CHAPTER EIGHT

HABITUAL OFFENDER ENHANCEMENTS

I. IN GENERAL

A. PURPOSE

The purpose of the habitual offender ("HO") statute is to penalize those persons whom prior sanctions have failed to deter from committing felonies more severely. Powers v. State, 539 N.E.2d 950, 952 (Ind. 1989), overruled in part on other grounds, Jaramillo v. State, 823 N.E.2d 1187 (Ind. 2005); Baker v. State, 425 N.E.2d 98, 100 (Ind. 1981).

B. SEPARATE SENTENCE, BUT NOT SEPARATE CRIME

Habitual offender statute, Ind. Code 35-50-2-8, does not establish a separate crime nor result in a separate sentence, but provides an additional sentence to be added to the term imposed for the triggering felony. State v. Hicks, 453 N.E.2d 1014, 1017 (Ind. 1983); Hernandez v. State, 439 N.E.2d 625, 633 (Ind. 1982); Haynes v. State, 431 N.E.2d 83, 88 (Ind. 1982). The additional punishment is imposed for each new crime and not for crimes for which a defendant has already been convicted and punished. Powers v. State, 539 N.E.2d 950, 952 (Ind. 1989). STATUTORY CONSTRUCTION – FOR PRE-JULY 1, 2014 HSO CASES
For habitual substance offender (HSO) cases filed before the repeal of the HSO statute (Ind. Code 35-50-2-10), decisions interpreting the HO statute apply to issues raised under the HSO statute. Roell v. State, 655 N.E.2d 599, 601 (Ind. Ct. App. 1995) ; see also Lindsey v. State, 877 N.E.2d 190, 197 (Ind. Ct. App. 2007) This is because the language in the habitual offender ("HO") statute, Ind. Code 35-50-2-8, mirrors the language in the habitual substance offender ("HSO") statute, Ind. Code 35-50-2-10. Because the HSO and HO statutes are clearly penal in nature, they must be construed against the state. See Marshall v. State, 493 N.E.2d 1317, 1319 (Ind. Ct. App. 1986) (construing HSO statute).

C. DOUBLE ENHANCEMENTS

For an overview of potential double enhancement issues, see The Honorable Cale J. Bradford & Alex J. Dudley, Double Trouble: Understanding Double Enhancement, 53 Ind. L. Rev. 73 (2020).

There are three different types of enhancement statutes:

(1) the general habitual offender statute, Ind. Code 35-50-2-8;

(2) the specialized habitual offender statutes, including Ind. Code 35-50-2-10 (HSO) (repealed effective June 30, 2014), Ind. Code 9-30-10-4 (HTV), and Ind. Code 35-50-2-14 (repeat sexual offender statute); and

(3) the progressive penalty statutes, including those statutes which elevate a charge if the person has been previously convicted of a particular offense, such as Ind. Code 35-48-4-11 (Level 6 felony marijuana statute).

What other offenses may qualify as progressive penalty statutes is an unanswered question. See Bradford, *supra*, at 91-92 (noting that failure to register under Ind. Code 11-8-8-17 may qualify as a progressive penalty statute.)

Although a conviction may technically qualify for multiple enhancements, a conviction can only be enhanced under the most specific of the three types of enhancement statutes unless the legislature has explicitly indicated otherwise. State v. Downey, 770 N.E.2d 794 (Ind. 2002).

For a summary of specific situations where the rule against double enhancements may be violated based on the current state of the law in Indiana, see Bradford, *supra*, at 93-94.

1. Rule of lenity

Where there is ambiguity in potential punishments, the Rule of Lenity dictates that the conflict should be resolved against the penalty. Generally, when two statutes both enhance one conviction, the conviction may only be enhanced under the more specific statute, unless the legislature otherwise states. Ross v. State, 729 N.E.2d 113 (Ind. 2000) (it was improper to enhance defendant's handgun conviction from misdemeanor to Class C felony due to prior felony, and then use Class C felony handgun conviction to support defendant's habitual offender enhancement).

PRACTICE POINTER: Ross clarified the conflicting and unclear case law concerning double enhancements. Because Ross is based on statutory construction, Ross did not technically overrule the cases which hold that double enhancements do not violate double jeopardy. See Hampton v. State, 526 N.E.2d 1154 (Ind. 1988); Woods v. State, 471 N.E.2d 691 (Ind. 1984). However, Ross explicitly disapproved of Thomas v. State, 684 N.E.2d 222 (Ind. Ct. App.1997), and implicitly *overruled* State v. Dennis, 686 N.E.2d 901 (Ind. Ct. App.1997) (Class D felony prostitution can be enhanced under HO statute). Further, Ross implicitly reaffirmed Freeman v. State, 658 N.E.2d 68 (Ind. 1995); Stanek v. State, 603 N.E.2d 152 (Ind. 1992) (Class C felony HTV conviction cannot be enhanced under HO statute); Cardwell v. State, 666 N.E.2d 420 (Ind. Ct. App. 1996); Burp v. State, 672 N.E.2d 439 (Ind. Ct. App. 1996) (Class D felony OWI cannot be enhanced under HO statute).

Jacobs v. State, 835 N.E.2d 485 (Ind. 2005) (Ross rule on double enhancement applies retroactively in post-conviction proceedings to persons whose cases were resolved before that holding).

Dugan v. State, 976 N.E.2d 1248 (Ind. Ct. App. 2012) (rule in Mills v. State, 868 N.E.2d 446 (Ind. 2007) applies retroactively; Mills held that a person convicted of unlawful possession of a firearm by a serious violent felon may not have his sentence enhanced under general habitual statute by use of same felony used to establish SVF status).

Puckett v. State, 843 N.E.2d 959 (Ind. Ct. App. 2006) (habitual offender charge cannot attach to an already-enhanced conviction for OWI).

Goodman v. State, 863 N.E.2d 898 (Ind. Ct. App. 2007) (defendant's sentence was impermissibly doubly enhanced when trial court erroneously based his Class C felony auto theft and habitual offender finding upon same prior felony conviction).

Cushenberry v. State, 792 N.E.2d 571 (Ind. Ct. App. 2003) (Indiana's aggravated battery statute does not constitute an habitual offender statute, nor is it part of a

sentencing scheme that progressively elevates classifications of an offense based upon identified criteria with features similar to HO statute, as was case in Ross).

But see:

State v. Downey, 770 N.E.2d 794 (Ind. 2002) (where specialized HSO statute by its own terms applied to drug possession misdemeanors and felonies, legislature intended it to be applicable to case where misdemeanor possession charge had already been enhanced to a D felony).

2. Effect of statutory amendments

Even if the 2001 amendment to the HO statute did not state that a specific crime is exempted from its application, that crime may still be exempted from the HO statute under the rule against double enhancement.

"As of July 1, 2001, the legislature has amended the HO statute to codify Freeman, Stanek and, at least in part, Ross. "The language in the 2001 amendment did not provide [sufficiently] explicit legislative direction to overcome the general rule against double enhancements 'absent explicit legislative direction.' It is clear that what the Legislature intended in the 2001 amendment was to prohibit double enhancements in specific situations (including the Ross situation). While it is fair to argue that the Legislature could have accomplished this by adding the language in subsection (b) without also inserting the 'except as otherwise provided in this section' language of subsection (a), the language does not, by its terms, foreclose judicial application of the longstanding rule against double enhancements. We conclude that the 'except as otherwise provided' language signals the Legislature's intent to create exceptions to the statutory rule of subsection (a) but does not preclude continued judicial application of the general rule against double enhancements absent explicit legislative direction." Mills v. State, 868 N.E.2d 446, 451-52 (Ind. 2007) (overruling Townsend v. State, 793 N.E.2d 1074 (Ind. Ct. App. 2003) (2001 amendment to HO statute overruled Conrad v. State, 747 N.E.2d 575 (Ind. Ct. App. 2001)).

Mills v. State, 868 N.E.2d 446 (Ind. 2007) (the 2001 amendment to the HO statute did not supersede the holding of Conrad v. State, 747 N.E.2d 575 (Ind. Ct. App. 2001) that the same felony cannot be used as the basis of a SVF conviction and a HO conviction, even though the 2001 amendment did not list SVF as an exception to the HO enhancement).

See *infra* Chapter 8, Subsection II.A*, Habitual Offender Statute*, for a more complete discussion of the amended statute.

3. Does not prohibit use of same conviction as predicate to habitual enhancement and as aggravator

The rule of lenity does not prohibit a trial court from using the same prior convictions to support a HO or HSO enhancement (filed before July 1, 2014) and to aggravate the underlying sentence. However, two convictions enhanced by the same crime cannot be ordered to run consecutively to one another. Pedraza v. State, 887 N.E.2d 77 (Ind. 2008).

Pedraza v. State, 887 N.E.2d 77 (Ind. 2008) (trial court properly used same prior OWI within five years to enhance defendant's OWI Causing Serious Bodily Injury to a Class C felony and as an aggravating circumstance for the same count; however, trial court abused its discretion by running two counts consecutively where both counts were enhanced by the same prior OWI; one count was elevated to a Class C felony and the other due to Defendant's habitual offender status based, in part, on the same 2001 OWI).

Golden v. State, 862 N.E.2d 1212 (Ind. Ct. App. 2007) (the same prior sex convictions used to enhance defendant's sentence under the repeat sex offender statute could be used as aggravators on the underlying sentence).

4. Discretion to choose enhancement

a. Prosecutor's discretion

If a defendant meets the requirements for enhancements under two different enhancement statutes, the prosecutor has the discretion to choose which enhancement to seek, and may choose the enhancement with the harsher punishment.

Hendrix v. State, 759 N.E.2d 1045 (Ind. 2001) (because defendant met statutory requirements for both HO statute and habitual substance offender statute, prosecutor had discretion in seeking harsher HO enhancement rather than habitual substance offender enhancement).

b. Trial court's discretion

Further, if the prosecutor seeks two enhancements, and the defendant is found guilty on both enhancements, the trial court can vacate either enhancement, regardless of which enhancement carries the lesser penalty.

Burrus v. State, 763 N.E.2d 469 (Ind. Ct. App. 2002) (where defendant was found guilty of Class C felony handgun based on prior felony and HO enhancement also based, in part, on the same prior felony, trial court did not abuse discretion in reducing Class C felony to class A misdemeanor rather than vacating HO enhancement).

c. Two sentences enhanced by the same crime cannot run consecutively

Although a trial court can avoid a double enhancement problem by moving a HO or HSO enhancement to a different conviction not already enhanced, the sentence upon which the HO or HSO is attached must run concurrently with the already-enhanced conviction and sentence. Sweatt v. State, 887 N.E.2d 81 (Ind. 2008).

Light v. State, 28 N.E.3d 1106 (Ind. Ct. App. 2015) (no impermissible double enhancement because even though both sentences were enhanced and served consecutively, the two enhancements were not based on the same prior convictions).

II. STATUTORY PROVISIONS

A. HABITUAL OFFENDER ("HO")

The state may seek to have a person sentenced as a habitual offender for a felony by alleging, on one (1) or more pages separate from the rest of the charging instrument, that the person has accumulated the required number of prior unrelated felony convictions in accordance with this section. Ind. Code 35-50-2-8(a). A person is an HO if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated two prior unrelated felony convictions. Ind. Code 35-50-2-8(h).

Effective July 1, 2014, through June 30, 2017: What Ind. Code 35-50-2-8(b)(d) requires the State to prove varies according to the severity of the instant offense.

For persons convicted of the following, the State must prove:

(a) A person convicted of murder or of a Level 1 through Level 4 felony is a habitual offender if the state proves beyond a reasonable doubt that:

(1) the person has been convicted of two (2) prior unrelated felonies; and

(2) at least one (1) of the prior unrelated felonies is not a Level 6 felony or a Class D felony.

(b) A person convicted of a Level 5 felony is a habitual offender if the state proves beyond a reasonable doubt that:

(1) the person has been convicted of two (2) prior unrelated felonies;

(2) at least one (1) of the prior unrelated felonies is not a Level 6 felony or a Class D and

(3) if the person is alleged to have committed a prior unrelated:

(i) Level 5 felony;
(ii) Level 6 felony;
(iii) Class C felony; or
(iv) Class D felony;

not more than ten (10) years have elapsed between the time the person was released from imprisonment, probation, or parole (whichever is latest) and the time the person committed the current offense.

(c) A person convicted of a felony offense is a habitual offender if the state proves beyond a reasonable doubt that:

(1) the person has been convicted of three (3) prior unrelated felonies; and

(2) if the person is alleged to have committed a prior unrelated:

(i) Level 5 felony;
(ii) Level 6 felony;
(iii) Class C felony; or
(iv) Class D felony;

not more than ten (10) years have elapsed between the time the person was released from imprisonment, probation, or parole (whichever is latest) and the time the person committed the current offense.

Johnson v. State, 87 N.E.3d 471 (Ind. 2018) (the unambiguous plain language of the 2015 statute, which has since been amended, requires each prior unrelated lower-level felony used for habitual purposes to meet the 10-year requirement. Thus, the statute required an offender to have been released from all lower-level felonies within 10 years to establish the habitual offender enhancement. The 2017 amended statute (below) clarified the statute to the contrary, and now requires the 10-year timeframe "for at least one (1) of the three prior unrelated felonies" required to support a habitual offender enhancement).

Effective July 1, 2017: Ind. Code 35-50-2-8 sections (c) and (d) were amended to specify that only one of the lower-level felonies must fall within the statute's ten-year limit:

(d) A person convicted of a Level 5 felony is an habitual offender if the state proves beyond a reasonable doubt that:

(1) the person has been convicted of two (2) prior unrelated felonies;

(2) at least one (1) of the prior unrelated felonies is not a Level 6 felony or a Class D and

(3) if the person is alleged to have committed a prior unrelated:

(i) Level 5 felony;
(ii) Level 6 felony;
(iii) Class C felony; or
(iv) Class D felony;

not more than ten (10) years have elapsed between the time the person was released from imprisonment, probation, or parole (whichever is latest) for at least one (1) of the two (2) prior felonies and the time the person committed the current offense.

(e) A person convicted of a felony offense is a habitual offender if the state proves beyond a reasonable doubt that:

(1) the person has been convicted of three (3) prior unrelated felonies; and

(2) if the person is alleged to have committed a prior unrelated:

(i) Level 5 felony;
(ii) Level 6 felony;
(iii) Class C felony; or
(iv) Class D felony;

not more than ten (10) years have elapsed between the time the person was released from imprisonment, probation, or parole (whichever is latest) for at least one (1) of the three (3) prior unrelated felonies and the time the person committed the current offense.

1. Definitions

a. Underlying felony

(1) Felony

"Felony conviction" means a conviction, in any jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one year. However, it does not include a conviction with respect to which the person has been pardoned, or a conviction of a Class A misdemeanor under Ind. Code 35-50-2-7(c). Ind. Code 35-50-2-1(b).

(2) Level 6 felony conviction – Effective July 1, 2014, until March 7, 2018

Ind. Code 35-50-2-1(a) defines a level 6 felony conviction as follows:

(1) a conviction in Indiana for:

(i) a Class D felony, for a crime committed before July 1, 2014; or

(ii) a Level 6 felony, for a crime committed after June 30, 2014; and

(2) a conviction, in any other jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year.

(3) Level 6 Felony (effective March 8, 2018):

"Level 6 felony conviction" means:

(1) A conviction in Indiana for:

(a) A Class D felony, for a crime committed before July 1, 2014; or

(b) A Level 6 felony, for a crime committed after June 30, 2014; and

(2) A conviction, in any other jurisdiction at any other time, with respect to which the convicted person might have been imprisoned for more than one (1) year but less than two and one-half (2 ½) years. Ind. Code 35-50-2-1(a).

Calvin v. State, 87 N.E.3d 474 (Ind. 2017) (Prior to the amendment of the statute which took emergency effect on March 8, 2018, Ind. Code 35-50-2-1(a) (2014) counted all prior non-Indiana felonies count as Level 6 felonies).

For a more detailed discussion, see *infra* Chapter 8, subsection IV. B., *Sufficiency of the Evidence*.

(4) Exceptions

(a) Statutory exceptions – Pre July 1, 2014

Pursuant to Ind. Code 35-50-2-8(b), the state may not seek to have a person sentenced as a habitual offender for a felony offense in the following situations:

(i) Misdemeanor enhanced to a felony

Pursuant to Ind. Code 35-50-2-8(b), the State may not seek to have a person sentenced as an habitual offender for a felony offense under this section if the offense is a misdemeanor that is enhanced to a felony in the same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction.

(ii) Habitual traffic offenses

Pursuant to Ind. Code 35-50-2-8(b), the State may not seek to have a person sentenced as an habitual offender for a felony offense under this section if the offense is an offense under Ind. Code 9-30-10-16 or Ind. Code 9-30-10-17.

(iii) Limited narcotic offenses

Pursuant to Ind. Code 35-50-2-8(b), the State may not seek to have a person sentenced as a habitual offender for a felony offense when all the following apply:

(1) the offense is an offense under Ind. Code 16-42-19 or Ind. Code 35-48-4;

(2) the offense is not listed in section 2(b)(4) of this chapter; and

(3) the total number of unrelated convictions that the person has for dealing in or selling a legend drug under Ind. Code 16-42-19-27, dealing in cocaine or a narcotic drug (Ind. Code 35-48-4-1), dealing in a schedule I, II, III controlled substance (Ind. Code 35-48-4-2), dealing in a schedule IV controlled substance (Ind. Code 35-48-4-3), and dealing in a schedule V controlled substance (Ind. Code 35-48-4-4) does not exceed one (1).

Lampitok v. State, 817 N.E.2d 630 (Ind. Ct. App. 2004) (trial court did not err in granting defendant's motion for directed verdict on HO charge, because his 1995 conviction in Illinois for delivery of a controlled substance and criminal drug conspiracy does not count as a "prior unrelated felony conviction" under statute).

Weiss v. State, 903 N.E.2d 557 (Ind. Ct. App. 2009) (the listed offenses are not limited to actual dealing offenses, but include all offenses enumerated, including possession with intent to deliver, in each of the statutory provisions listed within the subsection, specifically Ind. Code 16-42-19-27, 35-48-4-1, 35-48-4-2, 45-48-4-3 and 35-48-4-4).

Peoples v. State, 929 N.E.2d 750 (Ind. 2010) (a defendant's instant dealing offense is to be counted in calculating the total number of unrelated felony convictions an individual has for drug dealing; thus, the State is not prohibited from filing habitual offender charges with respect to a defendant who, if convicted on the underlying charges, will have accumulated two unrelated felony drug convictions by the time the habitual offender proceedings commence).

Cf. Seeley v. State, 936 N.E.2d 863 (Ind. Ct. App. 2010), *trans. denied* (defendant's four prior felony convictions were insufficient as a matter of law to support HO finding because total number of defendant's unrelated convictions for dealing crimes specified in Ind. Code 35-50-2-8 (b)(3)(C) does not exceed one).

Ind. Code 35-50-2-8(d)(3) does not include methamphetamine-related felony convictions under Ind. Code 35-48-4-1.1 and -6.1. Weiss v. State, 903 N.E.2d 557, 563 n.3 (Ind. Ct. App. 2009) ("we are skeptical the legislature intended to omit such offenses from subsection (d)(3)(d) and urge the legislature to correct the omission in the event our inclination is correct).

(b) Statutory exceptions – Effective July 1, 2014

Effective July 1, 2014, there is only one statutory exception to offenses for which the State can seek a habitual enhancement – misdemeanors. This exception is found in subsection (e) of Ind. Code 35-50-2-8, not subsection (b) as was the case before July 1, 2014.

The same language is used to describe the 2014 version of the statute. The exception exists for a felony that was initially a misdemeanor but that was enhanced to a felony in the same proceeding as the habitual offender proceeding solely because the person had a prior unrelated conviction. See Ind. Code 35-50-2-8(e).

(c) Common law exceptions

The 2001 amendment to the general habitual offender statute, which prohibits double enhancements in specific situations, did not provide sufficiently explicit legislative direction to overcome the general rule against double enhancements absent explicit legislative direction. Mills v. State, 868 N.E.2d 446 (Ind. 2007) (overruling Townsend v. State, 793 N.E.2d 1074 (Ind.Ct.App.Ind. Ct. App. 2003)). Thus, the common law exceptions prior to 2001 are still good law.

PRACTICE POINTER: Although Ind. Code 35-50-2-8(b) (now (e)) did not take effect until July 1, 2001, for those convicted and/or sentenced prior to July 1, 2001, argue that the prior case law entitles your client to relief from double enhancements that are more expansive than that provided by the amendment. See Ross v. State, 729 N.E.2d 113 (Ind. 2000) (it was improper to enhance defendant's handgun conviction to Class C felony due to prior felony, and then use Class C felony handgun conviction to support defendant habitual offender enhancement); Wood v. State, 734 N.E.2d 296 (Ind. Ct. App. 2000) (defendant may not be subjected to enhanced sentence under general HO statute as result of his conviction for operating vehicle after lifetime suspension). For a more complete discussion of the case law, see also infra, Chapter 8, Subsection I.B., *Double Enhancements*.

(i) Serious violent felon

The same felony cannot be used to establish both an HO enhancement and that the defendant was a serious violent felon. See Conrad v. State, 747 N.E.2d 575 (Ind. Ct. App. 2001); Mills v. State, 868 N.E.2d 446 (Ind. 2007). On rehearing in Dye v. State, 984 N.E.2d 625 (Ind. 2013), the Indiana Supreme Court expanded this rule slightly to hold that using an underlying

offense for the HO that is part of the *res gestae* of the underlying offense used for the SVF is an improper double enhancement.

Dye v. State, 984 N.E.2d 625 (Ind. 2013) (SVF and HO are improper double enhancement only when the same underlying offense, or an underlying offense within the *res gestae* of another underlying offense, is used to establish both the SVF status and the habitual offender status).

Shepherd v. State, 985 N.E.2d 362 (Ind. Ct. App. 2013), *trans. denied* (defendant's status as both a SVF and an HO did not lead to impermissible double enhancement because each status was supported by a different prior conviction). See also Shorter v. State, 144 N.E.3d 829, 842 (Ind. Ct. App. 2020).

Olatunji v. State, 788 N.E.2d 1268 (Ind. Ct. App. 2003) (nothing in Ross prohibited use of either unrelated handgun conviction, or previous unrelated felony conviction that caused handgun conviction to be enhanced, as predicate felony offenses in determining that person to be an HO after committing third unrelated felony).

Gray v. State, 786 N.E.2d 804 (Ind. Ct. App. 2003) (where defendant is convicted of multiple felonies, case law does not preclude use of one felony both to prove defendant was SVF and HO, where sentence for felony conviction other than possession of firearm by SVF is sentence that is enhanced under general HO statute). See also Sweatt v. State, 887 N.E.2d 81 (Ind. 2008).

Lewis v. State, 769 N.E.2d 243 (Ind. Ct. App.2002) (when felony convictions used to classify defendant as SVF and to classify him as habitual offender are different, there is no impediment to imposing HO enhancement upon sentence for unlawful possession by serious violent felon).

Conrad v. State, 747 N.E.2d 575 (Ind. Ct. App. 2001) (although not specifically covered by Ross, defendant convicted of unlawful possession of firearm by serious violent felon may not have his sentence enhanced again under general habitual offender statute by proof of same felony used to establish that defendant was SVF).

Graham v. State, 903 N.E.2d 538 (Ind. Ct. App. 2009) (trial court erred by using the same underlying felony to support the defendant's conviction for unlawful possession of a firearm by SVF and HO finding even where D pled guilty because defendant pled without any agreement with the State).

Woodruff v. State, 80 N.E.3d 216 (Ind. Ct. App. 2017) (trial court did not err in applying both the habitual offender enhancement and the firearm enhancement to defendant's sentence for aggravated battery; this was not an impermissible double enhancement. Double enhancement analysis is proper when the proof of previous criminal conduct is the basis of more than one enhancement).

PRACTICE POINTER: Although the State can avoid this problem by moving the habitual offender enhancement to a different conviction than the SVF, the conviction with the HO enhancement cannot be run consecutively with the SVF conviction if based on the same prior felony. Sweatt v. State, 887 N.E.2d 81 (Ind. 2008).

(ii) Auto theft; enhancement to a more severe felony

Goodman v. State, 863 N.E.2d 898 (Ind. Ct. App. 2007) (an auto theft conviction enhanced from a Class D felony to a Class C felony due to a prior conviction cannot be again enhanced under the HO statute due to the same conviction).

Brock v. State, 983 N.E.2d 636 (Ind. Ct. App. 2013) (sentence does not constitute impermissible double enhancement; enhanced auto theft conviction was not used to support general habitual offender enhancement; likewise, general habitual enhancement was attached to defendant's intimidation conviction, not the enhanced auto theft conviction).

b. Prior unrelated felony

(1) Felony

"Felony conviction" means a conviction, in any jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one year. However, it does not include a conviction with respect to which the person has been pardoned, or a conviction of a Class A misdemeanor under Ind. Code 35-50-2-7(c). Ind. Code 35-50-2-1(b).

Scott v. State, 924 N.E.2d 169 (Ind. Ct. App. 2010), trans. denied (nolo contrendere plea from Florida was admissible to prove defendant had a conviction for purposes of the serious violent felon statute).

Berberena v. State, 86 N.E.3d 199 (Ind. Ct. App. 2017) (an out-of state statute is not "substantially similar" to an Indiana statute pursuant to Ind. Code 35-47-4-5(a)(1) where the out-of-state statute is broader than the Indiana statute). See also State v. Hancock, 65 N.E.3d 585 (Ind. 2016)

(2) Required sequencing – Pre July 1, 2014

A person has accumulated two prior felony convictions for purposes of this section only if:

(1) the second prior unrelated felony conviction was committed after sentencing for the first prior unrelated felony conviction; and
(2) the offense for which the state seeks to have the person sentenced as an habitual offender was committed after sentencing for the second prior unrelated felony conviction.

Ind. Code 35-50-2-8(c); see also Clark v. State, 480 N.E.2d 555, 560 (Ind. 1985); Clark v. State, 597 N.E.2d 4, 12 (Ind. Ct. App. 1992).

Thomas v. State, 451 N.E.2d 651 (Ind. 1983) (definition of word "habitual" from dictionary was irrelevant to disprove whether defendant has been convicted of two prior felonies).

Darnell v. State, 435 N.E.2d 250 (Ind. 1982) (remoteness of prior convictions not precluding their use in HO proceedings is matter of legislative policy).

(3) Required sequencing – Effective July 1, 2014

A person has accumulated *two or three* prior unrelated felony convictions for purposes of this section only if:

(1) the second prior unrelated felony conviction was committed after and commission of sentencing for the first prior unrelated felony conviction; and

(2) the offense for which the state seeks to have the person sentenced as an habitual offender was committed after sentencing for the second prior unrelated felony conviction.

