

HABITUAL FELON ISSUES CHECKLIST

“Stand in one place and say the same thing over and over. Eventually, they’ll listen to you.”

Patricia Poore

The following is a checklist of possible issues arising under the Habitual Felon Act. It is by no means exhaustive and every case should be examined on its own facts.

I. Indictment

A. Prior record manipulation

Look at the Habitual Felon indictment and prior record level worksheet. See if the prosecutor used low point level prior convictions to get the Habitual Felon indictment and saved any high point prior convictions to increase the points under Structured Sentencing Law. Since the Habitual Felon Act does not specify which prior felonies should be selected to obtain the Habitual Felon indictment, the argument is the due process clause and the Rule of Lenity require that the Habitual Felon indictment be obtained in the way most beneficial to the Defendant. Cite *State v Gentry* 135 N.C App. 107 519 SE2d 68 (1999) “It is basic learning that criminal laws must be strictly construed and any ambiguities resolved in favor of the defendant.” This issue has not been previously decided and is scheduled for oral argument on January 30, 2002 in *State v Wilson*, COA01-156.

B. Are component offenses felonies or enhanced misdemeanors?

G.S. 14-7.1 requires that the Habitual Felon indictment be based on three prior non-overlapping felonies. Prosecutors are starting to get Habitual Felon indictments by using prior crimes that are normally misdemeanors but, due to prior convictions, the charge is punishable as a felony. Examples are breaking into a coin machine (G.S. 14-56.1), breaking into a currency machine (G.S. 14-56.3), habitual misdemeanor assault (14-33.2), habitual driving while impaired, and felonious speeding to elude arrest. G. S.14-7.1 says that a person must commit a felony to be eligible for Habitual Felon indictment. The question is whether a person breaking into a coin machine commits a felony or whether he commits a misdemeanor which is punishable as a class I felony due to prior record.

State v Priddy, 115 N.C. App 347, 445 S.E.2d 610, cert denied 337 N.C. 805, 449 S.E.2d 751 (1994) approves the use of habitual DWI as an underlying felony for an Habitual Felon indictment. *State v Smith*, ___ N.C.App ___, ___ S.E.2d ___ (2000) likewise approves the use of habitual misdemeanor assault. However, the Motion to Dismiss Habitual Felon Indictment based on due process and separation of powers grounds should still be made since there has been no federal review. *Priddy* and *Smith* can also be distinguished from cases involving charges like breaking into a coin machine, which specifically provides the charge will be “punished as a class I felony”.

This issue can arise in two contexts: enhanced misdemeanors being used as one of the three felonies used to get the Habitual Felon indictment and misdemeanors being used as the principal felony that is being tried. A new issue has just arisen from a sentence in *State v Vardiman* ___N.C.App (Oct 2, 2001) “Habitual impaired driving, however, is a substantive offense and a punishment enhancement (or recidivist, or repeat-offender) offense.” In other words, for someone facing only a charge of habitual driving while impaired, it makes no difference whether prior convictions are elements or sentencing enhancers. However, an argument can be made that it makes a big difference if the habitual DWI is used as a triggering felony for the habitual felon charge. Under the Rule of Lenity, it can be argued that if it’s ambiguous whether prior DWI’s are elements or enhancers, the ambiguity should be resolved in favor of the defendant. The most advantageous characterization of prior convictions for the defendant is that they are enhancers and therefore, habitual DWI cannot be a substantive triggering felony.

II. Plea Colloquy

G.S. 14-7.1 requires that a person either plead guilty to being an Habitual Felon or be convicted by a jury. In *State v Gilmore*, 142 N.C. App 465 542 S.E.2d 694 (2001) the Court of Appeals held a defendant may not stipulate or admit to Habitual Felon status. If your client admitted to the Habitual Felon status you can ask for the judgment to be set aside since he has not been properly convicted. (A very interesting issue is going to arise from the interplay between *Gilmore* and *State v Safrit* 551 S.E.2d 516 (2001). *Safrit* says principles of civil collateral estoppel apply to Habitual Felon proceedings. The rub will come when a defendant is tried as an Habitual Felon the second time using the same three underlying felonies. In that situation, *Safrit* says you must admit that which *Gilmore* says you cannot admit.)

III. Judgments

A. Separate sentences –

Occasionally a judge will make a mistake and impose a sentence in both the underlying principal felony and the Habitual Felon case. *State v Penland*, 89 N.C.App 350, 365 S.E.2d 721 (1988), *State v Wilson*, 139 N.C. App 544, 533 S.E.2d 865(2000). This cannot happen since G.S.14-7.6 says the defendant is sentenced on the underlying principal charge as a class C felon.

B. Judgment in the Habitual Felon Case File

Occasionally the Judge imposes the sentence in the Habitual Felon case file instead of the underlying felony file. The argument is that since being an Habitual Felon is not a criminal offense the sentence cannot be imposed in the Habitual Felon file. This issue is being litigated in *State v Cates* from Durham County which has just been filed in the Court of Appeals. I think *Penland*, which holds there cannot be a sentence in the Habitual Felon case because being an Habitual Felon is not an offense, supports this argument.

Likewise, there cannot be a bond set in an Habitual Felon case because it is not a criminal offense. If an Habitual Felon indictment is obtained after the defendant is released on bond in the principal case, the bond must be modified in the principal case instead of a new bond set in the Habitual Felon case.

