

Robert L. Farb
School of Government
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[Note: For an extensive analysis of habitual felon and violent habitual felon laws, see Jeff Welty, “North Carolina’s Habitual Felon and Violent Habitual Felon Laws,” Administration of Justice Bulletin No. 2008/04 (June 2008), available online at <http://www.sog.unc.edu/programs/crimlaw/documents/aojb0804.pdf>.]

Habitual Offender Laws

Habitual Felon Law; G.S. 14-7.1 through 14-7.6

Generally. Being an habitual felon is not a crime but is a status achieved when a person has been convicted of three felony offenses as set out in G.S. 14-7.1: the second felony must have been committed after the conviction of the first felony and the third felony must have been committed after the conviction of the second felony. When a defendant is convicted of a felony after having achieved habitual felon status, the punishment for that offense is elevated to a Class C felony. *State v. Penland*, 89 N.C. App. 350 (1986); *State v. Thomas*, 82 N.C. App. 682 (1986). For example, if a defendant is convicted of felonious breaking or entering, a Class H felony, and then found to be a habitual felon, the judgment for the conviction of felonious breaking or entering is for a Class C felony. No sentence is imposed for the finding of habitual felon. *State v. Wilson*, 139 N.C. App. 544 (2000).

Disqualifying convictions. Felonies that do not qualify to support habitual felon status: (1) convictions or pleas of guilty entered before July 6, 1967; (2) a conviction for which the defendant received a pardon; (3) federal intoxicating liquor offenses; and (4) a conviction of habitual misdemeanor assault for an offense committed on or after December 1, 2004. Multiple felonies committed before a defendant attained the age of 18 may not constitute more than one felony.

G.S. 14-33.2, as revised in 2004, provides in effect that a conviction of habitual misdemeanor assault for an offense committed on or after December 1, 2004, may not be used to prove a felony conviction to establish habitual felon status. For the text of the ratification clause concerning this effective date, see Sec. 10.2, S.L. 2004-186, and for a relevant interpretation of the ratification clause in the context of another statute, see *State v. Leeper*, 356 N.C. 55, 61-62 (2002). The 2004 legislative amendment effectively overrules *State v. Smith*, 139 N.C. App. 209 (2000), on this issue. See *State v. Artis*, 182 N.C. App. 196 (2007) (court discussed ratification clause of 2004 legislation and noted that convictions of habitual misdemeanor assault for offenses committed before December 1, 2004, may be used to prove habitual felon status; prohibition against using these convictions to prove habitual felon status only applies to offenses of habitual misdemeanor assault committed on or after December 1, 2004).

Use of habitual felon status for certain offenses. There is no statutory prohibition against using felony offenses such as habitual impaired driving, habitual misdemeanor assault, and the felony of operating a motor vehicle to elude arrest under G.S. 20-141.5 as the substantive felony which is elevated to a Class C felony by this law. *State v. Baldwin*, 117 N.C. App. 713 (1995) (habitual impaired driving); *State v. Smith*, 139 N.C. App. 209 (2000) (habitual misdemeanor assault); *State v. Scott*, 167 N.C. App. 783 (2005) (felony eluding arrest); *State v. Artis*, 182 N.C. App. 196 (2007) (habitual misdemeanor assault).

No bar to use habitual DWI conviction to prove habitual felon status. There is no statutory prohibition against using prior convictions of habitual impaired driving to establish habitual felon status, *State v. Baldwin*, 117 N.C. App. 713 (1995), even when the habitual impaired driving convictions were

also used to prove the substantive felony of habitual impaired driving. *State v. Misenheimer*, 123 N.C. App. 156 (1996).

No double jeopardy bars. There is no double jeopardy violation in using the same convictions previously used at a prior trial in establishing habitual felon status to establish habitual felon status at a later trial. *State v. Creason*, 123 N.C. App. 495 (1996). There is no double jeopardy violation when the state uses a felony conviction to prove possession of firearm by a convicted felon and uses that same felony conviction to prove habitual felon status. *State v. Glasco*, 160 N.C. App. 150 (2003); *State v. Crump*, 178 N.C. App. 717 (2006).

Collateral estoppel bar when acquittal based on same felony convictions. A not guilty verdict in a violent habitual felon hearing bars the state, on collateral estoppel grounds, from trying a defendant in later violent habitual felon hearing based on the same two prior convictions used in the prior violent habitual felon hearing. *State v. Safrit*, 145 N.C. App. 541 (2001). The *Safrit* ruling clearly would also apply a habitual felon hearing.

District attorney's policies. A district attorney's policy of prosecuting all defendants who qualify as habitual felons is not unconstitutional. *State v. Parks*, 146 N.C. App. 568 (2001).

Prosecutor has discretion to seek habitual felon status even though defendant indicted. A prosecutor has discretion to not seek habitual felon status even though the defendant had been indicted for habitual felon. *State v. Murphy*, 193 N.C. App. 236 (2008) (prosecutor after trial in which defendant was convicted of several felonies sought habitual felon status only for one of the felony convictions).

I. Indictment [see the indictment form at the end of this paper]

- A. G.S. 14-7.3 requires that an indictment charging habitual felon must be separate from the indictment charging the substantive felony. *State v. Patton*, 342 N.C. 633 (1996) (dicta). *But see* *State v. Young*, 120 N.C. App. 456 (1995) (court ruled, in case decided before *Patton*, that indictment alleging felony offense in first count and habitual felon in second count was not error; even if it was error, defendant was not prejudiced since he was properly notified of the charges and the habitual felon charge was not mentioned to the jury during the trial of the felony offense).
- B. An habitual felon indictment need not refer to the substantive felony offense(s) being tried. *State v. Cheek*, 339 N.C. 725 (1995). Any error in referring to the substantive felony is surplusage and does not invalidate the indictment if it does not prejudice the defendant. *State v. Bowens*, 140 N.C. App. 217 (2000).
- C. An indictment for substantive felony offense(s) need not refer to the habitual felon indictment. *State v. Todd*, 313 N.C. 110 (1985).
- D. One habitual felon indictment is sufficient for all felony offenses being tried. That is, a separate habitual felon indictment is not required for each substantive felony indictment. *State v. Patton*, 342 N.C. 633 (1996). However, if a defendant pleads guilty to criminal offenses and admits to habitual felon status and sentencing is continued until a later date, a felony charge brought thereafter must be accompanied by a new habitual felon indictment. *State v. Bradley*, 175 N.C. App. 234 (2005).
- E. The "date of offense" block in a habitual felon indictment is not legally significant because habitual felon is a status, not a crime. That block could be completed with (1)

the date when the grand jury considers issuing the habitual felon indictment; or (2) the date of the third conviction that effectively qualified the defendant as a habitual felon.

- F. For each of the three preceding felony convictions, an habitual felon indictment must allege the date of the commission of the offense and the date of the conviction, including the court and state where the defendant was convicted. The second felony must have been committed after the conviction of the first felony. The third felony must have been committed after the conviction of the second felony.

The date of a prior conviction under the habitual felon law is the date of the jury's return of the guilty verdict, not the date when the sentence was imposed. *State v. McGee*, 175 N.C. App. 586 (2006).

- G. Alleged indictment defects

State v. Gant, 153 N.C. App. 136 (2002). (1) The defendant was indicted for several felonies and for being an habitual felon. He was convicted of some of the felonies. An error was discovered in the habitual felon indictment in alleging the date of one of the prior felony convictions. The judge granted the state's motion for a continuance so the state could obtain a superseding habitual felon indictment to correct the error. The court ruled, citing *State v. Oakes*, 113 N.C. App. 332 (1994), that the trial judge did not err in granting the continuance. The court noted that the defect was only technical. [Author's note: A superseding indictment was probably unnecessary. The indictment likely could have been amended to correct the technical error. See, for example, *State v. Hargett*, 148 N.C. App. 688 (2002).]

State v. Briggs, 137 N.C. App. 125 (2000) (indictment alleging prior felony as "the felony of breaking and entering . . . in violation of . . . N.C. G.S. 14-54" sufficiently alleged a prior felony conviction even though misdemeanor breaking or entering is included in that statute).