(3) for a conviction requiring proof of *three (3) prior unrelated felonies*, the third prior unrelated felony conviction was committed after commission of and sentencing for the second prior unrelated felony conviction.

Ind. Code 35-50-2-8(f)

(4) Exceptions

A prior unrelated felony conviction may be used under this section to support a sentence as a habitual offender even if the sentence for the prior unrelated offense was enhanced for any reason, including an enhancement because the person had been convicted of another offense. Ind. Code 35-50-2-8(e).1

(a) Pardon/set aside

Pursuant to Ind. Code 35-50-2-8(g), a conviction does not count for purpose of this section as a prior unrelated felony conviction if:

(1) the conviction has been set aside; or

(2) the conviction is one for which the person has been pardoned.

(b) Habitual traffic offenses

Pre July 1, 2014

Pursuant to former Ind. Code 35-50-2-8(b), a prior unrelated felony conviction under Ind. Code 9-30-10-16 (habitual traffic violator), Ind. Code 9-30-10-17 (operating after a lifetime suspension), Ind. Code 9-12-3-1 (repealed), or Ind. Code 9-12-3-2 (repealed) could not be used to support a sentence as a habitual offender.

Parrett v. State, 800 N.E.2d 620 (Ind. Ct. App. 2003) (though part of a plea agreement, trial court imposed an illegal sentence on defendant when it

enhanced his sentence for operating vehicle after driving privileges were forfeited for life under Indiana's general habitual offender statute).

Effective July 1, 2014

It is true that Ind. Code 35-50-2-8 no longer states that a prior unrelated conviction for habitual traffic violator under Ind. Code 9-30-10-16 or a prior unrelated conviction for operating after a lifetime suspension under Ind. Code 9-30-10-17 may not be used to support a sentence as a habitual offender.

***However*, the common law restriction against double enhancements still exists.** See Ross v. State, 729 N.E.2d 113 (Ind. 2000); Freeman v. State, 658 N.E.2d 68 (Ind. 1995); Stanek v. State, 603 N.E.2d 152 (Ind. 1992) (Class C felony HTV conviction cannot be enhanced under HO statute); Cardwell v. State, 666 N.E.2d 420 (Ind. Ct. App. 1996); Burp v. State, 672 N.E.2d 439 (Ind. Ct. App. 1996).

BUT SEE: Tuell v. State, 118 N.E.3d 33 (Ind. Ct. App. 2019) (plain language of I.C. 35-50-2-8(e) explicitly authorizes level 5 felony to operating a motor vehicle after lifetime license forfeiture to be enhanced again under habitual offender statute),

(c) Limited narcotics convictions – Effective July 1, 2014

Ind. Code 35-50-2-8 no longer provides that the State may not seek to have a person sentenced as an habitual offender if the felony committed against another person was not a serious one, such as murder and rape, or if the offense was a certain kind of drug offense, or if the total number of unrelated convictions a person has for certain dealing offenses does not exceed one.

2. Bifurcation

If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing under Ind. Code 35-38-1-3. The role of the jury is to determine whether the defendant has been convicted of the unrelated felonies. The state or defendant may not conduct any additional interrogation or questioning of the jury during the habitual offender part of the trial. Ind. Code 35-50-2-8(h).

a. Bifurcation Also Required for Serious Violent Felon Enhancement

See Hines v. State, 801 N.E.2d 634 (Ind. 2004) ("while it is generally true that the State is entitled to prove its case by evidence of its own choice... the United States S.Ct. has determined that this general rule has virtually no applicability where" the issue is a Defendant's legal status independent of the criminal behavior later charged against him. Old Chief v. United States, 519 U.S. 172, 186-187 (1997)); see also Gray v. State, 841 N.E.2d 1210 (Ind. Ct. App. 2007), *trans. denied*.

3. Term of enhancement

a. Comparison Chart of Current and Former HO Enhancement Statutes

	Effective July 1, 2014	1993 – 2014	1985 – 1993	Pre-1985
General Rule	murder & level 1 through level 4 felonies: 6-20 yrs level 5 & 6 felonies: 2-6 yrs. Non-suspendible	advisory < enhancement < 3 times advisory; 30 year maximum	A, B, C felony: 30 years, with exceptions D felony: 8 years, with exceptions	30 years, with exceptions
Underlying Offense:				
D Felony		1 ½ to 4 ½ years	4 to 8 years	5 to 30 years
C Felony		4 to 12 years	5 to 30 years	5 to 30 years
B Felony		10 to 30 years	5 to 30 years	5 to 30 years
A Felony		30 years	5 to 30 years	5 to 30 years

b. Effective July 1, 2014

Ind. Code 35-50-2-8(i) provides:

> (i) The court shall sentence a person found to be a habitual offender to an additional fixed term that is between:
>
> (1) six (6) years and twenty (20) years, for a person convicted of murder or a Level 1 through Level 4 felony; or
>
> (2) two (2) years and six (6) years, for a person convicted of a Level 5 or Level 6 felony.

An additional term imposed under this subsection is non-suspendible.

c. July 1, 1993 -- July 1, 2014

The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three times the advisory sentence for the underlying offense. However, the additional sentence may not exceed 30 years. Ind. Code 35-50-2-8(h).

d. 1985 - July 1, 1993

(1) HO enhancement for Class A, B, C Felony

The court must sentence a person found to be an HO to an additional fixed term of 30 years to be added to the term of imprisonment imposed for the felony.

(a) Exceptions

(i) Ten years since last unrelated felony

If the court finds that ten years or more have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for the last prior unrelated felony conviction, and the date the person committed the felony for which sentence is currently being imposed, then the court may subtract up to 25 years from the 30-year term. Ind. Code 35-50-2-8(e).

(ii) D felony used as prior

If at least one of the offenses relied upon to establish that the person has accumulated two prior unrelated felonies is a Class D felony, then the court may subtract up to ten years from the 30-year term. Ind. Code 35-50-2-8(e).

(iii) D felony used as underlying felony

If the felony for which the person is being sentenced is a Class D felony, then the court may subtract up to 20 years from the 30-year term. Ind. Code 35-50-2-8(e).

(iv) D felonies used as priors and underlying felony

A person may not be sentenced as a HO under this section if all of the felonies relied upon for the sentencing of the person as an HO are Class D felonies. Ind. Code 35-50-2-8(h).

(b) Considerations

Pursuant to Ind. Code 35-50-2-8(g), if a reduction of the additional 30 year fixed term is authorized under subsection (e), the court may also consider the aggravators or mitigators in Ind. Code 35-38-1-7 to:

(1) decide the issue of granting a reduction; or

(2) determine the number of years, if any, to be subtracted under subsection (c).

(2) HO enhancement for Class D felony

The State may seek to have a person sentenced a habitual Class D felony offender by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two prior unrelated Class D felony convictions. Ind. Code 35-50-2-7.1 (repealed by P.L. 164-1993, § 14).

The court must sentence a person found to be a habitual Class D felony offender to an additional fixed term of eight years imprisonment to be added to the term imposed on the felony. Exceptions:

(a) If the court finds three years or more have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later), for the last prior unrelated Class D felony conviction and the date the person committed the Class D felony for which the person is being sentenced, then the court may subtract up to four years from the additional eight-year sentence. Ind. Code 35-50-2-7.1(e).

(b) If a reduction of the additional eight-year fixed term is authorized under subsection (e), the court may also consider the aggravating or mitigating circumstances in Ind. Code 35-38-1-7 to decide the issue of granting a reduction or determine the number of years, if any, to be subtracted under subsection (e). Ind. Code 35-50-2-7.1(f).

e. Prior to 1985

The court shall sentence a person found to be a habitual criminal to an additional fixed term of 30 years imprisonment to be added to the term of imprisonment imposed under section 3, 4, 5, 6, or 7 of this chapter. Ind. Code 35-50-2-8(e).

Johnson v. State, 593 N.E.2d 1181 (Ind. 1992) (both defendant's enhanced Class D felony and prior Class D felonies must have been committed prior to September 1, 1985, in order for defendant to have been sentenced under this section rather than subsequent Class D HO statute, Ind. Code 35-50-2-7.1).

(1) Exceptions

(a) Ten years since last unrelated felony

If the court finds that ten years or more have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for the last prior unrelated felony conviction, and the date the person committed the felony for which sentence is currently being imposed, then the court may subtract up to 25 years from the 30-year term. Ind. Code 35-50-2-8(e).

(b) Substance offenses used as priors

A person may not be sentenced as an HO under Ind. Code 35-50-2-8 if more than two of the felonies relied upon for sentencing the person as an HO are substance offenses as defined in Ind. Code 35-50-2-10(a).

(2) Considerations

Pursuant to Ind. Code 35-50-2-8(g), if a reduction of the additional 30-year fixed term is authorized under subsection (e), the court may also consider the aggravating or mitigating circumstances in Ind. Code 35-38-1-7 to:

(1) decide the issue of granting a reduction; or

(2) determine the number of years, if any, to be subtracted under subsection (c).

f. Which statute applies

There is a split in the Court of Appeals as to whether the version of Ind. Code 35-50-2-8 in effect at the time of the crime or at the time of the sentencing applies. As a general rule, the law in effect when the crime was committed controls sentencing. Isaacs v. State, 673 N.E.2d 757, 765 (Ind. 1996). However, the doctrine of amelioration provides for the application of the more lenient sentencing statute in effect at the time of the sentencing as opposed to the statute in effect at the time of the crime. The doctrine is only appropriate if the legislature intended the statute to apply to all the persons to whom such application would be possible and constitutional. Lunsford v. State, 640 N.E.2d 59, 60-61 (Ind. Ct. App. 1994).

(1) Crime committed before but sentenced after 1993 amendment

(a) Defendant benefits from amendment

Because the enactment of an ameliorative sentencing amendment is, in itself, a sufficient indication of legislative intent that it be applied to all to whom such application would be possible and constitutional, the more lenient provisions of the HO statute, which allow a reduced HO enhancement for class C and D felonies should apply to all those who are sentenced after its enactment on July 1, 1993.

> Elkins v. State, 659 N.E.2d 563 (Ind. Ct. App. 1995) (HO statute as amended reduces maximum sentences for Class C felonies and is therefore ameliorative as applied to defendant; because trial court erred when it enhanced defendant's sentence pursuant to law in effect at time he committed offense and not at time he was sentenced, case remanded and trial court directed to sentence defendant pursuant to statute in effect when he was originally sentenced).
>
> Bell v. State, 654 N.E.2d 856 (Ind. Ct. App. 1995) (defendant was entitled to be sentenced under version of statute in effect at time of sentencing because of ameliorative provisions of HO statute where defendant was convicted of class C felony and two class D felonies and new version of habitual offender statute reduced maximum enhancement for class C and class D felonies).

However, the Lunsford court held that because the legislature did not specifically evidence its intent to make the HO statute ameliorative, the doctrine does not apply.

> Lunsford v. State, 640 N.E.2d 59 (Ind. Ct. App. 1994) (defendant who was convicted of class B felony was properly sentenced on basis of HO statute in force at time of his conviction, rather than amended version in force at the time of sentencing because legislature neither expressed that purpose of amendment was to lessen severity of its former penalty, nor specified that amendment should be applied retroactively, and amendment did not reduce maximum enhancement of class B felony).

(b) Defendant does not benefit from amendment

Isaacs v. State, 673 N.E.2d 757 (Ind. 1996) (where judge stated additional thirty years was maximum time because court can impose up to three times presumptive, his statement clearly illustrated he was sentencing defendant under 1993 version of statute, which was error because offense occurred in 1992; because one of defendant's prior convictions was D felony, court was able to subtract ten years from enhancement under pre-1993 version which it could not do under amended version of HO statute).

g. Sentenced prior to 1993 amendment

Rowold v. State, 629 N.E.2d 1285 (Ind. Ct. App. 1994) (regardless of whether doctrine of amelioration applied to HO statute, new version of HO statute did not apply where defendant was sentenced prior to 1993 amendment and court merely corrected or modified sentence after 1993).

B. HABITUAL SUBSTANCE OFFENDER ("HSO")

Before July 1, 2014

The State may seek to have a person sentenced as a habitual substance offender for any substance offense by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two prior unrelated substance offense convictions. Ind. Code 35-50-2-10(b) (repealed effective July 1, 2014). A person is an HSO if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated two prior unrelated substance offense convictions. Ind. Code 35-50-2-10(e) (repealed effective July 1, 2014).

1. Definitions

a. Drug

"Drug" means a drug or a controlled substance (as defined in Ind. Code 35-48-1). Ind. Code 35-50-2-10(a)(1) (repealed effective July 1, 2014).

b. Substance offense

A "substance offense" is a Class A misdemeanor or felony in which the possession, use, abuse, delivery, transportation, or manufacture of alcohol or drugs is a material element of the crime. The term also includes an offense under Ind. Code 9-30-5 and under Ind. Code 9-11-2 (before its repeal). Ind. Code 35-50-2-10(a)(2) (repealed effective July 1, 2014). A conviction does not count for purposes of this subsection if it has been set aside or it is a conviction for which the person has been pardoned. Ind. Code 35-50-2-10(c) (repealed effective July 1, 2014).

Murray v. State, 798 N.E.2d 895 (Ind. Ct. App. 2003) (possession of chemical reagents or precursors with intent to manufacture methamphetamine cannot be used as predicate "substance offense" for purposes of enhancing a sentence under HSO statute; "immediate precursor" does not include precursors listed in Ind. Code 35-48-

4-14.5, and none of precursors defendant possessed – pseudoephedrine, ether, or lithium metal – are included in any schedule of controlled substances).

Marshall v. State, 493 N.E.2d 1317 (Ind. Ct. App. 1986) (trial court erred in denying defendant's motion for judgment on evidence at conclusion of HSO proceeding where statutory definition of substance offender in effect at time of defendant's trial did not include crime of possession).

c. Prior unrelated substance offense

After a person has been convicted and sentenced for a substance offense committed after sentencing for a prior unrelated substance offense, a person has accumulated two prior unrelated substance offense convictions. Ind. Code 35-50-2-10(c).

Morphew v. State, 672 N.E.2d 461 (Ind.Ct.App 1996) (prior misdemeanor conviction for operating while intoxicated could be considered to enhance defendant's sentence for subsequent operation while intoxicated offense under HSO statute, though defendant's prior misdemeanor conviction was uncounseled, so long as prior uncounseled misdemeanor conviction did not result in prison sentence).

Beldon v. State, 926 N.E.2d 480 (Ind. 2010) (a prior substance offense is not related to the underlying offense for which defendant is being sentenced simply because it is also being used to enhance the underlying OWI offense to a class D felony).

2. Bifurcation/trier of fact

If the person was convicted of the substance offense in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under Ind. Code 35-38-1-3. Ind. Code 35-50-2-10(d) (repealed effective July 1, 2014).

a. Bifurcation also Required for Serious Violent Felon Enhancement

See Hines v. State, 801 N.E.2d 634 (Ind. 2004) ("while it is generally true that the State is entitled to prove its case by evidence of its own choice ... the United States Supreme Court has determined that this general rule has virtually no applicability where" the issue is a Defendent's legal status independent of the criminal behavior later charged against him. Old Chief v. United States, 519 U.S. 172, 186-187 (1997)); see also Gray v. State, 841 N.E.2d 1210 (Ind. Ct. App. 2007), *trans. denied*.

3. Term of Enhancement

a. 3 to 8 years

The court shall sentence a person found to be a habitual substance offender to an additional fixed term of at least three years but not more than eight years imprisonment to be added to the term of imprisonment imposed under Ind. Code 35-50-2 or Ind. Code 35-50-3. Ind. Code 35-50-2-10(f) (repealed effective July 1, 2014).

b. Reduction of enhancement

If at least one of the following two situations occur, the court may reduce the additional fixed term. However, the court may not reduce the additional fixed term to less than one year. Ind. Code 35-50-2-10(f) (repealed effective July 1, 2014).

Pursuant to Ind. Code 35-50-2-10(g) (repealed effective July 1, 2014), if a reduction of the additional year fixed term is permissible, the court may also consider the aggravating circumstances in Ind. Code 35-38-1-7.1(a) and the mitigating circumstances in Ind. Code 35-38-1-7.1(b)to:

(1) decide the issue of granting a reduction; or

(2) determine the number of years, if any, to be subtracted, under subsection (f).

(1) Lapse of three or more years

The court finds that three years or more have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later), for the last prior unrelated substance offense conviction and the date the person committed the substance offense, for which the person is being sentenced as a habitual substance offender. Ind. Code 35-50-2-10(f)(1) (repealed effective July 1, 2014).

Hill v. State, 751 N.E.2d 273 (Ind. Ct. App. 2001) (where defendant has not been discharged from probation or parole, but rather is still on probation or parole at time of new offense, by statute, that person is still eligible for suspension down to one year of HSO; court was interpreting language of suspendibility statute, which is identical to HSO language).

(2) Certain substance offenses

(a) All of the substance offenses for which the person has been convicted are substance offenses under Ind. Code 16-42-19 or Ind. Code 35-48-4;

(b) the person has not been convicted of a substance offense listed in Ind. Code 35-50-2-2(b)(4) (repealed effective July 1, 2014) or this chapter; and

(c) the total number of convictions that the person has for:

i) dealing in or selling a legend drug under Ind. Code 16-42-19-27;
ii) dealing in cocaine or a narcotic drug (Ind. Code 35-48-4-1);
iii) dealing in a schedule I, II, or III controlled substance (Ind. Code 35-48-4-2);
iv) dealing in a schedule IV controlled substance (Ind. Code 35-48-4-3); and
v) dealing in a schedule V controlled substance (Ind. Code 35-48-4-4);

does not exceed one (1). Ind. Code 35-50-2-10(f)(2) (repealed effective July 1, 2014).

Peoples v. State, 929 N.E.2d 750 (Ind. 2010) (A defendant's instant dealing offense is to be counted in calculating the total number of unrelated felony convictions an individual has for drug dealing; thus, the State is not

prohibited from filing habitual offender charges with respect to a defendant who, if convicted on the underlying charges, will have accumulated two unrelated felony drug convictions by the time the habitual offender proceedings commence).

4. Double enhancements

a. Enhanced drug convictions

Because the legislature specified that a substance offense includes both a Class A misdemeanor or a felony in which the possession of drugs is a material element of the crime, a marijuana conviction enhanced from a Class A misdemeanor to a Class D felony based on a prior marijuana conviction can be used to also support a HSO enhancement. State v. Downey, 770 N.E.2d 794 (Ind. 2002).

b. Repeat OWI convictions

(1) After July 1, 1996

The General Assembly modified Ind. Code 35-50-2-10(a) (repealed effective July 1, 2014) as construed in Devore and Freeman (infra), with the enactment of P.L. 96-1996 and 97-1996. Thus, effective July 1, 1996, prior convictions under Ind. Code 9-30-5 (operating a vehicle while intoxicated) are available as predicate offenses for HSO enhancements. Haymaker v. State, 667 N.E.2d 1113, 1115 (Ind. 1996); Weaver v. State, 702 N.E.2d 750 (Ind. Ct. App. 1998). In other words, the requisite legislative direction exists to authorize an underlying elevated Class D felony to be enhanced by the specialized habitual substance offender enhancement even if one of the prior substances offenses is the same offense used to elevate the Class D felony. Beldon v. State, 926 N.E.2d 480 (Ind. 2010).

Schnepp v. State, 768 N.E.2d 1002 (Ind. Ct. App. 2002) (Indiana Supreme Court holding in Ross*, supra,* did not abrogate Weida, Roberts, and Weaver).

Roberts v. State, 725 N.E.2d 441 (Ind. Ct. App. 2000) (legislature evidenced its intent to allow Class D felony OWI to support HSO determination by amending HSO statute soon after the Indiana Supreme Court's decision in Freeman and Devore). See also Weida v. State, 693 N.E.2d 598 (Ind. Ct. App. 1998).

However, ex post facto requires that the 1996 amendment which expanded the definition of prior convictions to include D felony OWIs may not be applied retroactively. Thus, if the defendant committed the underlying D felony OWI prior to the 1996 amendment, that OWI may not be used to support the HSO. Only D felony OWIs committed after July 1, 1996, can be used to support an HSO. Settle v. State, 709 N.E.2d 34 (Ind. Ct. App. 1999); but see King v. State, 848 N.E.2d 305 (Ind. Ct. App. 2006).

(2) Prior to July 1, 1996

Because the legislative intent was for the more detailed and specific repeat OWI offender statute to supersede the more general HSO statute, trial court erred in enhancing punishment for second conviction of operating motor vehicle while

intoxicated (OWI) pursuant to both the repeat OWI offender statute and habitual substance offender statute. Freeman v. State, 658 N.E.2d 68, 71 (Ind. 1995); Devore v. State, 657 N.E.2d 740, 741 (Ind. 1995.

Morphew v. State, 672 N.E.2d 461 (Ind. Ct. App. 1996) (trial court properly enhanced A misdemeanors OWI pursuant to HSO statute when same OWI could not be enhanced under Ind. Code 9-30-5-3 because it did not occur within five years from last OWI).

c. Operating while HTV convictions

Howard v. State, 818 N.E.2d 469 (Ind. Ct. App. 2005) (Class D felony operating while HTV and defendant's habitual substance offender determination did not constitute an impermissible double enhancement).

C. HABITUAL SUBSTANCE OFFENDER

Effective July 1, 2014

Effective July 1, 2014, the habitual substance offender substance offender substance offender statute, Ind. Code 35-50-2-10, is repealed. However, effective January 1, 2015, there is a new offense under Ind. Code 9-30-15.5 for a person who is a "habitual vehicular substance offender." See infra.

D. HABITUAL VEHICULAR SUBSTANCE OFFENDER

Effective January 1, 2015

Effective January 1, 2015, Ind. Code 9-30-15.5-2 provides as follows:

(a) The State may seek to have a person sentenced as an habitual vehicular substance offender for any vehicular substance offense by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) or three (3) prior unrelated vehicular substance offense convictions. If the State alleges only two (2) prior unrelated vehicular substance offense convictions, the allegation must include that at least one (1) of the prior unrelated vehicular substance offense convictions occurred within the ten (10) years before the date of the current offense.

(b) For purposes of subsection (a), a person has accumulated two (2) or three (3) prior unrelated vehicular substance offense convictions only if:

(1) the second prior unrelated vehicular substance offense conviction was committed after commission of and sentencing for the first prior unrelated vehicular substance offense conviction;

(2) the offense for which the State seeks to have the person sentenced as a habitual vehicular substance offender was committed after commission of and sentencing for the second prior unrelated vehicular substance offense conviction; and

(3) for a conviction requiring proof of three (3) prior unrelated vehicular substance offense felonies, the third prior unrelated vehicular substance

offense conviction was committed after commission of and sentencing for the second prior unrelated vehicular substance offense conviction.

However, a conviction does not count for purposes of subsection (a) if it has been set aside or it is a conviction for which the person has been pardoned.

(c) A person is an habitual vehicular substance offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person has accumulated three (3) or more prior unrelated vehicular substance offense convictions at any time, or two (2) prior unrelated vehicular substance offense convictions, with at least one (1) of the prior unrelated vehicular substance offense convictions occurring within ten (10) years of the date of the occurrence of the current offense.

(d) The court shall sentence a person found to be a habitual vehicular substance offender to an additional fixed term of at least one (1) year but not more than eight (8) years of imprisonment, to be added to the term of imprisonment imposed under IC 35-50-2 or IC 35-50-3.

(e) Charges filed under this section must be filed in a circuit court or superior court.

1. Definition

"Vehicular substance offense" is defined by Ind. Code 9-30-15.5-1 as follows:

As used in this chapter, "vehicular substance offense" means any misdemeanor or felony in which operation of a vehicle while intoxicated, operation of a vehicle in excess of the statutory limit for alcohol, or operation of a vehicle with a controlled substance or its metabolite in the person's body, is a material element. The term includes an offense under IC 9-30-5, IC 9-24-6-15, and an offense under IC 9-11-2 (before its repeal). Ind. Code 9-30-15-5-1.

As in the habitual offender context, a HVSO finding is not a separate crime, nor does it result in a separate sentence. Instead, it enhances a sentence imposed. Weekly v. State, 105 N.E.3d 1133 (Ind.Ct. App. 2018) (trial court erred when it ordered the HVSO sentence to run separate and consecutive to defendant's Level 6 sentence for operating while intoxicated).

E. REPEAT SEXUAL OFFENDER

1. Procedure

The State may seek to have a person sentenced as a repeat sexual offender for a sex offense, by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated one prior unrelated felony conviction for a sex offense described in subsection (a). Ind. Code 35-50-2-14(b).

If the person was convicted of the sex offense in a jury trial, the jury shall reconvene to hear evidence in the enhancement hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall hear evidence in the enhancement hearing. Ind. Code 35-50-2-14 (d).

A person is a repeat sexual offender if the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person had accumulated one prior unrelated felony sex offense conviction. Ind. Code 35-50-2-14(e).

> Smith v. State, 825 N.E.2d 783 (Ind. 2005) (Indiana's repeat sexual offender statute is constitutional under both Indiana and United States Constitutions; jury determination is not required to impose recidivist sentencing enhancement).

2. Definition of sex offense

Pursuant to Ind. Code 35-50-2-14(a), a "sex offense" means a felony conviction under Ind. Code 35-42-4-1 through Ind. Code 35-42-4-9 or Ind. Code 35-46-1-3.

This would include attempts or conspiracy to commit the offenses in the statutes listed above, or an offense in another jurisdiction that is substantially similar to any of the above-listed offenses (see Ind. Code § 1-1-2-4). Arguably, the link between the repeat sex offender statute and the general reference to attempts, conspiracies and out-of-state convictions enacted in Title 1 is too attenuated to give fair warning of what conduct is prohibited to meet the requirements of due process. See Healthscript, Inc. v. State, 770 N.E.2d 810, 812 (Ind. 2002).

Prior to July 1, 2009, when the legislature amended Ind. Code 35-50-2-14, attempt and conspiracy crimes were not listed as sex offenses for purposes of the repeat sex offender enhancement, and thus were not included as sex offenses. Wright v. State, 881 N.E.2d 1018 (Ind. Ct. App. 2008).

3. Definition of prior unrelated felony sex offense conviction

Pursuant to Ind. Code 35-50-2-14(c), after a person has been convicted and sentenced for a felony under Ind. Code 35-42-4-1 through Ind. Code 35-42-4-9 or Ind. Code 35-46-1-3, or for an attempt or conspiracy to commit an offense under those code sections after having been sentenced for a prior unrelated sex offense, the person has accumulated one prior unrelated felony conviction. However, a conviction does not count for purposes of this subsection if:

(1) it has been set aside; or

(2) it is one for which the person has been pardoned.

4. Term of enhancement

The court may sentence a person found to be a repeat sexual offender to an additional fixed term that is the advisory sentence for the underlying offense. However, the additional sentence may not exceed ten years. Ind. Code 35-50-2-14(f).

