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## ARTICLES

### DOUBLE TROUBLE: UNDERSTANDING DOUBLE ENHANCEMENT

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#### INTRODUCTION

“Eleven times I been busted, eleven times I been to jail . . . Double trouble—that’s what my friends all call me.”<sup>1</sup> While this is just a lyric to an old Lynyrd Skynyrd song, all too often it describes the situation in which recidivists find themselves. In order to curb recidivism in the State of Indiana, the General Assembly has enacted multiple recidivism statutes, resulting in an increase to the possible sentencing range for a defendant’s conviction. Moreover, the General Assembly has provided for situations in which a defendant may be subjected to multiple recidivism statutes, permitting double enhancement of the defendant’s sentence. This article will address the applicable recidivism statutes and the instances where said statutes can be applied simultaneously. It will outline the statutory authority and relevant case law that provides the ongoing conversation between the General Assembly and Indiana appellate courts regarding double enhancement. Our goal is for this article to be a guide for trial judges and practitioners in understanding the various recidivism statutes enacted in Indiana and the situations in which double enhancement of a defendant’s conviction pursuant to multiple recidivism statutes is permissible.

#### I. GENERAL OVERVIEW

“The general rule is that, ‘absent explicit legislative direction, a sentence imposed following a conviction under a progressive penalty statute may not be increased further under either the general habitual offender statute or a specialized

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1. LYNYRD SKYNYRD, *Double Trouble*, on GIMME BACK MY BULLETS (MCA Records 1976).

habitual offender statute.”<sup>2</sup> Likewise, absent explicit legislative direction, a conviction under a specialized habitual offender statute cannot be further enhanced under the general habitual offender statute.<sup>3</sup> Therefore, double enhancement is not permitted unless the General Assembly has explicitly authorized double enhancement in the relevant statute.<sup>4</sup> In analyzing double enhancement issues, the court determines whether a defendant’s underlying conviction is pursuant to a progressive penalty statute or a specialized habitual offender statute; if neither, there is no double enhancement issue.<sup>5</sup> If so, then the court reviews the relevant statute (*i.e.* the general habitual offender or specialized habitual offender statute) to determine whether the General Assembly has explicitly authorized double enhancement of the underlying conviction.<sup>6</sup> For example, if a defendant was convicted of Level 5 felony carrying a handgun without a license, which is a progressive penalty statute (a Class A misdemeanor enhanced to a Level 5 felony due to a prior conviction for the same offense), and alleged to be a habitual offender, then the court would review the general habitual offender statute to determine whether the General Assembly has explicitly permitted this type of double enhancement.<sup>7</sup> The Indiana Supreme Court has explained that double enhancement jurisprudence is part of an ongoing dialogue between the appellate courts and the General Assembly.<sup>8</sup>

## II. RECIDIVISM STATUTES

The General Assembly has enacted statutes that authorize the imposition of more severe sentences for recidivism. Of those statutes, the following can trigger a double enhancement analysis: (1) the general habitual offender statute, (2) specialized habitual offender statutes, and (3) progressive penalty statutes.<sup>9</sup>

### *A. The General Habitual Offender Statute*

The general habitual offender statute provides in relevant parts that:

(a) 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

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2. *Dye v. State (Dye I)*, 972 N.E.2d 853, 857 (Ind. 2012) (quoting *State v. Downey*, 770 N.E.2d 794, 796 (Ind. 2002)) (emphasis omitted).

3. *Dye I*, 972 N.E.2d at 857.

4. *Id.* at 858.

5. *Id.*

6. *Id.*

7. IND. CODE § 35-47-2-1 (2017) provides that a person who knowingly or intentionally carries a handgun without a license which is not authorized by one of the listed exceptions and has a prior conviction for carrying a handgun without a license commits a Level 5 felony.

8. *Dye I*, 972 N.E.2d at 856.

9. *Id.* at 857.

section.

(b) 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.

(c) 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) for at least one (1) of the two (2) prior unrelated felonies and the time the person committed the current offense.

(d) 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:
  - (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) for at least one (1) of the three (3) prior unrelated felonies and the time the person committed the current offense.

(e) The state may not seek to have a person sentenced as a habitual offender for a felony offense under this section if the current 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. However, a prior unrelated felony conviction may be used to support a habitual offender determination 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.

...

(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 nonsuspendible.

(j) Habitual offender is a status that results in an enhanced sentence. It is not a separate crime and does not result in a consecutive sentence. The court shall attach the habitual offender enhancement to the felony conviction with the highest sentence imposed and specify which felony count is being enhanced. If the felony enhanced by the habitual offender determination is set aside or vacated, the court shall resentence the person and apply the habitual offender enhancement to the felony conviction with the next highest sentence in the underlying cause, if any.<sup>10</sup>

Generally, a defendant who has been convicted of a felony and has been previously convicted of three prior, unrelated felonies can receive a sentence enhancement between two and six years.<sup>11</sup> As outlined in the statute, however, the required number of prior unrelated convictions and possible penalty range are subject to change as the level of the underlying felony conviction increases.<sup>12</sup>

### *B. Specialized Habitual Offender Statutes*

Specialized habitual offender statutes subject a defendant to an enhanced sentence beyond that imposed for the underlying conviction if the defendant was previously convicted of multiple, closely related offenses.<sup>13</sup> Common specialized habitual offender statutes include Indiana Code section 9-30-15.5-2 (habitual vehicular substance offender),<sup>14</sup> Indiana Code section 9-30-10-4 (habitual traffic

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10. IND. CODE § 35-50-2-8 (2017).

11. § 35-50-2-8.

12. § 35-50-2-8.

13. *State v. Downey*, 770 N.E.2d 794, 795 (Ind. 2002).

14. IND. CODE § 9-30-15.5-2(a) (2015) provides that:

The state may seek to have a person sentenced as a 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.

violator),<sup>15</sup> and Indiana Code section 35-50-2-14 (repeat sexual offender).<sup>16</sup>

### *C. Progressive Penalty Statutes*

Under progressive penalty statutes, “the seriousness of a particular charge (with a correspondingly more severe sentence) can be elevated if the person charged has previously been convicted of a particular offense.”<sup>17</sup> Generally, progressive penalty statutes are misdemeanor offenses that are enhanced to felony offenses based on a prior conviction for a particular crime. Examples include Indiana Code section 35-47-2-1 (Class A misdemeanor carrying a handgun without a license enhanced to a Level 5 felony due to a prior carrying a handgun without a license conviction), Indiana Code section 9-30-5-3 (Class C misdemeanor operating a vehicle while intoxicated (“OWI”) enhanced to a Level 6 felony if defendant has a prior OWI conviction within the past seven years), Indiana Code section 35-46-1-15.1 (Class A misdemeanor invasion of privacy enhanced to a Level 6 felony based on a prior invasion of privacy conviction), and Indiana Code section 35-42-2-1.3 (Class A misdemeanor domestic battery enhanced to a Level 6 felony based on a prior domestic battery conviction).