IV. Unadjudicated Habitual Felon Status

Quite often clerks do not check the block on the Judgment form stating that the defendant is adjudicated to be an habitual felon. Look at the transcript from the sentencing hearing. If there was a guilty plea to the Habitual Felon indictment see whether or not the court made any findings adjudicating the defendant to be an Habitual Felon. The argument would be that imposing an Habitual Felon sentence on a person who has not been adjudicated to be an habitual felon would be like imposing a sentence without finding a factual basis for the guilty plea. G.S.15A-1022(c)

V. Date of Habitual Felon "Offense"

There is a great deal of confusion about when somebody becomes an Habitual Felon. G.S. 14-7.1 says a defendant becomes an habitual felon on the date of the conviction of the third prior non-overlapping felony. *State v Wilson* says a defendant becomes an Habitual Felon when he pleads guilty or is found guilty by the jury of being an Habitual Felon. *State v Parks* 533 S.E.2d 695 (2001) seems to indicate that both dates are appropriate. The reason that it is important to determine when somebody becomes an habitual felon is because G.S.14-7.6 states that a Defendant must already be an Habitual Felon before he commits the underlying principal felony. Quite often there is a great deal of contradiction between the indictment and the judgment as to the "date of offense" for the Habitual Felon charge. You should argue the Habitual Felon sentence should be vacated because the Defendant was not an Habitual Felon on the date he committed the principal offense.

VI. Internal Inconsistencies of the Habitual Felon Statute

To say the least, issues involving the application of the Habitual Felon Act are confusing because it is illogical to have both the Habitual Felon Act and the Structured Sentencing Law being applied simultaneously. The Habitual Felon Act is simply a crude form of structured sentencing which should have been repealed in 1994 when the Structured Sentencing Law went into effect. Therefore, don't be too concerned when some of the issues listed above (such as when does a person become an Habitual Felon) appear not to make any sense. It is hard to apply logic to an illogical situation. For example, *State v Wilson*, 139 N.C. App 544, 533 S.E.2d 865(2000) says that a Defendant cannot inform the jury of the potential sentence that he faces as a Class C felon because he is not an Habitual Felon until the jury says he is. However, *State v Parks* says that a person becomes an Habitual Felon on the date of the conviction of the third prior offense. It is going to be interesting to see how the tension between *Gilmore* and *Safrit* plays out when the defendants are being prosecuted a second time as Habitual Felon using the same three prior non-overlapping offenses. *Safrit* implies

that once a defendant is adjudicated to be an Habitual Felon based on three particular prior felonies, that fact is judicially established. *Gilmore* says that the status of Habitual Felons cannot be admitted or stipulated. That raises the question of what does a defense lawyer argue to a jury at a second Habitual Felon trial in which his client has already been adjudicated an Habitual Felon in a prior trial using the same three underlying offenses.

In light of the recent *Andrade* opinion from the Ninth Circuit declaring California's Three Strikes Law unconstitutional as applied in violation of the Eighth Amendment, you may want to consider a cruel and unusual punishment claim if you have an outrageous sentence compared to the facts.

Don't assume any portion of the habitual felon indictment is correct. Check everything. I just saw a HF indictment which contained an underlying charge which was committed nine days before the defendant's 18th birthday. Since the indictment already contained one charge committed before the defendant's 18th birthday the indictment was defective under G.S. 14-7.1

VII. Global Constitutional Challenges

In addition to the case-specific issues listed above, there are a number of broad challenges pending in the state and federal appellate courts challenging the Habitual Felon Act on a number of constitutional grounds. For more information on these challenges please obtain a copy of "Challenging Habitual Felon Prosecutions" at the Appellate Defender's website .

In summary these challenges raise the following issues:

1. Whether the combined use of the Structured Sentencing Law and Habitual Felon Act constitutes double punishment for the current offense?
2. Whether the power of the prosecutor to use his discretion to decide whether or not to apply the Habitual Felon Act to all eligible persons violates the separation of powers clause of the North Carolina Constitution?
3. Whether the application of the Habitual Felon Act to all persons in one county, when it does not apply to all defendants in other counties, violates the equal protection clause?
4. Whether the enactment of Structured Sentencing, which is a detailed and sophisticated form of structured sentencing law in which prior record automatically enhances punishment, impliedly repealed the Habitual Felon Law, which is a crude form of structured sentencing in which prior record enhances sentence?
5. Whether the existence of grants to fund positions in district attorney's offices to prosecute habitual felons gives the prosecutor a financial stake in the making

of a discretionary decision to seek an Habitual Felon indictment, in violation of the due process clause?

All of the above issues are pending in various courts. If you have a case which is particularly egregious, I would be interested in hearing about it so that we can discuss whether or not to include the global issues in the case. Specifically, I am looking for cases in which the principal offense is neither violent or a drug offense and the prior record is property crimes spread out over a long period of time. It also helps if the sentence is particularly lengthy.

I would be happy to provide copies of Motions for Appropriate Relief, Petitions for Certiorari or anything else that might be helpful. Please do not hesitate to contact me.

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RE: Habitual Felon Checklist

Dear Staples:

Following up your comment in the article in *Trial Briefs*, I have prepared a checklist of issues, with some attachments, that might be more useful than my talk at the Appellate Defenders Conference. Hopefully you can put this on the website and circulate it to anyone with an Habitual Felon appeal.

Please insert the website address before posting this on the web. If we can't include the attachments on the website, we should put a note for people to contact you or me to get copies of the attachments.

Sincerely yours,

CUNNINGHAM, DEDMOND, PETERSEN & SMITH, L.L.P.

Bruce T. Cunningham, Jr.

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Enc.