State v. Smith, 112 N.C. App. 512 (1993) [no fatal indictment defects when (i) date of guilty plea was not provided but date of sentencing was provided; and (ii) date of arrest was provided but date of offense may have been different from date of arrest].

State v. Williams, 99 N.C. App. 333 (1990) (no fatal defect in indictment when felony convictions were listed as in violation of enumerated "North Carolina General Statute" without naming "State of North Carolina"; this was a sufficient allegation of name of state against whom felonies were committed to comply with G.S. 14-7.3).

State v. Spruill, 89 N.C. App. 580 (1988) (alleging erroneous date of offense was not a fatal variance since time was not of the essence, and defendant's stipulation before trial as to correct date showed that he was not surprised by the variance).

State v. Bowens, 140 N.C. App. 217 (2000). The defendant was convicted of maintaining a dwelling to keep or sell controlled substances and possession of marijuana with intent to sell and deliver, and then was adjudicated a habitual felon and sentenced accordingly. The habitual felon indictment alleged the three felony convictions properly but also alleged that the principal felony as felonious possession of marijuana, which was dismissed at trial. Because there is no requirement that the habitual felon indictment refer to the principal felony or felonies [*State v. Patton*, 342 N.C. 633 (1996)], the court

ruling that the allegation of the principal felony was surplusage, it was not prejudicial to the defendant (he had proper notice that he was charged with being a habitual felon), and therefore the habitual felon indictment was valid. On the issue of surplusage in indictments, the court cited *State v. Westbrooks*, 345 N.C. 43 (1996) and *State v. Sisk*, 123 N.C. App. 361 (1996).

H. Amendment of indictment

An habitual felon indictment may be amended to change the date of the commission of a felony alleged in the indictment, *State v. Locklear*, 117 N.C. App. 255 (1994), to amend conviction dates, *State v. Hargett*, 148 N.C. App. 688 (2002), and to allege that all but one of the felony convictions were committed after the defendant became eighteen, *State v. Hicks*, 125 N.C. App. 158 (1997).

State v. Lewis, 162 N.C. App. 277 (2004). The court ruled that the state was properly permitted to amend a habitual felon indictment. The state corrected the second conviction alleged in the indictment, which had mistakenly noted the date and county of the defendant's probation revocation instead of the date and county of the defendant's prior conviction of felonious breaking and entering.

See *State v. Cogdell*, 165 N.C. App. 368 (2004), discussed below, which specifies when the state may obtain a superseding habitual felon indictment.

I. Defendant's appeal on indictment issue

A defendant is permitted to raise on appeal that one felony alleged in an habitual felon indictment was actually a misdemeanor even though in the trial court the defendant had stipulated to the convictions in the indictment. *State v. Moncree*, 188 N.C. App. 221 (2008).

II. Procedure

- A. The defendant is first tried for the substantive felony offense(s) for which the defendant has been indicted. The jury may not be informed of the pending habitual felon indictment. If the defendant is convicted of a felony or felonies, then the same jury (unless there is some reason not to use the same jury) will decide at a hearing whether or not the defendant is an habitual felon. *State v. Todd*, 313 N.C. 110 (1985) (jury need not be re-impaneled for hearing). Of course, the defendant may plead guilty to the habitual felon indictment, and a hearing on this issue would be unnecessary.

See generally *State v. Winstead*, 78 N.C. App. 180 (1985) (provision in G.S. 14-7.3 prohibiting trial of habitual felon indictment within 20 days of return of that indictment by grand jury did not apply when state obtained a new indictment for the substantive felony offense).

- B. Proof of prior convictions may be shown by evidence of: (1) the original record; (2) a certified copy of the original record [note the certified records are self-authenticating: Rules 901(b), 902(4), 1005 and 28 U.S.C. § 1738, a federal statute that provides a method of authenticating certified copies of court records from other states]; or (3) a stipulation between the state and the defendant.

State v. Wolfe, 157 N.C. App. 22 (2003). The defendant's name was Eldridge Frank Wolfe. The state introduced certified copies of two judgments entered on felony convictions of a person named "Eldridge Frank Wolfe." The court ruled that this established prima facie evidence of the prior felony convictions under G.S. 14-7.10. The court noted that any discrepancies in other details in the judgments (for example, one of the judgments noted that the person's race as black, while the defendant is white) are for the jury to consider in weighing the evidence.

State v. Gilmore, 142 N.C. App. 465 (2001). The defendant was convicted of felonious breaking or entering of a store and felonious larceny. He then was adjudicated a habitual felon. The defendant stipulated to the three prior convictions alleged in the habitual felon indictment and to his habitual felon status. However, the issue was not submitted to the jury, and the defendant did not plead guilty to being a habitual felon. The court ruled that the defendant was improperly adjudicated a habitual felon. There was no court inquiry establishing a record of a guilty plea.

State v. Wall, 141 N.C. App. 529 (2000). The court ruled that a fax of a certified copy of a conviction was sufficient to prove a conviction in a habitual felon hearing. The court stated, relying on the reasoning in *State v. Jordan*, 120 N.C. App. 364 (1995) [faxed copy of prior conviction admissible under former G.S. 15A-1340.4(e) in Fair Sentencing Act hearing] that the methods of proving a conviction in G.S. 14-7.4 are permissive, not mandatory. The court noted that the judge carefully examined the fax, which showed that it represented a document that was stamped with a seal showing it to be a true copy of the original that was signed by the clerk of superior court. The judge found that the fax was a reasonable copy of the seal. The defendant did not contend that the fax was inaccurate or incomplete, but only that its admission did not comply with G.S. 14-7.4.

See also the prima facie evidence rule in G.S. 14-7.4, *State v. Hodge*, 112 N.C. App. 462 (1993) (name "Michael Hodge" in court conviction record was sufficiently similar to "William Michael Hodge"), and *State v. Petty*, 100 N.C. App. 465 (1990) (similar ruling).

State v. Tyson, 189 N.C. App. 408 (2008). The court ruled that there was sufficient evidence introduced in an habitual felon hearing to prove the defendant's three prior convictions, although the defendant's birth date as alleged in the indictment for two of the convictions was given as 24 December 1979 and as 24 December 1978 for the other conviction. Each of the three court judgments introduced by the state listed the name as "Noel John Tyson," which was the same name as the defendant charged in the indictment. The defendant did not introduce any evidence to rebut the prima facie showing by the state under G.S. 14-7.4. Any discrepancies in the judgments were for the jury to consider.

State v. Carpenter, 155 N.C. App. 35 (2002). The defendant was convicted of habitual misdemeanor assault and then adjudicated a habitual felon. The court ruled, relying on *State v. Lindsey*, 118 N.C. App. 549 (1995), that the state failed to prove that two New Jersey convictions were felony convictions for the habitual felon law. The New Jersey judgments did not state that the defendant was convicted of a felony or sentenced as a felon. An official did not certify that the two offenses were felonies in New Jersey. The court rejected the state's argument that the defendant could have received sentences exceeding one year for each of the convictions, offenses punishable by more than one

year in prison constitute common law felonies under New Jersey law, and thus this was sufficient evidence to prove that they were felony convictions.

- C. A no contest plea entered in a North Carolina state court on or after July 1, 1975 is a conviction. See *State v. Jackson*, 128 N.C. App. 626 (1998).
- D. If a trial judge or appellate court rules that an habitual felon indictment is technically defective and dismisses the habitual felon indictment, the state may seek a new habitual felon indictment and sentencing as an habitual felon. *State v. Oakes*, 113 N.C. App. 332 (1994); *State v. Hawkins*, 110 N.C. App. 837 (1993), *reversed on other grounds*, *State v. Cheek*, 339 N.C. 725 (1995); *State v. Mewborn*, 131 N.C. App. 495 (1998) (violent habitual felon indictment).