The Indiana Supreme Court has dealt with the issue of whether the offense of unlawful possession of a firearm by serious violent felon (“SVF offense”)<sup>18</sup> is a progressive penalty statute, with a majority of the Court holding that it is.<sup>19</sup> The Court concluded that while an SVF offense is not the same as a traditional progressive penalty statute (in that it does not increase a misdemeanor offense to a felony based on a prior conviction), it does enhance the offense in the sense that it increases the potential punishment for possession of a firearm from nothing to

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15. IND. CODE § 9-30-10-4(b) (2019) provides that: “A person who has accumulated at least three (3) judgments within a ten (10) year period for any of the following violations, singularly or in combination, and not arising out of the same incident, is a habitual violator[.]” An example of one of the listed violations is an OWI conviction.

16. IND. CODE § 35-50-2-14(b) (2009) provides that:

The state may seek to have a person sentenced as a repeat sexual offender for a sex offense described in subsection (a)(1) or (a)(2) by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated one (1) prior unrelated felony conviction for a sex offense describe in subsection (a).

An example of one of the sex offenses listed in subsection (a) is rape.

Moreover, “[t]he 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 (10) years.” § 35-50-2-14(f).

17. *Downey*, 770 N.E.2d at 796.

18. IND. CODE § 35-47-4-5(c) (2018) provides that “[a] serious violent felon who knowingly or intentionally possesses a firearm commits unlawful possession of a firearm by a serious violent felon, a Level 4 felony.”

19. *Dye v. State* (*Dye I*), 972 N.E.2d 853, 858 (Ind. 2012), *See also* *Mills v. State*, 868 N.E.2d 446, 450 (Ind. 2007).

six to twenty years imprisonment as a Class B felony.<sup>20</sup> Justice Mark Massa, however, dissented and would have held that an SVF offense is not a progressive penalty statute.<sup>21</sup> He explained that the Court has previously found progressive penalty statutes where the seriousness of a charge can be elevated if the defendant has been previously convicted of a particular offense.<sup>22</sup> The SVF offense does not start as a misdemeanor that is then enhanced to a felony based on a prior conviction like the other statutes that have been found to be progressive penalty statutes by the Court, but rather, it is a felony from the start.<sup>23</sup> Notwithstanding Justice Massa's dissent, current precedent holds that an SVF offense is a progressive penalty statute.

### III. DOUBLE ENHANCEMENT APPLICATION

#### *A. General Habitual Offender & Specialized Habitual Offender*

The Indiana Supreme Court has concluded that absent explicit legislative direction, a conviction under a specialized habitual offender statute cannot be further enhanced under the general habitual offender statute.<sup>24</sup> A review of the current general habitual offender statute reveals that it does not contain any explicit language that would permit a sentence to be enhanced by both of the statutes.<sup>25</sup> In fact, the general habitual offender statute does not make a single reference to any specialized habitual offender statutes. Consequentially, a defendant's sentence for an underlying felony conviction may not be enhanced by the general habitual offender statute and the habitual vehicular substance offender statute. Should the General Assembly decide that such double enhancement ought to be permissible, it must amend the general habitual offender statute and provide explicit language permitting double enhancement.

#### *B. Specialized Habitual Offender & Progressive Penalty*

A sentence imposed following a conviction under a progressive penalty statute may not be further increased under a specialized habitual offender statute absent explicit legislative authorization in the specialized habitual offender statute.<sup>26</sup> Therefore, when this situation arises, courts must interpret the specialized habitual offender statute at issue to determine whether double enhancement is permissible.

*State v. Downey* provides an illustration of how a court must interpret specialized habitual offender statutes in these double enhancement situations. In *Downey*, the defendant was charged under a progressive penalty statute with

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20. *Mills*, 868 N.E.2d at 450.

21. *Dye I*, 972 N.E.2d at 859 (Massa, J., dissenting).

22. *Id.*

23. *Id.* at 861.

24. *Id.* at 857.

25. IND. CODE § 35-50-2-8 (2017).

26. *State v. Downey*, 770 N.E.2d 794, 794 (Ind. 2002).

Class D felony possession of marijuana,<sup>27</sup> a Class A misdemeanor offense enhanced by the defendant's prior conviction for possession of marijuana.<sup>28</sup> The defendant was also alleged to be a habitual substance offender<sup>29</sup>, under a specialized habitual offender statute.<sup>30</sup> The Indiana Supreme Court concluded that double enhancement was permissible in this instance, explaining that

the specialized habitual offender statute invoked here is Ind. Code § 35-50-2-10, applicable to “habitual substance offenders.” That statute, by its terms, permits a habitual substance offender enhancement to be imposed on a person convicted of three unrelated “substance offense[s].” *Id.* at § 10(b). “Substance offense” is defined to include “a Class A misdemeanor or a felony in which the possession . . . of . . . drugs is a material element of the crime.” *Id.* at § 10(a)(2). By its specific inclusion of drug possession misdemeanors and felonies in the category of offenses that are subject to habitual substance offender enhancement, we find the Legislature intended to authorize such an enhancement notwithstanding the existence of the drug possession progressive penalty statute.<sup>31</sup>

The key to permissible double enhancement in these situations is explicit legislative authorization in the particular specialized habitual offender statute, which permits further enhancement of a sentence imposed for a conviction under a progressive penalty statute.

In 2015, the habitual vehicular substance offender statute (“HVSO statute”) went into effect.<sup>32</sup> The HVSO statute provides that the State may seek to have a person sentenced as a habitual vehicular substance offender for *any* vehicular substance offense by alleging that the person has accumulated two<sup>33</sup> or three prior unrelated vehicular substance offense convictions.<sup>34</sup> The enactment of the HVSO statute seems likely to cause a situation where courts will have to apply a double enhancement analysis. First, the HVSO statute is likely to be considered a specialized habitual offender statute because it would subject a defendant to an enhanced sentence beyond that of the underlying conviction based on a

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27. *See* IND. CODE § 35-48-4-11 (1999) (noting enhancing a Class A misdemeanor possession of marijuana offense based on a prior conviction of an offense involving marijuana, hash oil, or hashish).

