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## Once, Twice, Four Times a Felon: North Carolina's Unconstitutional Recidivist Statutes

Jason White

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## ONCE, TWICE, FOUR TIMES A FELON: NORTH CAROLINA'S UNCONSTITUTIONAL RECIDIVIST STATUTES

### I. INTRODUCTION

Melissa Marvin downed three shots of booze at one bar and two margarita “grandes” at another.<sup>1</sup> The thirty-year-old then climbed into her sport utility vehicle and sped through traffic.<sup>2</sup> Marvin changed lanes frequently while resting her left foot upon the dashboard.<sup>3</sup> She ran a red light and plowed into a small car carrying five teenagers, killing four of them.<sup>4</sup>

Marvin is classified as a habitual impaired driver under North Carolina law.<sup>5</sup> A habitual impaired driver who subsequently drives while intoxicated is subject to felony punishment according to North Carolina law.<sup>6</sup> As a result of her actions, Marvin received a sixty-year sentence in January 2001.<sup>7</sup> Melissa Marvin is one of many habitual impaired drivers who has been subjected to North Carolina's attempt to prevent recidivist criminals from continuing to endanger society.

This article will examine actions taken by the North Carolina legislature to address problems posed by recidivist criminal behavior. In particular, the constitutional standing of North Carolina's habitual misdemeanor assault and habitual impaired driving statutes will be evaluated. In order to provide an adequate discussion, the history and general principles of recidivism will be addressed. In addition, the impact of recidivist statutory trends upon constitutional guarantees of double jeopardy will be analyzed. Finally, the article will explain that North Carolina's habitual misdemeanor statutes are standing upon teetering constitutional ground.

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1. Marjorie Mellott, *Drunk Driving and the Law*, (January 13, 2000) available at <http://www.vvcaps-vvsk.com/DWI.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. N.C. Gen. Stat. § 20-138.5 (1999).

6. *See id.*

7. Marjorie Mellott, *Drunk Driving and the Law*, (January 13, 2000) available at <http://www.vvcaps-vvsk.com/DWI.html>.

## II. RECIDIVIST HISTORY

Recidivism is defined as the tendency to relapse into a habit of multiple criminal offenses.<sup>8</sup> Dating back to colonial times, American legal systems have implemented statutes that punish recidivists more severely than first-time offenders.<sup>9</sup> In *Rummel v. Estelle*, the United States Supreme Court summarized the rationale supporting recidivist statutes as follows:

Its primary goals are 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. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.<sup>10</sup>

Presently, all fifty states, as well as the Federal Government, have enacted recidivist statutes.<sup>11</sup>

## III. RECIDIVIST STATUTORY METHODS

A wide variety of statutory methods for dealing with the problems of recidivism exist.<sup>12</sup> The challenge presented by recidivist legislation is justifying the habitual charge as solely a punishment-enhancing status, while at the same time, limiting the prejudicial effect caused by the required proof of prior convictions. Commentators generally categorize recidivist statutes according to the procedural methods employed when prosecuting violations of the statutes.<sup>13</sup> Recidivist statutes are generalized into three procedural categories: the English or Connecticut model, the supplementary proceeding method, and the common law method.<sup>14</sup> Each category represents a different approach to the process of introducing the existence of prior convictions into the trial for the current offense.

The English or Connecticut approach to recidivist legislation involves a bifurcated procedure that provides separate hearings to determine the issues of guilt in the current offense and the existence of

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8. BLACK'S LAW DICTIONARY 1276 (7th ed. 1999).

9. *Parks v. Rally*, 506 U.S. 20, 26-27 (1992).

10. *Rummel v. Estelle*, 445 U.S. 263, 284 (1980).

11. *Parks*, 506 U.S. at 26-27.

12. *Spencer v. Texas*, 385 U.S. 554, 556 (1967).

13. *Recidivist Procedures*, 40 N.Y.U.L. Rev. 332, 333 (1965).

