**HABITUAL FELON**

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**OUTLINE**

I. **What is Habitual Offender Law?**

   "The primary purpose of a recidivist statute is ‘to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time.’”  

   a. **General Rule:** a law that allows for greater punishment for “repeat offenders.”

   b. **Habitual Crimes vs. Habitual Felons.**

      i. Habitual Crimes are initially misdemeanors, but due to the multiple convictions for the same offense, the crime is enhanced to a felony.

      1. Habitual Crime does not mean Habitual Felon, but Habitual Crimes could lead to Habitual Felon status.

      2. **Examples of Habitual Crimes:**

         a. Habitual DWI (**3+ prior impaired driving**) N.C.G.S. §20-138.5;

         b. Habitual Larceny (**4+ prior Larcenies**) N.C.G.S. §14-72;

         c. Habitual Misdemeanor Assault (**2+ prior Assaults**) N.C.G.S. §14-33.2;

         d. Habitual Breaking &/or Entering (**1+ prior Breaking/Entering**) N.C.G.S. §§14-7.25 – 7.31;

         e. Armed Habitual Felon (**1+ prior Firearm related felony**) N.C.G.S. §§14-7.35 – 7.41.

      ii. Habitual Felon is different from Habitual crimes. There are two types:


            a. Three (3) prior felony convictions. Indicted on a new fourth (or more) felony. Sentenced at four (4) classes higher than the underlying felony, but no higher than a Class C felony punishment for sentencing.”

            b. See **Attachment A** – Habitual Felon Legal Definition; Punishment; Prior Record Example.
   a. Two (2) separate prior convictions for any Class A – E felonies. Indicted for any Class A – E felony. If convicted of the new Class A – E felony, the client will go to prison for LIFE without parole.
   b. See Attachment B – Violent Habitual Felon Legal Definition; Punishment; Prior Record Example.
   c. The existence of “factual violence” is irrelevant.


II. How does one become a Habitual Felon?
   a. Any person with three (3) non-overlapping felony convictions (federal or state) has reached Habitual Felon status. (Attach. A).
      i. This is a status, not a criminal charge.
      ii. A person with status as a Habitual Felon will have that status for life.
      iii. Legally, the felony convictions that establish the status must have occurred since July 1967. N.C.G.S. §14-7.1.
          1. The convictions do not have to be similar in nature to each other or to the newly charged offense.
          2. The convictions must be felonies in North Carolina or defined as felonies under the laws of any sovereign jurisdiction where the previous felony convictions occurred. Id.
          3. The previous felony convictions must be “non-overlapping,” meaning that there is a break between the three convictions. Id.
      iv. Only one felony committed before the defendant was 18 years old may be counted toward his Habitual Felon status. Id.

   III. How does one become a Violent Habitual Felon?
   a. Any person with two (2) non-overlapping “violent felony” convictions has reached Violent Habitual status. (Attach. B).
      i. Violent Felony means (according to N.C.G.S. §14-7.7):
         1. Any Class A – Class E felony in North Carolina.
         2. Any repealed or superseded offenses that are the substantial equivalent to a current Class A – E felony in North Carolina.
         3. Any offense in another jurisdiction substantially similar to either (a) or (b) above.
IV. How is Habitual Felon (or Violent H.F.) status charged?

a. The decision to charge an individual as a Habitual Felon (or Violent H.F.) is entirely within the prosecutor’s discretion. See State v. Parks, 146 N.C. App. 568 (2001).

b. See Attachment C – Charging of Habitual Felon §14-7.3 and Charging Violent Habitual Felon §14-7.9.

c. Indictment. N.C.G.S. §14-7.3.
   i. The Indictment must be separate from the Principal Felony Indictments. Id.
      1. However, the Court of Appeals has allowed Habitual Felon Indictments to be listed as Count II to the Principal Felony. See State v. Young, 120 N.C. App. 456, 459-60 (1995).
   ii. The Habitual Felon Indictment must set forth the following:
      1. The date of the commission (for each of the 3 felonies);
      2. The date of the conviction (for each of the 3 felonies);
      3. The state or sovereign against which the felony was committed (for each of the 3 felonies); &
      4. The identity of the court in which the conviction took place (for each of the 3 felonies). N.C.G.S. §14-7.3.

d. What evidence is sufficient to prove the predicate convictions?
   i. Stipulation by both parties. N.C.G.S. §14-7.4.
   ii. The original or certified copy of the court record of the prior convictions. Id.
   iii. Note: The original or certified copy of the court record of conviction is prima facie evidence of that prior conviction. Id.