> Primmer v. State, 857 N.E.2d 11 (Ind. Ct. App. 2006) (repeat sexual offender statute authorizes neither twelve-year sentence identified at sentencing hearing, nor the ten-year sentence actually imposed, where underlying felony was class C felony child molesting; Court *sua sponte* remanded to issue amended sentencing order).

5. Double enhancement implications

Golden v. State, 862 N.E.2d 1212 (Ind. Ct. App. 2007) (the same prior sex convictions used to enhance defendant's sentence under the repeat sex offender statute could be used as aggravators on the underlying sentence).

F. JUVENILE DETERMINATE SENTENCING

1. Purpose of statute

Juvenile determinate sentencing serves a different function from a habitual offender status; rather than dealing with juveniles who are "a most serious threat to our society," it provides an alternative means of rehabilitating frequent offenders. Juveniles above a certain age who are a "most serious threat" are instead automatically subject to adult courts or can be waived there. N.D.F. v. State, 775 N.E.2d 1085 (Ind. 2002). Ind. Code 31-30-1-4; Ind. Code 31-30-3-5.

2. Application to juveniles with multiple adjudications

Ind. Code 31-37-19-10 applies to a juvenile who:

(1) is adjudicated a delinquent child for an act that if committed by an adult would be:
   (a) a felony against a person;
   (b) a Level 1, Level 2, Level 3, or Level 4 felony that is a controlled substances offense under IC 35-48-4-1 through IC 35-48-4-5; or
   (c) burglary as a Level 1, Level 2, Level 3, or Level 4 felony under IC 35-43-2-1;

(2) is at least fourteen (14) years of age at the time the child committed the act for which the child is being placed; and

(3) has two (2) unrelated prior adjudications of delinquency for acts that would be felonies if committed by an adult.

The Court may adjudicate the child a delinquent and place him or her in a DOC facility under Ind. Code 31-37-19 for not more than two years. Ind. Code 31-37-19-10. The DOC may not reduce any sentence ordered under this statute. Ind. Code 31-37-19-10(c).

K.L.N. v. State, 881 N.E.2d 39, n.4 (Ind. Ct. App. 2008) (where juvenile court made no finding of two prior unrelated adjudications for acts that would be considered felonies if committed by an adult, Ind. Code 35-37-19-10 could not justify disposition).

A finding of juvenile determinant sentencing does not require a separate charging information, proof of prior charges beyond a reasonable doubt, or a jury determination of the defendant's status, as required by the HO statute. N.D.F. v. State, 775 N.E.2d 1085 (Ind. 2002).

N.D.F. v. State, 775 N.E.2d 1085 (Ind. 2002) (overruling W.T.J. v. State, 713 N.E.2d 938 (Ind. Ct. App. 1999), despite wording similar to HO statute, sequential requirements of HO statute do not apply and the meaning of "two unrelated prior adjudications of delinquency" merely requires that the earlier adjudications are independent of the instant offense; the court should use a procedure similar to that used in sentencing, finding a

history of delinquent acts as an aggravating circumstance that qualified the juvenile for determinant sentencing).

III. PROCEDURE

A. JURISDICTION

A county court which is given jurisdiction over Class D felonies by statute also has jurisdiction over HO proceedings. Pitts v. State, 410 N.E.2d 1387, 1391 (Ind. Ct. App. 1980).

B. PLEADINGS

1. Must file separate from charging instrument

A habitual allegation must be filed on a separate page from the charging instrument. Ind. Code 35-50-2-8(a) (HO); Ind. Code 35-50-2-10(b) (HSO) (repealed effective July 1, 2014).

a. Failure to file on separate page is error

Failure to include HO charge on a separate page in amended information is error. Sears v. State, 456 N.E.2d 390, 393 (Ind. 1983); Anderson v. State, 439 N.E.2d 558, 560 (Ind. 1982). But see Kindred v. State, 540 N.E.2d 1161, 1171-72 (Ind. 1989).

Murphy v. State, 499 N.E.2d 1077 (Ind. 1986) (where HO count was typed on separate piece of paper attached to page labeled "Amended Information" which recounted four underlying offenses, as HO charge should always be attached to original information on separate page, form of HO charge was proper).

Griffin v. State, 439 N.E.2d 160 (Ind. 1982) (questioned on other grounds by Woodson v. State, 778 N.E.2d 475, 478 (Ind. Ct. App. 2002)) (where State amended information and later filed pleading titled "Notice of Intent to Seek HO Status," which was not under oath, HO charge should have been dismissed because pleading was not part of charging information).

b. May file HO for each count

Kelly v. State, 452 N.E.2d 907 (Ind. 1983) (in consolidated trial, where it was clear that two separate crimes were committed involving two separate victims, sentencing defendant as HO in two separate causes was proper, as HO sentences were enhancement of sentences in two separate crimes).

PRACTICE POINTER: If the defendant is found to be an HO under both causes, the court may not order the two HO enhancements to run consecutively. Starks v. State, 523 N.E.2d 735 (Ind. 1988); Weaver v. State, 676 N.E.2d 22, 26 (Ind. Ct. App. 1997), *trans. denied*. This is so even when the underlying sentences are mandatory consecutive. Breaston v. State, 907 N.E.2d 992, 995 (Ind. 2009). See also Farris v. State, 907 N.E.2d 1057 (Ind. Ct. App. 2009), Smith v. State, 774 N.E.2d 1021 (Ind. Ct. App. 2002), *trans. denied* (trial court improperly sentenced D to consecutive habitual offender enhancements, even though sentencing did not take place in single proceeding); Ingram v. State, 761 N.E.2d 883 (Ind. Ct. App. 2002) (although defendant's consecutive HO sentences did not rise from single criminal trial, they did arise from single sentencing proceeding & therefore, trial court erred when it ordered HO sentences to run consecutively)); and McCotry v. State, 722 N.E.2d 1265 (Ind. Ct. App. App. 2000) (trial court exceeded its authority by sentencing defendant to consecutive HO enhancements).

2. Required safeguards

The habitual offender allegation must contain all of the procedural matters and safeguards of the original and underlying charges in that they are brought by sworn affidavit contained in an information and endorsed by the prosecuting attorney, setting out facts sufficient and adequate for the defendant to defend and to plead to such allegations. Griffin v. State, 439 N.E.2d 160, 165 (Ind. 1982) (questioned on other grounds by Woodson v. State, 778 N.E.2d 475, 478 (Ind. Ct. App. 2002)).

Clark v. State, 561 N.E.2d 759 (Ind. 1990) (reversal of HO conviction was not required because count of amended information was not signed by prosecutor, where motion for leave to amend count was signed by deputy prosecutor, thus satisfying purpose of statutory requirement for signature).

Anderson v. State, 439 N.E.2d 558 (Ind. 1982) (trial court erred in denying defendant's motion to dismiss State's HO charge where it was not sworn to as required by former Ind. Code 35-3.1-1-2 (now see Ind. Code 35-34-1-2), and where, in failing to parallel language of this section, charge did not advise defendant of what he was charged with in order to enable him to prepare his defense).

3. Specificity of HO allegation

Because an accused has the constitutional right to have notice and an opportunity to be heard regarding a recidivist charge, the information and accompanying affidavit together must inform the defendant of the nature of the charge and enable him to anticipate the proof and prepare his defense in advance of trial. Perry v. State, 541 N.E.2d 913, 919 (Ind. 1989); Kindred v. State, 540 N.E.2d 1161, 1182 (Ind. 1989).

a. Court and county

Prior convictions need not be set out in any particular order or form in an indictment or information. McCormick v. State, 262 Ind. 303, 317 N.E.2d 428, 429 (1974). However, pleading must state the court and county in which the alleged convictions were obtained. Shutt v. State, 233 Ind. 120, 117 N.E.2d 268, 271 (1954).

b. Dates of commission

Facts alleged in charging information must show dates defendant committed prior felonies, not simply the date the defendant was convicted of the two prior felonies. Roe v. State, 598 N.E.2d 586, 588 (Ind. Ct. App. 1992).

Webster v. State, 628 N.E.2d 1212 (Ind. 1994) (charging document sufficiently alleged commission date of predicate offense where phrase "on or about" was used). See also Gardner v. State, 641 N.E.2d 641 (Ind. Ct. App. 1994).

c. Alleging more than two prior convictions

The State may allege or offer proof of more than two unrelated felony convictions, with the additional convictions considered "harmless surplusage." Waye v. State, 583 N.E.2d 733, 734 (Ind. 1991).

Duff v. State, 508 N.E.2d 17 (Ind. 1987) (although third offense was not prior unrelated felony conviction, allegation of third conviction was mere surplusage).

However, where proof of more than two felonies includes one or more felonies that do not meet the statutory criteria and general HO verdict is returned, retrial on HO is required. Nash v. State, 545 N.E.2d 566 (Ind. 1989).

Addtionally, introduction of evidence of uncharged crimes may be reversible error. Gibbs v. Van Natta, 329 F.3d 582 (7th Cir. 2003).

Gibbs v. Van Natta, 329 F.3d 582 (7th Cir. 2003) (appellate counsel was deficient in failing to argue that State's use of 39 uncharged burglaries undermined defense on habitual offender charge; however, reversal was not required because two prior felony convictions were still properly proved).

4. Procedure for challenging information

Pursuant to Ind. Code 35-34-1-4(b)(1), the sufficiency of the information must be challenged by a motion to dismiss no later than twenty days prior to the omnibus date for felonies or ten days for misdemeanors, and if this procedure is not followed, any error regarding defects in the information is waived. Foster v. State, 526 N.E.2d 696, 698 (Ind. 1988).

5. Variance between charge and proof at trial

Where a defendant cannot show he was prejudiced or misled by the variance between the HO charge and the proof at trial, the variance will not require reversal.

Harmon v. State, 518 N.E.2d 797 (Ind. 1998) (variance between dates of prior convictions in information and those proven by State's exhibits was not material and fatal, as there was no showing that defendant was misled in any way by variance).

Goliday v. State, 526 N.E.2d 1174 (Ind. 1988) (where HO count charged that defendant was convicted of "entering to commit felony," whereas sentencing order contained heading "first degree burglary" and record reflected that defendant had pled guilty to lesser offense of entering to commit felony arising out of original first-degree burglary

charge, inconsistency was insufficient to impair either admissibility of sentencing order or sufficiency of evidence supporting HO determination).

Morgan v. State, 440 N.E.2d 1087 (Ind. 1982) (variance between information on HO charge, which indicated that one of defendant's prior convictions was for robbery, and proof introduced at trial, which showed that defendant's prior conviction was for armed robbery, did not require reversal where date, court and cause number alleged were all identical, defendant himself referred to his armed robbery conviction as robbery conviction in memorandum in support of pretrial motion to dismiss, and defendant failed to show any unfairness caused by variance).

Page v. State, 271 Ind. 670, 395 N.E.2d 235 (1979) (where information charging defendant with being HO stated that defendant was convicted of arson in "Hills County, New Hampshire" while evidence showed that he was convicted in Hillsborough County, there was no fatal variance because Hills County could be considered abbreviation of Hillsborough County) (*overruled on other grounds* by Rhyne v. State, 446 N.E.2d 970 (Ind. 1983)).

6. Amending pleadings

a. Adding HO count

An amendment of an indictment or information to include an HO charge under Ind. Code 35-50-2-8 must be made at least 30 days before the commencement of trial. However, upon a showing of good cause, the court may permit the filing of an HO charge at any time before the commencement of the trial if the amendment does not prejudice the substantial rights of the defendant. Ind. Code 35-34-1-5(e).

Timberlake v. State, 679 N.E.2d 1337 (Ind. Ct. App. 1997) (Ind. Code 35-34-1-5(e) is not ameliorative sentencing amendment to which doctrine of amelioration would apply; thus, amendment to Ind. Code 35-34-1-5(e) applied only to charges which were filed after July 1, 1993).

Cox v. State, 38 N.E.3d 702 (Ind. Ct. App. 2015) (although defendant was charged with dealing in cocaine before July 1, 2014, he was not entitled to have his sentence enhanced under the more lenient new habitual offender statute because the savings clause in Ind. Code 1-1-5.5-21 provides the doctrine of amelioration does not apply to crimes committed before July 1, 2014).

(1) Good cause

"Good cause" is not defined in the statute, but it must require something more than lack of prejudice. Attebury v. State, 703 N.E.2d 175 (Ind. Ct. App. 1998), *overruled on other grounds by* Williams v. State, 735 N.E.2d 785 (Ind. 2000).

The burden is on the State to make a showing of good cause and such showing should be reflected in the record. White v. State, 962 N.E.2d 511, 518 (Ind. 2012) ("Although we express no opinion on what the record must contain in this hypothetical circumstance, we are not convinced by the State's assertion that we should infer a showing of good cause in this case because 'it is clear' good cause existed.").

Williams v. State, 735 N.E.2d 785 (Ind. 2000) (fact that State and defendant were engaging in plea negotiations up until date HO enhancement was filed constituted good cause to amend). See also Land v. State, 802 N.E.2d 45 (Ind. Ct. App. 2004); Falls v. State, 797 N.E.2d 316 (Ind. Ct. App. 2003); and Johnican v. State, 804 N.E.2d 211 (Ind. Ct. App. 2004).

Campbell v. State, 161 N.E.3d 371, 377 (Ind. Ct. App. 2020) (although State filed notice of intent to file HO enhancement and relevant discovery documents months before amendment, it was abuse of discretion to allow late amendment with no evidence of ongoing, bona fide plea negotiations between State and defendant, and when State had ample opportunity within statutory time frame to file amendment and offered no reason why it could not have filed amendment sooner).

Attebury v. State, 703 N.E.2d 175 (Ind. Ct. App. 1998), *overruled on other grounds*, 735 N.E.2d 785 (trial court erred by allowing State to file HO count three days before trial without making affirmative finding of good cause for untimely addition). See also Hooper v. State, 779 N.E.2d 596 (Ind. Ct. App. 2002).

Blanchard v. State, 802 N.E.2d 14 (Ind. Ct. App. 2004) (good cause for belated filing existed when State believed HO information had been timely filed and provided copy of information to defendant, but trial court's file lacked the date stamped original copy, and defendant did not show prejudice).

Watson v. State, 776 N.E.2d 914 (Ind. Ct. App. 2002) (trial court acted within its discretion in finding that State had good cause to allow belated HO amendment, where State was unaware of defendant's additional felony charge to support HO allegation until after statutory deadline).

PRACTICE POINTER: Because there is little case law on what constitutes "good cause" under Ind. Code 35-34-1-5(e), analogize to other statutory provisions allowing delays based on good cause. See, e.g., Chapter 3, *Sentencing Procedure*, Subsection I.B., *Good Cause*.

(2) After court accepts plea agreement

A charge amended to add a habitual allegation after a plea of guilty is entered to the original charge was permissible and creates a new sentence; however, where the court then fails to advise the defendant of the sentencing ramifications of the habitual allegation, the defendant should be permitted to withdraw his plea. State v. Hicks, 453 N.E.2d 1014, 1020-21 (Ind. 1983).

However, a 2013 amendment substituted "at least 30 days before commencement of trial" for "not more than 10 days after omnibus date" in Ind. Code 35-34-1-5(e).

(3) Request for continuance required if trial date set

If a trial court permits a belated HO filing when a trial date has already been set, the defendant must move for a continuance in order to preserve the issue for appeal, even if the defendant is seeking a speedy trial. The defendant can seek more time to prepare for the HO enhancement and still proceed on schedule for the speedy trial of

the main charge. Williams v. State, 735 N.E.2d 785, 789 (Ind. 2000); Blanchard v. State, 802 N.E.2d 14 (Ind. Ct. App. 2004). If no trial date has been set when the HO charge is filed, a motion for continuance is not needed. Falls v. State, 797 N.E.2d 316 (Ind. Ct. App. 2003).

A 2013 amendment to Ind. Code 35-34-1-5(e) provides:

If the court permits the filing of a habitual offender charge less than thirty (30) days before the commencement of trial, the court shall grant a continuance at the request of the:

(1) state, for good cause shown; or

(2) defendant, for any reason.

b. Amending HO charge

An amendment of the habitual allegation during trial as to the date of the prior conviction so as to conform the charge to the evidence is permissible. Wright v. State, 467 N.E.2d 22, 25 (Ind. 1984); Hudson v. State, 443 N.E.2d 834, 836-37 (Ind. 1983).

State v. McFarland, 134 N.E.3d 1027 (Ind. Ct. App. 2019) (State's proposed amendment to HO charge replaced prior theft conviction with felony conviction for CHWOL would have prejudiced defendant's substantial rights where proposed amendment was filed less than two business hours before trial and proposed amendment implicated D's 6th Amendment rights by requiring defendant's attorney to modify defense on day of trial), trans. denied.

Wheeler v. State, 95 N.E.3d 149 (Ind. Ct. App. 2018) (trial court did not abuse its discretion by allowing State, on the last day of trial, to amend its HVSO charge by removing one of the three predicate convictions the State had originally cited because the amendment did not prejudice the defendant and only two predicate charges were necessary).

Nunley v. State, 995 N.E.2d 718 (Ind. Ct. App. 2013) (State not permitted to amend information to substitute allegation of prior conviction for drug possession (which was impermissible predicate offense) for prior theft convictions after jury impaneled. Amendment was one of substance and prejudiced D's substantial rights by drastically changing available defenses.). But see Smith v. State, 490 N.E.2d 300, 304 (Ind. 1986) (amendment during trial to substitute one prior felony for another that defendant admitted to during trial was not error where D did not ask for continuance and failed to show prejudice), trans. denied.

Cornett v. State, 536 N.E.2d 501 (Ind. 1989) (correction, by amendment, of error as to location of prior conviction in information alleging HO status was not prejudicial to defendant in that amendment did not change theory of prosecution or character of offense).

Haymaker v. State, 528 N.E.2d 83 (Ind. 1988) (State was properly allowed to amend HO information to reflect modification of prior burglary conviction absent showing of prejudice; cause number of prior conviction remained unchanged so defendant could not allege that amendment to theft conviction was surprise for which he could

not have been prepared or that identity of convictions used for HO purposes were unknown to him).

Stringer v. State, 690 N.E.2d 788 (Ind. Ct. App. 1998) (information could be amended to add three additional prior felony convictions to HO allegation, where accused offered no indication that he could have presented defense or was otherwise prejudiced). See also Denton v. State, 496 N.E.2d 576 (Ind. 1986).

C. ARRAIGNMENT

It is appropriate procedure to conduct an arraignment of an HO charge, but failure to conduct such an arraignment does not present grounds for reversal in the absence of prejudice. Foster v. State, 526 N.E.2d 696, 698 (Ind. 1988); Ashley v. State, 493 N.E.2d 768, 771 (Ind. 1986); Shelton v. State, 490 N.E.2d 738, 743 (Ind. 1986); Edwards v. State, 479 N.E.2d 541, 548 (Ind. 1985).

D. HABITUAL OFFENDER HEARING

An HO proceeding is designated as a sentencing hearing and such proceedings are not necessarily governed by all the statutes and cases dealing with trial procedure. Muse v. State, 419 N.E.2d 1302, 1305 (Ind. 1981).

PRACTICE POINTER: When attempting to apply a statute or trial rule to an HO proceeding, see Poore v. State, 685 N.E.2d 36 (Ind. 1997), which sets forth policy considerations and arguments of why an HO determination should be treated like a trial on the issue of guilt.

1. Bifurcated trial required

If the person was convicted of the felony in a jury trial, the jury shall reconvene for the HO sentencing hearing. If the trial was to the court or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing under Ind. Code 35-38-1-3. Ind. Code 35-50-2-8(h). Thus, the HO phase of the proceeding is not a separate trial but is a bifurcated continuation of the entire proceeding. Wine v. State, 539 N.E.2d 932, 936 (Ind. 1989).

Stone v. State, 599 N.E.2d 616 (Ind. Ct. App. 1992) (where defendant entered guilty plea to underlying felony charge, it was erroneous pursuant to Ind. Code 35-50-2-8(c) for trial court to convene jury to hear evidence on HO enhancement).

Ramsey v. State, 853 N.E.2d 491 (Ind. Ct. App. 2006) (defendant did not explain how HO evidence prejudiced him in eyes of jury, so combined HO/aggravated circumstances hearing did not deny defendant right to fair trial).

a. Required by constitution

Due process and the right to a fair trial requires a bifurcated trial so that the jury is not informed of the defendant's prior convictions during the trial on the underlying offense. Griffin v. State, 439 N.E.2d 160 (Ind. 1982) (questioned on other grounds by Woodson v. State, 778 N.E.2d 475, 478 (Ind. Ct. App. 2002)); Turpin v. State, 435 N.E.2d 1, 3 (Ind. 1982); Lawrence v. State, 259 Ind. 306, 286 N.E.2d 830 (1972); Fletcher v. State, 505 N.E.2d 491, 493 (Ind. Ct. App. 1987).

b. Trifurcation not required by constitution

When the State charges a defendant with certain offenses which may be enhanced by virtue of prior convictions and also alleges that the defendant is an HO, the trial need not proceed in three separate phases. Shelton v. State, 602 N.E.2d 1017, 1020-21 (Ind. 1992).

2. Speedy trial requirement

Because an HO proceeding is a trial for purposes of CR 4(B), the time limits for speedy trial provided for in CR 4(B) apply to a retrial of an habitual offender count. Poore v. State, 685 N.E.2d 36 (Ind. 1997). However, retrial of HO enhancement is not barred despite time lapse between original enhancement or dismissal and reversal. Gibson v. State, 661 N.E.2d 865 (Ind. Ct. App. 1996) (trial court was authorized to proceed with HO enhancement after dismissal of charge has been reversed on interlocutory appeal, although convictions on underlying felonies occurred while dismissal of HO enhancement was on interlocutory appeal).

3. Defendant does not have right to be absent

Ziebell v. State, 788 N.E.2d 902 (Ind. Ct. App. 2003) (while a defendant has a right to be present at all stages of his trial, a defendant does not have a corollary right to be absent where he is otherwise available and his presence is required for a legitimate purpose, such as identification).

4. Jury

a. Purpose

The jury in HO proceeding merely determines, based upon the evidence adduced, whether or not the defendant is an HO as defined by the statute. In the context of the HO proceedings, the jury serves no sentencing function. Owens v. State, 427 N.E.2d 880, 886 (Ind. 1981). Any discretion to be exercised is for the court alone at sentencing. Wolfe v. State, 562 N.E.2d 414, 421 (Ind. 1990). However, the defendant can exercise her right to have the jury determine the law and the facts. The jury is permitted to render a verdict that the defendant is not a habitual offender even if it finds that the State has proven beyond reasonable doubt that the defendant has accumulated two prior unrelated felonies. Seay v. State, 698 N.E.2d 732 (Ind. 1998).

b. Number of jurors

Defendant is not denied due process when he is tried by a six-member jury on habitual count where underlying offense was a Class D felony, which requires only six-member jury. Dyer v. State, 460 N.E.2d 511, 513 (Ind. 1984); Newland v. State, 459 N.E.2d 384, 385-86 (Ind. 1984).

PRACTICE POINTER: If the underlying felony was enhanced to a Class C felony due to a prior conviction, the defendant is entitled to a 12-member jury. Henderson v. State, 670 N.E.2d 706 (Ind. 1998). Thus, the defendant should also be entitled to a 12- member jury during the HO phase of trial.

c. Impaneling a new jury

Defendant is not entitled to a new jury panel for the habitual portion of the trial. Wright v. State, 467 N.E.2d 22, 25 (Ind. 1984). Because, in a bifurcated trial, the jury is not asked to find that the defendant is guilty of another charge but merely to find the facts which would enhance the defendant's sentence, the defendant is not denied his right to trial by an impartial jury when the same jury is used in both phases of the trial. Dullen v. State, 496 N.E.2d 381, 383 (Ind. 1986); Ferguson v. State, 273 Ind. 468, 405 N.E.2d 902, 908 (1980); Wise v. State, 272 Ind. 498, 400 N.E.2d 114, 118-19 (1980).

However, impaneling a different jury to hear the habitual phase is not error when necessity requires it, even if the defendant moves to reconvene the original jury.

Carter v. State, 505 N.E.2d 798 (Ind. 1987) (because court's calendar necessitated continuance of trial on habitual count, new jury was properly impaneled).

Murphy v. State, 499 N.E.2d 1077 (Ind. 1986) (where first jury fails to reach agreement on HO determination, new jury may be impaneled). See also Funk v. State, 427 N.E.2d 1081 (Ind. 1981); McMillan v. State, 409 N.E.2d 612 (Ind. 1980).

Kalady v. State, 462 N.E.2d 1299 (Ind. 1984) (trial judge properly ordered presentence investigation and hearing where defendant was eligible for alternate misdemeanor treatment; new jury had to be impaneled because some of original jurors had seen publicity).

Pitts v. State, 439 N.E.2d 1140 (Ind. 1982) (where defendant was granted a retrial on habitual count because of improper testimony concerning communications between probation officer and defendant, there was no error in denying motion to reconvene original jury to hear retrial).

d. Voir dire

A defendant charged with being an HO does not have a constitutional right to conduct further voir dire examination before commencement of the habitual phase of the trial. Cornelius v. State, 467 N.E.2d 1200 (Ind. 1984); Sears v. State, 457 N.E.2d 192 (Ind. 1983); Short v. State, 443 N.E.2d 298, 304 (Ind. 1982); Ross v. State, 442 N.E.2d 981 (Ind. 1982).

e. Bailiff need not be re-sworn

Feliciano v. State, 467 N.E.2d 748 (Ind. 1984) (failing to swear bailiff before deliberations on habitual count not error where bailiff had been sworn three hours earlier on murder count and defendant could not demonstrate harm).

f. Jury instructions

(1) Instructions when impaneling a new jury

Court may instruct newly impaneled jury on matters necessary for them to understand to reach a verdict.

Beavers v. State, 506 N.E.2d 1085 (Ind. 1987) (not error in HO phase to instruct a jury newly impaneled because of remand, on fact that defendant had been convicted of burglary in trial).

Denton v. State, 496 N.E.2d 576 (Ind. 1986) (not error to give preliminary instruction cautioning newly impaneled jury not to speculate about underlying conviction or why they were being asked to determine whether defendant was HO where prior conviction supporting habitual had been set aside and defendant was being retried on amended HO count).

(2) Elements of HO determination

(a) Definition of prior unrelated felony

Failure to instruct the jury on the definition of a prior unrelated felony is fundamental error unless the evidence shows the proper sequence of convictions so the jury could not have found that the sequence was other than proper. Baxter v. State, 689 N.E.2d 1254 (Ind. Ct. App. 1997).

Burton v. State, 526 N.E.2d 1163 (Ind. 1988) (although court failed to instruct on proper sequence of felonies, error was harmless because evidence clearly showed proper sequence).

