

Habitual Felon and Previous Convictions from New Jersey

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I don't mean to cast aspersions on the Garden State, but it seems like there are a lot of people here in North Carolina with criminal records from New Jersey. Some of those folks are repeat offenders, but an unusual aspect of New Jersey law calls into question the applicability of North Carolina's habitual felon law to defendants with previous New Jersey convictions.

New Jersey's Classification of Offenses. The issue arises from the fact that New Jersey's statutory scheme does not divide crimes into felonies and misdemeanors, as most states do, but rather into "crimes" and "disorderly persons offenses." N.J. Stat. 2C:1-4. There are four degrees of "crimes" under New Jersey law. N.J. Stat. 2C:43-1 (creating crimes of the first degree, second degree, third degree, and fourth degree). Confusingly, New Jersey sometimes uses the term "misdemeanor" to mean a "crime of the fourth degree" and the term "high misdemeanor" to mean a "crime of the third degree." N.J. Stat. 2C:43-1. Yet it is clear that even New Jersey's third- and fourth-degree "crimes" are akin to what we call felonies, not to what we call misdemeanors. Indeed, although N.J. Stat. 2C:1-4 states that "crimes" broadly include offenses punishable by more than six months imprisonment, by statute, defendants convicted of "crimes" face maximum punishments based on the degree of the offense, as follows:

- First degree: 10 years to 20 years imprisonment (ordinarily), 20 years to life imprisonment (exceptional cases)
- Second degree: 5 years to 10 years imprisonment (ordinarily), 10 years to 20 years imprisonment (exceptional cases)
- Third degree: 3 years to 5 years imprisonment (ordinarily); 5 years to 10 years imprisonment (exceptional cases).
- Fourth degree: up to 18 months imprisonment (ordinarily), 3 years to 5 years imprisonment (exceptional cases).

N.J. Stat. 2C:43-6 (ordinary punishment); N.J. Stat. 2C:43-7 (exceptional punishment).

The New Jersey concept of "disorderly persons offenses," which carry maximum punishments of 30 days or 6 months of incarceration, depending on the offense, N.J. Stat. 2C:43-8, are similar to what other states call misdemeanors.

New Jersey Isn't Alone. New Jersey is not completely alone in using a classification other than felonies and misdemeanors. *Jones v. State*, 23 A.3d 880 (Md. 2011) ("[S]ome states do not employ the 'felony-misdemeanor' dichotomy at all. Maine, for instance, classifies crimes in a 'class' system, ranking each individual offense as class A, B, C, D, or E. See Me. Rev. Stat. Ann. tit. 17-A, § 4(1) (2006)."). But we don't seem to have many repeat offenders from Maine in these parts.

North Carolina's Habitual Felon Statute. Under our habitual felon law, [G.S. 14-7.1](#), a conviction may be used to support a charge of being a habitual felon if the offense of conviction is "defined as an offense which is a felony under the laws of the State or other sovereign" where the conviction took place. This focus on how an offense is classified in the jurisdiction where it occurred differs from, for example, the approach in Structured Sentencing, where either the state or the defendant may prove that an out-of-state offense is substantially similar to a North Carolina offense, in which case, the conviction is classified as it would be under North Carolina law. [G.S. 15A-1340.14\(e\)](#).

