

[CAPTION]

DEFENDANT'S MOTION IN LIMINE CONCERNING USE OF THE TERM "HABITUAL TRAFFIC VIOLATOR"

The Defendant, by counsel, respectfully requests this Court for an Order prohibiting testimony or reference to the term "habitual traffic violator." In support of the Motion, the Defendant states the following:

1. Defendant is charged by Information as follows: [insert language of driving as an habitual traffic violator charge].
2. Ind. Code § 9-30-10-16 provides:
 - (a) A person who operates a motor vehicle:
 - (1) while the person's driving privileges are validly suspended under this chapter or IC 9-12-2 (repealed July 1, 1991) and the person knows that the person's driving privileges are suspended; or
 - (2) in violation of restrictions imposed under this chapter or IC 9-12-2 (repealed July 1, 1991) and who knows of the existence of the restrictions; commits a Class D felony.
3. The State of Indiana has used the term "Habitual Traffic Violator" in its charging information and it is anticipated that the State will utilize the term in voir dire, argument, and the presentation of documentary and testimonial evidence with drumbeat repetition.
4. The term "Habitual Traffic Violator" is not in the text of the statute with which Defendant is charged. Further, Ind. Code § 9-30-10-4, the statute whereby the Bureau of Motor Vehicles may determine whether a person is a Habitual Violator of Traffic Laws does not use the term "Habitual Traffic Violator."
5. The use of the term "Habitual Traffic Violator" is unduly prejudicial, as it necessarily implies that Defendant has a history of criminal activity and/or bad acts, or that he has a propensity to commit traffic violations.

6. The term “Habitual Traffic Violator” is not essential to the jury’s understanding of the offense charged.

7. As a person accused of a criminal offense, Defendant had a constitutional due process right to a fair trial. See U.S. CONST. AMENDS. V, XIV; IND. CONST. Art. I, §§ 12, 13. Due process constitutionally clothes Defendant with a presumption of innocence. See [Estelle v. Williams, 425 U.S. 501, 503, 48 L.Ed. 2d 126, 96 S.Ct. 1691 \(1976\)](#). Evidence of prior convictions is generally inadmissible because such evidence "has no tendency to establish the guilt or innocence of the accused." [Spearman v. State](#), 744 N.E.2d 545, 547 (Ind.Ct.App. 2001) (quoting [Shelton v. State](#), 602 N.E.2d 1017, 1019 (Ind. 1992)).

8. While the Defendant concedes that his status of being suspended pursuant to Ind. Code § 9-30-10-4 is an element of the offense described under Ind. Code § 9-30-10-16, being a “Habitual Traffic Violator” is not. The label implies prior convictions by Defendant. A trial court can limit the "prejudicial effect of evidence of a prior conviction by excluding evidence regarding the underlying facts of the prior felony and limiting prosecutorial references thereto." [Spearman](#), 744 N.E.2d at 550.

9. It is well established that the State bears the burden to prove every element of an offense. [Austill v. State](#), 745 N.E.2d 859, 862 (Ind. Ct. App. 2001). This burden is placed on the State as part of the constitutional presumption that a defendant is innocent until proven guilty. *Id.* The State of Indiana has the ability to establish the essential elements of Ind. Code § 9-30-10-16 without using the prejudicial status phrase of "habitual traffic violator."

10. Moreover, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (Darden, J., concurring in part and dissenting in part) (citing

Jones v. United States, 529 U.S. 848, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000) (quoting [United States ex rel. Attorney General v. Delaware & Hudson Co.](#), 213 U.S. 366, 53 L.Ed. 836, 29 S.Ct. 527 (1909))). As indicated by the majority in [Spearman](#), such doubtful constitutional questions can be avoided when applying Ind. Code § [35-47-4-5](#) (the statute prohibiting the possession of firearms by “Serious Violent Felons”) by minimizing the number of references to the underlying predicate felony and avoiding the phrase "serious violent felon," and instead referencing a felony "enumerated under [IC 35-47-4-5](#)."

11. The legislature could not have intended to apply Ind. Code § [35-47-4-5](#) otherwise, for to do so would be to create instances of prejudice analogous to determining habitual offender status without bifurcation or the admissibility of prior convictions contrary to the rules of evidence. See Ind. Evidence Rule 404(b). [Bayes v. State](#), 779 N.E.2d 77, 83 (Ind.Ct.App. 2002).

12. In habitual offender cases, the consideration of a defendant's prior convictions is removed from the jury's guilt/innocence determination on the felony charge. [Shelton v. State](#), 602 N.E.2d 1017, 1019 (Ind. 1992). Through separating the consideration of prior convictions from the jury's initial guilt/innocence determination, the defendant is provided a fair and impartial jury to determine his guilt or innocence on the underlying felony charge. [Id.](#)

13. The analysis utilized by the appellate courts of this state in considering the “serious violent felon” language is equally applicable to the use of the phrase “Habitual Traffic Violator” in this case.

14. Under the Indiana Rules of Evidence, "evidence of a prior conviction is as prejudicial as evidence can get, and requires a strong showing of probative value." [Thompson v. State](#), 690 N.E.2d 224, 235 (Ind. 1997).

15. Here, Defendant's suspension status pursuant to Ind. Code § 9-30-10-4 is an essential element of the charged offense and as such cannot be bifurcated, or considered not probative. See e.g. Spearman, 744 N.E.2d at 548. However, the potential for prejudice may be minimized by practices suggested by the Court in Spearman and Bayes by replacing the prejudicial language with a statutory reference. Bayes, 779 N.E.2d at 83.

WHEREFORE, the Defendant, by counsel, requests that this Court grant his Motion in Limine and order the State of Indiana, through its prosecutors and its witnesses, not to mention, refer to, interrogate concerning, or attempt to convey to the jury in any manner, either directly or indirectly any use of the phrase “Habitual Traffic Violator” without the permission of this Court, outside the presence and hearing of the jury; and further instruct the State of Indiana and its witnesses not to make any reference to the fact that this Motion has been filed and granted, and to warn and caution each and every one of its’ witnesses to strictly follow these same instructions and to grant all other relief just and proper in the premises.

(Signature)

CASE LAW

Flynn v. State, 177 Ind.App. 360, 379 N.E.2d 548 (1978) (prosecutor's reference to the Defendant as "drug dealer" required reversal where no supporting evidence).

Jones v. State, 708 N.E.2d 37 (Ind.Ct.App. 1999) (in prosecution for operating motor vehicle while license suspended for life, the trial court committed reversible error in admitting a laundry list of the Defendant's prior convictions; evidence beyond merely proving suspension is inadmissible). See also Dumes v. State, 718 N.E.2d 1171 (Ind.Ct.App. 1999); but see Carpenter v. State, 743 N.E.2d 326 (Ind.Ct.App. 2001).

Dugan v. State, 860 N.E.2d 1288 (Ind.Ct.App. 2007) (implicitly suggesting that parties and judges refer to statute cite rather than to "serious violent felon" when Defendant stipulates to his prior conviction).