V. What are key Pre-Trial considerations?

a. Late identification by District Attorneys of Habitual Felon status.
   i. A client, typically, will not be identified as a Habitual Felon until after Bond Hearing or Probable Cause Hearing dates in District Court.
   ii. Remember, Habitual Felon is a “status” and not a standalone offense, so a Habitual Felon Indictment should not result in a new Bond or Order for Arrest.
   iii. You may become aware of your client’s Habitual Felon status before the prosecutor does. In those instances, it might be advantageous to seek a disposition in the case as early as possible.

b. Critique every Habitual Felon Indictment; look for irregularities:
   i. Overlapping prior felonies.
   ii. Different names or dates of birth in court records.
   iii. Crimes alleged as predicate felonies that are not actually felonies. See State v. Moncree, 188 NC App 221 (2008).
c. Anti-Collateral Attack Rule
   i. If you believe that one of the predicate felony convictions might be effectively attacked by a Motion for Appropriate Relief make those efforts before the trial starts. See State v. Creason, 123 NC App 495 (1996).
   ii. EXCEPTION:
       1. Even during the trial proceedings on the Habitual Felon matter, a Motion to Suppress the prior convictions due to lack of counsel is still viable pursuant to N.C.G.S. §15A-980.

d. Beware of Rapidly Escalating Severity of Charges.
   i. Charges starting out as Misdemeanors can become Habitual Felon cases.
   ii. For example, a client can be charged with Misdemeanor Assault in District Court. Prosecutors could indict the client for Habitual Misdemeanor Assault, which would serve as the Principal felony for a Habitual Felon Indictment.
   iii. It is important that you analyze your clients record to the extent possible, and carefully interview him to determine his exposure to these Misdemeanor “bump-up” Felonies, and to the Habitual Felon status.

VI. What are key Guilty Plea considerations?
a. Most Habitual Felon cases are resolved with non-Habitual guilty pleas and sentences.
   i. A non-Habitual Felon Plea Transcript must be prepared as any other Felony plea.
   ii. On the other hand, if the plea involves an admission to Habitual Felon status, that admission must be part of the Plea Transcript. (Attachment D – Example of general Transcript of Plea with Principal Felony + Habitual Felon Status).
   iii. If there are multiple cases pending, try to wrap them up in one session of court, since Habitual Felony convictions in different sessions must run consecutively.

VII. What are key Trial considerations?
a. Habitual Felon trials are bifurcated.
   i. Phase-1: (The jury trial for the Principal/Substantive Felony.)
      1. A jury will deliberate on the Guilt/Innocence of the Principal Felony.
      2. The jury shall not hear about Habitual Felon status or sentence during the trial. N.C.G.S. §14-7.5.
      3. If a jury returns a verdict of Not Guilty, then the trial is over and the Habitual Felon charge must be dismissed.
      4. If a jury returns a verdict of Guilty on all or just one felony, then Phase-2 will begin.
      5. Permissible Closing Argument in Phase-1:
         a. You may not refer to the sentence your client might receive as a Habitual Felon.
         b. You may refer to the sentence your client might receive for the Principal Felony.
iii. Phase-2: (The jury trial for the Habitual Felon)
   1. The State must prove beyond reasonable doubt that the client has three (3) prior felony convictions, and thus is a Habitual Felon. N.C.G.S. §14-7.5.
   2. The main evidence for the State is typically certified court records.
   3. Permissible Closing Arguments in Phase-2:
      a. You may refer to the enhanced sentence your Habitual Felon client is expose to.
      b. If the State’s certified records of judgments and convictions are sloppy, exploit those mistakes. (i.e. Different names or dates of birth vary, etc.)
      c. An effective argument to make is that “when the stakes are this high, discrepancies like “that” are unacceptable.”

iii. See Attachment E – Habitual Felon and Violent Habitual Felon Pattern Jury Instructions.

b. You have leverage in Phase-2 for sentencing.
   i. If you get a guilty verdict on the Principal Felony, don’t give up!
   ii. You still have some leverage for a decent sentence by releasing the jury, prior to Phase 2, in exchange for a “more lenient” sentence from the court.
   iii. Ask to Conference the case with the judge and the prosecutor. Explore whether the judge would be willing to impose a Mitigated Range sentence or a bottom of the Presumptive Range sentence in exchange for a stipulation to the Habitual Felon status, rather than making the jury stick around to commence a trial on the Habitual Phase-2.
   iv. Your client will have to agree, since he will have to execute a Habitual Felon Plea Transcript and admit his Habitual Felon status. (Attachment F – Example of Transcript of Plea for Habitual Felon Status ONLY).
   v. Although all parties must reach a consensus, the Habitual Felon Plea Transcript will usually read “sentencing will be in the Court’s discretion.” (Attach. F).

c. Possible Phase 3: If aggravating factors have been alleged, the jury could be asked to deliberate a third time on whether aggravating factors have been proven beyond reasonable doubt.
VIII. How does Habitual Felon (or Violent) enhance the Sentence?
   a. Nothing, if a client’s Principal Felony charge(s) is dismissed or if a jury acquits.
      i. The Habitual Felon (or Violent) status has no impact.
      ii. The “status” must be dismissed. It cannot stand alone.
   b. For Habitual Felon sentencing:
      i. If a client is convicted of the principal felony charge, the Habitual Felon status
         will elevate the felony punishment four (4) classes higher for sentencing
         (capped at Class C). N.C.G.S. §14-7.6.

