

# Preventing Your Client from Becoming a Habitual Felon

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# Check current offense

- Is it a felony on which an habitual felon charge may be based?
  - Habitual DWI & misdemeanor assault—yes, so far
  - Other misdemeanors “punishable” as felonies, such as possession of cocaine—not specifically decided
  - “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 previous 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?
- When to raise (generally)
  - At h/f phase unless facts do not support 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 facts do not support 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).
    - Be sure to ask for arraignment
- 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 not 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 priors to use for h/f status
- 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*, 576 SE2d 114 (2003) (judgment and sentence on “non-crime” was judicial, not clerical, error; no remand).

# Check pending issues

- Constitutional or other global challenges
  - E.g., cruel & unusual punishment after *Ewing v. California*, 123 S Ct 1179 (2003)
    - When to raise? Generally, before or at h/f phase
- For current status, contact
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