28. *Downey*, 770 N.E.2d at 794-95.

29. IND. CODE § 35-50-2-10 (2014). The statute, which has since been repealed, provided that a person convicted of three unrelated substance offenses on three separate occasions could be subjected to an additional term of years beyond that imposed for the underlying offense.

30. *Downey*, 770 N.E.2d at 795.

31. *Id.* at 798.

32. IND. CODE § 9-30-15.5-2 (2015).

33. *Id.* If the State only alleges two prior unrelated vehicular substance offense convictions, then one conviction must have occurred within ten years before the date of the current underlying offense.

34. *Id.* (emphasis added).

defendant's previous convictions for multiple closely related offenses.<sup>35</sup> Second, a Level 6 felony OWI (a Class A misdemeanor enhanced by a prior OWI conviction within seven years) is a vehicular substance offense<sup>36</sup> and a progressive penalty statute.<sup>37</sup> If the State charges a defendant with Level 6 felony OWI and alleges he/she is a habitual vehicular substance offender, it would create a situation where a conviction under a progressive penalty statute is being further enhanced under a specialized habitual offender statute, setting up a double enhancement issue. While there is yet to be case law regarding this type of situation, it seems likely that the General Assembly has provided explicit legislative direction in the HVSO statute. By saying that "any" vehicular substance offense may be enhanced under the HVSO statute, it is likely that the General Assembly has authorized further enhancement of a conviction for Level 6 felony OWI, even though it is a progressive penalty statute.

#### IV. GENERAL HABITUAL OFFENDER & PROGRESSIVE PENALTY

Double enhancement also occurs when a defendant has a sentence imposed for a conviction under a progressive penalty statute and the State seeks to further enhance that sentence by alleging the defendant to be a habitual offender. A review of Indiana case law reveals that double enhancement issues involving the general habitual offender statute and a progressive penalty statute being simultaneously applied have arisen in two scenarios: (1) when a defendant is convicted of a felony which is typically a misdemeanor but has been enhanced by a prior conviction and the defendant is alleged to be a habitual offender, or (2) when a defendant is convicted of an SVF offense and alleged to be a habitual offender.

##### *A. Felony Enhancement by Prior Conviction*

The first situation, in which a misdemeanor offense is enhanced to a felony based on a prior conviction and the sentence for that conviction is further enhanced under the general habitual offender statute, is impermissible double enhancement under both statutory and case law. In *Ross v. State*, a defendant was convicted of Class C felony carrying a handgun without a license (a misdemeanor offense enhanced by a prior conviction) and found to be a habitual offender.<sup>38</sup> The defendant argued that because his handgun conviction had already been enhanced once, it was improper for it to be further enhanced under the general habitual offender statute, and the Indiana Supreme Court agreed.<sup>39</sup> The Court concluded

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35. See *Downey*, 770 N.E.2d at 795.

36. IND. CODE § 9-30-15.5-1 (2016) provides that a "'vehicular substance offense' means any misdemeanor or felony in which operation of a vehicle while intoxicated . . . is a material element."

37. See *Dye v. State (Dye I)*, 972 N.E.2d 853, 857 (noting that a misdemeanor OWI offense elevated to felony based on defendant's prior OWI conviction is a progressive penalty statute).

38. *Ross v. State*, 729 N.E.2d 113, 114-15 (Ind. 2000), *superseded by statute*, IND. CODE § 35-50-2-8(e) (2017).

39. *Id.* at 114.



that the “trial court should not use an already enhanced handgun conviction as the basis for further enhancement under the general habitual offender statute.”<sup>40</sup> It reasoned that when a court is “faced with a general statute and a specific statute on the same subject, the more specific one should be applied.”<sup>41</sup> The General Assembly eventually codified the holding in *Ross* in the general habitual offender statute; Indiana Code section 35-50-2-8(e) provides that

[t]he state may not seek to have a person sentenced as a habitual offender for a felony offense under this section if the current 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.<sup>42</sup>

Coupling the Court’s holding in *Ross* with subsection (e) in the general habitual offender statute, it is impermissible double enhancement for a defendant’s sentence for a felony conviction under a progressive penalty statute (a misdemeanor enhanced to a felony based on a prior conviction) to be further enhanced under the general habitual offender statute.<sup>43</sup>

#### *B. Serious Violent Felon Offense*

The most recent Indiana case law concerning double enhancement has dealt with the question of whether a defendant convicted and sentenced for an SVF offense may have that sentence further enhanced under the general habitual offender statute.<sup>44</sup> A serious violent felon is a person who has committed a serious violent felony, examples of which include murder, rape, robbery, criminal confinement.<sup>45</sup>

The leading case addressing this particular issue is *Mills v. State*, 868 N.E.2d 446 (Ind. 2007). In *Mills*, the defendant pled guilty to an SVF offense and admitted to being a habitual offender.<sup>46</sup> The SVF offense, which required a prior conviction for a serious violent felony, was based on a conviction for voluntary manslaughter in 1995.<sup>47</sup> The general habitual offender allegation, which required two prior unrelated felony convictions, was based on the same 1995 voluntary manslaughter conviction and another 1989 felony conviction.<sup>48</sup> The defendant contended that he could not be convicted of an SVF offense based on the 1995 voluntary manslaughter conviction and have that sentence enhanced under the

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40. *Id.* at 116.

41. *Id.*

42. IND. CODE § 35-50-2-8(e) (2017).

43. *See id.*

44. As discussed *supra* Section II.C, the Indiana Supreme Court concluded that an SVF offense was a progressive penalty statute in *Mills v. State*, 868 N.E.2d 446, 447 (Ind. 2007).

45. IND. CODE § 35-47-4-5 (2018).

46. *Mills*, 868 N.E.2d at 447.