State v. Cogdell, 165 N.C. App. 368 (2004). On January 14, 2002, the defendant was indicted for several felony offenses. On January 22, 2002, the defendant was indicted as an habitual felon. The defendant was arraigned on these indictments on May 29, 2002. A superseding habitual felon indictment was issued on September 3, 2002, which changed the allegations involving the three felony convictions set out in the original habitual felon indictment. The defendant was arraigned on this indictment on September 6, 2002. The defendant's trial began on December 9, 2002. Distinguishing *State v. Little*, 126 N.C. App. 262 (1997), the court ruled that the trial judge did not err in not dismissing the superseding indictment. In *Little*, the state obtained an habitual felon indictment before the defendant pled to the substantive felonies. However, after obtaining convictions on those substantive felonies, the state obtained a superseding habitual felon indictment, deleting one of the felonies alleged in a prior habitual felon indictment and replacing it with another. The court in *Little* ruled that it was error to adjudicate and sentence the defendant on the superseding habitual felon indictment because the defendant was entitled to rely, when he entered his plea on the substantive felonies, on the allegations in the habitual felon indictment in evaluating the state's likelihood of success on the habitual felon indictment. The court distinguished *Little* on the following grounds: (1) unlike the present case, the superseding habitual felon indictment in *Little* occurred *after* (court's emphasis) the defendant was convicted of the substantive felonies; (2) there was no indication in *Little* that the pleas to the substantive felonies actually occurred at an arraignment—the court stated that the critical event that forecloses substantive changes in an habitual felon indictment is the plea entered before the actual trial, not at an earlier arraignment; (3) the court stated that the most important distinction between this case and *Little* involves notice; although the superseding habitual felon indictment in this case was brought after the defendant's first arraignment, it was brought three months before the defendant's trial and thus the defendant received sufficient notice that he was being prosecuted as a habitual felon for the three felony convictions alleged in the superseding indictment.

- E. The state must obtain an habitual felon indictment before the trial of the substantive felony. That is, the state may not wait until the defendant is convicted and sentenced for the substantive felony and then obtain an habitual felon indictment. *State v. Allen*, 292 N.C. 431 (1977). However, it was not a violation of the *Allen* ruling when the defendant was indicted for felony larceny of a motor vehicle and habitual felon and then later indicted for felonious possession of stolen goods (the stolen vehicle), and then tried for felonious possession of stolen goods and habitual felon. *State v. Murray*, 154 N.C. App. 631 (2002).

- F. A habitual felon indictment returned two weeks before the substantive felony indictment was valid. *State v. Blakney*, 156 N.C. App. 671 (2003).
- G. A defendant may plead no contest to a habitual felon indictment, even though G.S. 14-7.6 only mentions “conviction or plea of guilty.” *State v. Jones*, 151 N.C. App. 317 (2002)
- H. When a defendant pleads guilty or no contest to habitual felon, the trial judge must comply with the procedures in G.S. 15A-1022(a) (judge’s duties in taking guilty plea from defendant). The trial judge may not simply accept a defendant’s stipulation to habitual felon status. *State v. Artis*, 174 N.C. App. 668 (2005); *State v. Gilmore*, 142 N.C. App. 465 (2001).
- I. The procedures in G.S. 15A-928 do not apply to a habitual felon proceeding. *State v. Marshburn*, 173 N.C. App. 749 (2005).
- J. A defendant in a habitual felon hearing could not collaterally attack a prior felony conviction on the ground that a district court did not have jurisdiction to accept a defendant’s guilty plea to a felony. *State v. Flemming*, 171 N.C. App. 413 (2005).
- K. Jury instruction is contained in N.C.P.I.—Crim. 203.10.

III. Sentencing

- A. If a defendant is determined to be an habitual felon, the punishment classification for the substantive felony conviction(s) is Class C (unless the felony was a Class A, B1, or B2, in which case the sentencing is under these higher classifications). See generally *State v. Thomas*, 82 N.C. App. 682 (1986); *State v. Aldridge*, 76 N.C. App. 638 (1985). The judgment for the substantive felony conviction(s) must contain the sentence for a Class C felony. No sentence is imposed for the finding of habitual felon status. *State v. Wilson*, 139 N.C. App. 544 (2000); *State v. Taylor*, 156 N.C. App. 172 (2003).
- B. For sentencing of felonies committed on or after October 1, 1994, the felony is treated a Class C felony under the Structured Sentencing Act (SSA). First, determine the defendant’s prior record level, except G.S. 14-7.6 prohibits the assignment of points for convictions “used to establish a person’s status as an habitual felon.” *State v. Miller*, 168 N.C. App. 572 (2005) (state improperly relied on two convictions used to prove habitual felon status to also prove the defendant’s prior record level). It is proper, in calculating prior record level, to use a felony conviction that was not submitted to the jury in establishing habitual felon status even if it occurred during the same week as the other felony conviction used to establish habitual felon status. *State v. Truesdale*, 123 N.C. App. 639 (1996); *State v. McCrae*, 124 N.C. App. 664 (1996). After determining the defendant’s prior record level, then the judge imposes a sentence from the presumptive, aggravated, or mitigated range just as the judge would do so for any other Class C felony under SSA.

In determining a prior record level under SSA, a prior conviction of felonious breaking or entering is considered a Class H felony for determining points, even though the defendant was sentenced as Class C felon for being a habitual felon. *State v. Vaughn*, 130 N.C. App. 456 (1998), *affirmed*, 350 N.C. 88 (1999).

The dispositional deviation for extraordinary mitigation under G.S. 15A-1340.13(g) and (h) may apply to prior record levels I and II under Class C.

- C. For sentencing of felonies committed before October 1, 1994, the felony is treated as a Class C felony under Fair Sentencing Act (FSA). The defendant's prior convictions that are used to prove the defendant's habitual felon status may also constitute aggravating factors. *State v. Roper*, 328 N.C. 337 (1991).
- D. Sentences imposed under the habitual felon law must run consecutively to any sentence being served at the time the defendant is sentenced. See G.S. 14-7.6.

State v. Watkins, 189 N.C. App. 784 (2008). The defendant pled guilty to financial card theft and habitual felon status. The trial judge sentenced him as a Class C felon with Prior Record Level IV to a minimum term of 64 months and a maximum term of 86 months. The judge also entered findings of extraordinary mitigation and ordered the sentence to run concurrently with the federal sentence the defendant was then serving. (1) The court ruled that the state had a right of appeal from the trial court's sentencing the defendant below the statutory minimum and maximum sentences. The court then ruled that the trial court erred in sentencing the defendant below the required minimum and maximum sentences, which for a Class C felony in Prior Record Level IV was 80 months for the minimum and 107 months for the maximum. (2) The court ruled that the state did not have a right of appeal from the trial judge's imposing a concurrent sentence for habitual felon. However, the court suspended the appellate rules and elected to treat the state's appeal as a petition for a writ of mandamus, for the reasons set out in *State v. Ellis*, 361 N.C. 200 (2007). The court ruled that defendant's concurrent sentence was contrary to G.S. 14-7.6, and the court directed the trial judge on remand to enter a judgment that comports with that statute.

- E. See *State v. Bethea*, 122 N.C. App. 623 (1996). The defendant pled guilty to two felony charges (felonious breaking and entering and felonious larceny) and to being an habitual felon. The prior convictions that established habitual felon status were (1) felonious breaking and entering and felonious larceny; (2) larceny of a firearm; and (3) possession of cocaine. In determining the defendant's prior record level, the trial judge assigned one point under G.S. 15A-1340.14(b)(6) because all the elements of the current offense were included in a prior offense [see (1) above] and one point under G.S. 15A-1340.14(b)(7) because the defendant committed the offenses for which he had pled guilty while he was on probation for a prior offense [see (3) above]. The defendant, citing G.S. 14-7.6 (which prohibits—in determining prior record level for sentencing as an habitual felon—convictions used to establish habitual felon status), argued that the trial judge erred in assigning one point each as described above. The court ruled that the trial judge did not err. The court reasoned that both G.S. 15A-1340.14(b)(6) and (b)(7) address the gravity and circumstances surrounding the offense for which the defendant is now being sentenced, rather than the mere existence of the prior offense.
- F. A defendant's guilty plea to habitual felon indictment alleging five felony convictions bars the state from using all five felony convictions in calculating a defendant's prior record level. *State v. Lee*, 150 N.C. App. 701 (2002). [Author's note: If the defendant had pleaded not guilty, a hearing held, and the trial judge had instructed the jury on only three of the five felony convictions, then it would appear that the remaining two felony convictions could be used to establish the defendant's prior record level.]