14. *Id.*

prior convictions.<sup>15</sup> In order to advance the separation of the proceedings, the indictment (which includes both the current charge and the charge of qualifying as a habitual offender) is divided into two parts.<sup>16</sup> Following conviction of the present offense, the portion of the indictment containing the habitual offender charge is read to the defendant, who is then required to plead to the recidivist allegation.<sup>17</sup> If he acknowledges the prior convictions, he is sentenced in accordance with the recidivist statute.<sup>18</sup> If he denies the prior convictions, the defendant is entitled to a jury trial on the issue of his prior convictions.<sup>19</sup>

A second approach to recidivist legislation is referred to as the supplementary proceeding method.<sup>20</sup> This method abolishes the need to prove prior convictions at the trial for the current offense.<sup>21</sup> Instead, a separate, subsequent hearing is required to prove the existence of prior convictions.<sup>22</sup> If the convictions are stipulated or proven at the subsequent hearing, the defendant will qualify for sentencing pursuant to the recidivist statute.<sup>23</sup>

The common law method is the most commonly recognized procedure.<sup>24</sup> This method for applying recidivist statutes requires allegations and proof of past convictions at the current trial.<sup>25</sup> North Carolina recidivist legislation, such as the Habitual Felons Act, the habitual misdemeanor assault statute, and the habitual impaired driving statute, are drafted and applied using the common law procedural method.<sup>26</sup> This procedure subjects the defendant to heightened jury prejudice when facing the current charge due to the introduction of prior criminal convictions.

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15. *Id.* at 333-334.

16. *Id.* at 333.

17. *Id.* at 334.

18. *Id.*

19. *Id.*

20. *Id.* at 335.

21. *Id.* at 333.

22. *Id.* at 336.

23. *Id.*

24. *Id.*

25. *Spencer v. Texas*, 385 U.S. 554, 556 (1967).

26. *See* N.C. Gen. Stat. § 14-7.1 (2000); N.C. Gen. Stat. § 14-33.2 (1999); N.C. Gen. Stat. § 20-138.5 (1999).

## IV. NORTH CAROLINA RECIDIVISM

A. *Habitual Felons Act*

North Carolina's most prominent recidivist enactment is embodied in its Habitual Felons Act.<sup>27</sup> Habitual felons are defined as those persons who have been convicted of three felonies.<sup>28</sup> The manifest intent of the General Assembly in enacting the Habitual Felons Act was to insure lengthier sentences for those persons who repeatedly violate the criminal laws of this State.<sup>29</sup> Nowhere in the Act is there any indication that it was intended to apply only to those persons who repeatedly violate the *same* criminal law, and the courts have declined to write any such requirement into the law.<sup>30</sup> Courts have justified the constitutionality of the Habitual Felons Act<sup>31</sup> by holding that the statute creates a fictional punishment enhancement status rather than a substantive, independent offense.

B. *Habitual Impaired Driving*

For one of every 190 miles driven in North Carolina in 1998, a legally intoxicated person (blood alcohol level > .08) sat behind the

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27. N.C. Gen. Stat. § 14-7.1 (2000).

28. *Id.*

29. *See* State v. Hodge, 112 N.C. App. 462, 469 (1993).

30. *Id.*

31. N.C. Gen. Stat. § 14-7.1 (1999). Persons defined as habitual felons.

Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon. For the purpose of this Article, a felony offense is defined as an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed. Provided, however, that federal offenses relating to the manufacture, possession, sale and kindred offenses involving intoxicating liquors shall not be considered felonies for the purposes of this Article. For the purposes of this Article, felonies committed before a person attains the age of 18 years shall not constitute more than one felony. The commission of a second felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the first felony. The commission of a third felony shall not fall within the purview of this Article unless it is committed after the conviction of or plea of guilty to the second felony. Pleas of guilty to or convictions of felony offenses prior to July 6, 1967, shall not be felony offenses within the meaning of this Article. Any felony offense to which a pardon has been extended shall not for the purpose of this Article constitute a felony. The burden of proving such pardon shall rest with the defendant and the State shall not be required to disprove a pardon.

wheel.<sup>32</sup> Each year 1,505 traffic deaths occur on North Carolina's highways.<sup>33</sup> Of those 1,505 motor vehicle fatalities, 536 are alcohol-related.<sup>34</sup> Statistics show that an alarming 35.6 percent of all traffic fatalities in North Carolina involve alcohol.<sup>35</sup>

Not surprisingly, driving under the influence was the offense most frequently cited among adults in the 14.6 million arrests for criminal infractions in 1994.<sup>36</sup> An estimated 513,200 offenders were on probation or incarcerated for driving while intoxicated in 1997.<sup>37</sup> In 1999, one of every nine intoxicated drivers involved in fatal crashes in North Carolina had been convicted of driving while intoxicated within three years of the fatal accident.<sup>38</sup>

Unquestionably, the legal and social consequences of impaired driving are severe. Perhaps the most alarming statistic regarding impaired driving is that in North Carolina, approximately one-third of drivers who were arrested or convicted for DWIs from 1990 to 1992 had previously been convicted of alcohol-impaired driving.<sup>39</sup> In response, the North Carolina Legislature has passed legislation aimed at curbing, if not eliminating, the problems presented by those who drive while under the influence of alcohol or narcotics. More specifically, North Carolina has adopted legislation aimed at preventing and severely punishing repeat offenders.