47. *Id.*

48. *Id.*

general habitual offender statute based, in part, on the same 1995 voluntary manslaughter conviction.<sup>49</sup> The Court held that “a defendant convicted of [an SVF offense] may not have his or her sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the defendant was a ‘serious violent felon.’”<sup>50</sup> The Court examined the general habitual offender statute enacted at the time, which provided, in relevant part, as follows:

- (a) Except as otherwise provided in this section, the state may seek to have a person sentenced as a habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions.
- (b) The state may not seek to have a person sentenced as a habitual offender for a felony offense under this section if:
  - (1) the offense is a misdemeanor that is enhanced to a felony in the same proceeding as the habitual offender proceeding solely because the person has a prior unrelated conviction;
  - (2) the offense is an offense under IC 9-30-10-16 or IC 9-30-10-17 [certain motor vehicle offenses]; or
  - (3) all of the following apply:
    - (A) The offense is an offense under IC 16-42-19 [Indiana Legend Drug Act] or IC 35-48-4 [certain controlled substance offenses].
    - (B) The offense is not listed in section 2(b)(4) [offenses for which the sentence cannot be suspended below the minimum] of this chapter.
    - (C) The total number of unrelated conviction that the person has for:
      - (i) dealing in or selling a legend drug under IC 16-42-19-27;
      - (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-3);
      - (iii) dealing a schedule I, II, III controlled substance (IC 35-48-4-2)
      - (iv) dealing in a schedule IV controlled substance (IC 35-48-4-3); and
      - (v) dealing in a schedule V controlled substance (IC 35-48-4-4); does not exceed one (1).<sup>51</sup>

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49. *Id.* Prior to *Mills*, the Indiana Court of Appeals had previously held that “a defendant convicted of [a SVF offense] may not have his or her sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the defendant was a ‘serious violent felon.’” *Conrad v. State*, 747 N.E.2d 575, 595 (Ind. Ct. App. 2001) (internal quotations omitted), *trans. denied*. However, when the Indiana Supreme Court took up the same issue in *Mills* in 2007, the general habitual offender statute had since been amended. *Mills*, 868 N.E.2d at 448.

50. *Mills*, 868 N.E.2d at 452.

51. *Id.* at 450-51 (quoting IND. CODE § 35-50-2-8 (2001)) (internal bolding omitted).

After examining the general habitual offender statute, the Court concluded that said statute “did not provide sufficiently explicit legislative direction to overcome the general rule against double enhancements absent explicit legislative direction.”<sup>52</sup> The Court noted that it is clear in the general habitual offender statute that the General Assembly specifically intended to prohibit double enhancement in the situations listed in subsection (b).<sup>53</sup> Moreover, the Court acknowledged that while it could be argued that the General Assembly could have accomplished the same objective by adding the prohibitions in subsection (b) without adding the “except as otherwise provided in this section” language in subsection (a), the “except as otherwise provided” language in subsection (a) nonetheless “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.”<sup>54</sup>

In *Dye v. State* (“*Dye I*”), the Indiana Supreme Court again granted transfer to examine the issue of double enhancement regarding a sentence for an SVF offense being further enhanced under the general habitual offender statute.<sup>55</sup> In *Dye I*, the defendant was charged with an SVF offense and alleged to be a habitual offender.<sup>56</sup> To prove that the defendant was a serious violent felon, the State used his previous 1998 conviction for attempted battery with a deadly weapon.<sup>57</sup> To prove that the defendant was a habitual offender, the State used a 1998 conviction for possession of a handgun within 1,000 feet of a school and a 1993 conviction for forgery.<sup>58</sup> Following a jury trial, the defendant was found guilty as charged.<sup>59</sup> He was sentenced to twenty years of incarceration for an SVF conviction, enhanced by thirty years.<sup>60</sup> The trial court suspended fifteen years of the sentence for an aggregate sentence of fifty years with fifteen years suspended.<sup>61</sup>

The defendant contended that further enhancement of his sentence for an SVF conviction under the general habitual offender statute was impermissible double enhancement.<sup>62</sup> The Court held that the defendant’s habitual offender enhancement violated the general rule against double enhancement.<sup>63</sup> First, the Court reiterated its decision in *Mills*, which determined an SVF offense to be a progressive penalty offense.<sup>64</sup> Second, the Court concluded that the general

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52. *Id.* at 451-52 (internal quotation marks omitted).

53. *Id.* at 452.

54. *Id.*

55. *Dye v. State* (*Dye I*), 972 N.E.2d 853, 855 (Ind. 2012).

56. *Id.*

57. *Id.*

58. *Id.* at 856.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 858.

64. *Id.* (citing *Mills v. State*, 868 N.E.2d 446, 452 (Ind. 2007)).

habitual offender statute did not include explicit legislative direction that indicated that double enhancement of a SVF offense was permitted.<sup>65</sup> The Court noted that the long established rule concerning double enhancement is that “*absent explicit legislative direction*, a sentence imposed following a conviction under a progressive penalty statute may not be increased further under either the general habitual offender statute or a specialized habitual offender statute.”<sup>66</sup> Therefore, the Court vacated the defendant’s thirty-year enhancement under the general habitual offender statute.<sup>67</sup>

Justice Massa dissented and would have held that even if an SVF offense were a progressive penalty statute subject to the general rule against double enhancements, the general habitual offender statute contains explicit legislative direction permitting the double enhancement of an SVF conviction.<sup>68</sup> In reviewing the language of the general habitual offender statute, Justice Massa concluded the following:

As I read it, subsection (a) of the habitual offender statute says, in effect, that a habitual offender enhancement to a felony charge may be sought anytime the defendant has two prior unrelated felony convictions—unless a separate subsection of the statute prohibits it. Subsection (b) then articulates the three instances in which the habitual offender enhancement is prohibited. In essence, it tells prosecutors and courts: “You may do this, except where we say you cannot. And here are the times we say you cannot.”

I think this was the most reasonable approach for the General Assembly to take while still responding to *Ross*’s articulation of our general rule, and I am not sure what else it could have done. Given the broad and general scope of the habitual offender statute, the starting presumption would be that it applies to *all* felonies; it was far easier to list those felonies to which it does *not* apply than to attempt to draft a list enumerating all of the ones to which it *does* apply (particularly if this Court continues to expand its class of judicially created progressive penalty statutes). The statute already prohibits habitual offender enhancement of misdemeanors that are elevated to felonies because of prior felony convictions in accordance with our jurisprudence—is the Court also requiring the General Assembly to comb the criminal code for stand-alone felonies that we might later judicially define as *de facto* progressive penalty statutes? This seems needlessly demanding.<sup>69</sup>

Notwithstanding Justice Massa’s dissent, the *Dye I* decision forbade a defendant’s sentence for an SVF conviction from being further enhanced under the general

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65. *Id.* at 858.