- G. There is no due process violation when a prosecutor decides which prior convictions to use to establish habitual felon status and which prior convictions to use to establish a defendant's prior record level. *State v. Cates*, 154 N.C. App. 737 (2002).
- H. The habitual felon law used in conjunction with structured sentencing does not violate double jeopardy. *State v. Brown*, 146 N.C. App. 299 (2001).

IV. Constitutional Issues

The habitual felon statute is not unconstitutional under the double jeopardy clause based on the rulings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or *Blakely v. Washington*, 542 U.S. 296 (2004).

Violent Habitual Felon Law; G.S. 14-7.7 through 14-7.12
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Being a violent habitual felon is not a crime but is a status achieved when a person has been convicted of two violent felony offenses as set out in G.S. 14-7.7. The second violent felony offense must have been committed after the conviction of the first violent felony. When a defendant is convicted of a violent felony after having achieved violent habitual felon status, the punishment for that offense is life imprisonment without parole.

Felonies that do not qualify to support violent habitual felon status: (1) a conviction or plea of guilty entered and a judgment entered thereon before July 6, 1967; and (2) a conviction for which the defendant received a pardon.

A "violent felony" is defined in G.S. 14-7.7(b) as:

- (1) All Class A through E felonies.
- (2) Any repealed or superseded offense substantially equivalent to the offenses listed in (1) above.
- (3) Any offense committed in another jurisdiction substantially equivalent to the offenses set forth in (1) or (2) above.

The classification of an offense as a violent felony (for both the offense being tried and for the determination of the convictions used in establishing violent habitual felon status) would be the classification of the offense under the Structured Sentencing Act at the time that offense was committed for which the defendant is being sentenced. See *State v. Stevenson*, 136 N.C. App. 235 (1999); *State v. Mason*, 126 N.C. App. 318 (1997). Thus, an offense classified under the Fair Sentencing Act as a Class D felony but classified as a Class G felony under the Structured Sentencing Act would be considered a Class G felony under the violent habitual felon law (for example, second-degree burglary and second-degree arson). Or a Class F felony under the Fair Sentencing Act that is classified as a Class D felony under the Structured Sentencing Act would be considered a Class D felony under the violent habitual felon law (for example, voluntary manslaughter).

Note that some Class A through E felonies (drug trafficking offenses, first-degree burglary, etc.) do not have violence as an element, but they are included in the definition of violent felony.

A not guilty verdict in a violent habitual felon hearing bars the state, on collateral estoppel grounds, from trying a defendant in later violent habitual felon hearing based on the same two prior convictions used in the prior violent habitual felon hearing. *State v. Safrit*, 145 N.C. App. 541 (2001).

I. Indictment [see the indictment form at the end of this paper] [See also the discussion under Habitual Felons above. Case law discussed in that topic would equally apply to this topic. For a case upholding a violent habitual felon indictment, see *State v. Mason*, 126 N.C. App. 318 (1997).]

II. Procedure [See the discussion under Habitual Felons above. Case law discussed in that topic would equally apply to this topic.]

Jury instruction: N.C.P.I. Crim.—203.13

III. Sentencing

A. If a defendant is determined to be a violent habitual felon, the punishment for the felony conviction(s) is life imprisonment without parole.

B. Sentences imposed under the violent habitual felon law must run consecutively to any sentence being served at the time the defendant is sentenced. See G.S. 14-7.12.

C. The reclassification of felony offenses after they were committed so they become violent felonies under the violent habitual offender statute does not violate ex post facto provisions. *State v. Mason*, 126 N.C. App. 318 (1997); *State v. Wolfe*, 157 N.C. App. 22 (2003).

Habitual Impaired Driving Law; G.S. 20-138.5

A person commits this offense:

- (1) by committing the offense of impaired driving under G.S. 20-138.1
- (2) having been convicted of three or more “offenses involving impaired driving” [defined in G.S. 20-4.01(24a) to include impaired driving, commercial impaired driving, felony death by vehicle, first- and second-degree murder and involuntary manslaughter based on impaired driving, similar offenses in other jurisdictions, etc.], and
- (3) these prior convictions all occurred within ten years of the date of the present offense. [For offenses committed before December 1, 2006, the prior convictions all must have occurred within seven years.]

I. Indictment [see the indictment form at end of this paper]

A. The indictment must conform to the provisions of G.S. 15A-928. For example, the allegation of the three or more prior convictions must be contained in a separate count of the indictment charging this offense or in a separate indictment.

State v. Lobohe, 143 N.C. App. 555 (2001). The court ruled that an indictment properly alleged habitual DWI (G.S. 20-138.1) as required by G.S. 15A-928. The first count alleged impaired driving (using the term “feloniously”). The second count alleged three prior DWI convictions, giving the dates of the convictions and the courts in which the defendant had been convicted.

B. The three or more prior convictions within ten years do not have to occur in any particular order. For example, they all could occur on the same date. *State v. Allen*, 164 N.C. App. 665 (2004) (two DWI convictions consolidated for judgment count as two convictions in prosecution of habitual DWI); *State v. Baldwin*, 117 N.C. App. 713 (1995).

C. Amendment of habitual DWI indictment

State v. Winslow, 360 N.C. 161 (2005). The court, per curiam and without an opinion, reversed the decision of the North Carolina Court of Appeals, 169 N.C. App. 137 (2005), for the reasons stated in the dissenting opinion. The defendant was arrested and charged with habitual impaired driving (DWI) on April 9, 2000. He later was indicted, with the oldest prior conviction mistakenly alleged as April 1, 1993, which is not within seven years of the current offense. At the close of the state’s evidence, the defendant moved to dismiss the indictment for not alleging habitual DWI. The trial judge allowed the state to amend the indictment to allege the correct conviction date of the oldest conviction as August 11, 1993. The dissenting opinion stated that the amendment was a substantial alteration of the charge and not allowed under G.S. 15A-923(e), because the amendment elevated the offense from a misdemeanor to a felony. The dissenting opinion stated that the case should be remanded for resentencing on misdemeanor DWI.

II. Misdemeanor DWI Is Lesser-Included Offense

Misdemeanor DWI is a lesser-included offense of habitual DWI. *State v. Corbett*, ___ N.C. App. ___, 661 S.E.2d 759 (17 June 2008).

III. Procedure

A. The procedure for trying this offense must conform to the provisions of G.S. 15A-928. For example, the case must be tried before the jury as a simple impaired driving offense (without mention of the prior impaired driving convictions, unless they are admissible under a rule of evidence such as Rule 609) unless the defendant denies the existence of one or more of the prior impaired driving convictions alleged in the indictment. If the defendant denies the existence of these convictions, then the state must prove all the prior convictions before the jury trying the impaired driving offense.

See generally *State v. Jernigan*, 118 N.C. App. 240 (1995) (trial judge in habitual impaired driving trial erred in failing to formally arraign defendant on prior convictions, but error was not prejudicial in this case, when the defendant had previously stipulated to the convictions before trial); *State v. Hudgins*, 167 N.C. App. 705 (2005) (trial judge erred under G.S. 15A-928 in allowing state in habitual DWI trial to introduce evidence of prior DWI convictions before arraigning defendant to determine whether he would admit to the convictions).

State v. Ellis, 130 N.C. App. 596 (1998). The court ruled that a certified AOC computer printout of one of the defendant's prior DWI convictions was admissible to prove a prior DWI conviction in a habitual impaired driving prosecution. The court, while noting the provisions of G.S. 8-35.2, rested its ruling on G.S. 15A-1340.14(f) (but note that this statute permits the use of AOC records to prove convictions under the Structured Sentencing Act, while this case involved proof of a conviction at trial.)