In 1989, the North Carolina Legislature passed North Carolina General Statute § 20-138.5.<sup>40</sup> Titled the "Habitual Impaired Driving Statute," it specifically punishes those who repeatedly drive while intoxicated.<sup>41</sup> To be convicted of habitual impaired driving, one must

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32. Mothers Against Drunk Driving, *State-By-State Traffic Fatalities (1999)*, available at <http://www.madd.org/madd/stats/0,1056,1303,00.html>.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Center For Disease Control, *Reduction in alcohol-related traffic fatalities—United States (1990-1992)*, available at [http://wonder.cdc.gov/wonder/prevguid/m0032985/m0032985.asp#Table\\_1](http://wonder.cdc.gov/wonder/prevguid/m0032985/m0032985.asp#Table_1).

40. N.C. Gen. Stat. § 20-138.5 (1999).

41. N.C. Gen. Stat. § 20-138.5 (1999). Habitual impaired driving.

- (a) A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving as defined in G.S. 20-4.01(24a) within seven years of the date of this offense.
- (b) A person convicted of violating this section shall be punished as a Class F felon and shall be sentenced to a minimum active term of not less than

currently face a charge of driving while impaired and must have been convicted of three or more offenses involving impaired driving within seven years of the current offense.<sup>42</sup> Defendants convicted of habitual impaired driving are punished as Class F felons and are sentenced to a minimum active term of not less than one year of imprisonment.<sup>43</sup> The justification for elevating what would be a misdemeanor offense to felony status is based upon the repetitive nature of the defendant's conduct.

### C. Habitual Misdemeanor Assault

North Carolina reported 71,346 simple assault convictions in 1998.<sup>44</sup> North Carolina also reported 28,637 aggravated assault convictions in 1998.<sup>45</sup> Undoubtedly, the incidents of assault within North Carolina are a cause for growing concern. In response to this concern, the North Carolina Legislature enacted the habitual misdemeanor

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12 months of imprisonment, which shall not be suspended. Sentences imposed under this subsection shall run consecutively with and shall commence at the expiration of any sentence being served.

- (c) An offense under this section is an implied consent offense subject to the provisions of G.S. 20-16.2.
- (d) A person convicted under this section shall have his license permanently revoked.
- (e) If a person is convicted under this section, the motor vehicle that was driven by the defendant at the time the defendant committed the offense of impaired driving becomes property subject to forfeiture in accordance with the procedure set out in G.S. 20-28.2. In applying the procedure set out in that statute, an owner or a holder of a security interest is considered an innocent party with respect to a motor vehicle subject to forfeiture under this subsection if any of the following applies:
  - (1) The owner or holder of the security interest did not know and had no reason to know that the defendant had been convicted within the previous seven years of three or more offenses involving impaired driving.
  - (2) The defendant drove the motor vehicle without the consent of the owner or the holder of the security interest.

42. *Id.* at N.C. Gen. Stat. § 20-138.5(a) (1999).

43. *Id.* at N.C. Gen. Stat. § 20-138.5(b) (1999).

44. North Carolina Department of Crime and Public Safety Control, Simple Assault by Month 1998-1999 (June 15, 2000), available at <http://sbi2.jus.state.nc.us/crp/public/1999/1999htm>.

45. North Carolina Department of Crime and Public Safety Control, Aggravated Assault by Month 1998-1999 (June 15, 2000), available at <http://sbi2.jus.state.nc.us/crp/public/1999/1999.htm>.

assault statute to provide enhanced punishment for recidivist behavior.<sup>46</sup>

The habitual misdemeanor assault statute punishes qualifying defendants as Class H felons.<sup>47</sup> If the defendant presently commits offenses of either aggravated or simple assault, and has previously been convicted of five or more misdemeanor offenses (two of which were assaults), he qualifies for punishment under the recidivist statute.<sup>48</sup> Again, the justification for elevating the misdemeanor conduct to a felony offense is based upon the repetitive nature of the defendant's criminal conduct.