Lucas v. State, 499 N.E.2d 1090 (Ind. 1986) (court erred by instructing jury that they could find defendant to be HO if they found he was convicted of underlying felonies; however, error was cured by next instruction, which gave definition of prior unrelated felony convictions).

(b) Definition of felony

The judge may instruct the jury that the prior crimes that defendant was charged with having committed were felonies because determination of whether the offense is a felony is a question of law for the court and not a question of fact for the jury. Griffin v. State, 415 N.E.2d 60 (Ind. 1981). A court is not required to instruct the jury that a conviction which has been set aside or for which the defendant had been pardoned is not a felony conviction, if the defendant does not present any evidence that the prior convictions were invalid. King v. State, 531 N.E.2d 1154 (Ind. 1988).

(c) Waiver of issue

Dixon v. State, 470 N.E.2d 728 (Ind. 1984) (defendant waived any error by failing to object to instruction setting forth elements of HO status).

Baxter v. State, 689 N.E.2d 1254 (Ind. Ct. App. 1997) (defendant waived any error that resulted from court failing to give instruction by not tendering instruction on issue and by not raising issue on direct appeal).

(3) Instructions infringing on jury nullification right

> Article 1, Section 19 of the Indiana Constitution gives the jury the right to determine the law and the facts. Therefore, even if the jury finds the prior felony conviction, it still has the absolute right to refuse to find the defendant a habitual offender. Seay v. State, 698 N.E.2d 732 (Ind. 1998) (holding it error to instruct jury in HO phase that they were not to determine the law).

When a defendant asks to instruct the jury on its right to find the law and the facts during the habitual offender phase, it is reversible error for the trial court to refuse the instruction. Warren v. State, 725 N.E.2d 828 (Ind. 2000).

> Parker v. State, 698 N.E.2d 737 (Ind. 1998) (reversible error where trial court instructed jury over defendant's objection that jury "should" find defendant to be habitual offender if it found that State had proved predicate felonies). See also Sample v. State, 932 N.E.2d 1230 (Ind. 2010) (reversible error to instruct jury it "must" find defendant to be habitual offender if predicate felonies proved in light of "law and facts" instruction jury also received).

Erroneous jury nullification instruction may be harmless considering other instructions given.

> Flake v. State, 767 N.E.2d 1004 (Ind. Ct. App. 2002) (jury was instructed that if State proved elements beyond reasonable doubt, then State proved defendant was HO; although instruction was clearly erroneous, error was harmless because instruction was accompanied by another instruction which stated that jury has right to determine both law and facts and that instructions of court are best source in determining law).

Trial court need not instruct on jury nullification beyond telling jury: (1) it "may" find the defendant a habitual offender if State proved its case; and (2) that "under the Constitution of Indiana you have the right to determine both the law and facts. The Court's instructions are your best source in determining the law." Walden v. State, 895 N.E.2d 1182 (Ind. 2008).

> Walker v. State, 445 N.E.2d 571 (Ind. 1983) (trial court properly refused to instruct jury that if jury thought mandatory punishment for habitual offense was excessive, it should consider this in returning verdict; instead, trial court instructed jury that Ind. Const. made them judges of law and fact, but this did not mean that jury can make, repeal, disregard or ignore existing law).
>
> Walden v. State, 895 N.E.2d 1182 (Ind. 2008) (no abuse of discretion in refusing proposed instruction that "even where the jury finds the facts of the prerequisite prior felony convictions to be uncontroverted, the jury still has the unquestioned right to refuse to find the defendant to be a habitual offender at law").

NOTE: In his dissent in Walden, 895 N.E.2d 1183, Justice Rucker suggested this instruction should be given in the guilt phase of trial when requested: "Even where the jury finds that the State has proven the statutory elements of the offense beyond a reasonable doubt, the jury still has the unquestioned right to determine whether in this case returning a verdict of guilty promotes fairness and the ends of justice." Id. at 1189.

Depending on other instructions given, the trial court's error in refusing to give proper jury nullification instruction may be harmless. Hancock v. State, 737 N.E.2d 791 (Ind. Ct. App. 2000); Johnson v. State, 717 N.E.2d 887 (Ind. Ct. App. 1999).

Shouse v. State, 849 N.E.2d 650 (Ind. Ct. App. 2006) (where defendant read instruction during closing of HO phase, judge instructed jury concerning nullification during final instructions of guilt phase and nullification instruction was brought into jury room, trial court's refusal to re-read nullification instruction during HO phase was not reversible error).

PRACTICE POINTER: Indiana Pattern Jury Instructions No. 15.19, Habitual Offender Elements and No. 15.27, HSO Elements (repealed effective July 1, 2014), properly instruct, under Parker v. State, that the jury "may" find the defendant to a HO/HSO (HSO (repealed effective July 1, 2014) only if the State meets its burden. Unresolved is the issue of whether the holding in Parker v. State applies to similar instructions used in the guilt phase of the trial. Thus, counsel may argue that any jury instruction which instructs the jury that they "should," "must," or "shall" find the defendant guilty if they make certain factual findings violates Article I, Section 19 of the Indiana Constitution. For example, Indiana Pattern Jury Instruction 3.01, setting forth the elements of murder, may be in violation of Article I, Section 19.

(4) HO penalty

Because juries do not fulfill any function regarding sentencing, a court does not err by refusing to instruct jury as to the potential penalty for an HO. Little v. State, 275 Ind. 78, 415 N.E.2d 44 (1981); Erickson v. State, 438 N.E.2d 269 (Ind. 1982). But the judge may instruct the jury that the judge is solely responsible for assessing the penalty and that the jury should not be aware of the penalty for an HO. Griffin v. State, 415 N.E.2d 60 (Ind. 1981).

(5) Failure to testify on own behalf

Smith v. State, 422 N.E.2d 1179 (Ind. 1981) (because defendant admitted to jury that he had sustained prior convictions by testifying in earlier phase of trial and because of limited scope of HO proceedings, there was no basis on which jury could speculate on defendant's reason for not testifying in HO phase; thus, refusing to give an instruction concerning defendant's failure to testify did not violate his right against self-incrimination).

g. Verdicts

(1) Special verdict forms - in general

Special verdict forms may be used in HO proceedings but are not required. Parks v. State, 921 N.E.2d 826, 834 (Ind. Ct. App. 2001). Special verdict form may provide

blanks for checking off "yes" and "no" as to findings on prior convictions. Hensley v. State, 497 N.E.2d 1053, 1057 (Ind. 1986). However, the form may not imply that finding two prior convictions is the equivalent of finding that defendant is an HO. Seay v. State, 698 N.E.2d 732, 735 (Ind. 1998). The benefit of a special verdict form is that where the jury's verdict specifically identifies prior convictions on which its determination is based, and as long as at least two of the prior convictions were unrelated felonies, the HO determination will be upheld. Stiles v. State, 686 N.E.2d 886 (Ind. Ct. App. 1997).

McCollum v. State, 582 N.E.2d 804 (Ind. 1991) (providing jury with verdict form which asked them to decide whether defendant was or was not guilty of two underlying felonies, but which did not require jury to specifically state whether he was or was not HO, was not fundamental error, where there was no substantial potential for harm).

Broshears v. State, 604 N.E.2d 639 (Ind. Ct. App. 1992), *clarified on reh'g*, 609 N.E.2d 1 (Ind. Ct. App. 1993) (in case in which it was possible defendant was subject to different-sized sentence enhancement under either current or former HO statutes, depending on which prior felonies jury relied upon, trial court committed error by denying request to use special verdict forms).

(2) Special verdict forms - compliance with jury nullification right

Special verdict forms may violate Article 1, Section 19 of the Indiana Constitution because they deprive jurors of their right to be the finders of the law, as well as the facts. A special verdict form that does not allow the jury to find that the defendant committed the prior unrelated felonies but is still not a habitual offender denies the jury its right to determine the law and is erroneous, but not fundamental error. Smock v. State, 766 N.E.2d 401 (Ind. Ct. App. 2002).

(3) Contradictory verdict

Where the jury, in the matter of the HO charge, returned two verdicts, the first finding the historical facts essential to constitute the status of an HO, and the second stating that the defendant was not guilty of being an HO, the second apparently contradictory verdict was properly treated as surplusage, and judgment was rendered on the first. Rogers v. State, 226 Ind. 539, 82 N.E.2d 89 (1948), *cert. den'd*, 336 U.S. 940, 69 S.Ct. 743 (1949).

Bradford v. State, 453 N.E.2d 250 (Ind. 1983) (in HO proceeding, jury's use of word "guilty" is technically incorrect, but does not constitute reversible error, as addition of word "guilty" in verdict is mere surplusage).

h. Mistrial

Where the jury which found the defendant guilty of the underlying offense could not agree in the HO proceeding, the court may declare a mistrial and order a new trial limited to the HO question. State v. McMillan, 274 Ind. 167, 409 N.E.2d 612 (1980), *cert. denied*, 450 U.S. 1003, 101 S.Ct. 1714 (1981).

i. Waiver of right to jury

A defendant must be advised that if he or she waives the right to have a jury determine the issue of guilt, the defendant also waives the right to have a jury determine the HO count. Snyder v. State, 654 N.E.2d 15, 18 (Ind. Ct. App. 1995), *aff'd in part, rev'd in part*, 668 N.E.2d 1214 (Ind. 1996). Regardless of whether the right to a jury trial in HO proceedings is created solely by statute or is rooted in the U.S. and Indiana Constitutions, the safeguards and precautions attendant to the waiver of a jury trial apply to waiver of the HO jury hearing.

O'Connor v. State, 796 N.E.2d 1230 (Ind. Ct. App. 2003) (defendant's waiver of her right to jury trial upon underlying charges was not effective as to HO information which had yet to be filed; fact that defendant was aware that habitual could be filed did not show she knowingly, voluntarily and intelligently waived her right to a jury trial as to HO enhancement).

Snyder v. State, 654 N.E.2d 15 (Ind. Ct. App. 1995), *aff'd in part, rev'd in part*, 688 N.E.2d 1214 (Ind. 1996) (reversible error where defendant was not informed that guilty plea to underlying offenses waived right to jury trial on pending HO allegation; guilty plea was rendered unintelligent and involuntary).

Pryor v. State, 949 N.E.2d 366 (Ind. Ct. App. 2011) (advising defendant of right to have a jury hear "this case" resulted in valid jury waiver on HO count because "case" encompassed all stages of proceeding, including HO).
Carr v. State, 591 N.E.2d 640 (Ind. Ct. App. 1992) (where there was no proper waiver of right to jury at trial, denial of a jury at HO proceedings was also error;).

E. SENTENCING

1. Trial court's discretion

The trial court has no discretion to depart from the statute. Beasley v. State, 452 N.E.2d 982 (Ind. 1983); Turpin v. State, 435 N.E.2d 1 (Ind. 1982).

2. Choosing underlying felony

When a defendant is being sentenced for more than one felony, the trial court does have discretion in determining which felony to attach the HO enhancement. Hendrix v. State, 759 N.E.2d 1045 (Ind. 2001).

Tipton v. State, 765 N.E.2d 187 (Ind. Ct. App. 2002) (where conviction to which HO enhancement was attached is reduced from Class C felony to Class D felony on appeal, on remand, trial court did not abuse its discretion in transferring HO enhancement to more serious count that was not vacated or reduced).

3. Consecutive sentence

a. To underlying felony

Because the HO statute provides that the defendant's sentence imposed upon an HO finding shall enhance the sentence for the underlying conviction rather than impose a

separate penalty, it is error for the trial court to order the HO sentence to run consecutively to the sentences for the primary offenses. Dullen v. State, 496 N.E.2d 381 (Ind. 1986); Johnson v. State, 490 N.E.2d 333 (Ind. 1986); Perry v. State, 471 N.E.2d 270 (Ind. 1984); Smith v. State, 559 N.E.2d 338 (Ind. Ct. App. 1990); Golden v. State, 553 N.E.2d 1219 (Ind. Ct. App. 1990).

Wilson v. State, 465 N.E.2d 717 (Ind. 1984) (thirty-year term of imprisonment provided for HO finding was enhancement of sentence for underlying felony and not separate sentence which was to run consecutively or concurrently with another sentence).

b. To other HO enhancement

Trial court cannot order enhanced sentences based on HO determinations to be served consecutively. Starks v. State, 523 N.E.2d 735, 736 (Ind. 1988); Weaver v. State, 676 N.E.2d 22, 26 (Ind. Ct. App. 1997). For a more analysis, see Subsection V.2.b., *Constitutional Issues; Inappropriate*.

Breaston v. State, 907 N.E.2d 992 (Ind. 2009) (even when underlying sentences are required to run consecutively under Ind. Code 35-50-1-2(d) (requiring consecutive sentences when a person commits a second crime after being arrest for, but before, being discharged from a first crime), a trial court cannot order HO enhancements attached to the first and second crimes consecutively).

Smith v. State, 774 N.E.2d 1021 (Ind. Ct. App. 2002) (trial court improperly sentenced defendant to serve consecutive HO enhancements, even though sentencing did not take place in single proceeding).

Ingram v. State, 761 N.E.2d 883 (Ind. Ct. App. 2002) (even if both HO enhancements are based on different trials, HO enhancements cannot be run consecutively if arising from same sentencing hearing).

However, a defendant who receives a bargain from a plea agreement, may agree to serve illegal, consecutive HO enhancement.

Borders v. State, 854 N.E.2d 888 (Ind. Ct. App. 2006) (illegal sentence of consecutive habitual substance offender (HSO) enhancements did not invalidate plea). But see Crider v. State, 984 N.E.2d 618, 622 (Ind. 2013) (plea did not call for illegal sentence where it was silent on whether the HO enhanced sentence was to run consecutively or concurrently with the sentence imposed in another county).

Also, a trial court cannot order consecutive HSO enhancements. Venters v. State, 8 N.E.3d 708 (Ind. Ct. App. 2014).

Note: Effective July 1, 2014, Indiana no longer has HSO enhancements. See P.L.158-2013, § 664.

However, effective January 1, 2015, a person may be adjudicated as a *vehicular substance offender*. See Ind. Code 9-30-15.5. A person is a vehicular substance offender if the jury finds by proof beyond a reasonable doubt that the person has three prior unrelated vehicular substance convictions or two prior unrelated vehicular substance

convictions within ten years before the date of the current offense. See Ind. Code 9-30-15.5-2(c). The trial court shall sentence a vehicular substance offender to an additional term of at least one year but not more than eight years of imprisonment. See Ind. Code 9-30-15.5-2(d).

4. Suspendibility of enhancement – Pre July 1, 2014

There is a split in authority as to whether a HO or HSO (repealed effective July 1, 2014) enhancement is suspendible. One line of cases holds that a HO enhancement is suspendible if the underlying offense is suspendible. Collins v. State, 583 N.E.2d 761, 765 (Ind. Ct. App. 1991) (implicitly upheld in Stanek v. State, 603 N.E.2d 152 (Ind. 1992)); see also Bauer v. State, 875 N.E.2d 744 (Ind. Ct. App. 2007) (implying minimum HSO (repealed effective July 1, 2014) sentence would be suspendible if the underlying sentence was suspendible below the minimum) and Young v. State, 901 N.E.2d 624 (Ind. Ct. App. 2009). However, another line of cases hold that no part of a HO or HSO (repealed effective July 1, 2014) sentence is suspendible. Reffett v. State, 843 N.E.2d 1072 (Ind. Ct. App. 2006) (trial court erred when it suspended two years of the five-year HSO enhancement it imposed) and Howard v. State, 873 N.E.2d 685 (Ind. Ct. App. 2007) (although the trial court could not suspend any of the HO enhancement, the trial court could suspend the portion of the sentence on the underlying felony in excess of the minimum).

PRACTICE POINTER: Under former Ind. Code 35-50-2-2, a felony sentence was non-suspendible if the defendant had a prior unrelated felony; thus, older cases held that an HO or HSO enhancement was non-suspendible because, by definition, an HO always had a prior unrelated felony. State v. Williams, 430 N.E.2d 756, 758 (Ind. 1982); Atkins v. State, 550 N.E.2d 342, 343 (Ind. Ct. App. 1990). However, now a felony may be suspendible under Ind. Code 35-50-2-2, and thus, an enhancement based on a suspendible felony is also suspendible.

5. Suspendibility of enhancement – Effective July 1, 2014

Effective July 1, 2014, Ind. Code 35-50-2-8(i) does not allow a trial court to suspend an habitual offender term, stating, "[a]n additional term imposed under this subsection is non-suspendible."

6. Statement of reasons not required

There is no authority for the proposition that a trial court must set forth aggravating and mitigating circumstances explaining the particular HO enhancement chosen by the court. Instead, the decision is left to the trial court's discretion. Montgomery v. State, 878 N.E.2d 262, 268 (Ind. Ct. App. 2008) (*citing* Merritt v. State, 663 N.E.2d 1215, 1217 (Ind. Ct. App. 1996)).

> Lewis v. State, 800 N.E.2d 996 (Ind. Ct. App. 2003) (both State and defendant improperly analyzed defendant's 30-year HO sentence in relation to weighing aggravators and mitigators, as these factors are not relevant to a sentence enhancement).

However, a habitual sentence that is not justified may be held to be disproportional under the Indiana Constitution or inappropriate under Indiana Appellate Rule 7(B). See, e.g., Best v. State, 566 N.E.2d 1027 (Ind. 1991); Wilson v. State, 583 N.E.2d 742 (Ind. 1992).

7. Determination of whether to grant AMS or enhance to D felony

A court may withhold its decision whether to grant alternative misdemeanor sentencing ("AMS") to a defendant under Ind. Code 35-50-2-7 or whether an offense will be enhanced to a D felony until sentencing and after HO determination. However, in the case of a guilty verdict on a Class D felony, it would be a better practice for the court to determine whether or not it will withhold judgment for a Class D felony and enter judgment for a Class A misdemeanor prior to the trial on the status question but after considering the presentence report and arguments of counsel. If the court decides to enter judgment for a Class D felony it should do so and reserve the imposition of sentence for the felony until after the trial on the HO charge. Wright v. State, 467 N.E.2d 22, 25 (Ind. 1984); Gross v. State, 444 N.E.2d 296 (Ind. 1983).

Sears v. State, 457 N.E.2d 192 (Ind. 1983) (trial court did not err in failing to determine status of offense of perjury (Class D felony or Class A misdemeanor) prior to habitual proceeding).

IV. EVIDENCE

A. BURDEN OF PROOF

The State must prove beyond a reasonable doubt that the defendant has accumulated two prior unrelated felony [or substance offense] convictions. Ind. Code 35-50-2-8(g) (HO); Ind. Code 35-50-2-10(e) (HSO) (repealed effective July 1, 2014). The State must prove beyond a reasonable doubt that the defendant has accumulated one prior unrelated sex offense. Ind. Code 35-50-2-14(e) (repeat sexual offender).

B. SUFFICIENCY OF THE EVIDENCE

When the information and commitment documents show on their face distinct and separate offenses, and evidence of the underlying offenses come out during the guilt phase of the trial there has been statutory compliance. Knuckles v. State, 549 N.E.2d 85 (Ind. Ct. App. 1990).

1. Proving defendant's identity

The State must prove that the defendant is the same person who was convicted of the alleged prior felonies. Smith v. State, 243 Ind. 74, 181 N.E.2d 520 (Ind. 1962), *overruled on other grounds by* Seeglitz v. State, 500 N.E.2d 144 (Ind. 1986).

Identity may be proven by circumstantial evidence. Baxter v. State, 522 N.E.2d 362 (Ind. 1988); Patton v. State, 501 N.E.2d 436, 439 (Ind. 1986); Coker v. State, 455 N.E.2d 319 (Ind. 1983); Oster v. State, 992 N.E.2d 871 (Ind. Ct. App. 2013), *trans. denied*. However, there must be some evidence other than the similarity of names to identify the defendant as being the same person as that appearing in the record of other convictions. Brown v. State, 270 Ind. 399, 385 N.E.2d 1148 (1979); Sullivan v. State, 517 N.E.2d 1251 (Ind. Ct. App. 1988) (superseded by statute on other grounds as recognized by Allman v. State, 728 N.E.2d 230, 233-234 (Ind. Ct. App. 2000)).

Payne v. State, 96 N.E.3d 606 (Ind. Ct. App. 2018) (majority held that certified records matching defendant's name and date of birth were insufficient to prove identity), trans. denied.

Horton v. State, 51 N.E.3d 1154 (Ind. 2016) (State presented sufficient evidence that Defendent had previously been convicted of domestic battery despite fact that prior conviction's sentencing order was unsigned and a judicially noticed case file was never entered into the record; Ind. Evidence Rule 201(b)(5) now permits courts to take judicial notice of "records of the courts of this state").

Woods v. State, 654 N.E.2d 1153 (Ind. Ct. App. 1995) (evidence presented during HO phase of defendant's bench trial was insufficient to support enhancement of convictions for dealing in cocaine where State's exhibit regarding 1970 burglary listed race and date of birth different from defendant's race and date of birth).

Livingston v. State, 537 N.E.2d 75 (Ind. Ct. App. 1989) (State's evidence of 10 certified copies of BMV driving record showing "DWI-Liquor" notation on 9/27/82; 2) certified copy of docket sheet showing change of plea & sentence for DWI on 9/27/82; & 3) certified copy of abstract of Ct. record showing conviction for DWI on 9/27/82 did not prove defendant was same person who had been convicted previously; birth dates did not match on all documentation and State presented no additional evidence).

a. Certified records accompanied by supporting evidence

Certified copies of judgments or commitments containing same or similar name as defendant's may be introduced into evidence to prove conviction of prior offenses for purposes of HO determination; however, supporting evidence must exist to identify defendant as being same person named in document. Woods v. State, 654 N.E.2d 1153 (Ind. Ct. App. 1995). Supporting evidence may be circumstantial. Tyson v. State, 766 N.E.2d 715 (Ind. 2002).

Driver v. State, 467 N.E.2d 1186 (Ind. 1984) (where State attempted to prove theft conviction merely by oral testimony of prosecuting attorney and without showing any official written court records showing judgment of conviction, finding of HO was improper).

Smith v. State, 559 N.E.2d 338 (Ind. Ct. App. 1990) (where records linking defendant to prior conviction in different jurisdiction contained defendant's name but no other identifying information, records were insufficient to show prior conviction).

(1) Testimony

Where there is documentary proof of the existence of the prior convictions, the identity of the defendant and the sequence of events may be established by parol evidence. Powers v. State, 617 N.E.2d 545 (Ind. 1993).

(a) Court reporter

Coker v. State, 455 N.E.2d 319 (Ind. 1983) (court reporter's testimony that she heard defendant admit in another trial the same prior felonies specified on certified judgment and commitment orders was sufficient evidence of identification).

(b) Former attorney

Donnersbach v. State, 444 N.E.2d 1184 (Ind. 1983) (former attorney may testify at HO phase to confirm contents of documents which are public records and to identify defendant as the one to whom documents pertain since such testimony does not reveal anything confidential). See also Leavell v. State, 455 N.E.2d 1110 (Ind. 1983); Ziebell v. State, 788 N.E.2d 902 (Ind. Ct. App. 2003).

(c) Prosecuting attorney

Gentry v. State, 835 N.E.2d 569 (Ind. Ct. App. 2005) (although State used a prosecutor who was not involved in earlier conviction to introduce evidence of defendant's past felonies, defendant's date of birth and social security number were established and these matched those listed for defendant on charging informations for previous convictions; based on this evidence, a reasonable jury could find that individual discussed in documents was the defendant).

(d) Investigating officer

Bell v. State, 622 N.E.2d 450 (Ind. 1993) (HO charge can be supported by evidence of charging information for prior felony conviction, judgment, sentencing order, and testimony of investigating officer's prior arrest). See also Griffin v. State, 275 Ind. 107, 415 N.E.2d 60 (1981).

Hadley v. State, 496 N.E.2d 67 (Ind. 1986) (where sheriff testified that he heard defendant admit to committing prior felonies during hearing and transcript of that hearing was produced, along with certified copies of judgments and convictions, evidence was sufficient).

Estep v. State, 271 Ind. 525, 394 N.E.2d 111 (1979 (certified copies of prior convictions and testimony by investigating police officer were adequate to make prima facie case although there was no direct evidence that defendant was same person who was convicted), *overruled on other grounds by* Jones v. State, 438 N.E.2d 972 (Ind. 1982). See also Eckstein v. State, 526 N.E.2d 693 (Ind. 1988).

(e) Defendant

Trice v. State, 490 N.E.2d 757 (Ind. 1986) (defendant's testimony at trial on underlying felony in which he admitted prior convictions where State presented documents evidencing those convictions was sufficient evidence of identity).

(f) Parole officer

Maier v. State, 437 N.E.2d 448 (Ind. 1982) (parole officer's testimony that defendant once stated to him that he had been convicted in 1971 of automobile banditry, and documentation proving same, were sufficient proof of offense for purposes of finding that defendant was HO).

(2) Photographs and physical descriptions

Eckstein v. State, 526 N.E.2d 693 (Ind. 1988) (where documents showing three burglary convictions were accompanied by photograph of defendant, evidence was sufficient for HO finding).

Meredith v. State, 503 N.E.2d 880 (Ind. 1987) (introduction of properly authenticated commitment papers which contained photographs and physical description of defendant was sufficient evidence to support HO finding).

b. Pre-sentence reports from previous convictions

Reed v. State, 491 N.E.2d 182 (Ind. 1986) (evidence that defendant's social security number, birth date, and physical description matched information contained in presentence report for prior felony was sufficient evidence of identity).

Feliciano v. State, 467 N.E.2d 748 (Ind. 1984) (evidence that defendant had same address, date of birth, height, weight, eye and skin color, body build, and two distinctive tattoos (one being heart-shaped tattoo on his forehead) as individual of same name on presentence reports for two other felonies was sufficient to support jury inference that defendant was same man who committed two prior felonies).

c. Fingerprints

A match of fingerprints in state police central repository or in certified records with fingerprints taken from defendant is sufficient evidence from which jury can conclude that the defendant committed the prior convictions. Palmer v. State, 679 N.E.2d 887 (Ind. 1997); Duncan v. State, 274 Ind. 144, 409 N.E.2d 597 (1980).

See Glitz v. State, 500 N.E.2d 144 (Ind. 1986) (photos and fingerprints from two prior felonies were properly admitted and used to show that defendant was same defendant who committed two prior felonies).

Clay v. State, 440 N.E.2d 466 (Ind. 1982) (where defendant's fingerprints previously taken at state farm and DOC's diagnostic center were properly certified and admitted into evidence and were compared by expert witness to fingerprints taken in course of instant proceedings, it was unnecessary that expert have been present when earlier prints were taken).