66. *Id.* at 857 (quoting *State v. Downey*, 770 N.E.2d 794, 796 (Ind. 2002)).

67. *Id.* at 859.

68. *Id.* at 864 (Massa, J., dissenting). As discussed *supra*, Justice Massa would not have concluded that an SVF offense is a progressive penalty offense.

69. *Id.*

habitual offender statute.

In 2013, the Indiana Supreme Court granted rehearing (“*Dye II*”) to clarify its prior holding in *Dye I*.<sup>70</sup> The Court reiterated that its holding in *Mills* prohibited double enhancement where the SVF offense and the general habitual offender enhancement were established by the same prior felony conviction.<sup>71</sup> The Court also clarified that its holding in *Dye I* prohibited double enhancement in situations where the general habitual offender enhancement and the SVF offense were established by prior felony convictions that were part of the same *res gestae*, i.e., arose out of and were part of an uninterrupted transaction.<sup>72</sup> The Court reasoned:

The general habitual offender statute provides in pertinent part “the state may seek to have a person sentenced as a habitual offender for any felony by alleging . . . that the person has accumulated two (2) prior *unrelated* felony convictions. As we noted nearly three decades ago—shortly after the statute was enacted—“[t]he phrase ‘unrelated felony’ in our habitual offender statute means the predicate felony is not part of the *res gestae* of the principal offense and that the second predicate felony was committed after conviction of the first predicate felony.”<sup>73</sup>

In this case, the defendant was charged with an SVF offense based on a 1998 conviction for attempted battery with a deadly weapon and alleged to be a habitual offender based on a 1998 conviction for possession of a handgun within 1,000 feet of a school and a 1993 conviction for forgery.<sup>74</sup> Although not the same felony, both of the felonies used to establish that the defendant was a serious violent felon and a habitual offender arose out of an uninterrupted transaction in 1998 between the defendant and Elkhart police.<sup>75</sup> Therefore, because both the convictions were part of the same *res gestae*, it would contradict the rule of lenity<sup>76</sup> to allow such a situation to occur.<sup>77</sup> Justice Massa concurred only with the Majority in *Dye II* in its clarification that *Dye I* did not extend *Mills* to situations where different prior unrelated felony convictions are used to establish that

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70. *Dye v. State (Dye II)*, 984 N.E.2d 625, 625 (Ind. 2013).

71. *Id.* at 628.

72. *See id.* at 630 (“In sum, the State is not be permitted to support [defendant’s] habitual offender finding with a conviction that arose out of the same *res gestae* that was the source of the conviction used to prove [defendant] was a serious violent felon.”).

73. *Id.* at 629 (internal quotations omitted).

74. *Id.* at 628-29.

75. *Id.* at 629.

76. *See id.* at 630 (quoting *Ross v. State*, 729 N.E.2d 113, 116 (Ind. 2000) (“[W]hen a conflict arises over the question of imposing a harsher penalty or a more lenient one, the longstanding Rule of Lenity should be applied. It is a familiar principle that statutes which are criminal or penal in their nature or which are in derogation of a common-law right must be strictly construed. Also, where there is ambiguity it must be resolved against the penalty.”)).

77. *Id.*

defendant is a habitual offender and a serious violent felon but dissented for all the reasons previously stated in *Dye I*.<sup>78</sup>

1. *Post-Dye II*.—Given the Indiana Supreme Court’s opinion in *Dye II*, it appears that there are currently only two instances when a defendant’s sentence for an SVF conviction which is further enhanced under the general habitual offender statute would result in impermissible double enhancement: (1) when the same prior felony conviction is used to establish that the defendant is a serious violent felon and a habitual offender, and (2) when the prior felony convictions used to establish that the defendant is a serious violent felon and a habitual offender were part of the same *res gestae*, *i.e.*, arose out of and were part of an uninterrupted transaction. Since *Dye II*, the Indiana Supreme Court has not granted transfer on a case dealing directly with this specific double enhancement issue; however, the Court of Appeals of Indiana has followed *Mills* and its progeny in subsequent cases where the issue has arisen.<sup>79</sup>

Overall, a defendant’s sentence pursuant to a progressive penalty statute which is further enhanced under the general habitual offender statute is impermissible double enhancement in two circumstances: (1) when a sentence for a felony conviction (a misdemeanor offense enhanced by a prior conviction) is further enhanced under the general habitual offender statute, and (2) when a sentence for an SVF conviction is further enhanced under the general habitual offender statute and both enhancements are established by the same prior felony conviction or prior felony convictions that were part of the same *res gestae*.

2. *Questions Arising Post-Dye II*.—The general rule is that, absent explicit legislative direction, a sentence imposed following a conviction under a progressive penalty statute may not be further increased under the general habitual offender statute.<sup>80</sup> In *Dye I*, the Court concluded that there was no explicit legislative direction in the general habitual offender statute authorizing a sentence for an SVF conviction to be further enhanced under the general habitual offender statute.<sup>81</sup> Yet, in *Mills* and *Dye II*, the Court did not reach its holding based on that reasoning. In *Mills*, the Court held that “a defendant convicted of [an SVF offense] may not have his or her sentence enhanced under the general habitual offender statute by proof of the same felony used to establish that the defendant was a serious violent felon.”<sup>82</sup> In *Dye II*, the Court held that a

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78. *Id.*

79. See *Shepherd v. State*, 985 N.E.2d 362, 363 (Ind Ct. App. 2013), *trans. denied* (“the [Indiana Supreme Court] clarified that an SVF conviction enhanced by an habitual offender adjudication is impermissible 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 statute.”). See also *Tuell v. State*, 118 N.E.3d 33, 37-38 (Ind. Ct. App. 2019) (“As to caselaw . . . many Indiana decisions have held that there is no double enhancement unless more than one of the statutes that authorize enhancement for repeat offenders are applied to the same felony or the same proof of an uninterrupted transaction.”).

80. *Dye v. State (Dye I)*, 972 N.E.2d 853, 857 (Ind. 2012).

81. *Id.* at 858.

82. *Mills v. State*, 868 N.E.2d 446, 452 (Ind. 2007) (internal quotations omitted).

defendant may not have his sentence for an SVF conviction enhanced under the general habitual offender statute where the general habitual offender enhancement and the SVF offense were established by prior felony convictions that were part of the same *res gestae*.<sup>83</sup> One is still left to wonder, however, whether it matters if the prior felony convictions used to establish both the general habitual offender enhancement and an SVF offense are the same felony or part of the same *res gestae* if the general habitual offender statute still does not contain explicit legislative direction permitting double enhancement of the SVF offense.