## V. DOUBLE JEOPARDY

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."<sup>49</sup> The Fourteenth Amendment's Due Process Clause extends the protection provided by the Double Jeopardy Clause to state prosecutions.<sup>50</sup> In addition, the North Carolina Supreme Court has held that the North Carolina Constitution incorporates a prohibition against double jeopardy.<sup>51</sup>

The Double Jeopardy Clause protects defendants against three classifications of prosecutions.<sup>52</sup> First, the clause protects against a second prosecution after acquittal for the same offense.<sup>53</sup> Secondly, it protects against a second prosecution after conviction for the same offense.<sup>54</sup> Finally, the double jeopardy clause protects against multiple punishments for the same offense.<sup>55</sup>

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46. N.C. Gen. Stat. § 14-33.2 (1999). Habitual misdemeanor assault.

A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33(c) or G.S. 14-34 and has been convicted of five or more prior misdemeanor convictions, two of which were assaults. A person convicted of violating this section is guilty of a Class H felony.

47. *Id.*

48. *Id.*

49. U.S. Const. amend. V.

50. *Ashe v. Swenson*, 397 U.S. 436, 438 (1970).

51. *State v. Brunson*, 327 N.C. 244, 247-249 (1990).

52. *Brown v. Ohio*, 432 U.S. 161, 165 (1977).

53. *State v. Gardner*, 315 N.C. 444, 451 (1986).

54. *Id.*

55. *Id.*



## VI. RECIDIVISM AND DOUBLE JEOPARDY

Habitual or recidivist statutes have faced repeated constitutional challenges. However, statutes that enhance punishment on the basis of subsequent convictions for identical offenses and statutes that enhance penalties on the basis of any prior felony convictions have been repeatedly upheld against almost every imaginable constitutional challenge.<sup>56</sup> Courts have developed a fictional distinction between actual punishment and enhancement of punishment in order to rationalize the constitutionality of recidivist statutes. Courts apply this distinction to conclude that increased punishment authorized by recidivist statutes does not punish a defendant for crimes previously committed.<sup>57</sup> Instead, recidivist statutes authorize states to punish current offenses more severely based upon the fact that a particular defendant has demonstrated the propensity to repeatedly disrupt society.<sup>58</sup>

According to the substantive offense-status distinction, habitual or recidivist statutes merely convey a punishment enhancement status upon qualifying defendants.<sup>59</sup> Generally, habitual offender statutes can only act to convey the punishment enhancement status and cannot independently support a criminal sentence.<sup>60</sup> Since the enhanced punishment imposed for the latter offense is to be viewed as sentence enhancement status rather than new jeopardy or additional penalty for prior crimes, double jeopardy guarantees are not considered violated.<sup>61</sup> In other words, defendants are not punished again for prior criminal acts; rather, they are being punished more severely because of their prior criminal convictions. Therefore, recidivist statutes are determined to be consistent with double jeopardy guarantees because they convey a sentence enhancing status and not a substantive offense. The important distinction between status and substantive offense recidivist statutes will be further examined later in this commentary.

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56. See *Spencer v. Texas*, 385 U.S. 554, 559-560 (1967).

57. *Moore v. Missouri*, 159 U.S. 673, 676-677 (1895).

58. *Id.*

59. See *State v. Allen*, 292 N.C. 431 (1977) (“[b]eing a habitual felon is a status justifying an increased punishment for the principal felony”).

60. *Richardson v. Stainer*, 15 F.3d 1088, 1993 WL 5343000 (9th Cir. 1993) (unpublished) (“[I]n general, a charge under a habitual criminal statute does not state a separate offense.”).

61. *United States v. Nichols*, 511 U.S. 738, 747 (1994).

## VII. FEDERAL RECIDIVIST JURISPRUDENCE

Federal courts have had numerous opportunities to determine the constitutional standing of recidivist statutes. The following is a brief sampling of cases that demonstrate the rationale employed in upholding recidivist statutes. This sampling is not exhaustive, but it is sufficient to demonstrate the consistent reasoning that comprises federal recidivist jurisprudence. As the following cases show, the rationale for holding recidivist statutes constitutional in the face of double jeopardy clauses is centered on the substantive-status distinction.