Nelson v. State, 792 N.E.2d 588 (Ind. Ct. App. 2003) (trial court was unduly restrictive of defendant's right to cross-examine fingerprint expert at HO hearing in denying defendant's offer of proof; usually denial of an offer of proof is reversible error, but because expert testimony was mere surplusage to the HO phase and proper evidence existed of two prior felonies, error was deemed harmless).

Grant v. State, 870 N.E.2d 1049 (Ind. Ct. App. 2007) (defendant's fingerprints and the use of a gallery number unique to defendant used in both prior felony convictions was sufficient evidence to identify him as the defendant in the prior convictions).

2. Proving two prior unrelated felonies

Pre July 1, 2014

The State must prove beyond a reasonable doubt that the defendant has accumulated two prior unrelated felony convictions. Ind. Code 35-50-2-8(g).

Effective July 1, 2014

Under the new version of Ind. Code Ind. Code 35-50-2-8(b), (c), (d):

(a) A person convicted of murder or of a Level 1 through Level 4 felony is a habitual offender if the state proves beyond a reasonable doubt that:

(1) the person has been convicted of two (2) prior unrelated felonies; and

(2) at least one (1) of the prior unrelated felonies is not a Level 6 felony or a Class D felony.

(b) A person convicted of a Level 5 felony is a habitual offender if the state proves beyond a reasonable doubt that:

(1) the person has been convicted of two (2) prior unrelated felonies;

(2) at least one (1) of the prior unrelated felonies is not a Level 6 felony or a Class D felony; and

(3) if the person is alleged to have committed a prior unrelated:

(a) Level 5 felony;

(b) Level 6 felony;

(c) Class C felony; or

(d) Class D felony;

not more than ten (10) years have elapsed between the time the person was released from imprisonment, probation, or parole (whichever is latest) and the time the person committed the current offense.

(c) A person convicted of a Level 6 felony is a habitual offender if the state proves beyond a reasonable doubt that:

(1) the person has been convicted of three (3) prior unrelated felonies; and

(2) if the person is alleged to have committed a prior unrelated:

(i) Level 5 felony;

(ii) Level 6 felony;

(iii) Class C felony; or

(iv) Class D felony;

not more than ten (10) years have elapsed between the time the person was released from imprisonment, probation, or parole (whichever is latest) and the time the person committed the current offense.

a. Felony

A felony conviction is a "conviction in any jurisdiction, at any time with respect to which the convicted person might have been imprisoned for more than one year." It does not include a conviction with respect to which the person has been pardoned, or a conviction of a Class A misdemeanor under Ind. Code 35-50-2-7(b). Ind. Code 35-50-2-1.

Level 6 felony conviction – Effective July 1, 2014 until March 7, 2018

Ind. Code 35-50-2-1(a) defines a level 6 felony conviction as follows:

(a) As used in this chapter, "Level 6 felony conviction" means**:**

(1) a conviction in Indiana for:

(i) a Class D felony, for a crime committed before July 1, 2014; or

(ii) a Level 6 felony, for a crime committed after June 30, 2014: and

(2) a conviction, in any other jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year.

However, the term does not include a conviction with respect to which the person has been pardoned, or a conviction of a Class A misdemeanor entered under IC 35-38-1-1.5 or section 7(c) or 7(d) [IC 35-50-2-7(c) or IC 35-50-2-7(d)] of this chapter.

Level 6 felony conviction – Effective March 8, 2018

Ind. Code 35-50-2-1(a) defines a level 6 felony conviction as follows:

(a) As used in this chapter, "Level 6 felony conviction" means:

(1) a conviction in Indiana for:

(i) a Class D felony, for a crime committed before July 1, 2014; or

(ii) a Level 6 felony, for a crime committed after June 30, 2014: and

(2) a conviction, in any other jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year but less than two and one-half (2 1/2) years.

However, the term does not include a conviction with respect to which the person has been pardoned, or a conviction of a Class A misdemeanor entered under IC 35-38-1-1.5 or section 7(c) or 7(d) [IC 35-50-2-7(c) or IC 35-50-2-7(d)] of this chapter.

Calvin v. State, 87 N.E.3d 474 (Ind. 2017) (Prior to the amendment of the statute which took emergency effect on March 8, 2018, Ind. Code 35-50-2-1(a) (2014) counted all prior non-Indiana felonies count as Level 6 felonies).

In order to sustain finding of HO status, the State is not required to show that the defendant was incarcerated for the prior convictions, Havens v. State, 429 N.E.2d 618 (Ind. 1981), or that the sentence for the prior felony was completed. Yeagley v. State, 467 N.E.2d 730 (Ind. 1984).

(2) Felony or misdemeanor

(a) Question of law

The question of whether a past conviction is a felony or a misdemeanor is a question of law for the court and not a question of fact for the jury. Cain v. State, 594 N.E.2d 835, *modified on other grounds,* 599 N.E.2d 625 (Ind. 1992); Blatz v. State, 486 N.E.2d 990 (Ind. 1985); Galmore v. State, 467 N.E.2d 1173 (Ind. 1984).

Shelton v. State, 490 N.E.2d 738, 744 (Ind. 1986) (trial court may take judicial notice that particular offense constitutes felony).

(b) Convictions in other states

Convictions not within Indiana jurisdiction, including federal jurisdiction, are admissible in HO determinations. Denton v. State, 496 N.E.2d 576 (Ind. 1986). Whether or not another state in which a crime had been committed and in which the defendant was convicted classified such crime as a felony is not relevant for the purpose of establishing a prior felony conviction for the purpose of HO status in Indiana. Beach v. State, 496 N.E.2d 43 (Ind. 1986); Collins v. State, 275 Ind. 86, 415 N.E.2d 46, *cert. den'd,* 451 U.S. 991, 101 S.Ct. 2331 (1981); but see Hornbostel v. State, 757 N.E.2d 170 (Ind. Ct. App. 2001) (holding that evidence that prior crimes were felonies in Florida was sufficient to support court's finding that crimes were felonies for purpose of HO statute).

Harris v. State, 981 N.E.2d 610 (Ind. Ct. App. 2013), *trans. denied* (insufficient evidence defendant was habitual offender because his 1997 Illinois conviction for Manufacture/Delivery of Controlled Substance could not be counted as a predicate conviction because Illinois abstract of judgment is silent as to which drug defendant manufactured).

Bochner v. State, 715 N.E.2d 416 (Ind. Ct. App. 1999) (defendant's prior guilty plea to Missouri charge could not serve as prior unrelated felony because it resulted in suspended sentence and probation, which is not considered conviction under Missouri law, although charge could carry up to five-year sentence). See also Straub v. State, 567 N.E.2d 87 (Ind. 1991).

Slocumb v. State, 573 N.E.2d 427 (Ind. 1991) (where State charged defendant as HO and listed as prior convictions several felonies from other states for which penalties imposed were within sentencing range for Indiana class D felonies, prior convictions constituted D felonies for Indiana HO statute).

Jones v. State, 485 N.E.2d 627, 629 (Ind. 1985) (where records admitted at habitual proceeding indicated only that defendant received two years-probation on out-of-state conviction, State failed to prove conviction was for felony).

Welch v. State, 828 N.E.2d 433 (Ind. Ct. App. 2005) (defendant's third degree burglary conviction in Tennessee met definition of "felony" for

purposes of HO statute, because sentence imposed was three years; fact that defendant might have received something akin to a suspended sentence does not affect court's analysis).

Scott v. State, 924 N.E.2d 169 (Ind. Ct. App. 2010) (*nolo contendere* plea from Florida was admissible to prove defendant had a conviction for purposes of the serious violent felon statute).

(c) Felonies under prior law

The fact that one of the prior felony convictions used in the HO proceeding would have been a misdemeanor rather than a felony at the time of the HO proceeding did not invalidate the HO sentence since prior unrelated felony convictions are viewed as they existed at the time they occurred. Maier v. State, 437 N.E.2d 448 (Ind. 1982); Ross v. State, 274 Ind. 588, 413 N.E.2d 252 (1980); Dixon v. State, 624 N.E.2d 472 (Ind. Ct. App. 1993).

Clay v. State, 440 N.E.2d 466 (Ind. 1982) (fact that defendant had been sentenced to 60 days for prior conviction did not render record inadequate to prove felony conviction where record also showed that defendant had been charged with felony but was convicted under "minor statute," which gave courts discretion to sentence persons under twenty-one to less than one year for felony convictions).

Baker v. State, 425 N.E.2d 98 (Ind. 1981) (since possible punishment for shoplifter at time defendant plead guilty could have been imprisonment in state prison, State correctly characterized offense as felony for purposes of HO statute).

Dixon v. State, 624 N.E.2d 472 (Ind. Ct. App. 1993) (a conviction for theft under $100 was a felony conviction, despite the fact that one could not receive more than one year imprison).

(d) Evidence used as proof

Certified records are required from State in view of the consequences at stake for HO candidate, and the relative ease with which the State can marshal accurate documentary proof. Davis v. State, 493 N.E.2d 167 (Ind. 1986). Parol evidence standing alone is insufficient to prove prior convictions absent a showing of unavailability of proper certified records. Morgan v. State, 440 N.E.2d 1087 (Ind. 1982).

Straub v. State, 567 N.E.2d 87 (Ind. 1991) (parol evidence alone was insufficient to prove Ohio conviction was felony where State failed to demonstrate unavailability of documentary evidence, failed to request that court take judicial notice of Ohio statute and made no showing that police officer was qualified to offer testimony on potential sentences for particular crimes or to interpret Ohio statutes providing for those sentences).

Davis v. State, 493 N.E.2d 167 (Ind. 1986) (testimony from police officer, parole officer and judge were not adequate when certified records were available).

Carter v. State, 479 N.E.2d 1290 (Ind. 1985) (copies of out-of-state records of judgment and sentence certified by central administrator of DOC, which had originals of such records, were admissible in HO proceeding, although they were not certified by clerk of trial court).

Abdullah v. State, 847 N.E.2d 1031 (Ind. Ct. App. 2006) (where a certified, but unsigned, abstract of judgment is the only evidence before the court introduced to show that an offender has prior conviction, evidence is insufficient to prove defendant was an HO).

Dexter v. State, 959 N.E.2d 235 (Ind. 2012) (unsigned judgment of conviction was insufficient to prove beyond a reasonable doubt that defendant had been convicted of one of the predicate felonies)

However, where the existence of prior felonies is established by certified records, parol evidence may provide sufficient proof of dates of the commission. Powers v. State, 617 N.E.2d 545 (Ind. 1993).

Spencer v. State, 660 N.E.2d 359 (Ind. Ct. App. 1996) (testimony of deputy sheriff of county in another state regarding defendant's prior convictions in that state, in which deputy made courtroom identification of defendant, and documents concerning prior convictions with official seal of out-of-state court affixed were sufficient proof of prior unrelated felonies).

(e) Prior felonies: not set aside or pardoned

It is incumbent upon the defendant to prove that the alleged prior convictions have been set aside or that the defendant has been pardoned. The State is not required to prove that the defendant has not been pardoned or that the convictions have not been set aside. Harper v. State, 474 N.E.2d 508 (Ind. 1985). Thus, whether one of the charged prior convictions has been set aside or has resulted in a pardon is an affirmative defense to an HO charge. Havens v. State, 429 N.E.2d 618 (Ind. 1981); Williams v. State, 424 N.E.2d 1017 (Ind. 1981), *cert. den'd*, 469 U.S. 1229, 105 S.Ct. 1229 (1985).

The defendant meets this burden when the Court of Appeals sets aside a prior conviction. The trial court proceedings are deemed insufficient to constitute a waiver of such fundamental a claim.

Nash v. State, 545 N.E.2d 566 (Ind. 1989) (where defendant was convicted of auto banditry and theft in same case but auto banditry was set aside because theft and auto banditry offenses were one and the same, habitual enhancement based on auto banditry and theft must also be set aside).

Maisonet v. State, 448 N.E.2d 1052 (Ind. 1983) (fact that prior felonies were being appealed did not affect their use as priors to support HO status).

Ferguson v. State, 273 Ind. 468, 405 N.E.2d 902 (1980) (fact that one of felonies upon which HO sentence was based would have been barred by statute of limitations if tried at that time does not affect it being prior unrelated felony). See also Wise v. State, 272 Ind. 498, 400 N.E.2d 114 (1980).

(f) Sequence of felonies

Pre July 1, 2014

In order for the State to prove two prior unrelated felonies, the State must establish that: (1) the commission, conviction and sentencing on the first offense preceded the commission of the second offense; and (2) the commission of the principal offense followed the commission, conviction and sentencing on the defendant's second offense. Weatherford v. State, 619 N.E.2d 915 (Ind. 1993); See also Henderson v. State, 534 N.E.2d 1105 (Ind. 1989); Jaske v. State, 539 N.E.2d 14 (Ind. 1989); Roell v. State, 655 N.E.2d 599 (Ind. Ct. App. 1995); Lingler v. State, 635 N.E.2d 1102 (Ind. Ct. App. 1994); Bray v. State, 547 N.E.2d 862 (Ind. Ct. App. 1989). The State is not required to plead and prove when the first offense was committed. Steelman v. State, 602 N.E.2d 152 (Ind. Ct. App. 1992); McConnell v. State, 526 N.E.2d 1214 (Ind. Ct. App. 1988). Neither must the State show the date the defendant was released from prison, parole, or probation on last prior felony conviction in order to effectuate its provisions. Woods v. State, 456 N.E.2d 417 (Ind. 1983).

Effective July 1, 2014

Under Ind. Code 35-50-2-8(f), the statutory requirements to prove the sequence of prior unrelated felonies are the same but now include the sequence required when the State is attempting to prove that a person convicted of a Level 6 felony (per Ind. Code 35-50-2-8(d)) has the requisite *three* prior unrelated felonies to be an habitual offender.

Ind. Code 35-50-2-8(f) states:

A person has accumulated two (2) or three (3) prior unrelated felony convictions for purposes of this section only if:

(1) the second prior unrelated felony conviction was committed after commission of and sentencing for the first prior unrelated felony conviction;

(2) the offense for which the state seeks to have the person sentenced as an habitual offender was committed after commission of and sentencing for the second prior unrelated felony conviction; and

(3) for a conviction requiring proof of three (3) prior unrelated felonies, the third prior unrelated felony conviction was committed after commission of and sentencing for the second prior unrelated felony conviction.

N.D.F. v. State, 775 N.E.2d 1085 (Ind. 2002) (for purposes of juvenile determinant sentencing statute, which allows juvenile to be committed to DOC, requirement that juvenile have accumulated two unrelated prior adjudications of delinquency does not have same meaning as adult HO statute and does not require any particular sequence).

Mayo v. State, 681 N.E.2d 689 (Ind. 1997) (fact that defendant committed second unrelated felony of escape while serving sentence for first felony did not make felonies related because defendant committed second felony of escape after being sentenced for first felony). See also Harmer v. State, 455 N.E.2d 1139 (Ind. 1983).

Jackson v. State, 575 N.E.2d 617 (Ind. 1991) (remoteness of prior conviction does not disqualify conviction as prior to be used to support HO determination).

Bryant v. State, 760 N.E.2d 1141 (Ind. Ct. App. 2002) (where defendant's 1976 conviction was vacated and reinstated after his 1986 conviction, two convictions were not unrelated felonies).

Dennis v. State, 686 N.E.2d 901 (Ind. Ct. App. 1997) (phrase "prior unrelated felony convictions," as used in HO statute, does not mean felony of unlike nature; rather, felonies are not related to instant felony conviction in sense that they are not connected as part of *res gestae* of current crime).

(3) Failure to prove sequence requires reversal

The evidence must eliminate the possibility that the second predicate offense was committed prior to the sentencing date of first predicate offense or habitual determination will be vacated. Jaske v. State, 539 N.E.2d 14 (Ind. 1989); Smith v. State, 514 N.E.2d 1254 (Ind. 1987); Steelman v. State, 486 N.E.2d 523 (Ind. 1985). The State fails to meet its burden when it only offers proof of the date of conviction and fails to present evidence of the date of commission. Williams v. State, 541 N.E.2d 921 (Ind. 1989); Jackson v. State, 546 N.E.2d 846 (Ind. 1989); Zavesky v. State, 515 N.E.2d 530 (Ind. 1987); Allen v. State, 596 N.E.2d 280 (Ind. Ct. App. 1992).

Where the record of the HO proceeding clearly shows inadequate proof with regard to the chronological sequence of the underlying felonies, the error is fundamental. Williams v. State, 525 N.E.2d 1238 (Ind. 1988).

Timmons v. State, 500 N.E.2d 1212 (Ind. 1986) (HO finding was vacated and cause remanded for new sentencing hearing, where there was no way to discern if defendant's prior convictions were in requisite statutory sequence because documents offered by State did not indicate dates on which predicate felonies were committed).

Williams v. Duckworth, 738 F.2d 828 (7th Cir. 1984), *cert. den'd*, 469 U.S. 1229, 105 S.Ct. 1229 (1985) (there was insufficient evidence to support finding beyond reasonable doubt that defendant was HO where evidence that would have proven that defendant was actually sentenced on second of his two prior convictions was missing from trial record).

Graham v. State, 435 N.E.2d 560 (Ind. 1982) (sentencing as HO was improper where commission of requisite third felony was not subsequent to conviction for second felony offense).

(4) Lack of evidence of commission dates

The courts will not infer that the commission of a second felony was after the sentencing for a first felony without evidence of the commission dates regardless of the time span between convictions. Thus, the State must admit evidence of commission, conviction, and sentencing to prove all unrelated felonies.

McCovens v. State, 539 N.E.2d 26 (Ind. 1989) (inference that because defendant's prior convictions spanned nearly twenty years they were committed in sequence mandated by statute was insufficient to support imposition of HO status).

McManomy v. State, 751 N.E.2d 291 (Ind. Ct. App. 2001) (where State failed to admit commission dates into evidence, there was insufficient evidence to support HO; court could not infer prior felonies were unrelated from two-year time span between convictions).

Spann v. State, 681 N.E.2d 223 (Ind. Ct. App. 1997) (evidence was insufficient to support HO determination where State failed to present any evidence regarding commission dates of prior felonies; jury could not infer from imposition of consecutive sentences that defendant committed second and third felonies before he was discharged from probation or imprisonment imposed on first felony because record was silent as to court's reason for consecutive sentences).

However, a record which does not provide the proper dates of commission does not require vacating the HO determination, if it provides a rational basis upon which to conclude that the convictions are in their proper statutory sequence. Lee v. State, 550 N.E.2d 304 (Ind. 1990).

State v. Brooke, 565 N.E.2d 754 (Ind. 1991) (evidence was sufficient to allow jury to determine that defendant was HO, despite fact police officer did not testify to exact date of commission of second offense, where officer testified, from personal knowledge, that defendant committed the second offense after being sentenced on first).

Burnett v. State, 736 N.E.2d 259 (Ind. 2000) (although the better practice is to offer direct evidence of the commission date of the second offense, a reasonable jury could have concluded that defendant committed his second felony after receiving his sentence for the first; evidence presented included that the arrest date of the second offense was almost eight years after the sentencing for the first offense) (overruled on other grounds by Ludy v. State, 784 N.E.2d 459, 462 (Ind. 2003)).

(5) Parol evidence

Where there is documentary proof of the existence of the prior convictions, the identity of the defendant and the sequence of events may be established by parol evidence. Powers v. State, 617 N.E.2d 545 (Ind. 1993).

3. Proving underlying felony

The statute does not require State to re-prove underlying felony or felonies of which jury has just convicted defendant during HO phase of proceedings. Gilliam v. State, 563 N.E.2d 94 (Ind. 1990); Payne v. State, 658 N.E.2d 635 (Ind. Ct. App. 1995). However, when there are more than one underlying felonies, the judge must designate which sentence will be enhanced due to HO status. Carter v. State, 479 N.E.2d 1290 (Ind. 1985); Pillow v. State, 479 N.E.2d 1301 (Ind. 1985).

Webster v. State, 628 N.E.2d 1212 (Ind. 1994) (error for court to enhance three sentences by reason of one HO standing; however, since sentences were ordered to run concurrently, there was no utility in remanding to trial court for resentencing to apply thirty-year HO enhancement to only one of convictions. See also Holbrook v. State, 556 N.E.2d 925 (Ind. 1995).

Baker v. State, 562 N.E.2d 726 (Ind. 1990) (trial court erred in enhancing sentence by thirty years without indicating which of three separate primary felonies were enhanced by reason of HO status).

C. ADMISSIBILITY OF EVIDENCE

1. Records and documents used to prove prior convictions

In order for a public or business record to be admissible, the record must be certified according to the Indiana Code or the Trial Rules, or the State must produce testimony creating the foundation to make the records admissible under an exception to the hearsay rule.

Dexter v. State, 959 N.E.2d 235, 238 (Ind. 2012) ("For almost 30 years, this Court has held that the State **must** introduce into evidence proper certified and authenticated records of the defendant's prior felony convictions in order to prove beyond a reasonable doubt the existence of those prior convictions." (collecting cases)).

Kelly v. State, 561 N.E.2d 771, 775 (Ind. 1990) ("Considering the possibility of undetected mistake or inadvertence, the law of evidence wisely favors the enhanced assurance of accuracy, reliability, and integrity of such exhibits that is provided by the requirement of an individualized original certification of authenticity. The resulting burden upon the proponent is minimal.").

Abdullah v. State, 847 N.E.2d 1031 (Ind. Ct. App. 2006) (certified but unsigned abstract of judgment is insufficient to prove habitual offender status; TR 59 requires that an abstract of judgment include a judicial signature in order to be considered a final record of a trial court's ruling); see also Dexter v. State, 959 N.E.2d 235 (Ind. 2012) (unsigned judgment of conviction insufficient to prove fact of prior conviction beyond a reasonable doubt.)

a. Certification

Certified records of Indiana and out-of-state convictions are admissible under Ind. Code 34-39 *et seq.* as official records without having keeper of records testify to authentication. Graham v. State, 441 N.E.2d 1348, 1352 (Ind. 1982). They are also admissible, without testimony, under Indiana Rule of Evidence 902. All of these methods of authentication

are alternative to one another. Carter v. State, 479 N.E.2d 1290, 1292 (Ind. 1985); Ind. Rule of Evid. 901(b)(10).

Davis v. State, 493 N.E.2d 167 (Ind. 1986) (although police officer testified that he obtained documents from state central repository, non-certified documents containing a chart of fingerprints, photographs, signature, and other information identifying the defendant's previous convictions were not admissible because officer did not have legal custody of them).

(1) Indiana Rule of Evidence 902

Pre January 1, 2014

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public documents*. The original or a duplicate of a domestic official record proved in the following manner: An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy. Such publication or copy need not be accompanied by proof that such officer has the custody. Proof that such officer does or does not have custody of the record may be made by the certificate of a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

Effective January 1, 2014

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic public documents that are sealed and signed. -- A document that bears:

  (a) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular area of the United States; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

  (b) a signature purporting to be an execution or attestation.

(2) Domestic public documents that are not sealed but are signed and certified. -- A document that bears no seal if:

  (a) it bears the signature of an officer or employee of an entity named in Rule 902(l)(A); and

  (b) another public officer who has a seal and official duties within that same entity certifies under seal -or its equivalent- that the signer has the

official capacity and that the signature is genuine.

(3) Foreign public documents. -- A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(a) order that it be treated as presumptively authentic without final certification; or

(b) allow it to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. -- A copy of an official record or a copy of a document that was recorded or filed in a public office as authorized by law -if the copy is certified as correct by:

(a) the custodian or another person authorized to make the certification; or

(b) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) Official publications. -- A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and periodicals. -- Printed material purporting to be a newspaper or periodical.

(7) Trade inscriptions and the like. -- An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged documents. -- A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) Commercial paper and related documents. -- Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions by a federal or Indiana statute. -- A signature, document, or anything else that a federal or Indiana statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified domestic records of a regularly conducted activity. -- Unless the source of information or the circumstances of preparation indicate a lack of trustworthiness, the original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification under oath of the custodian or another qualified person. Before the trial or hearing, the

proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.

(12) Certified foreign records of a regularly conducted activity. -- The original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows:

(a) the certification must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed; and

(b) the signature must be certified by a government official in the manner provided in Rule 902(2).

The proponent must also meet the notice requirements of Rule 902(11).

Bartlett v. State, 711 N.E.2d 497 (Ind. 1999) (Defendant challenged the admission of conviction and sentencing records from two other states for habitual offender status; proper foundation was laid for their admission because the documents met with the requirements of Rule 902; both were compiled and kept by public officers in their respective states, and both were authenticated by a seal of office).

Wilson v. State, 513 N.E.2d 653 (Ind. 1987) (certified copies of information charging defendant with robbery and armed robbery, certified copies of court minutes showing guilty pleas, and certified copies of court commitment orders on convictions, were self-authenticating documents and admissible hearsay).

(2) Ind. Code 34-37-1-8 (formerly Ind. Code 34-1-17-7)

While the statute is not incorporated by Rule 902(1), Rule 901(b)(10) permits an exhibit to be authenticated by any method of authentication provided by statute, and Rule 902(8) – now Rule 902(10) - allows self-authentication pursuant to any state law that declares a document to be presumptively or prima facie genuine or authentic.

Ind. Code 34-37-1-8 provides:

Exemplifications or copies of records, records of deeds, other instruments, office books, parts of office books, and official bonds that are kept in any public office in Indiana shall be prove or admitted as legal evidence in any court of office in Indiana:

(a) by the attestation of the custodian of the records that the copies are true and complete; and

(b) by the annexation by the custodian of the seal of office of the custodian, or, if there is not official seal, by the attachment to the attestation of the certificate of the clerk and the seal of the circuit or superior court of the proper county where the custodian resides, that the attestation is made by the proper officer.

Griffin v. State, 275 Ind. 107, 415 N.E.2d 60 (1981) (probable cause affidavit, information and criminal docket sheet which were all certified by clerk of court

in which prior conviction was obtained were properly authenticated under TR 44(A)(1) and Ind. Code 34-1-17-7).

Payne v. State, 658 N.E.2d 635 (Ind. Ct. App. 1995) (arrest records that did not bear clerk's certification in addition to attestation of officer who was keeper of records was not self-authenticating under Ind. Code 34-1-17-7).

(3) Ind. Code 34-39 (formerly 34-1-18-7)

The following may be admitted as competent evidence in any court of the state:

(a) The decisions of the Supreme Court as published in official Indiana reports and when identified by parol or other evidence (Ind. Code 34-39-1-1);

(b) Papers and entries related to a case and transcripts of a case certified and attested with the seal of the court (Ind. Code 34-39-2-1);

(c) Evidence of a final judgment for a felony shall be admitted in any civil action to prove any fact (Ind. Code 34-39-3-1);

(d) Copies of proceedings and judgments of any justice of the peace of any state or territory of the United States properly certified by a justice with legal custody of the proceedings and accompanied by a certificate of the clerk or prothonotary of any court of record of the county or district where the justice holds office certifying that the justice was qualified at the time (Ind. Code 34-39-4-1); and

(e) Records and judicial proceedings of any state or territory of the United States when authenticated by attestation or certificate of the clerk or prothonotary, with the seal of the court annexed, and the seal of the chief justice or one or more judges, attesting that the person who signed the attestation or certificate was the clerk or prothonotary and the attestation is in due form of law shall have full faith and credit in any court within this state (Ind. Code 34-39-4-3).