Can Convictions from New Jersey Be Used? One could argue that the habitual felon statute applies only to offenses defined as felonies, and that New Jersey does not have any such offenses, so it simply is not possible to use New Jersey convictions to support a habitual felon charge. But barring the use of New Jersey convictions would create a windfall for defendants who happen to have committed their prior crimes in New Jersey, and would undermine the purpose of the habitual felon law. Furthermore, New Jersey courts themselves recognize that New Jersey “crimes” are the functional equivalent of felonies. *See, e.g., State v. Doyle*, 200 A.2d 606 (N.J. 1964) (“Misdemeanors under the crimes act which are punishable by imprisonment for more than a year in state prison . . . are sufficiently equatable with common law felony to justify arrest by a peace officer without a warrant when he has reasonable ground to believe that an offense of that grade is being or has been committed by the person to be apprehended.”); *In re Rettschlag*, 2008 WL 1787466 (N.J. Super. Ct. App. Div. Apr. 22, 2008) (unpublished) (prior conviction of fourth degree crime was listed in New Jersey computer system as a “felony” conviction; because that was a barrier to employment, the defendant sought to have it re-described as a “misdemeanor” consistent with New Jersey’s statutory classification scheme; the court rejected the defendant’s argument, stating that “[a] fourth degree crime is punishable by a term of imprisonment not to exceed eighteen months,” and that “[o]ffenses that are punishable by imprisonment for more than one year are considered common law felonies,” so the defendant’s “Criminal History Record accurately designates his fourth degree conviction as equivalent to a common law felony”); *Zaborowski v. New Jersey Div. of State Police*, 2007 WL 935603 (N.J. Super. Ct. App. Div. Mar. 30, 2007) (unpublished) (similarly recognizing that “our fourth-degree crimes, which are punishable in State prison for a term of up to eighteen months, are equivalent to common law felonies”).

Therefore, convictions for New Jersey “crimes” probably should count as previous convictions under North Carolina’s habitual felon law. Other jurisdictions have recognized that New Jersey crimes are equivalent to felonies. *United States v. Brown*, 937 F.2d 68 (2nd Cir. 1991) (finding that defendant’s prior New Jersey conviction, though a “high misdemeanor” under the state’s statutory scheme, was a “common-law felon[y]” under New Jersey case law); *State v. Gillison*, 2009 WL 606230 (Iowa Ct. App. 2009) (unpublished) (describing New Jersey law, noting New Jersey’s own recognition that “crimes” are akin to felonies, and ruling that the defendant’s prior convictions should count as felonies under an Iowa habitual offender statute that applies to defendants who have “twice before been convicted of any felony in a court of this or any other state”).

Procedure. If previous convictions from New Jersey can, in fact, be used to support a habitual felon charge, what must the state do to prove that a defendant’s previous New Jersey conviction is for a felony? In theory, it seems that it would be enough to establish:

- That the defendant was convicted of crime X in New Jersey, as reflected in the New Jersey judgment;
- That crime X was classified as a “crime” by New Jersey when the defendant committed it, using the relevant New Jersey statute; and
- That a “crime” under New Jersey law is the equivalent of a felony, using the case law cited above.

However, in *State v. Carpenter*, 155 N.C. App. 35 (2002), the court of appeals considered a case in which the state seems to have offered proof along those lines, and found it insufficient because “there was no certification from any official that the two offenses [in question] were felonies in New Jersey.” *Id.* (citing *State v. Lindsey*, 118 N.C. App. 549 (1995)). The court did not describe the nature of the needed certification, nor did it elaborate on the type of official from who it should be sought.

Practical Advice. In light of *Carpenter*, what’s a prosecutor to do? First, when it is possible, a prosecutor may choose to use convictions from somewhere other than New Jersey to support a habitual felon charge. Second, a prosecutor may seek a stipulation from the defendant that his prior New Jersey conviction is a felony. This appears to be permissible under *State v. Bohler*, 198 N.C. App. 631 (2009) (holding that, while a trial judge may not accept a stipulation that a particular out-of-state offense is substantially similar to a particular North Carolina offense, “it may accept a stipulation that the defendant in question has been convicted of a particular out-of-state offense and that this offense is either a felony or a misdemeanor under the law of that jurisdiction”). Third, a prosecutor may seek to obtain a “certification” from a New Jersey official – perhaps a New Jersey prosecutor – confirming that the defendant’s prior

conviction is equivalent to a felony. Finally, a prosecutor might try to distinguish *Carpenter* by making a more comprehensive exposition of New Jersey's classification scheme than the state made in that case.

Sorry for the long post, but this has been the subject of many questions over the years so I thought it would be good to lay out everything that I know about the subject.