In *Baker v. Duckworth*, the Seventh Circuit addressed the issue of whether Indiana's habitual offender statute violated guarantees provided by prohibitions against double jeopardy.<sup>62</sup> The court recognized that Indiana's habitual offender act did not create a separate crime.<sup>63</sup> Instead, the court held that the habitual offender statute created a punishment enhancement status.<sup>64</sup> Consequentially, the court held that the use of prior convictions for sentence enhancement purposes did not violate the guaranty against double jeopardy because the defendant is not twice tried or punished for the same offense.<sup>65</sup>

In *Davis v. Bennett*, the Eighth Circuit was presented with the issue of whether the Texas habitual offender statute violated guaranteed protections against double jeopardy.<sup>66</sup> In rejecting double jeopardy arguments, the court found that Bennett's prior convictions were used only for enhancing the sentence of his current offense.<sup>67</sup> The court held that double jeopardy protections were not violated since the prior conviction was used for punishment enhancement rather than as an element of a subsequent crime.<sup>68</sup>

Several state courts have also held that recidivist proceedings do not violate the guarantees against double jeopardy. In *McMannis v. Mohn*, the West Virginia Supreme Court held that "[s]ince a recidivist proceeding does not involve a separate substantive offense, double jeopardy principles do not bar a retrial of that proceeding."<sup>69</sup> Similarly, in *State v. Torrez*, the Arizona Court of Appeals held that recidivist statutes requiring proof of prior convictions do not violate guarantees against double jeopardy when the effect of such statutes is

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62. *Baker v. Duckworth*, 752 F.2d 302 (7th Cir. 1985).

63. *Id.* at 304.

64. *Id.*

65. *Id.*

66. *Davis v. Bennett*, 400 F.2d 279 (8th Cir. 1968).

67. *Id.* at 282.

68. *Id.*

69. *McMannis v. Mohn*, 254 S.E.2d 805, 813 (W. Va. 1979).

to create a punishment enhancement status.<sup>70</sup> Finally, in *State v. Carlson*, the Supreme Court of Alaska held that “[h]abitual criminal statutes have been found not violative of the fifth amendment prohibition against double jeopardy, because these statutes do not create a separate offense but merely enhance the punishment for the latest offense.”<sup>71</sup>

### VIII. NORTH CAROLINA RECIDIVIST JURISPRUDENCE

North Carolina courts have also interpreted state recidivist statutes in the face of constitutional challenges on numerous occasions. Perhaps the most notable are the supreme court’s pronouncements on the constitutionality of the Habitual Felons Act. In *State v. Todd*, the North Carolina Supreme Court held that the Legislature is not constitutionally prohibited from enhancing punishment for habitual offenders.<sup>72</sup> The Court also concluded that the Legislature acted within constitutionally permissible bounds in enacting legislation designed to identify habitual criminals and in authorizing enhanced punishment.<sup>73</sup>

In *State v. Allen*, the North Carolina Supreme Court held that being a habitual felon is not a crime, but a status.<sup>74</sup> Attaining such status subjects a person subsequently convicted of a crime to an increased punishment for that crime.<sup>75</sup> The status itself, standing alone, will not support a criminal sentence.<sup>76</sup> Similar to federal precedent, North Carolina courts have construed recidivist statutes as consistent with constitutional guarantees because such statutes merely convey individuals with a status and do not independently create a substantive criminal offense.

The Habitual Felons Act of North Carolina and similar recidivist statutes across the nation have been declared consistent with constitutional guarantees because they merely establish a punishment enhancement status. This rationale reconciles such statutes with double jeopardy protections in that criminals are not punished twice for their crimes; instead, criminal sentences are enhanced due to propensities for recidivism. North Carolina courts have upheld similar

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70. *State v. Torres*, 687 P.2d 1292, 1294 (Ariz. 1984).

71. *State v. Carlson*, 500 P.2d 26, 31 (Alaska 1977).

72. *State v. Todd*, 313 N.C. 110, 117-118 (1985).

73. *Id.* at 117.

74. *State v. Allen*, 292 N.C. 431 (1977). *Accord* *State v. Thomas*, 82 N.C. App. 682 (1986), *cert. denied*, 320 N.C. 637 (1987); *State v. Penland*, 89 N.C. App. 350 (1988).

