

Check current offense

- Is it a felony on which an habitual felon charge may be based?
 - Habitual DWI & misdemeanor assault—yes, so far
 - Misdemeanors “punishable” as felonies, such as possession of cocaine—see next slide
 - “Felony” possession of drug paraphernalia
 - No. *S v. Wagner*, 356 NC 599 (2002) (not a felony and cannot support h/f indictment)
- When to raise (generally)
 - Immediately, if offense is misdemeanor and facts do not support alternative felony charge

Check prior offenses

- Do they meet the statutory requirements?
 - Must be committed after conviction of prior offenses
 - May include only one offense committed before age 18
 - May not include no contest plea before July 1, 1975
 - Must, in fact, be felony
 - Watch out-of-state convictions
 - Misdemeanors “punishable” as felonies? *See State v. Jones*, 161 NC App 100 (2003) (possession of cocaine is not prior felony that would support habitual felon conviction)
- When to raise (generally)
 - At h/f phase unless no alternative charge

Check circumstances of priors

- Can priors be set aside?
 - Ineffectiveness of counsel
 - Prior guilty plea not knowing and voluntary
 - Denial of counsel
- When to raise (generally)
 - You may “collaterally attack” conviction (that is, challenge conviction in current case) for denial of counsel. *See* GS 15A-980 for suppression procedure.
 - But, for other issues you must file MAR in original case

Check prior h/f adjudications

- Has defendant ever been acquitted of being a habitual felon?
 - If underlying felonies were the same, collateral estoppel applies. *S v. Safrit*, 145 NC App 541 (2001).
- When to raise (generally)
 - At h/f phase unless no alternative charge

Check timing of h/f indictment

- When was it filed?
 - Substantive offense must still be pending. *S v. Allen*, 292 NC 431 (1977).
 - May not be filed after defendant enters plea. *S v. Little*, 126 NC App 262 (1997).
 - What does entry of plea mean?
 - Ask for arraignment anyway
- When to raise (generally)
 - If h/f indictment filed after conviction of substantive offense, immediately
 - If h/f indictment filed after entry of plea, at h/f phase

Check pleading of indictments

- Was habitual felon indictment properly pled?
 - Ex., failure to allege state against which felony committed. *S v. Mewborn*, 131 NC App 495 (1998).
- Was current offense properly pled?
 - Habitual felon indictment must be supported by valid indictment for current offense. *S v. Winstead*, 78 NC App 180 (1985).
- When to raise (generally)
 - If defective h/f indictment, at h/f phase
 - Remedy may be limited if defect not substantive

Check amendments

- Does amendment or superseding indictment make substantive change to h/f indictment?
 - Ex., substitution of underlying felonies
 - Under *Little*, substantive change may not be permitted after entry of plea
- When to raise (generally)
 - At h/f phase

Check timing of trial

- Is habitual felon charge calendared along with current offense?
 - If not, object when state seeks to add on charge
- Is trial at least 20 days after habitual felon indictment?
 - If not, object
 - Right may be waived

Check proof of priors

- State must prove
 - That defendant is person who was convicted and that conviction is felony
 - Watch out-of-state convictions. *S v. Carpenter*, 573 SE2d 668 (2002) (New Jersey judgments did not reflect that offenses were felonies and could not be counted as felonies)
- Proof may be by
 - Original or certified copy of court record or stipulation by defendant (to priors, not to being habitual felon)
- When to raise (generally)
 - At h/f phase

Check number of sentences

- Court may not impose
 - sentence for both substantive offense and for habitual felon charge
- Court not required to impose
 - consecutive sentences for multiple offenses tried in same proceeding
- When to raise (generally)
 - At sentencing

Check use of priors at sentencing

- Convictions used to establish h/f status may not be used for structured sentencing
 - But, state may use one prior conviction for h/f and one prior for s/s even if entered in same session
 - State cases also allow state to pick which priors to use for h/f status and which to use for s/s
- Prior h/f convictions do not count as “C” felonies
 - Count as class of substantive offense
- When to raise (generally)
 - At sentencing

Check extraordinary mitigation

- Court may suspend active imprisonment even in “A” only block
 - for Class C felony, including when defendant found to be habitual felon, if prior record level I or II
- When to raise (generally)
 - At sentencing

Check stipulations

- Sufficient for prior convictions
 - But, for guilty plea, colloquy required
- When to raise (generally)
 - On appeal
 - But remedy may be limited

Check judgment

- Sentence is for underlying felony as Class C
 - Court should make finding in judgment that defendant is habitual felon
 - But may not impose sentence on defendant for being habitual felon
- When to raise (generally)
 - On appeal
 - Remedy may be vacating of judgment. *See S v. Taylor*, 156 NC App 172 (2003) (judgment and sentence on “non-crime” was judicial, not clerical, error; no remand).

Check pending issues

- Constitutional or other global challenges
- For current status, contact/review
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 - Most recent paper by Bob Farb
 - posted at <http://iog.unc.edu/programs/crimlaw/habitual.pdf>
 - www.famm.org (families against mandatory minimums)