It could be argued that *Mills* and *Dye II* are inconsistent or premature given the opinion in *Dye I*, the general rule against double enhancements, and the language of the general habitual offender statute. While *Mills* and *Dye II* look at which prior felony convictions are used to establish that the defendant is a serious violent felon and a habitual offender, arguably the first question should be whether the general habitual offender statute even permits the SVF offense to be further enhanced at all. If the answer is no, as the Court concluded in *Dye I*, then the analysis need not go any further, because double enhancement would be impermissible. If the General Assembly, however, eventually amends the general habitual offender statute to include explicit language authorizing the double enhancement of an SVF conviction, then it could be argued that courts should look to determine whether the SVF conviction and general habitual offender enhancement are being established using the same prior felony conviction or prior felony convictions of the same *res gestae*. It seems difficult to reconcile a situation where a defendant whose SVF conviction and general habitual offender enhancement, which are not established by the same prior felony or prior felonies of the same *res gestae*, could have his/her sentence doubly enhanced, unless *Dye II* overruled the conclusions in both *Mills* and *Dye I* that the general habitual offender statute did not contain explicit legislative direction.<sup>84</sup>

#### V. A SAMPLING OF OTHER DOUBLE ENHANCEMENT ISSUES

In *Sweatt v. State*, the defendant was convicted of an SVF offense and burglary and had the general habitual offender enhancement applied to his burglary sentence.<sup>85</sup> The defendant's conviction for rape in 1994 was used to

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83. *Dye v. State (Dye II)*, 984 N.E.2d 625, 630 (Ind. 2013).

84. *See Dye I*, 972 N.E.2d at 858. The case notes:

[T]he general habitual offender statute does not include explicit legislative direction indicating that a double enhancement is proper here. *Mills* held that the general rule against double enhancements remains intact and that a double enhancement is improper where the underlying conviction is for unlawful possession of a firearm by a SVF. 868 N.E.2d at 452; *see also Beldon*, 926 N.E.2d at 484 (“*Mills* made clear that ‘the general rule against double enhancements ‘absent explicit legislative direction’” remains intact. As the Legislature had provided no such direction to the contrary, the underlying elevated conviction in that case could not be further enhanced by the general habitual offender statute.” (internal citation omitted)).

85. *Sweatt v. State*, 887 N.E.2d 81, 83 (Ind. 2008).

establish that he was a serious violent felon and a habitual offender.<sup>86</sup> The trial court ordered both sentences to be served consecutively.<sup>87</sup> The Court concluded that a trial court may avoid impermissible double enhancement “by attaching the habitual to some offense other than the SVF, but, when counts are ordered served consecutively this is a distinction without a difference.”<sup>88</sup> It further concluded that the sentences must be served concurrently, noting that “[i]n a case where separate counts are enhanced based on the same prior felony conviction, ordering the sentences to run consecutively has the same effect as if the enhancements both applied to the same count.”<sup>89</sup>

In *Daugherty v. State*, the defendant was convicted of two SVF offenses, and the trial court ordered both of those sentences to be served consecutively.<sup>90</sup> The defendant contended that the two consecutive sentences for his SVF convictions, based on the same prior felony conviction, violated the general rule against double enhancement.<sup>91</sup> He was essentially urging the court to extend the Indiana Supreme Court’s holding in *Dye* to situations “involving consecutive sentences for two progressive-penalty statutes.”<sup>92</sup> The court held that because the defendant’s “single underlying felony conviction served as an element in each SVF count, not as an enhancement, and because each SVF count was a separate and distinct offense . . . the imposition of two sentences for two [SVF convictions] to run consecutively was not an improper double enhancement[.]”<sup>93</sup> Moreover, the court noted that only progressive penalty statutes were before it, and the Indiana Supreme Court explicitly stated in *Dye* that “[d]ouble enhancement issues arise where *more than one of the [three types of repeat offender] statutes*’ apply to the defendant at the same time.”<sup>94</sup> Put another way, the defendant’s sentences for his SVF convictions were not further enhanced by a specialized habitual offender statute or the general habitual offender statute; therefore, there was no double enhancement issue to warrant application of *Dye*.<sup>95</sup>

In *Woodruff v. State*, the court concluded that a defendant’s sentence for Level 3 felony aggravated battery could be enhanced by both the general habitual offender statute and for the use of a firearm in the commission of the felony

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86. *Id.*

87. *Id.*

88. *Id.* at 84.

89. *Id.*

90. *Daugherty v. State*, 52 N.E.3d 885, 890-91 (Ind. Ct. App. 2016). The two SVF offenses stemmed from a traffic stop, which occurred upon a police officer’s belief that the defendant was driving while intoxicated. During the traffic stop, a handgun was discovered on the defendant’s person and a rifle on the floorboard of his car. As a result, the defendant was charged with two SVF offenses. *Id.* at 893.

91. *Id.* at 891.

92. *Id.*

93. *Id.* at 892.

94. *Id.* (quoting *Dye v. State (Dye I)*, 972 N.E.2d 853, 857 (Ind. 2012)) (emphasis added by the Court of Appeals).

95. *Id.*



(firearm enhancement).<sup>96</sup> The trial court imposed a fifteen-year sentence for the aggravated battery conviction and enhanced that sentence by fifteen years under the general habitual offender statute and an additional ten years under the firearm enhancement, for an aggregate sentence of forty years.<sup>97</sup> The defendant contended that it was impermissible double enhancement for the trial court to enhance his felony conviction using both the general habitual offender statute and the firearm enhancement.<sup>98</sup> The court reasoned:

Contrary to [the defendant's] suggestion, *Dye* does not stand for the proposition that whenever *any* two enhancements are applied to an underlying conviction there is an impermissible double enhancement. Rather, *Dye* states that there is a double enhancement issue when more than one of the types of statutes that authorize enhancements for repeat offenders are applied to the same proof of an uninterrupted transaction. Therefore, double enhancement analysis is proper when the proof of previous criminal conduct is the basis of more than one enhancement.<sup>99</sup>

Because the defendant's conviction for aggravated battery was neither a progressive penalty statute nor a specialized habitual offender statute, the only recidivism statute applicable was the general habitual offender statute.<sup>100</sup> Thus, there was no double enhancement issue.<sup>101</sup>

While double enhancement jurisprudence is an ongoing conversation between the General Assembly and the appellate courts, the courts have determined that certain holdings, in which impermissible double enhancements have been found, apply retroactively. In *Ross*, the Indiana Supreme Court concluded that a felony handgun conviction (a misdemeanor offense enhanced by a prior conviction) could not be further enhanced using the general habitual offender statute.<sup>102</sup> Five years later, in *Jacobs v. State*, the Court determined that its holding in *Ross* applied retroactively in post-conviction proceedings to defendants whose cases were disposed of prior to *Ross*.<sup>103</sup> Therefore, any defendant who was convicted of felony carrying a handgun without a license based on a prior conviction and

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96. *Woodruff v. State*, 80 N.E.3d 216, 218 (Ind. Ct. App. 2017). *See also* IND. CODE § 35-50-2-11(2019) (permitting the firearm enhancement to be attached to sentence for aggravated battery conviction).