75. *Id.* at 435 (quoting *Spencer v. Texas*, 385 U.S. 554, 556 (1967)).

76. *Id.*

habitual misdemeanor statutes based upon the same rationale set forth above. However, recent case law indicates an important distinction that places the habitual misdemeanor criminal statutes in violation of constitutional guarantees.

Few cases have addressed the constitutionality of North Carolina's habitual misdemeanor offender statutes. Even in the face of little precedent, the substance, construction, and impact of such statutes become clearer with each new decision. The following discussion evaluates cases contributing to the evolution of habitual misdemeanor precedent. In turn, that precedent is slowly indicating that these statutes are on a collision course with the constitutional guarantee of protection against double jeopardy.

A sharp distinction exists between the habitual impaired driving or the habitual misdemeanor assault statute and the Habitual Felons Act. North Carolina courts have construed state habitual misdemeanor criminal statutes to create and independently support a substantive criminal offense.<sup>77</sup> In contrast, precedent defines the Habitual Felons Act to merely convey a punishment enhancement status upon qualified defendants.<sup>78</sup> Unlike the habitual misdemeanor criminal offenses, the Habitual Felons Act is incapable of creating or independently supporting a substantive criminal offense.<sup>79</sup> As will be demonstrated, this substantive offense-status distinction has produced significant effects on the constitutionality of habitual misdemeanor criminal statutes.

The North Carolina Court of Appeals first addressed the substantive offense-status distinction in *State v. Priddy*.<sup>80</sup> Priddy asserted that her charge of habitual impaired driving did not constitute a substantive felony offense, but merely operated as a punishment enhancement under statute.<sup>81</sup> Priddy moved to dismiss the habitual impaired driving charge because habitual impaired driving created only a punishment enhancement status. There was no underlying felony to make original jurisdiction in superior court proper.<sup>82</sup>

The primary issue before the court was whether the trial court erred in dismissing the charge of habitual impaired driving for lack of

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77. See *State v. Priddy*, 115 N.C. App. 547, 549 (1994). See also *State v. Smith*, 139 N.C. App. 209, 215 (2000), *appeal dismissed*, 353 N.C. 277 (2000).

78. *State v. Allen*, 292 N.C. 431 (1977). Accord *State v. Thomas*, 82 N.C. App. 682 (1986), *cert. denied*, 320 N.C. 637 (1987); *State v. Penland*, 89 N.C. App. 350 (1988).

79. *Id.*

80. *State v. Priddy*, 115 N.C. App. 547 (1994), *disc. review denied*, 337 N.C. 805 (1994).

81. *Id.* at 548.

82. *Id.*

jurisdiction.<sup>83</sup> The State contended superior court jurisdiction was proper because the offense of habitual impaired driving constituted a separate substantive felony.<sup>84</sup> The court relied upon statutory language analysis in order to determine whether habitual impaired driving conveyed a status or created a substantive felony offense.<sup>85</sup> The court determined that the legislature intended to create a substantive felony offense because the statutory language set out the required elements of proof, specifically defined the applicable punishment, and explicitly provided that a person “commits the offense of habitual impaired driving.”<sup>86</sup>

In *State v. Baldwin*,<sup>87</sup> the Court of Appeals relied upon the precedent established in *Priddy*<sup>88</sup> to determine that a conviction for habitual impaired driving may serve as a predicate felony for enhancement to habitual felon status under North Carolina General Statute § 14-7.1.<sup>89</sup> One of the three predicate felony offenses used to charge Baldwin as a habitual felon was habitual impaired driving.<sup>90</sup> Baldwin contended that the use of his habitual impaired driving conviction to elevate him to the status of a habitual felon was improper because habitual impaired driving did not create a substantive felony offense.<sup>91</sup> The court reiterated the language of *Priddy*<sup>92</sup> by stating that “[h]abitual impaired driving is a substantive felony offense.”<sup>93</sup>

## IX. APPLES AND ORANGES

The importance of the substantive offense-status distinction and the relevant constitutional implications this distinction creates is best recognized in *State v. Smith*.<sup>94</sup> Smith was convicted of two counts of habitual misdemeanor assault and of being a habitual felon.<sup>95</sup> The

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83. *Id.*

84. *Id.*

85. *Id.* at 549.

86. *Id.* (emphasis added).

87. *State v. Baldwin*, 117 N.C. App. 713 (1995).