- B. This offense is a substantive felony offense within the original jurisdiction of superior court. *State v. Priddy*, 115 N.C. App. 547 (1994); *State v. Bowden*, 177 N.C. App. 718 (2006) (court reaffirmed that habitual DWI is a substantive felony offense, not a status offense, and thus the superior court had original jurisdiction to try the transactionally-related misdemeanors under G.S. 7A-271(a)(3); court noted that in the post-*Priddy* case of *State v. Vardiman*, 146 N.C. App. 381 (2001), habitual DWI was described as a recidivist offense; court, relying on *In re Appeal from Civil Penalty*, 324 N.C. 373 (1989), stated that one panel of the Court of Appeals cannot overrule another panel, and that in any event *Vardiman* in fact reaffirmed *Priddy*'s ruling that habitual DWI is a substantive felony; court also noted that the mere fact that a statute is directed at recidivism does not prevent the statute from establishing a substantive offense).
- C. Jury instruction: N.C.P.I. Crim.—270.25A.

IV. Constitutional Issues

- A. If a defendant is convicted of a misdemeanor (for example, misdemeanor assault) in district court and appeals for trial de novo in superior court, the state's later indictment of the defendant for felonious assault arising out of the same incident creates a presumption of vindictiveness under the Due Process Clause. *Blackledge v. Perry*, 417 U.S. 21 (1974). See also *Thigpen v. Roberts*, 468 U.S. 27 (1984) (prosecution of manslaughter barred under *Blackledge* after conviction of misdemeanor traffic offenses in lower court and appeal for trial de novo in higher court; court stated in footnote 6 that state may attempt to rebut presumption of vindictiveness); *State v. Mayes*, 31 N.C. App. 694 (1976) (prosecution of felonious assault barred under *Blackledge* after conviction of misdemeanor assault in district court and appeal for trial de novo in superior court). These rulings would likely apply to a defendant who is convicted of impaired driving in district court, appeals to superior court for trial de novo, and the state then indicts the defendant for habitual impaired driving; *State v. Bissette*, 142 N.C. App. 669 (2001).
- B. If a defendant is convicted of impaired driving in district court and does not appeal for trial de novo, and then the state charges the defendant with habitual impaired driving, the habitual impaired driving prosecution may be barred by the Double Jeopardy Clause because the state may not prosecute a defendant for a greater offense after a prosecution for a lesser-included offense. *Brown v. Ohio*, 432 U.S. 161 (1977).
- C. Habitual DWI is a substantive and punishment enhancement offense that does not violate double jeopardy. The defendant is subjected to enhanced punishment for the current impairing violation and is not being punished a second time for the three prior DWI convictions. Also, it is not a double jeopardy violation to use the same prior DWI convictions to prove more than one habitual DWI offense. *State v. Vardiman*, 146 N.C. App. 381 (2001), *appeal dismissed*, 355 N.C. 222 (2002). The court in *State v. Bradley*, 181 N.C. App. 557 (2007), ruled that the habitual DWI offense is not unconstitutional

under the Double Jeopardy Clause based on the rulings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or *Blakely v. Washington*, 542 U.S. 296 (2004).

V. Sentencing

- A. For offenses committed on or after December 1, 1997, the punishment is a Class F felony and is subject to the sentencing provisions of the Structured Sentencing, but a defendant must be sentenced to a minimum active term of not less than 12 months of imprisonment, which shall not be suspended. A sentence must run consecutively to any sentences being served at the time of sentencing. G.S. 20-138.5(b). The North Carolina Court of Appeals ruled in *State v. Gentry*, 135 N.C. App. 107 (1999) that impaired driving convictions used to prove habitual impaired driving may not be used to calculate the defendant's prior record level.

For offenses committed on or after October 1, 1994 and before December 1, 1997, the punishment for this offense is a Class G felony and is subject to the sentencing provisions of the Structured Sentencing Act.

- B. A defendant convicted of this offense must have his or her driver's license permanently revoked. G.S. 20-138.5(d).
- C. The motor vehicle driven at the time of this offense is subject to forfeiture under certain conditions. See G.S. 20-138.5(e).

Habitual Misdemeanor Assault Law; G.S. 14-33.2

[Note: The elements below reflect the changes made to G.S. 14-33.2, effective for offenses committed on or after December 1, 2004.]

A person commits this offense:

- (1) (a) by violating any of the offenses in G.S. 14-33 and causes physical injury; *or*
(b) by violating G.S. 14-34; *and*
- (2) has been convicted of two or more prior felony or misdemeanor assaults.

A prior assault conviction does not qualify under element (2) above if it occurred more than 15 years before the date of the offense set out in element (1) above.

[Note: When two prior assault convictions occurred on the same date, there is no statutory bar to count them as two convictions under element (2) above. *See State v. Forrest*, 168 N.C. App. 614 (2005) (no statutory requirement that prior convictions occur on separate dates).]

I. Indictment [see the indictment form at end of this paper]

- A. The indictment must conform to the provisions of G.S. 15A-928. For example, the allegation of the prior convictions must be contained in a separate count of the indictment charging this offense or in a separate indictment.

State v. Williams, 153 N.C. App. 192 (2002). The state indicted the defendant for assault on a female. He was convicted. Then the state proved at a separate sentencing hearing that the defendant had five qualifying convictions to purportedly establish habitual misdemeanor assault under G.S. 14-33.2. The court ruled that the court lacked jurisdiction to sentence the defendant for habitual misdemeanor assault when the indictment only charged assault on a female, a misdemeanor. An indictment charging the felony of habitual misdemeanor assault is required. [Author's note: G.S. 15A-928 requires the state, in charging the felony of habitual misdemeanor assault, to indict the defendant for the misdemeanor assault and to allege in either a separate count of the same indictment or in a separate indictment the five prior qualifying convictions that constitutes habitual misdemeanor assault.]

- B. The two prior convictions do not have to occur in any particular order. For example, they could have occurred on the same date. *See State v. Forrest*, 168 N.C. App. 614 (2005) (no statutory requirement that prior convictions occur on separate dates).

II. Procedure

- A. The procedure for trying this offense must conform to the provisions of G.S. 15A-928. For example, the case is tried before the jury as a simple assault on a female offense (without mention of the prior convictions, unless they are admissible under a rule of evidence such as Rule 609) unless the defendant denies the existence of one or more of the prior convictions alleged in the indictment. If the defendant denies the existence of these convictions, then the state must prove all the prior convictions before the jury.

State v. Burch, 160 N.C. App. 394 (2003). The court ruled that the state failed to prove the felony of habitual misdemeanor assault when the defendant neither stipulated to his prior convictions nor was arraigned under G.S. 15A-928(c) and admitted to them, and the state did not prove the convictions before the jury.

- B. This offense is a felony within the original jurisdiction of superior court. *State v. Smith*, 139 N.C. App. 209 (2000).
- C. Jury instruction: N.C.P.I Crim.—208.45.

III. Constitutional Issues

- A. If a defendant is convicted of a misdemeanor (for example, misdemeanor assault) in district court and appeals for trial de novo in superior court, the state's later indictment of the defendant for felonious assault arising out of the same incident creates a presumption of vindictiveness under the Due Process Clause. *Blackledge v. Perry*, 417 U.S. 21 (1974). *See also Thigpen v. Roberts*, 468 U.S. 27 (1984) (prosecution of manslaughter barred under *Blackledge* after conviction of misdemeanor traffic offenses in lower court and appeal for trial de novo in higher court; court stated in footnote 6 that state may attempt to rebut presumption of vindictiveness); *State v. Mayes*, 31 N.C. App. 694 (1976) (prosecution of felonious assault barred under *Blackledge* after conviction of misdemeanor assault in district court and appeal for trial de novo in superior court). These rulings would likely apply to a defendant who is convicted of assault on a female in district court, appeals to superior court for trial de novo, and the state then indicts the defendant for habitual misdemeanor assault.