97. *Woodruff*, 80 N.E.3d at 217. The defendant was also convicted and sentenced for Level 5 felony intimidation, but that sentence was ordered to be served concurrently. *Id.*

98. *Id.*

99. *Id.* at 218 (internal quotations omitted).

100. *Id.*

101. *See id.* at 217-18. (“[O]ur supreme court explained that three types of statutes authorize enhanced sentences for repeat offenders: the general habitual offender statute, specialized habitual offender statutes, and progressive-penalty statutes . . . . [I]f not more than one of these types of statutes apply, then there is no double enhancement issue to review.”(internal citations omitted)).

102. *Ross v. State*, 729 N.E.2d 113, 116-17 (Ind. 2000), *superseded by statute*, IND. CODE § 35-50-2-8(e) (2019).

103. *Jacobs v. State*, 835 N.E.2d 485, 486 (Ind. 2005).

had that sentence further enhanced under the general habitual offender statute is entitled to have the general habitual offender enhancement vacated if his or her case was resolved prior to *Ross* in 2000. However, if said defendant was convicted of multiple felonies, the State can seek to reposition the general habitual offender enhancement to any of the other felony convictions in that defendant's case.<sup>104</sup>

In *Dugan v. State*, the Court of Appeals was asked whether the Indiana Supreme Court's holding in *Mills*<sup>105</sup> should be applied retroactively to defendants seeking post-conviction relief ("PCR").<sup>106</sup> A jury convicted the defendant of an SVF offense, and he admitted to being a habitual offender in exchange for the minimum ten-year sentence under the habitual offender statute.<sup>107</sup> The defendant's conviction for battery in 1994 was used to establish that he was a serious violent felon and a habitual offender.<sup>108</sup> The defendant argued that because his case was resolved prior to the Court's holding in *Mills*, he was entitled to have said holding applied retroactively.<sup>109</sup> The court concluded that because the defendant did not receive a favorable outcome as a result of admitting to being a habitual offender,<sup>110</sup> he was entitled to have the *Mills* holding applied retroactively to his case.<sup>111</sup> The court noted this case was contrary to the ultimate disposition in *Mills*,<sup>112</sup> because here the defendant did not receive the benefit of dropped or reduced charges in exchange for his plea.<sup>113</sup> Thus, the defendant was entitled to have *Mills* applied retroactively on PCR and have his general habitual offender enhancement vacated as an impermissible double enhancement.<sup>114</sup>

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104. See *State v. Jones*, 835 N.E.2d 1002, 1004 (Ind. 2005) (concluding that a habitual offender finding following a trial that results in multiple felony convictions is independent of each individual felony conviction and applies equally to all such convictions; therefore, the State may seek to reposition the general habitual offender finding to any of the other felony convictions if the defendant is entitled to have it vacated from his felony handgun conviction pursuant to *Ross*).

105. A defendant may not have his or her sentence for an SVF conviction further enhanced under the general habitual offender statute by proof of the same felony used to establish he or she was a serious violent felon. *Mills v. State*, 868 N.E.2d 446, 447 (Ind. 2007).

106. *Dugan v. State*, 976 N.E.2d 1248, 1250 (Ind. Ct. App. 2012).

107. *Id.* at 1249.

108. *Id.*

109. *Id.* at 1250.

110. *Id.* at 1252. The court noted that the only benefit the defendant received for admitting to being a habitual offender was a fixed minimum sentence on the habitual offender enhancement, which was not a benefit considering it was an illegal sentence. *Id.*

111. *Id.* at 1251-52.

112. *Id.* at 1251. "Among the favorable outcomes *Mills* achieved were resolution of other charges pending against him and a sentence on those charges concurrent with that on the charges discussed in this opinion. *Mills* relinquished the right to challenge his sentence as an impermissible double enhancement when he pled guilty." *Id.* (quoting *Mills v. State*, 868 N.E.2d 446, 453 (Ind. 2007)).

113. *Id.* at 1252.

114. *Id.*

## VI. ISSUES ON THE HORIZON

Indiana appellate courts have long noted the ongoing dialogue between the General Assembly and appellate courts when it comes to double enhancement jurisprudence; however, one difficulty with such dialogue is that it lacks finality in order to form a definitive list of what qualifies as a progressive penalty statute. Progressive penalty statutes have been defined as those in which “the seriousness of a particular charge (with a correspondingly more severe sentence) can be elevated if the person charged has previously been convicted of a particular offense.”<sup>115</sup> While these commonly have been misdemeanor offenses enhanced to felony offenses based on a prior conviction, there are other offenses that have been deemed to have met this definition, *e.g.*, an SVF offense. Ultimately, this leads to the question many practitioners are faced with: What other offenses are progressive penalty statutes? It is a fair question, given that criminal statutes are often amended, prosecutors need to know when they can charge multiple enhancements, and defense attorneys need to know when to object to such an impermissible double enhancement.