88. *State v. Priddy*, 115 N.C. App. 547 (1994), *disc. review denied*, 337 N.C. 805 (1994).

89. *State v. Baldwin*, 117 N.C. App. 713 (1995).

90. *Id.* at 716.

91. *Id.*

92. *State v. Priddy*, 115 N.C. App. 547 (1994), *disc. review denied*, 337 N.C. 805 (1994).

93. *State v. Baldwin*, 117 N.C. App. 713 (1995).

94. *State v. Smith*, 139 N.C. App. 209 (2000), *appeal dismissed*, 353 N.C. 277 (2000).

95. *Id.* at 211.

North Carolina Court of Appeals relied upon the similarities between the habitual impaired driving and the habitual misdemeanor assault statutes in order to reject Smith's contention that the habitual misdemeanor assault statute served only as a punishment status and not a substantive felony offense.<sup>96</sup>

The court also rationalized the constitutionality of the habitual misdemeanor assault statute in light of *ex post facto* challenges by relying on North Carolina Supreme Court pronouncements of the constitutionality of the Habitual Felons Act.<sup>97</sup> The supreme court held in *State v. Todd*<sup>98</sup> that the Habitual Felons Act did not violate *ex post facto* principles because it did not punish the defendant for "previous conduct, but for his current conduct to a greater degree, due to his previous similar offenses."<sup>99</sup> The *Smith*<sup>100</sup> Court analyzed the habitual misdemeanor assault statute based upon the Supreme Court's analysis in *Todd*.<sup>101</sup> The *Smith*<sup>102</sup> court held the habitual misdemeanor assault statute not to be in violation of *ex post facto* principles because the statute does not impose punishment for the previous crimes. Instead, it imposes an enhanced punishment for behavior occurring after the enactment of the statute due to the repetitive nature of the defendant's behavior.<sup>103</sup>

While concurring in the result in *Smith*,<sup>104</sup> Judge Wynn noted the possible constitutional deficiencies of both the habitual misdemeanor assault and the habitual impaired driving statutes.<sup>105</sup> Specifically, Wynn recognized the analytical flaws in relying on the supreme court's determination of the constitutionality of the Habitual Felons Act to conclude that the habitual misdemeanor assault and habitual impaired driving statutes survive constitutional scrutiny.<sup>106</sup> Wynn

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96. *State v. Smith*, 139 N.C. App. 209, 213-214 (2000), *appeal dismissed*, 353 N.C. 277 (2000).

97. *Id.* at 214.

98. *State v. Todd*, 313 N.C. 110 (1985).

99. *Id.* at 117.

100. *State v. Smith*, 139 N.C. App. 209 (2000), *appeal dismissed*, 353 N.C. 277 (2000).

101. *State v. Todd*, 313 N.C. 110 (1985).

102. *State v. Smith*, 139 N.C. App. 209 (2000), *appeal dismissed*, 353 N.C. 277 (2000).

103. *Id.* at 214-215 (Wynn, J., concurring).

104. *State v. Smith*, 139 N.C. App. 209, 220-222 (2000), *appeal dismissed*, 353 N.C. 277 (2000) (Wynn, J., concurring).

105. *Id.*

106. *Id.* at 221.

explained that such analysis leads to the comparison of “apples and oranges.”<sup>107</sup>

The essence of this troublesome comparison lies in the fact that the Habitual Felons Act creates a status offense that will not independently support a criminal sentence. In contrast, the habitual misdemeanor assault and habitual impaired driving statutes create substantive felony offenses that will independently support a criminal sentence. The Habitual Felons Act requires that the defendant’s prior convictions be proven by the state in the sentencing phase. However, predicate offenses are not true elements of the offense. Predicate offenses become relevant only when sentences for the underlying felony are imposed.<sup>108</sup>

On the other hand, the habitual misdemeanor assault and the habitual impaired driving statutes require that the prior convictions be essential elements of the substantive offense.<sup>109</sup> Violations of double jeopardy protections arise since these statutes are dependent upon prior convictions. Judicial precedent has erroneously determined the constitutionality of these statutes by using a rationale that supports the validity of the Habitual Felons Act. These statutes are inherently different. Yet, the validity of one turns upon the constitutionality of the other.