- B. If a defendant is convicted of assault on a female in district court and does not appeal for trial de novo, and then the state charges the defendant with habitual misdemeanor assault, the habitual misdemeanor assault prosecution may be barred by the Double Jeopardy Clause because the state may not prosecute a defendant for a greater offense after a prosecution for a lesser-included offense. *Brown v. Ohio*, 432 U.S. 161 (1977). For an analysis of what constitutes offenses subject to the Double Jeopardy Clause, see *United States v. Dixon*, 509 U.S. 688 (1993).
- C. The habitual misdemeanor assault law does not violate double jeopardy. *State v. Carpenter*, 155 N.C. App. 35 (2002). There is no ex post facto violation in using offenses to prove habitual misdemeanor assault that occurred before the enactment of the statute creating the habitual misdemeanor assault offense. *State v. Smith*, 139 N.C. App. 209 (2000). The habitual misdemeanor assault offense is not unconstitutional under the rulings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or *Blakely v. Washington*, 542 U.S. 296 (2004), or under the Double Jeopardy Clause. *State v. Massey*, 179 N.C. App. 803 (2006).

IV. Sentencing

- A. This offense is a Class H felony. It became effective for offenses committed on or after December 1, 1995. Sentencing for this offense is subject to the provisions of the Structured Sentencing Act, which requires the determination of the defendant’s prior record level and the imposition of a sentence in the presumptive, aggravated, or mitigated range. The North Carolina Court of Appeals ruled in *State v. Gentry*, 135 N.C. App. 107 (1999) that impaired driving convictions used to prove habitual impaired driving may not be used to calculate the defendant’s prior record level. The *Gentry* ruling would apply to habitual misdemeanor assault as well.
- B. G.S. 14-33.2, as revised in 2004 effective for offenses of habitual misdemeanor assault committed on or after December 1, 2004, provides in effect that a conviction of habitual misdemeanor assault may not be used to prove one of the three felonies to establish habitual felon status. The statutory revision effectively overrules *State v. Smith*, 139 N.C. App. 209 (2000), on this issue.

General Constitutional Issues

I. Challenging Prior Convictions

- A. Collateral attack of a prior conviction is limited to a claim based on an alleged violation of right-to-counsel.

Custis v. United States, 511 U.S. 485 (1994). The Court ruled that although a defendant has a federal constitutional right to collaterally attack a prior conviction because it was obtained in violation of an indigent’s constitutional right to counsel, a defendant has no federal constitutional right to collaterally attack a prior conviction on other grounds, such as (1) the guilty plea was obtained without proper advice about waiver of rights as required by *Boykin v. Alabama*, 395 U.S. 238 (1969), or (2) the defendant’s lawyer provided ineffective assistance of counsel under the Sixth Amendment. The Court ruled that a trial judge at a federal sentencing hearing had properly barred the defendant from

attacking—under the grounds specified in (1) and (2) above—prior state convictions offered by the government to enhance a federal sentence.

The Court stated that the defendant could attack his state convictions in state court or through federal habeas review. If the defendant was successful, the defendant then could apply for reopening of any federal sentence enhanced by the state convictions (although the Court stated that it expressed no opinion on the appropriate disposition of such an application).

[Author's note: The North Carolina Court of Appeals in *State v. Stafford*, 114 N.C. App. 101 (1994) ruled that a defendant may not collaterally attack prior DWI convictions on *Boykin* grounds when the convictions are offered to prove the offense of habitual impaired driving. The *Stafford* ruling is consistent with the *Custis* ruling, and it would also bar a defendant from collaterally attacking a prior conviction on *Boykin* grounds when the state seeks to use the conviction at sentencing or to impeach the defendant with that conviction. See *State v. Muscia*, 115 N.C. App. 498 (1994) (court ruled, relying on *Stafford*, that the defendant was properly denied collateral attack of a prior DWI conviction used in sentencing for a DWI offense). A defendant's remedy would be to directly attack the prior conviction (if it occurred in a North Carolina state court) by a motion for appropriate relief under G.S. 15A-1415 in the court where the conviction occurred.

For right-to-counsel violations, G.S. 15A-980 allows a defendant to collaterally attack a prior conviction that the state seeks to use for impeachment or sentencing purposes. Thus, North Carolina statutory law is consistent with federal constitutional law as described in *Custis*.

The North Carolina Court of Appeals has ruled that a defendant has the burden of proof when seeking to set aside a conviction on *Boykin* grounds. *State v. Hester*, 111 N.C. App. 110 (1993); *State v. Bass*, 133 N.C. App. 646 (1999) (defendant failed to meet burden of proof). And, G.S. 15A-980 specifically provides that a defendant has the burden of proof when seeking to set aside a conviction on right-to-counsel grounds.

Note that part of the court's opinion in *State v. Creason*, 123 N.C. App. 495 (1996) is inconsistent with the discussion above. To the extent it is inconsistent, it is of questionable validity.

A defendant may not collaterally attack a prior conviction based on allegation of ineffective assistance of counsel. *State v. Hensley*, 156 N.C. App. 634 (2003).]

State v. Fulp, 355 N.C. 171 (2002). The court ruled that the trial judge properly ruled that a prior conviction used in a habitual felon hearing was not obtained in violation of the defendant's right to counsel. The defendant did not meet his burden of proving by a preponderance of evidence that he had not waived his right to counsel—G.S. 15A-980(c). The court noted, citing *State v. Heatwole*, 344 N.C. 1 (1996), that a waiver of the right to counsel need not be in writing. G.S. 7A-457(a) ("may, in writing, waive") is directory, not mandatory. The court also stated that although a trial judge must consider the factors in G.S. 7A-457(a) in deciding whether a waiver of counsel is valid, the judge is not required to find and state that it considered those factors.

- B. An uncounseled misdemeanor conviction, when only a fine is imposed, is valid for later use as a prior conviction. However, an uncounseled misdemeanor conviction is not valid for such use if a suspended sentence or active sentence was imposed. See *Alabama v. Shelton*, 535 U.S. 654 (2002). The ruling in *Nichols v. United States*, 511 U.S. 738 (1994) (because an uncounseled misdemeanor conviction is constitutionally valid if a defendant does not receive an active sentence for that conviction, that conviction may

constitutionally be used in a later proceeding, including a sentencing hearing), must be reconsidered in light of *Alabama v. Shelton*.

II. Constitutionality of Habitual Felon Law

North Carolina appellate courts have upheld the constitutionality of the habitual felon law. *State v. Todd*, 313 N.C. 110 (1985); *State v. Smith*, 112 N.C. App. 512 (1993).

III. Miscellaneous Issues

- A. Manson is convicted of armed robbery (the offense was committed on October 15, 1994) and is found to be a violent habitual offender. He is sentenced to life imprisonment without parole. Manson argues it is a violation of the *ex post facto* clause to find him to be a violent habitual offender because the convictions establishing that status occurred before the October 1, 1994, effective date of the violent habitual offender law under which he was sentenced. Is it a violation of the *ex post facto* clause?

No. Courts have ruled that a sentence imposed as an habitual offender is an increased punishment for the current offense, not an additional punishment for the prior convictions. *Gryger v. Burke*, 334 U.S. 728 (1948); *McDonald v. Massachusetts*, 180 U.S. 311 (1901). See also *State v. Todd*, 313 N.C. 110 (1985); *State v. Cobb*, 18 N.C. App. 221 (1973), *reversed on other grounds*, 284 N.C. 573 (1974); *State v. Smith*, 139 N.C. App. 209 (2000).

- B. Weldon is convicted of felonious breaking and entering for a crime committed on October 2, 1994. He has a 1989 conviction for assault with a deadly weapon with intent to kill inflicting serious injury, which was a Class F felony then and which is a Class C felony under SSA. As a result of SSA sentencing law [see G.S. 15A-1340.14(c)], the trial judge assesses 6 points (for a Class C felony) for the 1989 conviction. Weldon argues the legislature's classification of the 1989 conviction as a Class C felony for determining prior record level is a violation of the *ex post facto* clause. Is it a violation of the *ex post facto* clause?

No. *State v. Mason*, 126 N.C. App. 318 (1997). See also *Covington v. Sullivan*, 823 F.2d 37 (2d Cir. 1987) (no violation of *ex post facto* clause when defendant's predicate crime was reclassified as a violent felony after his first conviction but before the offense for which he was convicted and sentenced as a second violent felony offender); *United States ex rel. Boney v. Godinez*, 837 F. Supp. 268 (N.D. Ill. 1993).

