statutory limitations concerning the use of a single previous felony conviction for multiple purposes are discussed above. See *supra* notes 63–66; notes 144–46 and accompanying text.

234. See, e.g., *State v. Williams*, 149 N.C. App. 795, 801 (2002).

them violates equal protection. The court of appeals has rejected this argument in an unpublished opinion.²³⁵

C. Separation of Powers

Two distinct separation of powers arguments have been made concerning the habitual felon laws. 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 been repudiated by the state's appellate courts.²³⁶

Alternatively, it has been argued that because the district attorney may decide whether to bring a habitual felon charge against an eligible defendant, the habitual felon laws unconstitutionally award to the district attorney the legislative power to define sentences for crimes. This argument has also been rejected.²³⁷

D. Ex Post Facto

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, the argument goes, defendants who committed violent felonies between 1967 and 1994 did so without knowing that they were moving towards violent habitual felon status. This argument has failed.²³⁸

E. Cruel and Unusual Punishment

Finally, many have argued that the habitual felon laws, because they often require lengthy sentences for relatively minor offenses, violate the Eighth Amendment's prohibition against cruel and unusual punishment. The United States 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.²³⁹ However, the Court has otherwise rejected Eighth Amendment arguments of this type, even on seemingly favorable facts, and has emphasized the limited nature of proportionality review.²⁴⁰ North Carolina's appellate courts

235. *State v. Shuler*, No. COA12-986, 2013 WL 1315927, at *2 (N.C. Ct. App. Apr. 2, 2013) (unpublished) (the defendant pled guilty in 2012 to possessing cocaine in 2010 and to being a habitual felon; he was sentenced as a Class C felon under pre-JRA law based on his offense date; on appeal, the defendant claimed an equal protection violation in not being sentenced under the JRA; the court of appeals ruled that the issue was not preserved but also stated that G.S. 14-7.6 "treats habitual felons in different ways depending upon the date the principal felony is committed" and that "[t]his does not implicate an equal protection violation").

236. *See, e.g., Williams*, 149 N.C. App. at 802.

237. *State v. Wilson*, 139 N.C. App. 544, 551 (2000).

238. *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.").

239. *See Solem v. Helm*, 463 U.S. 277, 303 (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).

240. *See, e.g., Lockyer v. Andrade*, 538 U.S. 63, 64 (2003); *Ewing v. California*, 538 U.S. 11 (2003); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

have never invalidated a habitual felon or violent habitual felon sentence on Eighth Amendment grounds and have rejected Eighth Amendment challenges many times.²⁴¹

VIII. Conclusion

The habitual felon and violent habitual felon laws have created some confusion—and much litigation—since they were first enacted. The habitual breaking and entering statutes are new but also promise controversy. Hopefully, this bulletin will serve as a useful summary of settled law and will help judges and lawyers to recognize cases that pose unanswered questions.

241. As to habitual felon sentences, see *State v. Lackey*, 204 N.C. App. 153 (2010) (rejecting Eighth Amendment challenge to habitual felon sentence of 84 to 110 months for possession of 0.1 grams of cocaine), and *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). As to violent habitual felon sentences, see *State v. Mason*, 126 N.C. App. 318 (1997) (rejecting the defendant's argument that the violent habitual felon laws are facially unconstitutional under the Eighth Amendment). Note, however, *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).

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