The unwritten or common law of any state or territory of the United States may be proved as facts by parole evidence; the reports of cases of any court may also be admitted as evidence. Ind. Code 34-39-4-2.

Mayes v. State, 467 N.E.2d 1189 (Ind. 1984) (applying Ind. Code 34-1-18-7) (although judicial certification of clerk's status and judicial certification that attestation was in due form of law were lacking on information and order of conviction and sentencing of defendant from Michigan, it was properly admitted in HO phase of proceedings since exhibit was certified by clerk of Recorder's Court of Detroit as correct transcript from court record).

Hernandez v. State, 439 N.E.2d 625 (Ind. 1982) (applying Ind. Code 34-1-18-7) (order of probation from Michigan which was certified by clerk as being true copy of original record on file in court was properly admitted).

(4) Other methods provided for by law

A record can be authenticated or identified by any method provided by the Supreme Court of this State or by a statute or as provided by the Constitution of this State. Indiana Rule of Evidence 901(b)(10).

Carter v. State, 479 N.E.2d 1290 (Ind. 1985) (certification of copies of microfilmed records which was made by judge, rather than clerk, stated that they have same legal efficacy as original, as same appears of record in judge's office; this certification, absent evidence that microfilmed copies were not true and correct, provided sufficient reliability for them to be admitted under former TR 44(c) which allowed authentication by other lawful methods).

(5) Certification requirements

Although a document bears a seal of the circuit court and a stamp indicating it was recorded in the official records book, there must be some attestation that would comply with either Ind. Code 34-1-17-7 (now Ind. Code 34-37-1-8) or TR 44(A)(1) (see now Rule of evidence 902(1)). Lewis v. State, 554 N.E.2d 1133 (Ind. 1990).

(a) Signature

Keegan v. State, 564 N.E.2d 533 (Ind. Ct. App. 1990) (unsigned certificate of conviction was inadmissible hearsay).

(b) Original certification

While copies of public records can themselves be admissible if their authenticity is properly certified, the certifications themselves do not constitute public records and photocopies of the certification are not acceptable. Kelly v. State, 561 N.E.2d 771, 773 (Ind. 1990); Harwood v. State, 582 N.E.2d 359 (Ind. 1991).

(c) Attachment of certification

Proper certification on one page of an exhibit or document provides adequate certification for the other pages of the exhibit. Craig v. State, 481 N.E.2d 390, 392 (Ind. 1985). In addition, validity of records do not rely on sturdiness of the binder; fact that copies of the court record have been separated from the certification do not make the records inadmissible. Brown v. State, 650 N.E.2d 304 (Ind. 1995).

Hill v. State, 592 N.E.2d 1229 (Ind. 1992) (trial court did not err in admitting in evidence certified exhibits from which staples had been removed and certification may have been mis-attached; prosecutor testified that he had retrieved exhibits used in defendant's first trial from transcript of first appeal, removed staples, photocopied each page, replaced originals in transcript with photocopies, and re-stapled originals back in order resulting in extra staple holes).

Brackens v. State, 480 N.E.2d 536 (Ind. 1985) (fact that documents held together by paper clips instead of staples was irrelevant because several of

documents in each exhibit included defendant's name, charge, date of conviction or similar information pertaining to his record).

b. Admissible as exception to hearsay

(1) IRE 803 (8): Public records exception

Some public records that do not include factual findings or investigative reports made by a government agency may be admitted by the State under the public records exception to the hearsay rule. See IRE 803(8).

Scott v. State, 924 N.E.2d 169 (Ind. Ct. App. 2010) (*nolo contrendere* plea from Florida was admissible to prove defendant had a conviction for purposes of the serious violent felon statute).

(2) IRE 803(6): Business records exception

Records of regularly conducted business activity: a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony or affidavit of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this Rule includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. IRE 803(6).

Effective January 1, 2014, the business record exception under IRE 803(6) provides:

(1) Records of a regularly conducted activity. -- A record of an act, event, condition, opinion, or diagnosis if:

(a) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;
(b) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
(c) making the record was a regular practice of that activity;
(d) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and
(e) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(a) Arrest records

Payne v. State, 658 N.E.2d 635 (Ind. Ct. App. 1995) (copies of arrest records properly qualified as business records exception to hearsay where officer testified that he was keeper of records for IPD, IPD kept records in normal course of business and that persons with business responsibility to do so kept and recorded arrest information at or near time transactions reflected upon record occurred); see also Burton v. State, 526 N.E.2d 1163 (Ind. 1988) (arrest report relevant and admissible).

(b) Order book entries

Certified copies of order book entries regarding cases in which the defendant has been convicted and sentenced for prior unrelated felonies—after an official record keeper has read and attested to the records—may be admissible. Leavell v. State, 455 N.E.2d 1110 (Ind. 1983).

(c) Thumbprint or fingerprint cards

Index cards containing thumbprint or fingerprint are admissible under business records exception to the hearsay rule. Boarman v. State, 509 N.E.2d 177 (Ind. 1987); Jones v. State, 267 Ind. 205, 369 N.E.2d 418 (1977), overruled on other grounds, Elmore v. State, 269 Ind. 532, 540, 382 N.E.2d 893, 898 (1978) Landers v. State, 464 N.E.2d 912 (Ind. 1984) (copy of police arrest report containing information about defendant and thumbprint obtained as result of arrest for robbery which resulted in theft conviction admissible under business records exception; fingerprint expert testified to match).

(d) Police reports

Police report does not meet the definition of a business record eligible for exception from the hearsay rule under Rule 803(6). Bacher v. State, 686 N.E.2d 791, n.4 (Ind. 1997). "Any report prepared by law enforcement personnel and offered against a criminal defendant that would be excluded as a public record under 803(8) should also be excluded if offered as a business record. Committee Commentary, Ind.R.Evid. 803(6). See Rule 803(8) for the use of police reports by the accused.

(3) Prison records

Prison records may also be admissible under the business records or the public record exception to the hearsay rule. Wilson v. State, 513 N.E.2d 653, 656 (Ind. 1987);

Straub v. State, 567 N.E.2d 87 (Ind. 1991) (exhibits, consisting of copies of fingerprint cards, were admissible under business record exception to hearsay rule, where officer testified he was head of scientific identification unit of records section and that he supervised all activities with respect to fingerprints of criminal records, and officer identified exhibits as copies of fingerprint cards maintained in his office in normal course of business; because officer was custodian of records they did not need to meet the certification requirements).

Mott v. State, 547 N.E.2d 261 (Ind. 1989) (failure to exemplify foreign court documents offered to establish HO status did not preclude their admission, where official charged with retention and maintenance of documents personally appeared and testified as to their authenticity).

But see:

Davis v. State, 493 N.E.2d 167 (Ind. 1986) (prison records not certified or admitted by the officer with legal custody are inadmissible).

c. Best evidence rule

Properly authenticated copies of court records are admissible in HO proceedings as an exception to the best evidence rule. Collins v. State, 453 N.E.2d 980 (Ind. 1983).

Hudson v. State, 443 N.E.2d 834 (Ind. 1983) (best evidence rule did not preclude admission of docket sheet when order book entry was available because docket sheet was introduced to prove its contents and not to prove contents of order book entry).

d. Relevancy of document or record

A document or record used to prove a prior conviction must sufficiently identify the defendant in order to be relevant.

Burton v. State, 526 N.E.2d 1163 (Ind. 1988) (although arrest record had different cause number than that on judgment, arrest report was sufficiently connected to judgment because dates, alias, birth date, description of arrest, fingerprints in arrest record matched those in other records of proceeding for prior conviction).

Wilson v. State, 513 N.E.2d 653 (Ind. 1987) (certified copy of court minutes showing information and guilty plea, but failing to state cause number or defendant's name, was insufficiently connected to defendant to establish relevancy to HO status; however, certified copies of prison records were sufficiently connected to defendant).

e. Compliance with court rules

Abdullah v. State, 847 N.E.2d 1031 (Ind. Ct. App. 2006) (certified but unsigned abstract of judgment is insufficient to prove prior convictions for habitual offender purposes; TR 58 requires abstract of judgment to include a judicial signature).

f. Chain of custody not required

Chain of custody requirements do not apply to certified copies of public records. McCollum v. State, 582 N.E.2d 804 (Ind. 1991); Graham v. State, 441 N.E.2d 1348, 1352 (Ind. 1982).

g. Alterations in document

Rule excluding papers because of unexplained alterations does not apply to official documents not in custody of party to be hurt or benefitted by them.

Andrews v. State, 532 N.E.2d 1159 (Ind. 1989) (admission of certified copies of records of convictions during habitual phase where name and number of another person had been whited out and defendant's name typed over it was proper on basis of State's representation that exhibits were in this form when received from Illinois Court which issued judgment in question).

h. Discrepancy in docket sheets

Steelman v. State, 486 N.E.2d 523 (Ind. 1985) (where there is discrepancy between names of judges indicated on bench docket and on docket sheet, this difference does not render exhibit inadmissible in consideration of HO status because it merely reflects that one is presiding judge and other former judge of same court).

2. Prior convictions used to impeach

a. During HO phase

Evidence of prior convictions not alleged as unrelated felonies are irrelevant and inadmissible in HO proceedings. However, once a defendant opens the door, the State may offer evidence of specific misconduct to rebut the evidence presented by the defendant.

Hazzard v. State, 642 N.E.2d 1368 (Ind. Ct. App. 1994) (although it was serious error for trial court to allow into evidence defendant's criminal transcript, which included additional felonies not alleged as priors, defendant failed to prove how such error placed him in grave peril).

Hensley v. State, 448 N.E.2d 665 (Ind. 1983) (there was no reversible error in trial court's allowing State to cross-examine defendant, during HO portion of trial, on non-felony convictions, which were not being used to support HO charge, where prior non-felony convictions were admitted to rebut defendant's inference that he was dependable family man).

b. During guilt phase

Although the State should not present, during trial on underlying felony, evidence of the prior convictions supporting the HO charge, the State is not precluded from using prior felonies to impeach a defendant who is also charged with an habitual and who testifies in his own defense at guilt phase thereby placing his/her credibility at issue. Brackens v. State, 480 N.E.2d 536, 540 (Ind. 1985); Denton v. State, 455 N.E.2d 905, 908 (Ind. 1983).

Griffin v. State, 275 Ind. 107, 415 N.E.2d 60 (1981) (prior convictions alleged as prior unrelated felonies could have been admitted into evidence during guilt phase of trial where defendant pled insanity).

3. Relevancy of evidence

Any evidence which the defendant seeks to introduce in HO proceeding must be relevant to the matters at issue. The only issue before the trial court in an HO proceeding is whether the defendant has been found guilty and sentenced for the prior offense charged. Thomas v.

State, 451 N.E.2d 651, 654 (Ind. 1983). However, evidence relating to issues other than whether the defendant has been found guilty and sentenced for prior offenses may be relevant if the defendant is arguing jury nullification. Hollowell v. State, 753 N.E.2d 612 (Ind. 2001).

Pointer v. State, 499 N.E.2d 1087 (Ind. 1986) (nature of presentence reports filed in prior cases in which defendant was convicted is irrelevant to any of issues presented in HO trial and, thus, constitutes improper evidence to submit to jury). See also Owen v. State, 427 N.E.2d 880 (Ind. 1981).

Young v. State, 521 N.E.2d 671, 674-75 (Ind. 1988) (where prosecutor read portions relating to the prior felonies from a presentence report and the jury did not have access to the presentence report, there was no harm).

Taylor v. State, 468 N.E.2d 1378 (Ind. 1984) (incorporation of evidence from underlying felony trial means incorporation only of *relevant* evidence; court did not err in preventing defendant from referring, during final argument in habitual phase, to plea agreement of co-defendant and to fact that co-defendant was not tried as HO because State did not mention plea agreement in HO phase).

Thomas v. State, 451 N.E.2d 651 (Ind. 1983) (evidence regarding severity of sentence, defendant's positive character traits, opportunities for rehabilitation, and his work record were irrelevant and properly excluded in HO proceeding). See also Leslie v. State, 558 N.E.2d 813 (Ind. 1990).

4. Excess information relating to prior convictions

Although the HO statute requires only that the State prove the defendant has two prior unrelated felony convictions, relevant information connected with those convictions is not generally considered prejudicial to the defendant. Maisonet v. State, 448 N.E.2d 1052, 1056 (Ind. 1983).

Hollowell v. State, 753 N.E.2d 612 (Ind. 2001) (although defendant stipulated to prior felonies being burglary and theft, trial court did not abuse its discretion by allowing State to admit CCS of prior battery conviction which was originally charged as attempted murder; CCS was relevant to jury's determination of nullification; Rucker and Dickson, J.J., dissenting on basis that any consideration of mercy was likely eliminated by erroneous and prejudicial information in CCS).

Daniel v. State, 526 N.E.2d 1157 (Ind. 1988) (defendant has not been prejudiced by introduction of documentary evidence which refers not only to his conviction or "predicate offense," but also to original charges which led to his predicate offense, where State's documentary evidence clearly re-elects relationship between original charges and predicate felonies).

Ritchie v. State, 526 N.E.2d 699 (Ind. 1988) (fact that jury might view charge of aiming weapon at deputy sheriff more harshly than if target had been ordinary citizen does not make evidence of such prior conviction inadmissible or unduly prejudicial; in addition, State's mentioning that prior conviction was reduced charge based on plea of guilty to lesser included offense did not place defendant in position of grave peril).

Taylor v. State, 420 N.E.2d 1231 (Ind. 1981) (allowing into evidence document which showed that, in connection with one of prior felony convictions, defendant had violated terms of his probation and that his probation had been revoked was not error).

5. Evidence of additional convictions or charges for substantive purposes

Evidence relative to proof of the prior conviction alleged is admissible even if that evidence also tends to prove an unalleged prior conviction. Donahoo v. State, 640 N.E.2d 702, 705 (Ind. 1994); Denton v. State, 496 N.E.2d 576, 584 (Ind. 1986); Golden v. State, 485 N.E.2d 51, 56 (Ind. 1985).

Donahoo v. State, 640 N.E.2d 702 (Ind. 1994) (fact that State introduced during HO phase of bifurcated trial charging information that included four charges, only one of which State was using as prior conviction, was merely surplusage in HO proceeding and could not have prejudiced trial on charge which had been completed).

However, the State cannot introduce evidence of a conviction that cannot be used as a prior unrelated felony without that evidence being part of a relevant exhibit.

Fozzard v. State, 518 N.E.2d 789 (Ind. 1988) (it was error to present evidence of involuntary manslaughter conviction during HO phase of defendant's subsequent trial for murder, where other two felonies alleged occurred between commission of manslaughter and conviction).

Miller v. State, 275 Ind. 454, 417 N.E.2d 339 (1981) (State amended HO count to add two prior felonies for which defendant had recently been convicted but not yet sentenced; these new convictions could not be considered mere surplusage because they could not qualify as prior felonies under statute).

Moreover, in other status offenses, the courts have held it is error to introduce evidence of convictions not charged. See, e.g., Rhodes v. State, 771 N.E.2d 1246 (Ind. Ct. App. 2002) (admission in HTV case of unredacted driving record including twelve suspensions, at least four of which were obtained after HTV status, was irrelevant and erroneous). See also Jones v. State, 708 N.E.2d 37 (Ind. Ct. App. 1999); Dumes v. State, 718 N.E.2d 1171 (Ind. Ct. App. 1999), *supplemented on reh'g*, 723 N.E.2d 460 (Ind. Ct. App. 2000); but see Carpenter v. State, 743 N.E.2d 326 (Ind. Ct. App. 2001).

6. Improper prosecutorial comments

It is inappropriate for a prosecutor to suggest that an HO sentence should be attached to the defendant because he might have faced more severe punishment than that given in the underlying trial. Russell v. State, 438 N.E.2d 741 (Ind. 1982).

7. Order of evidence

The rule that the order of evidence is discretionary with the trial court is no different in an HO trial. Pointer v. State, 499 N.E.2d 1087, 1089 (Ind. 1986).

Luttrull v. State, 499 N.E.2d 1139 (Ind. 1986) (trial court had discretion to allow admission of three DOC commitment papers on two separate occasions, notwithstanding

their cumulative nature; it was unlikely that jury would believe that defendant was convicted of six different crimes).

V. CHALLENGING HABITUAL OFFENDER DETERMINATIONS

A. ATTACKING PRIOR CONVICTION

It is the defendant's burden to produce evidence supporting a defense that his prior convictions were invalid. Collins v. State, 275 Ind. 86, 415 N.E.2d 46, 55, *cert. den'd*, 451 U.S. 991, 101 S.Ct. 2331 (1981).

A defendant may challenge the validity of a prior conviction used to support an HO determination by filing a petition for post-conviction relief, appealing a conviction or, under limited circumstances, by collaterally attacking the conviction at trial.

Maffett v. State, 766 N.E.2d 765 (Ind. Ct. App. 2002) (although Kentucky did not provide procedural avenue for defendant to attack prior conviction because of passage of time, defendant still could not collaterally attack prior conviction during HO proceedings).

1. Collateral attack

Generally, the alleged invalidity of prior convictions cannot be collaterally attacked during the course of an HO proceeding when the prior final judgments are regular on their face. Edwards v. State, 479 N.E.2d 541 (Ind. 1985); Dexter v. State, 959 N.E.2d 235, 238 (Ind. 2012).

However, a defendant may sustain a collateral attack on a prior felony alleged in HO proceeding when the conviction is constitutionally invalid. A prior conviction is deemed constitutionally invalid only if:

1. trial court records, on their face, raise a presumption of constitutional infirmity; and
2. the apparent infirmity is of the type which undermines the integrity and reliability of the determination of guilt.

Edwards v. State, 479 N.E.2d 541, 547 (Ind. 1985);Maffett v. State, 766 N.E.2d 765, 768-69 (Ind.Ct.App. 2002), trans. denied; Smith v. State, 982 N.E.2d 393 (Ind. Ct. App. 2013).

PRACTICE POINTER: Because the defendant does not want the jury to hear about the constitutionally infirm prior conviction, before trial either move to strike the prior felony conviction (if the State alleged more than two prior felonies) or move to dismiss the HO charge (if the State only alleged two prior felonies). However, if the defendant loses on the challenge prior to trial, still object to the admissibility of the conviction at trial so the issue is preserved for appeal. In addition, the court need not grant a continuance in order for the defendant to attack the validity of a prior convictions. See Williams v. State, 431 N.E.2d 793 (Ind. 1982).

a. Infirmity on face of records

Where it is impossible to determine whether a prior conviction was constitutionally infirm from the records introduced by the State during the HO proceeding, the defendant cannot show that the prior conviction is constitutionally invalid.

Vanway v. State, 541 N.E.2d 523 (Ind. 1989) (where record of guilty plea to prior conviction introduced at HO proceeding was only two-page document and did not purport to be entire record, defendant failed to show Sixth Amendment violation on face of record to attack prior conviction directly).

Mills v. State, 512 N.E.2d 846 (Ind. 1987) (where records introduced by State showed that defendant consulted with counsel but failed to show that defendant waived his right to counsel, no constitutional infirmity was raised).

Lucas v. State, 499 N.E.2d 1090 (Ind. 1986) (claim that transcript of guilty plea to prior convictions is non-existent did not suffice for purpose of showing constitutional infirmities on face, when defendant did not include any documents used to prove convictions).

Armour v. State, 479 N.E.2d 1294 (Ind. 1985) (although it was apparent that record of prior conviction presented by prosecution was ambiguous as to role of special judge in prior conviction, defendant could not substantiate invalidity of predicate felony conviction during habitual proceeding without more information).

However, because an attack on the validity of prior convictions used to enhance defendant's punishment may be available in the case of a prior conviction that is constitutionally infirm, existing court records reflecting such prior trials should be made available to indigent defendants upon proper request. Morgan v. State, 440 N.E.2d 1087, 1089 (Ind. 1982).

PRACTICE POINTER: Be aware that an indigent's right to a transcript of a prior felony may be limited to the part of the transcript which is essential to making the claim of constitutionally infirm prior convictions. The court noted that there is much material in a trial transcript which has no potential pertinence to showing a constitutionally infirm conviction. Morgan v. State, 440 N.E.2d 1087, 1089 (Ind. 1982).

b. Infirmity must undermine guilt

(1) Violation of right to counsel

A defendant may raise as a defense in an HO proceeding the asserted invalidity of those prior convictions used to enhance his punishment if he can show that he was not adequately represented by counsel or knowingly and intelligently waived such representation. Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258 (1967); Edwards v. State, 479 N.E.2d 541, 546 (Ind. 1985); Morgan v. State, 440 N.E.2d 1087, 1088 (Ind. 1982).

However, the State does not have the burden of showing that the defendant properly waived his right to counsel or was properly represented. The fact that the records introduced at trial proving the prior conviction are silent to the waiver of counsel

does not present a constitutional infirmity. See *supra* Subsection A.1.a, *Collateral Attack; Infirmity on face of records*.

Polk v. State, 783 N.E.2d 1253 (Ind. Ct. App. 2003) (rejecting defendant's allegation that one set of underlying convictions was constitutionally infirm based on fact he was not represented by counsel during preliminary matters prior to his guilty plea; initial hearing is not critical stage of proceeding requiring presence of counsel).

United States v. Bryant, 136 S.Ct. 1954 (2015) (uncounseled tribal court convictions were valid and properly used as predicate offenses in a subsequent prosecution for Domestic Assault Within Indian Country because the Indiana Civil Rights Act of 1968 provides indigent clients with a right to appointed counsel only in cases where the sentence exceeds one year).

(2) Failure to advise of rights when pleading guilty

Where the prior conviction is based on a guilty plea, the infirmity must affect that part of the guilty plea which constitutes the admission of guilt. Kindred v. State, 540 N.E.2d 1161, 1182 (Ind. 1989). Thus, because a court's failure to advise a defendant of the Boykin rights only affects the waiver part of a guilty plea, such a constitutional violation cannot be collaterally attacked and must be attacked through appeal or post-conviction relief.

Kindred v. State, 521 N.E.2d 320 (Ind. 1988) (court's failure to advise defendant of his privilege against self-incrimination and his right to confront his accuser when he pled guilty did not undermine integrity of plea; thus, defendant could not later attack prior guilty plea when used as prior conviction in HO proceeding). See also Edwards v. State, 479 N.E.2d 541 (Ind. 1985).

Guajardo v. State, 496 N.E.2d 1300 (Ind. 1986) (conviction was regular on its face where sentencing entry showed that defendant was represented by counsel and changed his plea pursuant to plea negotiations, judge questioned defendant to ascertain his understanding his rights, and, after this questioning, court found defendant's plea of guilty was voluntarily made).

(3) Public policy arguments

Courts will not second-guess the criteria established by the legislature for the imposition of HO penalties, nor is it the court's prerogative to interfere with the discretionary power of the State to invoke HO penalties. Rodgers v. State, 422 N.E.2d 1211 (Ind. 1981).

Polk v. State, 783 N.E.2d 1253 (Ind. Ct. App. 2003) (rejecting defendant's argument that public policy should prevent an HO determination where predicate offenses occurred while defendant was a minor; by failing to exclude felony convictions of minors in adult courts, legislature did not intend such exemptions).

2. Waiver

a. Failure to object at prior conviction proceedings

Fact that a defendant fails to object to an error during the proceedings for a prior conviction may waive the defendant's right to collaterally attack the prior conviction based on that error in a subsequent HO proceeding. A defendant may even waive a Sixth Amendment violation by not objecting to it during the original trial because not all Sixth Amendment violations are apparent on the facts of the record.

Lawrence v. State, 464 N.E.2d 1291 (Ind. 1984) (where attorney failed to object at trial for prior conviction to defendant's failure to waive his right to counsel, defendant could not collaterally attack prior convictions later on same basis in HO proceeding).[1]

Stone v. State, 437 N.E.2d 76 (Ind. 1982) (in HO prosecution, court would not consider fundamental error doctrine in connection with defendant's collateral attack on prior conviction on ground that guilty plea was not voluntary where defendant had failed to preserve error, if any, by proper in-trial objection or motion, and where error alleged was not that court erred in accepting guilty plea, but rather that it erred in subsequent denial of motion to withdraw it).

b. Failure to object at HO proceeding

A defendant's failure to object at an HO proceeding to the constitutional invalidity of the prior convictions does not prevent him from thereafter challenging one of the prior convictions relied upon. Haynes v. State, 436 N.E.2d 874, 876 (Ind. Ct. App. 1982); but see Dixon v. State, 760 N.E.2d 613, 615 (Ind. Ct. App. 2001) (failure to challenge a conviction on the basis it has been vacated at the time of the HO proceeding or on direct appeal may waive the issue for post-conviction relief).

Failure to object at the HO proceeding does not waive the defendant's ability to raise the issue through a petition for post-conviction relief. Olinger v. State, 494 N.E.2d 310 (Ind. 1986). Where a petitioner seeks post-conviction relief, the court must hold a hearing on the question of whether laches or equitable estoppel prohibits the defendant from raising the challenge through post-conviction relief. Haynes v. State, 436 N.E.2d 874 (Ind. Ct. App. 1982).

c. Defendant benefitted from constitutional infirmity

Collins v. State, 509 N.E.2d 827 (Ind. 1987) (defendant was estopped from attacking prior conviction where defendant entered plea agreement for illegal sentence, benefitted from sentence, then complained it was illegal when conviction used to support HO determination).

Williams v. State, 42 N.E.3d 107 (Ind. Ct. App. 2015) (defendant could not claim plea was not knowing, intelligent, and voluntary because counsel allegedly was

[1] In an unpublished Order, the federal district court granted the defendant habeas relief, finding cause for the procedural default and finding counsel ineffective for failing to object.

wrong to tell him he was eligible for HSO enhancement because defendant received substantial benefit from plea deal).

But cf:

Dugan v. State, 976 N.E.2d 1248 (Ind. Ct. App. 2012), *trans. denied* (defendant's plea to the HO enhancement in exchange for minimum sentence on the enhancement did not waive the issue; a minimum sentence on an illegal sentence is not a benefit of the plea).

Graham v. State, 903 N.E.2d 538 (Ind. Ct. App. 2009) (defendant did not waive his improper double enhancement claim by pleading guilty without benefit of a plea agreement).