- C. It is a matter of legislative intent whether cumulative punishments for multiple offenses are permitted at a single trial.

Missouri v. Hunter, 459 U.S. 359 (1983). The defendant was convicted first-degree robbery and armed criminal action at a single trial in Missouri state court. The defendant was sentenced for each of these offenses. The elements of armed criminal action are the commission of a felony with a dangerous or deadly weapon, and all these elements are included in the offense of first-degree robbery. The Court ruled that when a legislature specifically authorizes cumulative punishment under two statutes, regardless whether these two statutes proscribe the "same" conduct under the *Blockburger* test [*Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932)], there is no violation of the Double Jeopardy Clause of the Fifth Amendment.

HABITUAL FELON INDICTMENT
page one of two pages

G.S. 14-7.1

[This form is to be used in preparing an indictment that alleges that the defendant is an habitual offender. Being an habitual offender is not a crime; it is a status. G.S. 14-7.6 provides that a defendant is to be sentenced as a Class C felon when convicted of a felony committed while the defendant is an habitual offender. **Do not use this form to charge a defendant with violent habitual offender status under G.S. 14-7.7. There is another indictment form available to charge that status.**]

The jurors for the State upon their oath present that (*name defendant*) is an habitual felon in that on or about (*give date the defendant committed felony*) (*name defendant*) did commit the felony of (*name felony and give statutory citation*) and that on or about (*give date the defendant was convicted of felony*) (*name defendant*) was convicted of the felony of (*name felony for which defendant was convicted and the court and state in which the defendant was convicted*); and that on or about (*give date the defendant committed felony*) (*name defendant*) did commit the felony of (*name felony and give statutory citation*) and that on or about (*give date the defendant was convicted of felony*) (*name defendant*) was convicted of the felony of (*name felony for which defendant was convicted and the court and state in which the defendant was convicted*); and that on or about (*give date the defendant committed felony*) (*name defendant*) did commit the felony of (*name felony and give statutory citation*) and that on or about (*give date the defendant was convicted of felony*) (*name defendant*) was convicted of the felony of (*name felony for which defendant was convicted and the court and state in which the defendant was convicted*).

Note:

To be an habitual felon, the defendant must have pled guilty or no contest to or have been convicted of *three* felonies *before* the commission of the felony with which the defendant is charged. Each of the three prior felonies must have been *committed* after the plea of guilty or no contest to or conviction of the one before it.

The North Carolina Supreme Court in *State v. Patton*, 342 N.C. App. 633 (1996) ruled that a separate habitual felon indictment is not required for each substantive felony indictment. One habitual felon indictment is sufficient.

Note (continued):

The North Carolina Supreme Court in *State v. Cheek*, 339 N.C. 725 (1995) ruled that a habitual felon indictment need not allege the predicate felony being tried.

Sample Indictment

The jurors for the State upon their oath present that James Peter Kenly is an habitual felon in that on or about June 1, 1982, James Peter Kenly did commit the felony of armed robbery in violation of G.S. 14-87 and that on or about January 12, 1983, James Peter Kenly was convicted of the felony of armed robbery in the Superior Court of Wilson County, North Carolina; and that on or about April 30, 1990, James Peter Kenly did commit the felony of felonious breaking and entering in violation of G.S. 14-54 and that on or about November 10, 1990, James Peter Kenly was convicted of felonious breaking and entering in the Superior Court of Cumberland County, North Carolina; and that on or about August 30, 1995, James Peter Kenly did commit the felony of felonious larceny in violation of G.S. 14-72 and that on or about December 12, 1995, James Peter Kenly was convicted of the felony of felonious larceny in the Superior Court of Sampson County, North Carolina.

Punishment:

If the defendant is convicted of a felony, and if the jury then finds (or the defendant pleads guilty to) in a separate proceeding that the defendant is an habitual felon, that conviction is punished as a Class C felony. If there is more than one felony conviction, each conviction is punished as a Class C felony. See *State v. Thomas*, 82 N.C. App. 682 (1986).

VIOLENT HABITUAL FELON INDICTMENT
page one of two pages

G.S. 14-7.7

[This form is to be used in preparing an indictment that alleges that the defendant is a violent habitual offender. Being an habitual offender is not a crime; it is a status. G.S. 14-7.12 provides that a defendant is to be sentenced to life imprisonment without parole when convicted of a violent felony committed while the defendant is a violent habitual offender. **Do not use this form to charge a defendant with habitual offender status under G.S. 14-7.1. There is another indictment form available to charge that status.**]

The jurors for the State upon their oath present that (*name defendant*) is a violent habitual felon in that on or about (*give date the defendant committed felony*) (*name defendant*) did commit the violent felony of (*name felony and give statutory citation*) and that on or about (*give date the defendant was convicted of felony*) (*name defendant*) was convicted of the violent felony of (*name felony for which defendant was convicted and the court and state in which the defendant was convicted*); and that on or about (*give date the defendant committed felony*) (*name defendant*) did commit the violent felony of (*name felony and give statutory citation*) and that on or about (*give date the defendant was convicted of felony*) (*name defendant*) was convicted of the violent felony of (*name felony for which defendant was convicted and the court and state in which the defendant was convicted*).

Note

To be a violent habitual felon, the defendant must have pled guilty or no contest to or have been convicted of *two* violent felonies *before* the commission of the felony with which the defendant is charged. Each of the two prior violent felonies must have been *committed* after the plea of guilty or no contest to or conviction of the one before it.

For a definition of “violent felony” for violent felonies committed on or after May 1, 1994 until September 30, 1994, see the version of G.S. 14-7.7 applicable to those offenses. For a definition of “violent felony” for violent felonies committed on or after October 1, 1994, see the version of G.S. 14-7.7 applicable to those offenses.

The North Carolina Supreme Court in *State v. Patton*, 342 N.C. App. 633 (1996) ruled that a separate habitual felon indictment is not required for each substantive felony indictment. One habitual felon indictment is sufficient. This ruling would likely be applied to a violent habitual felon indictment.

Note (continued):

The North Carolina Supreme Court in *State v. Cheek*, 339 N.C. 725 (1995) ruled that an habitual felon indictment need not allege the predicate felony being tried. That ruling would likely be applied to a violent habitual felon indictment.

Sample Indictment

The jurors for the State upon their oath present that David Louis Smith is a violent habitual felon in that on or about July 5, 1982, David Louis Smith did commit the violent felony of armed robbery in violation of G.S. 14-87 and that on or about January 12, 1983, David Louis Smith was convicted of the violent felony of armed robbery in the Superior Court of Wilson County, North Carolina; and that on or about April 30, 1990, David Louis Smith did commit the violent felony of second-degree rape in violation of G.S. 14-27.3 and that on or about November 10, 1992, David Louis Smith was convicted of second-degree rape in the Superior Court of Cumberland County, North Carolina.

Punishment

If the defendant is convicted of a violent felony, and if the jury then finds (or the defendant pleads guilty to) in a separate proceeding that the defendant is a violent habitual felon, the punishment for that violent felony is life imprisonment without parole. If there is more than one violent felony conviction, each conviction is punished with life imprisonment without parole. See *State v. Thomas*, 82 N.C. App. 682 (1986) (this ruling, applicable to the habitual felon law, would appear to be equally applicable to the violent habitual felon law).

[Note: Use this form only for offenses committed on or after December 1, 2006.]