#### X. STATUTORY ANALYSIS

Only one North Carolina case has presented a direct challenge to the constitutionality of the habitual impaired driving or the habitual misdemeanor assault statutes based upon double jeopardy principles.<sup>110</sup> In *Vardiman*, the North Carolina Court of Appeals rejected the substantive-status distinction and upheld the defendant’s habitual impaired driving conviction.<sup>111</sup> The rationale of the court was that *Vardiman* was merely having the punishment of his current offense enhanced rather than being convicted of a separate, substantive offense.<sup>112</sup> However, developing precedent and the expression of constitutional concern by the North Carolina Court of Appeals suggest that the time has come to obtain a definitive ruling from the North Carolina Supreme Court. Once squarely faced with the double jeop-

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107. *Id.*

108. *Id.* at 221-222.

109. *Id.*

110. *See State v. Vardiman*, 552 S.E.2d 697 (2001).

111. *Id.*

112. *Id.*

ardly issue, the supreme court should recognize the habitual misdemeanor statutes as unconstitutional.

The North Carolina Supreme Court has recognized that conviction and sentencing or conviction and acquittal of an offense require the prohibition from being subsequently indicted, convicted, or sentenced a second time for that same offense. The supreme court has not limited this to direct prosecution, but has extended the protection to include subsequent indictment, conviction, or sentencing for a charge of which the predicate offense is an essential element.<sup>113</sup> With the habitual misdemeanor statutes, defendants are convicted and sentenced for the crime of impaired driving in violation of North Carolina General Statute § 20-401(24a).<sup>114</sup> The State subsequently relies upon this conviction as an essential element in order to punish the defendant under the habitual impaired driving statute.

The distinction between substantive and status offense is crucial to the analysis. Were the habitual impaired driving capable of creating only a status for punishment enhancement, the defendant would not be subjected to double jeopardy. The status element would merely serve to use the prior convictions to justify elevating the misdemeanor offense to felony punishment status.

However, North Carolina courts have consistently held the habitual impaired driving and the habitual misdemeanor assault statutes to create and independently support a substantive criminal offense. Consequentially, the prior convictions are essential elements of the felony offense. The prior convictions do not serve as justifications for sentence enhancement. Rather, they establish a criminal offense. Therefore, a defendant's prior convictions subject him to new jeopardy.

## XI. SOLUTIONS

North Carolina's inflexible stance regarding recidivist behavior is justified. However, the State currently relies on statutes that are stricken with constitutional violations. Fortunately, there are alternative statutory procedures that allow for enhanced punishment of recidivists while at the same time complying with the constitutional guarantee of protection against double jeopardy. For example, the North Carolina Habitual Felons Act fully complies with double jeopardy protections. The legislature could amend the habitual misdemeanor assault and habitual impaired driving statutes so that

113. *State v. Midyette*, 270 N.C. 229 (1967), *overruled on other grounds*, *State v. Gardner*, 315 N.C. 444 (1986).

114. N.C. Gen. Stat. § 20-138.5 (1999).



violations will create a punishment enhancement status. As previously discussed, status based recidivist statutes are held to be constitutional throughout the American judicial system. A statutory amendment could create a status of being a habitual impaired driver or a habitual perpetrator of assault. This would justify the enhancement of punishment for subsequent criminal convictions incurred following the imposition of the status.

## XII. CONCLUSION

Recidivist legislation undoubtedly comprises an essential element of American criminal law. When properly drafted and applied, the twin aims of deterring criminal behavior and punishing repeat offenders more severely are achieved. The goals of enhanced punishment for repeat offenders are legitimate. As recidivist behavior continues to increase, so too will the application of recidivist statutes. For that reason, it is critical that recidivist statutes do not violate the guarantees of the United States Constitution.

Habitual assault and habitual impaired driving present serious problems. North Carolina's interest in punishing those who repeatedly engage in criminal conduct is justified. In order to insure the validity of recidivist convictions, statutes must comply with constitutional guarantees. Presently, the North Carolina habitual misdemeanor assault and habitual impaired driving statutes do not comply with constitutional guarantees. Fortunately, the Legislature has curative means at its disposal. Amending the existing statutory language that creates a substantive offense in these two recidivist statutes so that punishment enhancement status is created instead, would make these statutes conform to constitutional mandates. Such amendments would also continue to recognize the goals of punishing repeat offenders through elevated punishment structures. Although no court as of yet has pronounced the habitual misdemeanor assault or habitual impaired driving statutes to be unconstitutional, such a holding is imminent.

*Jason White*