# Prior Record Level for Habitual and Repeat Offender Sentencing

**Author :** Jamie Markham

**Categories :** Sentencing, Uncategorized

**Tagged as :** habitual breaking and entering, habitual DWI, habitual felon, prior record level, Sentencing

**Date :** November 4, 2014

In North Carolina we have a fair number of habitual and repeat offender punishment provisions—laws that increase a defendant's punishment because of crimes he or she has committed in the past. Today's post considers how the prior convictions needed to establish those enhancements factor into the defendant's prior conviction level.

The general rule is that the prior conviction or convictions used to establish a person's eligibility for a punishment enhancement do not count toward his or her prior record level. Under most of our laws that use the word "habitual," that rule is set out by statute.

- **Habitual felon**: "In determining the prior record level, convictions used to establish a person's status as an habitual felon shall not be used." G.S. 14-7.6. So, a person's three prior strikes do not count toward his or her record level for the crime now being sentenced. Recall, however, that the State is free to allege the defendant's least serious prior convictions in the habitual felon indictment, leaving the more serious ones available for prior record points, State v. Cates, 154 N.C. App. 737 (2002), or vice-versa. And if the State alleges "extra" prior convictions in the habitual felon indictment beyond the requisite three, they too are off limits for prior record points. State v. Lee, 150 N.C. App. 701 (2002).
- **Habitual breaking and entering**: "In determining the prior record level, any conviction used to establish a person's status as a status offender shall not be used. G.S. 14-7.31(b).
- **Armed habitual felon**: "In determining the prior record level, any conviction used to establish a person's status as an armed habitual felon shall not be used." G.S. 14-7.41(b).

Sometimes the rule is not statutory, but nonetheless applies as a matter of case law. The leading case is State v. Gentry, 135 N.C. App. 107 (1999), in which the court of appeals held that the three prior misdemeanor DWIs underlying a felony habitual DWI charge do not count toward the defendant's prior record for the sentencing of the felony, as doing so would be unfair double counting of those priors.

The *Gentry* rule against the double counting of prior convictions that make a present crime more serious would seem to come into play when sentencing a number of other repeat offender statutes. Among them:

**Habitual misdemeanor assault**: The two prior assault convictions—felony or misdemeanor—that must be alleged in a habitual misdemeanor assault prosecution probably do not count for prior record points (of course, if they were Class 2 simple assaults, they wouldn't count in any event). The court of appeals came close to saying that in State v. Smith, 139 N.C. App. 209 (2000), but ultimately didn't have to because the defendant had two prior assault convictions on the same date, one used to establish the habitual misdemeanor assault charge and the other used for a prior record point. In unpublished State v. Cooper, 154 N.C. App. 521 (2002), the court "f[ound] no justifiable reason to depart from the rationale utilized in *Gentry*," and concluded that a prior assault listed in a habitual misdemeanor assault indictment could not count for a point.

**Habitual misdemeanor larceny**: The four prior larceny offenses that can elevate an ordinary larceny to a felony under G.S. 14-72(a)(6) probably should not count for points in light of *Gentry*. That statute hasn't been around long enough for there to be an appellate case saying so.

*This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved. use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited. To browse a complete catalog of School of Government publications, please visit the School's website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919-966-4119; or fax 919-962-2707.*

There are other repeat offender statutes that we don't label as "habitual" for which *Gentry* would seem to dictate the same result. For example, a second or subsequent conviction for stalking is enhanced from a Class A1 misdemeanor to a Class F felony. G.S. 14-277.3A(d). In light of *Gentry,* the prior stalking conviction used to elevate the offense to a felony should not count for a point. Ditto for second or subsequent breaking into a coin-operated machine (G.S. 14-56.1), promoting prostitution of a minor or mentally disabled person (G.S. 14-205.3(d)), or any other such provision.

I see no reason the *Gentry* rule should be limited to felony sentencing. For instance, the three prior convictions underlying a Class 1 fourth or subsequent worthless check conviction would appear not to count toward the defendant's prior conviction level. Same for repeat peepers (G.S. 14-202(i)), shoplifters (G.S. 14-72.1), grass fire setters (G.S. 14-136), and electronic dog collar removers (G.S. 14-401.17).

One area where *Gentry* does not apply is when having a prior conviction operates not as a sentencing enhancement with respect to a later offense, but rather as a necessary prerequisite to the commission of that crime. The clearest example is possession of a firearm by a felon. In State v. Best, 214 N.C. App. 39 (2011), the court of appeals concluded that the prior felony that cost the defendant his gun rights could count for sentencing points when he was later sentenced for possession of a firearm by a felon. The court applied similar logic in State v. Harrison, 165 N.C. App. 332 (2004), concluding that a defendant's prior reportable sex crime could count for points toward the sentencing of his conviction for failure to register as a sex offender. It's not always easy to separate the "enhancements" from the "elements," but when the present offense is not even criminal without the existence of a particular prior conviction, it's probably safe to say the prior is no mere enhancement, and may thus count for points.

*This blog post is published and posted online by the School of Government to address issues of interest to government officials. This blog post is for educational and informational Copyright © 2009 to present School of Government at the University of North Carolina. All rights reserved. use and may be used for those purposes without permission by providing acknowledgment of its source. Use of this blog post for commercial purposes is prohibited. To browse a complete catalog of School of Government publications, please visit the School's website at www.sog.unc.edu or contact the Bookstore, School of Government, CB# 3330 Knapp-Sanders Building, UNC Chapel Hill, Chapel Hill, NC 27599-3330; e-mail sales@sog.unc.edu; telephone 919-966-4119; or fax 919-962-2707.*