For instance, are felony offenses, of which the level of the felony offense is increased based on a prior conviction, progressive penalty statutes? An example of such a statute is Indiana Code section 11-8-8-17, failure to register, which increases a Level 6 felony failure to register offense to a Level 5 felony if the defendant has a prior conviction for failing to register. Although it has not been a legal question presented to Indiana appellate courts, it seems likely these types of statutes would qualify as progressive penalty statutes. First, it seems to meet the definition for what constitutes a progressive penalty statute as defined by Indiana appellate courts.<sup>116</sup> Second, in *Downey*, when providing examples of progressive penalty statutes, the Indiana Supreme Court included “Ind. Code § 9-30-10-16 & 17 (formerly § 9-12-3-1 & 2), under which the Class D felony operating a motor vehicle while driving privileges suspended can be charged as a Class C felony if the person charged has a prior conviction for operating while suspended.”<sup>117</sup>

That said, consider offenses that are enhanced not only by proof of a prior conviction but also an additional element. Examples of such statutes include Indiana Code section 35-48-4-10 and Indiana Code section 35-48-4-6.1. Under Indiana Code section 35-48-4-10, Class A misdemeanor marijuana dealing is enhanced to a Level 6 felony if the person has a prior conviction for a drug offense and the amount of the drug involved is less than thirty grams of marijuana. Under Indiana Code section 35-48-4-6.1, Level 6 methamphetamine possession is enhanced to a Level 5 felony if the amount of the methamphetamine involved is less than five grams and an enhancing circumstance applies. A prior conviction for dealing in a controlled substance is considered an enhancing

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115. *State v. Downey*, 770 N.E.2d 794, 796 (Ind. 2002).

116. *Id.*

117. *Id.*

circumstance.<sup>118</sup> Arguably, both of these statutes are progressive penalty statutes given that a progressive penalty statute has been judicially defined as a statute that allows a defendant to have his or her charge elevated based on being “previously . . . convicted of a particular offense.”<sup>119</sup> On the other hand, it could be argued, at least for the dealing marijuana statute, that even if the statute is a progressive penalty, it may be further enhanced based on the language found in subsection (e) of the general habitual statute.<sup>120</sup> Subsection (e) provides that “[t]he state may not seek to have a person sentenced as a habitual offender for a felony offense under this section if the current 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.”<sup>121</sup> This explicit language seems to only prohibit a misdemeanor offense enhanced by a felony “solely” because of a prior conviction, which the Level 6 dealing marijuana statute does not do. It also requires a certain amount of drug weight as an element of the offense.<sup>122</sup> Regardless of how the appellate courts decide these issues, these statutes will likely be considered only progressive penalties statutes, if at all, as applied and not facially, because the statutes each allow for enhancement based on other circumstances besides prior convictions.<sup>123</sup>

With the rise in recidivism and drug crimes throughout the country, it appears that legislatures will continue to enact criminal statutes that further enhance the level of offenses based solely or in part on a defendant’s prior convictions. The statutes discussed above and the ones to follow will become yet another part of the ongoing dialogue between the General Assembly and Indiana appellate courts regarding double enhancement.

## VII. PRACTITIONERS GUIDE

Below is a brief summary of the situations discussed throughout this article in which the general rule against double enhancement is at issue, and whether the situation violates said rule based on the current state of the law in Indiana. Hopefully this will provide practitioners with a guide to navigate through these same issues they may encounter in their own cases.

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118. IND. CODE § 35-48-1-16.5 (2019).

119. *Downey*, 770 N.E.2d at 796.

120. *See* IND. CODE § 35-50-2-8(e) (2019).

121. *Id.* (emphasis added).

122. IND. CODE § 35-48-4-10.

123. IND. CODE § 35-48-4-10 (2019); IND. CODE § 35-48-4-6.1 (2019). IND. CODE § 35-48-4-10 provides that a person can also be convicted of Level 6 felony dealing marijuana if the amount of the drug involved is at least thirty grams but less than ten pounds of marijuana. IND. CODE § 35-48-4-6.1 provides that a person can also be convicted of Level 5 felony methamphetamine possession if the amount of methamphetamine is at least five but less than ten grams.

1. *Specialized Habitual Offender Statute & General Habitual Offender Statute*
  - a. **No.** A sentence enhanced by both of these statutes is impermissible double enhancement.
    - i. Example: A defendant's sentence for an underlying conviction enhanced by both the habitual vehicular substance offender statute and the general habitual offender statute.
2. *Progressive Penalty Statute & Specialized Habitual Offender Statute*

**Maybe.** It is permissible if the particular specialized habitual offender statute contains explicit language authorizing double enhancement.

  - i. Example: A sentence for Class D felony marijuana possession (progressive penalty statute) enhanced by the habitual substance offender statute<sup>124</sup> (specialized habitual offender statute) was deemed permissible based on language in the habitual substance offender statute.
3. *Progressive Penalty Statute & General Habitual Offender Statute*
  - a. Misdemeanor enhanced to a felony based on a prior conviction.
    - i. **No.** This is specifically prohibited in the general habitual offender statute.<sup>125</sup>
      1. Example: Class A misdemeanor invasion of privacy enhanced to a Level 6 felony based on a prior conviction for invasion of privacy further enhanced under the general habitual offender statute is impermissible.
  - b. SVF
    - i. **Yes.** It is permissible as long as the felony convictions used to establish that the defendant is a habitual offender are not the same prior felony conviction or part of the same *res gestae* as the prior felony conviction used to establish that the defendant is a serious violent felon.
      1. Example A: SVF offense based on a 1990 felony robbery and the general habitual offender based on a 1991 felony theft, 1996 felony burglary, and a 2001 felony aggravated battery would be permissible.
      2. Example B: SVF offense based on a 1990 felony robbery and the general habitual offender based on a 1990 felony robbery, 1996 felony burglary, and a 2001 felony aggravated battery would be impermissible.

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124. IND. CODE § 35-50-2-10 (repealed 2014).

125. IND. CODE § 35-50-2-8(e) (2019).

(based on same felony)

3. Example C: SVF offense based on a 1990 felony robbery and the general habitual offender based on a 1990 felony theft (same cause number as the 1990 felony robbery), 1996 felony burglary, and a 2001 felony aggravated battery would be impermissible. (1990 felonies part of same *res gestae*)

#### VIII. CONCLUSION

As recidivism statutes continue to be enacted and used throughout Indiana, “double trouble” is much more of a description for the reality defendants in the Hoosier state today face rather than some catchy lyric from an old Lynyrd Skynyrd song. Although it has lessened in recent years, the ongoing conversation between the General Assembly and the Indiana appellate courts regarding double enhancement law began to heat up from 2000 through 2013. It provided practitioners with a framework for dealing with situations where double enhancement jurisprudence is at issue. This framework, however, is far from complete or clear. As more clarity for past issues lingers, new recidivism statutes are enacted, and the language of old statutes is amended, more legal issues regarding permissible double enhancement will rear their ugly heads. All in all, the one thing that is clear is that this ongoing conversation regarding double enhancement will remain exactly that, ongoing.