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   ii. See Attachment G – Habitual Felon Verdict and Judgment; Evidence of Prior
       Convictions of Felony Offenses; and Sentencing of Habitual Felons.

   c. For Violent Habitual Felon sentencing:
      i. If a client is convicted of the principal Class A – E felony with a Violent Habitual
         Indictment attached, the client will be sentenced to LIFE without Parole.
         N.C.G.S. §14-7.12.
      ii. The law does not specify a felony class for sentencing, but the effect appears to
           be the same as non-capital sentencing for a Class A felony.

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   iii. See Attachment H – Violent Habitual Felon Verdict and Judgment; Evidence of
        Prior Convictions of Felony Offenses; and Sentencing of Habitual Felons.
IX. How does Habitual Felon status change the Prior Record Level Points?
   a. If a client is indicted as a Habitual Felon, none of the felony convictions used to establish the client’s Habitual Felon status can count toward the Prior Record Level point system. N.C.G.S. §14-7.6.

   b. However, if a person was convicted of multiple felonies in one session of court, one of those felony convictions may be used as a predicate conviction toward Habitual Felon status, and a second one can be used toward the Prior Record Level. N.C.G.S. §14-7.12.

   c. Sometimes, a Habitual Felon status client will face more time on a non-Habitual plea or conviction – so watch out.

X. What to expect in Client Communications?
   a. Clients in Habitual Felon cases have special concerns.
      i. There is often an unwillingness or inability to accept the possibility of a Habitual Felon sentence.
      ii. As the attorney, you will be competing with myths about the Habitual Felon law.
      iii. Visit your clients early and often. Sit for a while. You need to build a relationship and trust in order to get through this with your client with the least amount of harm incurred on your client.
      iv. You have very little good news, but you must try to communicate that the offer is much better than the alternative.
      v. Younger/new Habitual Felon clients are generally more difficult to work with than older/previously Habitual Felon convicted clients.

   b. See Jeff Welty’s online article “Advising a Defendant of the Maximum Possible Sentence During a Habitual Felon Plea.” https://nccriminallaw.sog.unc.edu/advising-a-defendant-of-the-maximum-possible-sentence-during-a-habitual-felon-plea/

   c. Decisions made with clients regarding strategy become more fraught with danger.
      i. For example, it is often easy to give up a reasonable plea offer and fight for suppression on a Class H drug felony.
      ii. However, if the client is Habitual Felon status, the rest of his life on the line.
      iii. Clients must know as soon as possible what they are facing so that decision-making can begin.
      iv. It is extremely important not to sugar coat any aspect of the case or the Habitual Felon status.

_Habitual Felon cases can be tough to handle but know this – Habitual Felon cases can be won. These are still regular cases with the only difference being the amount of time your client faces. So, FIGHT but only when the case is worth it. Good luck!_
Attachments

1. **Attachment A** – Habitual Felon Legal Definition; Punishment; Prior Record Example.
2. **Attachment B** – Violent Habitual Felon Legal Definition; Punishment; Prior Record Example.
3. **Attachment C** – Charging Habitual Felon §14-7.3 and Charging Violent Habitual Felon §14-7.9.
4. **Attachment D** – Example of general Transcript for Plea with Principal Felony + Habitual Felon Status.
5. **Attachment E** – Habitual Felon and Violent Habitual Felon Pattern Jury Instructions.
6. **Attachment F** – Example of Transcript of Plea for Habitual Felon Status ONLY.
7. **Attachment G** – Habitual Felon Verdict and Judgment; Evidence of Prior Convictions of Felony Offenses; and Sentencing of Habitual Felons.
8. **Attachment H** – Violent Habitual Felon Verdict and Judgment; Evidence of Prior Convictions of Felony Offenses; and Sentencing of Habitual Felons.
9. **Quick Habitual Felon (& Violent H.F.) Statutory HyperLinks:**

**Article 2A - Habitual Felons.**

§ 14-7.1. Persons defined as habitual felons.
§ 14-7.2. Punishment.
§ 14-7.3. Charge of habitual felon.
§ 14-7.4. Evidence of prior convictions of felony offenses.
§ 14-7.5. Verdict and judgment.

**Article 2B - Violent Habitual Felons.**

§ 14-7.7. Persons defined as violent habitual felons.
§ 14-7.9. Charge of violent habitual felon.
§ 14-7.10. Evidence of prior convictions of violent felonies.
§ 14-7.11. Verdict and judgment.