Charging Language for Arrest Warrant or Magistrate's Order only:

... **unlawfully, willfully, and feloniously did** drive a vehicle¹ on *(name or describe highway or public vehicular area)*, a *(choose one: highway;² public vehicular area³)*, while subject to an impairing substance⁴ and, within ten years of the date of this offense, has been convicted of three or more offenses involving impaired driving.⁵ The defendant has been previously convicted⁶ on (1) *(name date of conviction, offense, and court in which conviction occurred)*; (2) *(name date of conviction, offense, and court in which conviction occurred)*; and (3) *(name date of conviction, offense, and court in which conviction occurred)*.⁷

Charging Language for an Indictment or Information (see Note below):

First count in the indictment or information:

... **unlawfully, willfully, and feloniously did** drive a vehicle¹ on *(name or describe highway or public vehicular area)*, a *(choose one: highway;² public vehicular area³)*, while subject to an impairing substance.⁴

Second count in the indictment or information:

... ~~**unlawfully, willfully, and feloniously did**~~ within ten years of the date of this offense, has been convicted of three or more offenses involving impaired driving.⁵ The defendant has been previously convicted on (1) *(name date of conviction, offense, and court in which conviction occurred)*; (2) *(name date of conviction, offense, and court in which conviction occurred)*; and (3) *(name date of conviction, offense, and court in which conviction occurred)*.⁷

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1. “Vehicle” is defined in G.S. 20-4.01(49).
 2. “Highway” is defined in G.S. 20-4.01(13).
 3. “Public vehicular area” is defined in G.S. 20-4.01(32).
 4. “Impairing substance” is defined in G.S. 20-4.01(14a).
 5. “Offense involving impaired driving” is defined in G.S. 20-4.01(24a).
 6. “Conviction” is defined in G.S. 20-4.01(4a). It includes, for example, out-of-state convictions. A conviction must have occurred within ten years of the date of the impaired driving offense.
 7. More than three prior convictions may be alleged. It may be useful to do because if the state is unable to prove a particular prior conviction at trial, it may still be able to prove three other prior convictions alleged in the criminal pleading.

Note:

The misdemeanor offense of impaired driving, G.S. 20-138.1, is a lesser-included offense of habitual impaired driving. Therefore, it is not necessary to charge the misdemeanor offense when charging habitual impaired driving.

In alleging and proving prior convictions in superior court, a prosecutor must comply with G.S. 15A-928, which requires that an indictment or information for this kind of offense must allege prior convictions in either (1) a separate count of the indictment or information charging the substantive offense, or (2) in a separate indictment or information. Also, the title of the indictment or information must not include a reference to the prior convictions; therefore, the title probably should delete the reference to “habitual” in the name of the offense. The defendant on trial for this offense in superior court must be arraigned before the close of the state’s evidence in the absence of the jury. If the defendant admits the prior convictions, proof of the convictions and jury instructions about this element are not permitted. If the defendant denies the prior convictions or a particular conviction, then the state has the burden of proving the conviction(s) before the jury.

Sample Charge (Arrest Warrant or Magistrate's Order only):

... unlawfully, willfully, and feloniously did drive a vehicle on U.S. 70, Raleigh, N.C., a highway, while subject to an impairing substance and, within ten years of the date of this offense, has been convicted of three or more offenses involving impaired driving. The defendant has been previously convicted on (1) April 1, 2000, of impaired driving in Durham County District Court; (2) March 6, 2001, of felony death by vehicle in Wake County Superior Court; and (3) January 4, 2003, of impaired driving in Durham County District Court.

Sample Charge (Indictment or Information only):

(First count of indictment or information)

... unlawfully, willfully, and feloniously did drive a vehicle on, U.S. 70 in Raleigh, N.C., a highway, while subject to an impairing substance.

(Second count of indictment or information)

... unlawfully, willfully, and feloniously did within ten years of the date of this offense, has been convicted of three or more offenses involving impaired driving. The defendant has been previously convicted on (1) April 1, 2000, of impaired driving in Durham County District Court; (2) March 6, 2001, of felony death by vehicle in Wake County Superior Court; and (3) January 4, 2003, of impaired driving in Durham County District Court.

Punishment:

Class F felony.

I. Charging Language for an Arrest Warrant or Magistrate's Order only:

... unlawfully, willfully, and feloniously did (*insert proper charging language of a violation of G.S. 14-33 or G.S. 14-34*).¹ This assault caused physical injury to the victim, [*describe injury*].²

The defendant has been previously convicted of two or more felony or misdemeanor assault offenses. The defendant has been previously convicted of the [*choose one: misdemeanor; felony*] assault of (*name offense*) on (*give date*) in (*name court*). The defendant has been previously convicted of the [*choose one: misdemeanor; felony*] assault of (*name offense*) on (*give date*) in (*name court*).³ The earlier of these convictions occurred no more than 15 years prior to the date of current violation.

II. Charging Language for an Indictment or Information (see Note below):

(*First count of the indictment or information*)

... unlawfully, willfully, and feloniously did (*insert proper charging language of a violation of G.S. 14-33 or G.S. 14-34*).¹ This assault caused physical injury to the victim, [*describe injury*].²

(*Second count of the indictment or information*)

The defendant has been previously convicted of two or more felony or misdemeanor assault offenses. The defendant has been previously convicted of the [*choose one: misdemeanor; felony*] assault of (*name offense*) on (*give date*) in (*name court*). The defendant has been previously convicted of the [*choose one: misdemeanor; felony*] assault of (*name offense*) on (*give*

date) in (*name court*).³ The earlier of these convictions occurred no more than 15 years prior to the date of current violation.

1. Violations of G.S. 14-33 include: simple assault; simple affray; assault on a sports official; assault inflicting serious injury; assault with a deadly weapon; assault on a female by a male at least 18 years old; assault on a child under 12; assault on a government officer or employee; assault on school personnel; assault on public transit operator; and assault in the presence of a minor. A violation of G.S. 14-34 is assault by pointing a gun.
2. The allegation that the assault caused physical injury is not required if charging a violation of G.S. 14-34 (assault by pointing a gun).
3. More than two misdemeanor or felony assault convictions may be alleged even though only two convictions must be proved at trial.

Note:

This charging form reflects legislative changes that were effective for habitual misdemeanor assault offenses committed on or after December 1, 2004.

A conviction of habitual misdemeanor assault may not be used for any other habitual offense statute, such as habitual felon under Article 2 of General Statutes Chapter 14.

In alleging and proving prior convictions in superior court, a prosecutor must comply with G.S. 15A-928, which requires that an indictment or information for this kind of offense must allege prior convictions in either (1) a separate count of the indictment or information charging the substantive offense, or (2) in a separate indictment or information. Also, the title of the indictment or information must not include a reference to the prior convictions—it is unclear whether the reference to “habitual” in the name of the offense needs to be deleted. The defendant on trial for this offense in superior court must be arraigned before the close of the state’s evidence in the absence of the jury. If the defendant admits the prior convictions, proof of the convictions and jury instructions about this element are not permitted. If the defendant denies the prior convictions or a particular conviction, then the state has the burden of proving the conviction(s) before the jury.

Sample Charge (Arrest Warrant or Magistrate’s Order only):

. . . unlawfully, willfully, and feloniously did assault and strike Susan Riggins, a female person, by throwing an empty whiskey bottle and hitting her on the left shoulder. The defendant is a male person and was at least 18 years of age when the assault and striking occurred. This assault caused physical injury to the victim, bruises on her left shoulder. The defendant has been previously convicted of two or more felony or misdemeanor assault offenses. The defendant has been previously convicted of misdemeanor assault of assault on a female on October 14, 2003, in Wake County District Court. The defendant has been previously convicted of misdemeanor assault of assault on a female on December 13, 2004, in Wake County District Court. The earlier of these convictions occurred no more than 15 years prior to the date of current violation.

Sample Charge (Indictment or Information only):

(First count of indictment or information)

. . . unlawfully, willfully, and feloniously did assault and strike Susan Riggins, a female person, by throwing an empty whiskey bottle and hitting her on the left shoulder. The defendant is a male person and was at least 18 years of age when the assault and striking occurred. This assault caused physical injury to the victim, bruises on her left shoulder.

(Second count of indictment or information)

The defendant has been previously convicted of two or more felony or misdemeanor assault offenses. The defendant has been previously convicted of misdemeanor assault of assault on a female on October 14, 2003, in Wake County District Court. The defendant has been previously convicted of misdemeanor assault of assault on a female on December 13, 2004, in Wake County District Court. The earlier of these convictions occurred no more than 15 years prior to the date of current violation.

Punishment:

Class H felony.