3. Effect of successful challenge

a. When HO required to be vacated

(1) Only two priors alleged

Where one of two prior unrelated felony convictions used to support the HO determination is set aside, the HO status and resulting sentence cannot stand. Coble v. State, 500 N.E.2d 1221, 1223 (Ind. 1986); Spivey v. State, 638 N.E.2d 1308, 1321 (Ind. Ct. App. 1994); State v. Jones, 819 N.E.2d 877 (Ind. Ct. App. 2004).

Olinger v. State, 494 N.E.2d 310 (Ind. 1986) (although defendant failed to challenge prior conviction at HO proceeding, where prior conviction was vacated in subsequent post-conviction relief proceeding, trial court was required to vacate HO determination).

(2) More than two priors alleged

Where there were more than two prior unrelated felonies and one is set aside, the HO will not always be vacated.

(a) Special verdict

Where the jury's verdict on special verdict form specifically identifies prior convictions on which determination is based, and as long as at least two of the prior convictions were unrelated felonies, the HO determination will be upheld. Stiles v. State, 686 N.E.2d 886, 889 (Ind. Ct. App. 1997). Thus, where one prior is set aside, the HO enhancement can still stand on the other prior unrelated felonies the jury found were also proven. **See *supra* Subsection III.D.4, *Jury*.**

(b) General verdict

The courts are split as to whether a court is required to vacate an HO determination based on the setting aside of a prior conviction where more than two prior unrelated convictions are alleged, and general verdict form used.

Spivey v. State, 638 N.E.2d 1308, 1312 (Ind. Ct. App. 1994) (*citing* Waye v. State, 583 N.E.2d 733, 735 (Ind. 1991); Nash v. State, 545 N.E.2d 566 (Ind. 1989); Boarman v. State, 509 N.E.2d 177, 180 (Ind. 1987)) (when State alleges more than two prior felonies, jury finds defendant to be HO by general verdict, and one of prior felonies is subsequently set aside, HO finding must be set aside; it is impossible to know whether jury relied upon vacated conviction in concluding that defendant was HO).

But see:

Eldridge v. State, 498 N.E.2d 12, 13 (Ind. 1986) (court may assume that jury found defendant had been convicted, sentenced and imprisoned upon all three of felonies charged despite use of general verdict form; thus, habitual determination was deemed valid although one of prior unrelated felonies was subsequently set aside).

Elmore v. State, 688 N.E.2d 213 (Ind. Ct. App. 1997) (any one of defendant's thirteen prior felonies could have combined with defendant's subsequent conviction to support HO determination, and thus, vacation of one of those prior felonies was not grounds to reverse HO determination even though jury did not specify which of fourteen priors alleged they used to support HO).

PRACTICE POINTER: Failure to challenge a conviction on the basis it has been vacated at the time of the HO proceeding or on direct appeal may waive the issue for post-conviction relief. Dixon v. State, 760 N.E.2d 613, 615 (Ind. Ct. App. 2001); but see Olinger v. State, 494 N.E.2d 310 (Ind. 1986).

b. When underlying conviction is required to be vacated

Where the underlying conviction and the HO enhancement were not part of a plea agreement, a successful challenge to an HO determination will vacate enhancement but underlying charge will remain undisturbed. Messenger v. State, 650 N.E.2d 702, 704 (Ind. Ct. App. 1995).

Where a plea agreement is involved, vacating HO conviction alters the sentence for the underlying conviction and therefore, underlying conviction must also be vacated. Boykin v. State, 702 N.E.2d 1105, 1107 (Ind. Ct. App. 1998).

Boykin v. State, 702 N.E.2d 1105 (Ind. Ct. App. 1998) (where defendant pled guilty to three charges, one of which was enhanced by HO determination which was later vacated, conviction to which HO was attached must also be vacated, while pleas to other charges remained intact).

Snyder v. State, 668 N.E.2d 1214 (Ind. 1996) (where defendant pled guilty only to underlying charge and not HO enhancement, plea to underlying charge remained undisturbed when HO enhancement was later vacated).

But, sometimes, vacating the HO enhancement requires vacating entire plea agreement. See e.g., State v. Arnold, 27 N.E.3d 315 (Ind. Ct. App. 2015) (State argued HO enhancement was "central" to it agreeing to dismiss Class A felony attempt murder charge in exchange for serving 20-year sentence; thus, vacatur of HO enhancement

frustrated basic purpose of contract and required setting plea agreement set aside), *reh'g denied*, *trans. denied*.

c. Resentencing possibilities on underlying charge

(1) Enhanced sentence

When an HO determination is vacated, the trial court has jurisdiction to resentence the defendant on the underlying felony to a harsher sentence because the HO enhancement was part of the underlying felony sentence and when it was vacated the whole sentence was vacated with instructions to resentence the defendant without the HO enhancement.

Coble v. State, 523 N.E.2d 228 (Ind. 1988) (court prohibited from enhancing sentence for count not attached to HO but allowed to enhance sentence for count which HO enhancement was attached; however, new sentence did not increase total time defendant would serve as compared to initial sentence with habitual enhancer).

Jackson v. State, 105 N.E.3d 1081 (Ind. 2018) (vacating criminal gang enhancement required resentencing on all affected counts).

(2) Repositioning habitual offender enhancement

Trial court may reposition habitual offender enhancement when defendant appeals from judgment imposing multiple felony convictions and obtains reversal of the one enhanced by habitual offender finding. Greer v. State, 680 N.E.2d 526, 527-28 (Ind. 1997); *see also* Tipton v. State, 765 N.E.2d 187 (Ind. Ct. App. 2002) (noting that "[w]hile Greer does not expressly permit repositioning of an enhancement upon vacation and re-entry of a felony conviction for the same count, neither does it expressly prohibit such repositioning"); *accord* State v. Jones, 835 N.E.2d 1002, 1004 (Ind. 2005).

(3) Consecutive or concurrent sentences

Where an HO is reversed and the defendant has not yet completed any of his existing sentences, trial court has duty to reassess whether the new sentence would run consecutively to or concurrently with the existing sentence. Coble v. State, 523 N.E.2d 228, 229 (1988).

Sizemore v. State, 531 N.E.2d 201 (Ind. 1988) (where defendant was originally convicted of four counts, three of which were to run concurrently to each other and consecutively to fourth which had HO attached, trial court erred in resentencing defendant to all convictions running consecutively to one another because, when HO was reversed, defendant had already completed serving his concurrent sentences).

PRACTICE POINTER: When dealing with an HO determination set aside during post-conviction proceedings, be aware of PCR 1, § 10(b). Itprohibits a trial court from imposing a more severe penalty on resentencing than originally imposed if a sentence has been set aside based on post-conviction relief. In addition, due process prohibits the threat of increased sentence to discourage appeals. North Carolina v. Pearce, 395 U.S. 711 (1969), *modified by* Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201 (1989). For a more detailed discussion on limitations during resentencing, see Chapter 9, *Limitations on Sentence*, Subsection V., *Vindictive Sentencing*.12

4. Appeal of dismissal

The trial court is authorized to proceed with an HO charge after a dismissal of the charge had been reversed on interlocutory appeal. Gibson v. State, 661 N.E.2d 865, 867 (Ind. Ct. App. 1996).

B. CHALLENGING UNDERLYING CONVICTION

1. Guilty plea to underlying charge while HO pending

Snyder v. State, 654 N.E.2d 15 (Ind. Ct. App. 1995) (trial court committed reversible error where defendant was not informed that guilty plea to underlying offenses waived right to jury trial on pending habitual offender allegation; guilty plea rendered unintelligent and involuntary), *aff'd by,* 668 N.E.2d 1214 (Ind. 1996) (remanding with instructions to provide defendant with jury trial on HO count).

2. Effect of vacated underlying conviction

An underlying felony is essential to an HO determination and to subsequent sentencing. Dotson v. State, 463 N.E.2d 266 (Ind. 1984). If an appeal of the underlying felony is successful, the HO determination and sentencing must also be reversed; without the former, the latter cannot stand. However, if there is another valid underlying felony conviction entered at the time of the vacated felony conviction, the HO enhancement may be coupled with that remaining valid conviction. The HO enhancement need not be vacated along with the underlying felony with which it was originally coupled. Greer v. State, 680 N.E.2d 526 (Ind. 1997).

McCormick v. State, 262 Ind. 303, 317 N.E.2d 428 (1974) (where Count II was vacated as lesser included offense of Count I, and HO enhancement was designated to enhance Count II, HO enhancement need not be vacated where it could have been attached to Count I).

Cooley v. State, 642 N.E.2d 284 (Ind. Ct. App. 1994) (where defendant was convicted of two felonies and one misdemeanor and appellate court vacated felony enhanced by HO determination, trial court could not use HO status to enhance misdemeanor on resentencing; court declined to remand for resentencing so HO enhancement could be coupled with remaining valid felony conviction).

3. Effect of reducing underlying conviction

Tipton v. State, 765 N.E.2d 187 (Ind. Ct. App. 2002) (although conviction to which HO enhancement was attached was not vacated but rather reduced from Class C felony to Class D

felony on appeal, on remand, trial court did not abuse its discretion in transferring HO enhancement to more serious count that was not vacated or reduced; Riley, J., dissenting).

C. CHALLENGING SEQUENCE OF FELONIES

1. Burden of proof

The means by which a defendant appeals an HO determination directly affects the standard of review.

a. Direct Appeal

On direct appeal, the defendant need only demonstrate that State failed at the hearing to prove the commission dates of the predicate felonies used to support the determination to get the HO enhancement vacated. Weatherford v. State, 619 N.E.2d 915, 917-18 (Ind. 1993). In addition, when reviewing HO cases on direct appeal, the courts have regarded issues involving improper sequence or inadequate proof as fundamental error, which warrants vacating the HO adjudication. Weatherford v. State, 619 N.E.2d 915, 917 (Ind. 1993); see, e.g., Jaske v. State, 539 N.E.2d 14, 24 (Ind. 1989); Smith v. State, 514 N.E.2d 1254, 1254-55 (Ind. 1987); Steelman v. State, 486 N.E.2d 523, 525 (Ind. 1985); Clark v. State, 480 N.E.2d 555, 560 (Ind. 1985).

b. Post-conviction relief

If challenged through a petition for post-conviction relief, the defendant has the burden of proving that the convictions did not occur in the required sequence. Weatherford v. State, 619 N.E.2d 915, 916-18 (Ind. 1993); Thomas v. State, 652 N.E.2d 550, 551 (Ind. Ct. App. 1995).

Butler v. State, 658 N.E.2d 72 (Ind. 1995) (to gain post-conviction relief on guilty plea where defendant was found to be an HSO, defendant had to prove that prior offense was Class C misdemeanor instead of DUI, Class A misdemeanor).

Lingler v. State, 644 N.E.2d 131 (Ind. 1994) (framing claim in terms of ineffective assistance of counsel issue based on lawyer's failure to assert sequence of prior felonies will not relieve defendant of his burden of proving improper sequence; DeBruler, J., dissenting).

Williams v. State, 525 N.E.2d 1238 (Ind. 1988) (defendant clearly proved that events were not in proper sequence where evidence showed that defendant committed first offense, committed second offense, then was convicted for first offense; HO determination vacated).

Bryant v. State, 760 N.E.2d 1141 (Ind. Ct. App. 2002) (where defendant proved first conviction was vacated and reinstated after conviction for second conviction, defendant showed that convictions were not required sequence).

Brown v. State, 712 N.E.2d 503 (Ind. Ct. App. 1999) (fact that defendant pled guilty prior to Weatherford decision did not relieve defendant of his burden of proving that prior felonies did not actually occur in proper sequence).

Long v. State, 645 N.E.2d 1111 (Ind. Ct. App. 1995) (defendant must demonstrate that sequential requirements of HO statute were not present, and not merely that there was technical deficiency at guilty plea hearing).

PRACTICE POINTER: In his dissent in Lingler v. State, 644 N.E.2d 131 (Ind. 1994), Justice DeBruler stated that failure of appellate counsel to challenge the State's proof of habitual offender status meets the criteria for ineffective assistance if such failure results in an enhanced burden of proof in the post-conviction stage.

c. Habeas corpus

For a petitioner to use federal habeas corpus review to challenge past convictions after her custodial term for those convictions has expired, the petitioner must establish that her current confinement violates the constitution because that sentence was enhanced on the basis of prior convictions. Clay v. McBride, 946 F.Supp. 639 (N.D.Ind. 1996).

2. Waiver

Because the State's failure to prove the proper sequence of felonies to support an HO determination is fundamental error, a petitioner's failure to raise the issue on appeal does not waive the issue for post-conviction relief proceedings. Williams v. State, 525 N.E.2d 1238, 1241 n.1 (Ind. 1988) (citing Timmons v. State, 500 N.E.2d 1212 (Ind. 1986)).

D. CHALLENGING GUILTY PLEA TO HO CHARGE

1. Factual basis

The minimum requirements for a guilty plea to an HO charge are met if the record shows either that the defendant admitted committing the two predicate felonies in the required sentencing/commission sequence or that the defendant was aware of the required sequence and admitted being an HO.

Frazier v. State, 490 N.E.2d 315 (Ind. 1986) (factual basis for HO plea was established where trial court read information showing date, place and offense involved in prior felony conviction and prosecutor gave detailed verbal description of documents that he had in hand to substantiate prior convictions).

Roe v. State, 598 N.E.2d 586 (Ind. Ct. App. 1992) (court erred in accepting defendant's plea of guilty to HO because HO information failed to show dates felonies were committed).

But, where defendant shows that prior unrelated offenses did not occur in proper sequence, plea will be vacated regardless of whether he admitted they were in the proper sequence during the guilty plea hearing.

Bryant v. State, 760 N.E.2d 1141 (Ind. Ct. App. 2002) (where fact that 1979 felony was vacated and defendant was re-sentenced for that felony in 1986 was not disclosed during factual basis and destroyed sequence of unrelated felonies, guilty plea to HO enhancement was vacated on post-conviction review).

PRACTICE POINTER: Because a petition for post-conviction relief is the method for challenging guilty pleas, the standard set forth above in Weatherford v. State, 619 N.E.2d 915 (Ind. 1993), which requires the petitioner to prove that he actually did not commit the prior felonies in proper sequence, would apply. See Brown v. State, 712 N.E.2d 503 (Ind. Ct. App. 1999). To the extent Roe v. State, 598 N.E.2d 586 (Ind. Ct. App. 1992) holds otherwise, it has been overruled by Weatherford, *supra*. Thomas v. State, 652 N.E.2d 550, 551-52 (Ind. Ct. App. 1995).

2. Using possible HO status in negotiations

a. Prosecutor may threaten charging HO

Prosecutor's threat to request sentencing as an HO to coerce the defendant to plead guilty is justifiable exploitation of legitimate bargaining leverage. Bordenkircher v. Haynes, 434 U.S. 357, 98 S.Ct. 663 (1978); Brown v. State, 453 N.E.2d 254, 255 (Ind. 1983); Baker v. State, 425 N.E.2d 98, 103 (Ind. 1981).

However, it is proper to threaten the habitual charge only if probable cause for charge exists. If a threatened habitual charge lacks probable cause, the guilty plea should be vacated. Bordenkircher v. Haynes, *supra*; Brown v. State, *supra*; Davis v. State, 418 N.E.2d 256, 259 (Ind. Ct. App. 1981).

Munger v. State, 420 N.E.2d 1380 (Ind. Ct. App. 1981) (defendant's contention that prosecutor's unwarranted threat to file HO charge deceived him into pleading guilty was not sustained where there was no evidence to show that prosecutor ever made such threat).

Nash v. State, 429 N.E.2d 666 (Ind. Ct. App. 1981) (trial court erred in failing to determine if pleas were a result of any promises, especially where prosecutor erroneously represented in plea negotiations that the defendant was subject to eight habitual offender counts for which there was no legal basis).

b. Failed negotiations

Daniel v. State, 526 N.E.2d 1157 (Ind. 1988) (although defendant alleged State should have been precluded from filing HO allegation regardless of when it was filed because State was bound by promise that it made during plea negotiations, State was not bound by promise because prior to commencement of trial, at hearing on his objections to late filing, both deputy prosecutor and defendant's trial counsel indicated that no plea agreement had been entered into by parties and defendant admitted at that time that he had initially rejected agreement).

3. Procedure

Post-conviction relief, and not direct appeal, is the vehicle for challenging the factual basis, i.e., the sequence of felonies in a plea to HO enhancement, of a guilty plea. Tumulty v. State, 666 N.E.2d 394 (Ind. 1996). Robey v. State, 7 N.E.3d 371 (Ind. Ct. App. 2014), *trans. denied*. For standard of review on post-conviction relief, see *supra*, Subsection C.1.b, *Challenging felony sequence; Post-conviction relief*.

VI. CONSTITUTIONAL ISSUES

A. CRUEL AND UNUSUAL PUNISHMENT

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., Amend. VIII. "Cruel and unusual punishment shall not be inflicted. All penalties shall be proportioned to the nature of the offense." Ind. Const. art. 1, § 16.

PRACTICE POINTER: Although Indiana case law confuses and incorrectly combines the two analyses, the Indiana Constitution's guarantees of proportional and appropriate sentences require two different analyses. Under a proportionality analysis, a reviewing court is concerned that all penalties shall be proportioned to the nature of the offense; whereas, in determining if a sentence inappropriate, the court is guided by Indiana Appellate Rule 7(B), considering whether the sentence is appropriate to the particular offense and the offender for which such sentence was imposed. The difference between the proportionality and appropriateness standards is the additional requirement in the inappropriate standard that the sentence be appropriate to the offender. Young v. State, 620 N.E.2d 21, 27 n.11 (Ind. Ct. App. 1993) (applying old "manifestly unreasonable" standard). The new "inappropriate" standard, revised as of January 1, 2003, seems to indicate an intention to provide the appellate courts with more power to revise sentences than did the manifestly unreasonable language.

1. Proportionality

Proportionality is, in essence, a constitutional challenge stemming from both the U.S. Constitution and the Indiana Constitution. Young v. State, 620 N.E.2d 21, 27 (Ind. Ct. App. 1993).

a. Eighth Amendment

It is unclear to what extent there is a proportionality guarantee in the Eighth Amendment of the U.S. Constitution. The U.S. Supreme Court, in a 5-4 decision, held that the only clearly established law in its jurisprudence is that a "gross disproportionality principle" applies to three strikes laws and similar laws. Lockyer v. Andrade, 538 U.S. 63, 123 S.Ct. 1166 (2003). Such a standard is to be applied only in an exceedingly rare cases. Id. (*citing* Harmelin v. Michigan, 501 U.S. 957, 1001, 111 S.Ct. 2680, 2686 (1991)). The majority opinion appears to hold that because the Court's jurisprudence is not clear or consistent, lower courts can come to almost any decision and not violate "clearly established" law. Lockyer v. Andrade, 538 U.S. at 71-72, 123 S.Ct. at 1172-73 (*citing* Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133 (1980)). For a detailed analysis of the U.S. Constitutional proportionality guarantee, see Chapter 9, *Limitations on Sentences*, Subsection II.B., *Cruel and Unusual Punishment; Proportionality*.

Prior to Harmelin v. Michigan, the Indiana courts held that an extensive U.S. Constitutional proportionality analysis was limited to death penalty and life without parole cases and, thus, did not apply to HO enhancements. Taylor v. State, 511 N.E.2d 1036, 1039 (Ind. 1987); but see Woods v. State, 471 N.E.2d 691 (Ind. 1984) (sentence of four years for illegal possession of handgun enhanced by thirty years on HO finding, was upheld using proportionality test under Eight Amendment).

However, since Harmelin v. Michigan, the Indiana Supreme Court has recognized that a "narrow proportionality principle" applies to non-capital cases under the Eighth Amendment. Smith v. State, 636 N.E.2d 124, 127 (Ind. 1994).

Regardless of whether a proportionality analysis under the Eighth Amendment applies in non-capital cases, a proportionality analysis under the Eight Amendment will be very limited.

> Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133 (1980) (mandatory life sentence imposed upon defendant under Texas recidivist statute did not violate prohibition against cruel and unusual punishment although total amount taken during all three underlying crimes amounted to less than two hundred and fifty dollars).

PRACTICE POINTER: Although counsel may argue that a sentence is disproportionate to the offense under the Eighth Amendment, be certain to argue that it is disproportionate under the Indiana Constitution, which affords more protection to a defendant.

b. Ind. Const., Article 1, § 16

The Indiana Constitution, in contrast to the federal charter, demands that penal sanctions be proportionate to the nature of the offense. Smith v. State, 636 N.E.2d 124, 127 (Ind. 1994).

Proportionality analysis for habitual sentences under the Indiana Constitution requires consideration of two factors:

(a) nature and gravity of the present felony; and
(b) the nature of the prior offenses.

Taylor v. State, 511 N.E.2d 1036, 1039 (Ind. 1987); Young v. State, 620 N.E.2d 21, 27 (Ind. Ct. App. 1993); Shields v. State, 131 N.E.3d 708 (Ind. Ct. App. 2019).

As the principal felony becomes more egregious, satisfying the proportionality requirement requires less of the prior convictions. Mills v. State, 512 N.E.2d 846, 849 (Ind. 1987).

PRACTICE POINTER: The consideration of the nature and gravity of a felony includes, at a minimum, those factors a court properly may consider when it determines what sentence to impose for that offense in the first place. Manley v. State, 656 N.E.2d 277, 280 (Ind. Ct. App. 1995). The court in Manley used this notion to consider the defendant's prior criminal history which was not proven in HO proceeding and defendant's need of correction or rehabilitative treatment that can best be provided by his commitment to a penal facility. Although this approach of considering aggravators and mitigators may be appropriate in an inappropriateness analysis where the court can consider the offender as well as the offense, argue that such individualized analysis is not permitted under the proportionality guarantee of the Indiana Constitution. Manley is another example of a court confusing the former manifestly unreasonable and proportionality analyses. The proportionality analysis should be strictly limited to the offenses for which the defendant is being sentenced.

(1) Theft offenses

> Mills v. State, 512 N.E.2d 846 (Ind. 1987) (thirty-two-year sentence based on all auto thefts or unauthorized use of automobile was not disproportionate).

Taylor v. State, 511 N.E.2d 1036 (Ind. 1987) (thirty-two-year sentence for theft of fifty-dollar spark plugs and being HO based upon prior nonviolent property offenses was proportionate due to shortness of time between offenses).

Hammers v. State, 502 N.E.2d 1339 (Ind. 1987) (five-year HO enhancement was not disproportionate punishment where prior felonies, with one exception, were theft related and more than twenty-five years old).

Hensley v. State, 497 N.E.2d 1053 (Ind. 1986) (sentence of thirty-two years for Class D felony of stealing gasoline which included HO enhancement of thirty years based on prior unrelated Class D felonies, was not disproportionate).

Comstock v. State, 273 Ind. 259, 406 N.E.2d 1164 (1980) (although underlying crime was theft of food, cigarettes and change and priors were another theft and nonviolent burglary, thirty-year sentence for being HO was not so grossly out of proportion to severity of crime as to violate Indiana or U.S. Constitutions).

(2) Handgun offenses

Manley v. State, 656 N.E.2d 277 (Ind. Ct. App. 1995) (sentence of thirty-four years for carrying handgun without license and being HO not disproportionate to offense, although offense was misdemeanor at outset; defendant had fired shots at someone resulting in aggravated property damage, had lengthy criminal history and his flight from jurisdiction showed lack of respect for criminal justice system). See*, supra ,* Practice pointer under this subsection dealing with Indiana constitutional proportionality analysis.

(3) Child molestation

Shields v. State, 131 N.E.3d 708 (Ind. Ct. App. 2019) (53-year aggregate sentence for two counts of child molestation, a concurrent sentence for strangulation, and a habitual offender enhancement not constitutionally disproportionate).

(4) Dealing in cocaine

McCollum v. State, 582 N.E.2d 804 (Ind. 1991) (one-hundred-and-ten-year sentence imposed on an HO convicted of dealing in cocaine was not disproportionate, excessive, and cruel and unusual in violation of Indiana Constitution because of seriousness of cocaine dealing and long prior criminal history).

McGowen v. State, 671 N.E.2d 872 (Ind. Ct. App. 1996) (enhanced sentence of thirty years for Class A felony of dealing in cocaine was not so disproportionate to offense as to violate Indiana constitution).

Young v. State, 620 N.E.2d 21 (Ind. Ct. App. 1993) (twenty- year HO enhancement of defendant's conviction for dealing in cocaine was not disproportionate given that enhancement was based upon prior convictions for robbery and aggravated assault and battery and given gravity of crime of dealing in cocaine).

(5) Drug dealing school zone enhancement

Steelman v. State, 602 N.E.2d 152 (Ind. Ct. App. 1992) (four-year sentence and twenty-year HO enhancement for dealing in marijuana within 1000 feet of school was not disproportionate considering prior unrelated felonies were both class D felony thefts and fact that dealing occurred within 1,000 feet of school made crime more serious than dealing not near school). See also Schnitz v. State, 650 N.E.2d 717 (Ind. Ct. App. 1995).

(6) Non-violent felonies

The enhanced sentence provided for the recidivist offender by the HO statute does not constitute cruel and unusual punishment simply because the principal offense may be characterized as nonviolent in nature. Beach v. State, 496 N.E.2d 43, 45 (Ind. 1986).

Howard v. State, 467 N.E.2d 1 (Ind. 1984) (sentence of life imprisonment upon HO finding where underlying offense as well as prior convictions were nonviolent, but serious, felonies did not violate ban on cruel and unusual punishment). See also Mitchell v. State, 272 Ind. 369, 398 N.E.2d 1254 (1979).

(7) Double enhancements (OWI and prostitution offenses)

When a misdemeanor enhanced to a felony because of a prior crime is used to support a habitual offender enhancement, the enhancement, along with the sentence, may be disproportional. In addition, after July 1, 2001, misdemeanors enhanced to felonies cannot be used as the underlying felony, but only as a prior unrelated felony. For a more detailed discussion concerning the use of misdemeanors enhanced to felonies, see *supra*, Subsection II.A.1., *Statutory Provisions; Habitual Offender*.

Best v. State, 566 N.E.2d 1027 (Ind. 1991) (enhancement of the defendant's two-year sentence for driving while intoxicated, by adding twenty years under HO statute, was disproportionate, even though the defendant had a long history of nonviolent alcohol-related offenses, thefts, and burglaries; ten-year enhancement all that Indiana constitution allows).

Clark v. State, 561 N.E.2d 759 (Ind. 1990) (thirty-five-year sentence, based on HO enhancement of convictions for operating while intoxicated and for driving while suspended, was not proportionate to offense and violated Indiana Constitution; enhancement ultimately based upon conviction for conduct that legislature classified as misdemeanor was entirely out of proportion to gravity of offense, where there was no injury to person or property).

Sowell v. State, 590 N.E.2d 1123 (Ind. Ct. App. 1992), *overruled on other grounds by* Shelton v. State, 602 N.E.2d 1020 (Ind. 1992) (defendant's overall sentence of nine years for prostitution which was originally misdemeanor was not unconstitutionally disproportionate or manifestly unreasonable because defendant had long history of prior offenses including nine convictions for prostitution although it was enhanced by eight years due to HO statute).

Lindsey v. State, 877 N.E.2d 190 (Ind. Ct. App. 2007) (eight-year sentence for a Class A misdemeanor and HSO was not disproportionate).

(8) Consideration of illness

Higgins v. State, 601 N.E.2d 342 (Ind. 1992) (there was no violation of Eighth Amendment when court enhanced sentence because of an HO determination after finding defendant Guilty but Mentally Ill when there was no evidence at time of prior crimes that defendant was suffering from mental disease so severe as to preclude appreciation of wrongfulness of conduct).

(9) Life sentence

A life sentence for a habitual criminal is not so disproportionate to the underlying offense as to constitute cruel and unusual punishment. Parks v. State, 270 Ind. 689, 389 N.E.2d 286, 289 (1979); see also Howard v. State, 467 N.E.2d 1 (Ind. 1984).

2. Inappropriate

A claim of inappropriateness (formerly manifest unreasonableness) derives from Ind.App.R. 7(B), which in return, derives from Article VII, Section 4 of the Indiana Constitution that gives the appellate courts power to review sentences. Young v. State, 620 N.E.2d 21, 27 n.10 (Ind.Ct.App 1993).

NOTE: Although the following section includes cases analyzing the "manifestly unreasonable" standard, as of January 1, 2003, Ind.App.R. 7(B) is amended to allow revision of the sentence "if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The Indiana Supreme Court changed the thrust of Rule 7(B) from a prohibition on revising sentences unless certain narrow conditions were met to an authorization to revise sentences when certain broad conditions are satisfied. Neale v. State, 826 N.E.2d 635 (Ind. 2005).

a. Theft

Frye v. State, 837 N.E.2d 1012 (Ind. 2005) (40 years is inappropriate where defendant's committed underlying burglary and theft without being armed and while victim was away from her home; despite defendant's extensive criminal history, his record did not warrant 40 years because burglary conviction that in part supports HO occurred more than 20 years ago and his last conviction for a violent offense occurred in 1999 for battery, and many of his convictions have been related to his life-long struggle with alcoholism; defendant's sentence was revised to 10 years for burglary, enhanced by 15 years for being an habitual offender).

Hollin v. State, 877 N.E.2d 462 (Ind. 2007) (despite 18-year-old's "numerous transgressions," 40-year sentence for conspiracy to commit burglary/habitual inappropriate; court reduced to aggregate 20- year sentence).

Wilson v. State, 583 N.E.2d 742 (Ind. 1992) (thirty-four year sentence was manifestly unreasonable where underlying theft was D felony that produced no property or personal damage, prior convictions used for HO occurred while defendant was in his twenties,

defendant successfully completed parole in 1970, defendant did not show return to violent crime, and felony used by State to establish HO status was Class D felony; remanded to modify sentencing order to impose presumptive term of two years for Class D felony conviction, and to impose ten-year enhancement for HO status).

b. Consecutive HO enhancements

Whether the resulting sentence is considered inappropriate or exceeding statutory authority, trial court cannot order enhanced sentences based on HO determinations to be served consecutively. The power to order consecutive sentences is subject to the rule of rationality and the limitations in the Constitution. Starks v. State, 523 N.E.2d 735, 736 (Ind. 1988); Weaver v. State, 676 N.E.2d 22, 26 (Ind. Ct. App. 1997). Even when underlying sentences are required to run consecutively under Ind. Code 35-50-1-2(d) (requiring consecutive sentences when a person commits a second crime after being arrest for, but before, being discharged from a first crime), a trial court cannot order HO enhancements attached to the first and second crimes consecutively. Breaston v. State, 907 N.E.2d 992 (Ind. 2009).

Nelson v. State, 792 N.E.2d 588 (Ind. Ct. App. 2003) (total 90-year sentence based on consecutive sentences for two felonies and consecutive HO enhancement for defendant who sold less than one gram of cocaine to an undercover officer, was unarmed and cooperative with police, and who had not been convicted of a crime of violence as an adult was inappropriate; court remanded for application of concurrent sentences but still permitted thirty-year HO enhancement, for total sentence of 60 years).

Ingram v. State, 761 N.E.2d 883 (Ind. Ct. App. 2002) (sentencing court exceeded its legislative authorization when it imposed consecutive felony sentences because of HO status at single sentencing). See also McCotry v. State, 722 N.E.2d 1265 (Ind. Ct. App. 2000); Starks v. State, 523 N.E.2d 735 (Ind. 1988).

Smith v. State, 774 N.E.2d 1021 (Ind. Ct. App. 2002) (although second HO enhancement was attached to second felony that was committed while defendant was on bond for first felony, trial court erred in ordering second HO enhancement to run consecutively to first HO enhancement attached to first felony; trial court cannot order HO enhancements to run consecutively regardless of whether the HO enhancement was determined in single or multiple proceedings).

In addition, the State is barred from seeking multiple, pyramiding HO sentence enhancements by bringing successive prosecution for charges that could have been consolidated for trial under Ind. Code 35-41-1-9.

Seay v. State, 500 N.E.2d 1284 (Ind. 1990) (although charges could have been joined, State brought four separate counts of dealing in controlled II substance in two separate trials, alleging two counts in each trial; where both juries convicted defendant and determined defendant was an HO, trial court improperly ordered sentence from first to run consecutively to sentence from second trial).

See also State v. Wiggins, 661 N.E.2d 878 (Ind. Ct. App. 1996); Williams v. State, 762 N.E.2d 1216 (Ind. 2002).

Also, there is no statutory authorization for stacking general and specialized habitual offender enhancements and a trial court may not order the habitual and repeat sexual offender enhancements consecutively. Young v. State, 57 N.E.3d 857 (Ind. Ct. App. 2015), *trans. denied*.

PRACTICE POINTER: The holding in Calloway v. State, 500 N.E.2d 1196 (Ind. 1986), that a prosecutor could threaten to request multiple habitual on two different counts to run consecutively in order to get the defendant to plead, was questioned by Starks v. State, 523 N.E.2d 735, 736 (Ind. 1988).

c. Consideration of illness

Craig v. State, 481 N.E.2d 390 (Ind. 1985) (sentence of thirty-six years for burglary, as enhanced by HO determination, was not manifestly unreasonable, despite defendant's criminal history allegedly being caused by alcohol addiction).

d. Consideration of criminal history

Binkley v. State, 654 N.E.2d 736 (Ind. 1995) (once defendant's sentence for murder had been enhanced based in part on his prior criminal history which was not basis of HO determination, it was not manifestly unreasonable for judge to impose full thirty years for HO determination).

Lucas v. State, 499 N.E.2d 1090 (Ind. 1986) (where defendant was charged with multiple burglaries and with being HO and received maximum, consecutive penalties for crimes for which he was convicted, sentence imposed was not manifestly unreasonable in view of his past criminal history and his apparent readiness to use deadly force although no injuries occurred).

PRACTICE POINTER: Based on the reasoning in Binkley, argue that a sentence which is enhanced because of the same prior crimes on which the HO determination was supported is inappropriate.

3. Unlimited prosecutorial discretion

The HO statute does not violate the proscription against cruel and unusual punishment by improperly vesting unlimited discretion in the prosecutor to determine whom and whom not to punish as HO. Funk v. State, 427 N.E.2d 1081 (Ind. 1981).

B. DOUBLE JEOPARDY

The HO procedure does not unconstitutionally subject the defendant to two trials. Ferguson v. State, 273 Ind. 468, 405 N.E.2d 902, 908 (1980); Hicks v. Duckworth, 708 F.Supp. 214 (N.D.Ind. 1989), *aff'd*, 922 F.2d 409 (7th Cir. 1991); U.S. Const., Amend. V; Ind. Const., art. 1, § 14.

The HO procedure does not involve double jeopardy because it merely provides a more severe penalty for the crime charged, rather than imposing punishment for a separate crime. Dullen v. State, 496 N.E.2d 381, 383 (Ind. 1986). The HO finding is not a separate punishment, but enhancement of the underlying conviction which allows for a longer term of imprisonment because previous contacts with the justice system have failed to provide any meaningful deterrence to the defendant. Mayo v. State, 681 N.E.2d 689, 694 (Ind. 1997).

1. Same prior felony can support HO and aggravated underlying sentence

A court may consider the same prior offenses for both enhancement of the instant offense and to establish HO status. James v. State, 643 N.E.2d 321, 323 (Ind. 1994); Calhoun v. State, 484 N.E.2d 7, 10 (Ind. 1985). In fact, the use of prior convictions to enhance the sentence for the latest crime as well as to constitute an aggravating factor in the underlying sentence does not violate the ban on double jeopardy because the defendant is not twice tried nor punished for the same offense. Yurina v. State, 474 N.E.2d 93, 98 (Ind. 1985); Kelly v. State, 452 N.E.2d 907, 912 (Ind. 1983); Hicks v. Duckworth, 708 F.Supp. 214 (N.D. Ind. 1989), *aff'd,* 922 F.2d 409 (7th Cir. 1991).

PRACTICE POINTER: Although the use of same prior felony as a predicate for HO enhancement and to aggravate the underlying sentence may not violate double jeopardy, there are some limits to its use. For instance, such sentence cannot run consecutively to another sentence also enhanced by the same felony. Sweatt v. State, 887 N.E.2d 81 (Ind. 2008). Also, if the only aggravator was a prior crime which was also used to support an HO determination, argue that the sentence is inappropriate. Davis v. State, 851 N.E.2d 1264 (Ind. Ct. App. 2006) (sentence was inappropriate where same prior OWI conviction was used to aggravate sentence and to increase sentence from class D felony to class C felony).

2. Same prior felony can support two HO enhancements

Double Jeopardy Clause is not violated where the same prior offenses are used to support two separate habitual allegations. Mayo v. State, 681 N.E.2d 689, 694-95 (Ind. 1997); Mers v. State, 496 N.E.2d 75, 77-80 (Ind. 1986); Morgan v. State, 462 N.E.2d 1029, 1030 (Ind. 1984).

Mayo v. State, 681 N.E.2d 689 (Ind. 1997) (same prior conviction for escape was properly used in another state and in Indiana to support two separate HO determinations).

Hill v. State, 122 N.E.3d 979 (Ind. Ct. App. 2019) (OVWI conviction used to enhance a prior habitual offender status can be used as predicate conviction for HVSO status).

However, while the State may use the same prior convictions to support two HO convictions, the felonies underlying those two HO convictions must be distinct and unrelated. Golden v. State, 553 N.E.2d 1219, 1222 (Ind. Ct. App. 1990).

Golden v. State, 553 N.E.2d 1219 (Ind. Ct. App. 1990) (where two underlying forgeries were related and HO status was attached to both, one HO status had to be vacated).

3. Retrial of HO charge

a. In same proceeding (same underlying felony)

(1) Reversal based on grounds other than insufficiency of HO enhancement

Double jeopardy does not bar retrial of a HO enhancement when the reversal is based on grounds other than insufficiency of the HO enhancement.

Gilliam v. State, 563 N.E.2d 94 (Ind. 1990) (subsequent vacation of one of prior felony convictions shown at original proceeding created no impediment to retrial of defendant's habitual offender status); Denton v. State, 496 N.E.2d 576 (Ind. 1986).

(2) Reversal based on insufficiency of HO enhancement

(a) Federal double jeopardy analysis

Retrial on a sentencing enhancement based on a prior conviction is permitted even where the enhancement is reversed because of insufficient evidence. Dexter v. State, 959 N.E.2d 235, 240 (Ind. 2012) (citing Monge v. California, 524 U.S. 721 (1998); Jaramillo v. State, 823 N.E.2d 1187 (Ind. 2005)).

But see Nunley v. State, 995 N.E.2d 718 (Ind. Ct. App. 2013), *trans. denied* (Jaramillo does not apply to reversals of habitual offender allegations wrongfully amended under Ind. Code 35-34-1-5).

Similarly, the Indiana Double Jeopardy Clause does not bar retrial of habitual offender charge when it was reversed on basis of insufficient evidence. Moore v. State, 769 N.E.2d 1141 (Ind. Ct. App. 2002).

(b) Indiana Double Jeopardy Analysis

Similarly, the Indiana Double Jeopardy Clause does not bar retrial of habitual offender charge when it was reversed on basis of insufficient evidence. Similarly, the Indiana Double Jeopardy Clause does not bar retrial of habitual offender charge when it was reversed on basis of insufficient evidence. Moore v. State, 769 N.E.2d 1141 (Ind. Ct. App. 2002).

(c) Res Judicata

In Shumate v. State, 718 N.E.2d 1133 (Ind. Ct. App. 1999), the Court of Appeals held that res judicata, but not double jeopardy, barred second probation revocation following reversal of first revocation due to insufficient evidence. (Arguably, res judicata would bar the re-trial of a habitual offender phase based on the same prior offenses after a reversal due to insufficiency.)

But cf. Dexter v. State, 991 N.E.2d 171 (Ind. Ct. App. 2013), *trans. denied* (even if four-pronged test from Shumate applies, Indiana Supreme Court's reversal of defendant's habitual offender enhancement was not a final judgment on merits, so doctrine of res judicata did not bar State from retrying enhancement).

b. In future proceedings (different underlying felony)

The state may use this HO status any time the defendant commits a further crime and a jury's determination that a defendant is not an HO during a particular trial is not an "acquittal" of that defendant's status as an HO. A defendant cannot be "acquitted" of that status any more than he can be "acquitted" of being a certain age or sex or any other inherent fact. Mers v. State, 496 N.E.2d 75, 79 (Ind. 1986).

In fact, following an HO acquittal, double jeopardy does not bar use of same prior unrelated felonies in subsequent HO determination with different underlying felony. Dixon v. State, 437 N.E.2d 1318, 1320 (Ind. 1982); Baker v. State, 425 N.E.2d 98, 101 (Ind. 1981); Baker v. Duckworth, 752 F.2d 302 (7th Cir. 1985).

Harris v. State, 427 N.E.2d 658 (Ind. 1981) (underlying felonies used to enhance defendant's sentence had been used in prior habitual charge, of which defendant was acquitted, but double jeopardy did not bar subsequent habitual criminal finding).

c. Collateral estoppel

The State is not collaterally estopped from pursuing HO proceeding because one of the prior felonies was alleged in an earlier HO proceeding at which defendant was acquitted. Mers v. State, 496 N.E.2d 75, 79 (Ind. 1986); Harrison v. State, 496 N.E.2d 49, 53 (Ind. 1986).

PRACTICE POINTER: Following the reasoning in Mers, collateral estoppel will bar the use of the prior felony used in an HO charge of which the defendant was previously acquitted in another HO charge, if a special verdict form was used for HO charge for which the defendant was acquitted and the reason the jury found the defendant not an HO is because the State failed to prove the prior felony. However, the reasoning set forth in Mers is not the same reasoning set forth in Baker v. State, 425 N.E.2d 98 (Ind. 1981)(finding that defendant is or is not HO is not ultimate issue of fact in sense that term plays in application of collateral estoppel).

4. Enhancement under two different recidivist statutes

Although enhancement under two separate recidivism statutes may be prohibited by statute, double enhancements do not violate double jeopardy. Hampton v. State, 526 N.E.2d 1154 (Ind. 1988); Woods v. State, 471 N.E.2d 691 (Ind. 1984). For a detailed discussion on the prohibition against double enhancements, see *supra* Subsection I.D, *Double enhancements*, and Subsection II.A., *Habitual Offender*.

Woods v. State, 471 N.E.2d 691 (Ind. 1984) (use of same prior felony conviction to raise possession of handgun from Class A misdemeanor to felony under Ind. Code 35-47-2-1 and then to enhance penalty under HO statute did not constitute double jeopardy). See also Hampton v. State, 526 N.E.2d 1154 (Ind. 1988).

C. DUE PROCESS

A sentence enhancement imposed upon an HO is a significant infringement upon one's liberty interest, and one charged as such must be afforded due process safeguards. Snyder v. State, 654 N.E.2d 15 (Ind. Ct. App. 1995). An accused has the constitutional right to have notice and an opportunity to be heard regarding a recidivist charge. Barnett v. State, 429 N.E.2d 625 (Ind. 1981). However, the filing of an HO charge does not deny the defendant due process of law. Norris v. State, 271 Ind. 568, 394 N.E.2d 144 (1979).

Ziebell v. State, 788 N.E.2d 902 (Ind. Ct. App. 2003) (trial court did not deny defendant's due process rights by requiring defendant to be present during HO phase of trial).

1. Bifurcated trial

Due process under the Indiana and Federal Constitutions requires the HO phase of a trial to be bifurcated from the guilt phase of a trial. Lawrence v. State, 259 Ind. 306, 286 N.E.2d 830 (1972). For a detailed analysis of bifurcation, see *supra* Subsection III, *Procedure*, D.1., *HO hearing; Bifurcated trial.*

2. Self-incrimination

Due process rights are not violated by State's filing of HO charge, despite fact that defendant *must* choose between testifying in his own behalf (becoming subject to cross-examination that could expose him as an HO and influencing jury in its deliberations on HO count) and not testifying. Reed v. State, 438 N.E.2d 704, 707 (Ind. 1982).

3. Prosecutor's discretion

The fact that it is within the prosecutor's discretion whether to bring an HO charge does not violate due process. Collins v. State, 275 Ind. 86, 415 N.E.2d 46, 52 *cert. den'd,* 451 U.S. 991, 101 S.Ct. 2331 (1981); Eaton v. State, 274 Ind. 73, 408 N.E.2d 1281, 1284 (1980). To prove a violation of the due process clause based on discrimination, defendant must show that the discrimination exists and is a deliberate policy of the State. Jones v. State, 449 N.E.2d 1060, 1065 (Ind. 1983), *overruled* on other grounds by Seay v. State, 698 N.E.2d 732 (Ind. 1998).

Some selectivity is always permitted, so long as the election is not discriminatorily based on classifications of race, national origin, sex, religion, etc. Eaton v. State, 274 Ind. 73, 408 N.E.2d 1281, 1284 (1980).

> Jones v. State, 449 N.E.2d 1060 (Ind. 1983), *overruled on other grounds by* Seay v. State, 698 N.E.2d 732 (Ind. 1998 (where defendant was first black person in six years to be charged in county with HO status, there was no evidence that his race was used to selectively charge him).

PRACTICE POINTER: Selective prosecution can also violate Equal Protection Clause when selection is based on an unjustifiable standard (e.g., race).

D. EQUAL PROTECTION

1. Reasonable classification: repeat offenders

HO statute does not violate the Equal Protection Clause because the statute was enacted with a view to the protection of society, believing that a hardened criminal needed more severe punishment than a first offender. The statute makes a reasonable classification and applies equally on all persons within that class. Barr v. State, 205 Ind. 481, 187 N.E. 259 (1933).

2. Selective enforcement of statute

Although there are no standards or classifications utilized by the prosecutor in determining who ought to be sentenced as HO, the HO statute does not violate the equal protection clause of the Fourteenth Amendment and the Indiana Constitution, Article. 1, § 23. Ferguson v. State, 438 N.E.2d 286, 287 (Ind. 1982); see also Hill v. State, 452 N.E.2d 932, 933 (Ind. 1983).

The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Smith v. State, 422 N.E.2d 1179, 1187 (Ind. 1981). Laxity in the administration of the law, no matter how long continued, is not a denial of equal protection. Owens v. State ex rel Vannatta, 178 Ind.App. 406, 382 N.E.2d 1312, 1316 (1978).

Where the defendant does not assert that alleged selective enforcement of HO statute is based upon an unjustifiable standard such as race, religion, or other arbitrary classification, that HO statute is generally applied in an arbitrary fashion or through some arbitrary classification, or that the HO statute was arbitrarily applied against him, that he was unjustly found to be an HO, the defendant fails to show that the wide discretion granted to the prosecutor by HO statute is being, or has been applied in a manner which denied him equal protection of the law. Smith v. State, 422 N.E.2d 1179, 1187 (Ind. 1981).

Kindred v. State, 540 N.E.2d 1161 (Ind. 1989) (mere showing that no females were sentenced as HO in Indiana prior to 1981 was insufficient to support defendant's equal protection claim or require hearing on claim).

PRACTICE POINTER: Selective prosecution can also violate Due Process Clause when selection is done in effort to restrict fundamental right.

E. EX POST FACTO/BILL OF ATTAINDER

The HO statutes do not violate the prohibition against ex post facto laws (U.S. Const. Article. 1, §10 and Ind. Const. Article. 1, §24). Gryger v. Burke, 334 U.S. 728, 68 S.Ct. 1256 (1948). The HO statute does not provide for a second offense, but establishes a status of the defendant which provides for an enhanced sentence for the instant felony. Keeby v. State, 511 N.E.2d 1005, 1009 (Ind. 1987); Wise v. State, 272 Ind. 498, 400 N.E.2d 114, 117 (1980).

F. SEPARATION OF POWERS

The HO statute does not violate the separation of powers clause by allowing the prosecutor the discretion to charge a person as an HO. Jones v. State, 449 N.E.2d 1060, 1065 (Ind. 1983), *overruled on other grounds by* Seay v. State, 698 N.E.2d 732 (Ind. 1998); Havens v. State, 429 N.E.2d 618, 622 (Ind. 1981); Eaton v. State, 269 Ind. 556, 408 N.E.2d 1281, 1284 (1980).

G. SIXTH AMENDMENT - RIGHT TO TRIAL BY JURY

Since Apprendi was decided, there has appeared to be almost total consensus that due process and the Sixth Amendment do not require a jury determination to impose a recidivist sentencing enhancement. The doctrine of res judicata provides a second justification for not requiring the jury to find fact of a prior conviction. Smith v. State, 825 N.E.2d 783 (Ind. 2005). However, in Indiana, the HO and HSO statutes provide for a right to a jury trial.

Smith v. State, 825 N.E.2d 783 (Ind. 2005) (repeat sex offender statute which does not provide for a jury is constitutional).

A defendant's right to an impartial jury is not violated because the jury determining the HO phase is the same jury that convicted in the guilt phase. Dullen v. State, 496 N.E.2d 381, 383 (Ind. 1986).

However, due process requires that the court advise the defendant that waiving the right to a jury trial during the guilt phase of the trial also waives the defendant's right to a jury trial on the habitual offender count.

O'Connor v. State, 796 N.E.2d 1230 (Ind. Ct. App. 2003) (defendant's waiver of her right to jury trial upon underlying charges was not effective as to HO information which had yet to be filed).

Snyder v. State, 654 N.E.2d 15 (Ind. Ct. App. 1995) (reversible error where defendant not informed that guilty plea to underlying offenses waived right to jury trial on pending habitual offender allegation; guilty plea rendered unintelligent and involuntary), *aff'd in part and remanded by* 668 N.E.2d 1214 (Ind. 1996).

For a more detailed discussion on waiver of jury trial at the HO proceeding, see *supra*, Subsection III, *Procedure; Habitual Offender Hearing; Jury; Waiver of right to jury*

H. SIXTH AMENDMENT - RIGHT TO PRESENT EVIDENCE

Jones v. State, 449 N.E.2d 1060 (Ind. 1983), *overruled on other grounds by* Seay v. State, 698 N.E.2d 732 (Ind. 1998) (trial court did not violate defendant's right to present defense by denying defendant's request for discovery (to aid defendant in making do process claim) of name, address, race, and gender of everyone charged with felony in county and who could have been charged with HO for six-year period).

I. VINDICTIVE / REFORMATION

The HO statute does not violate Ind. Const., Art I § 18, which guarantees that "[t]he penal code shall be founded on the principles of reformation, and not of vindictive justice." Erickson v. State, 438 N.E.2d 269, 271-72 (Ind. 1982); Funk v. State, 427 N.E.2d 1081, 1086 (Ind. 1981); Wise v. State, 272 Ind. 498, 400 N.E.2d 114, 118 (1980).

Marsillett v. State, 495 N.E.2d 699 (Ind. 1986) (thirty-two-year sentence for theft of $990 did not constitute vindictive justice, rather than reformation, as required by Indiana Constitution, where sentence had been enhanced under HO statute).

Coble v. State, 476 N.E.2d 102 (Ind. 1985) (although defendant claimed crimes were caused by alcoholism, imposition of HO was not in violation of Article I, § 18 of Indiana Constitution).

J. JURY NULLIFICATION

In Indiana, jurors have the right to determine the law and the facts in HO proceedings. Ind. Const., art. 1. § 19. The jury has the ability to find a defendant to be an HO or not to be an HO irrespective of the uncontroverted proof of prior felonies. Seay v. State, 698 N.E.2d 732 (Ind. 1998) (adopting principles enunciated by Justice Dickson in Mers v. State, 496 N.E.2d 75 (Ind. 1986), Hensley v. State, 497 N.E.2d 1053 (Ind. 1986) (Dickson, J., dissenting), and Duff v. State, 508 N.E.2d 17 (Ind. 1987)), *overruling* Jones v. State, 449 N.E.2d 1060 (Ind. 1983).

1. Jury instructions

For examples of jury instructions which do and do not violate Article I, Section 19, see *supra*, Section III, *Procedure*, Subsection D.4.f, *HO hearing; Jury Instructions*.

2. Right to present evidence of jury nullification

Evidence relating to issues other than whether the defendant has been found guilty and sentenced for prior offenses may be relevant if the defendant is arguing jury nullification. Hollowell v. State, 753 N.E.2d 612 (Ind. 2001); but see Taylor v. State, 511 N.E.2d 1036, 1040 (Ind. 1987) (trial court did not err by prohibiting defendant from testifying about why he did not deserve to be considered habitual criminal during the HO phase of the trial; court reasoned that the trial court may consider defendant's testimony for sentencing, but Article 1, Section 19 does not require that this evidence go to jury).

Taylor is arguably overruled by Hollowell v. State, 753 N.E.2d 612 (Ind. 2001); Seay v. State, 698 N.E.2d 732 (Ind. 1998) and Parker v. State, 698 N.E.2d 737 (Ind. 1998). Because a jury now has the right to jury nullification during the HO phase of a trial, the defendant has the right to present evidence of jury nullification. See Joyner v. State, 678 N.E.2d 386 (Ind. 1997) (exclusion of evidence of the defendant's defense that another committed the crime could not be harmless error).

K. INVOLUNTARY SERVITUDE: THIRTEENTH AMENDMENT

Punishment as a habitual criminal is not punishment for a status but punishment for the last crime committed and is therefore within the exception to the Thirteenth Amendment of the U.S. Constitution permitting involuntary servitude as punishment for crime. United States ex rel. Smith v. Dowd, 271 F.2d 292 (7th Cir. 1959)*, cert. den'd*, 362 U.S. 978, 80 S.Ct. 1063 (1960).