CHAPTER ONE

SENTENCING AUTHORITY

I. ROLE OF THE TRIAL COURT

A. FIXING THE PENALTY WITHIN THE STATUTORY LIMITS

The court shall fix the penalty of and sentence a person convicted of an offense. Ind. Code § 35-50-1-1. Courts are limited to imposing sentences that are authorized by statute, rather than only being limited to sentences that are not prohibited by statute. Wilson v. State, 5 N.E.3d 759 (Ind. 2014).

1. Cannot delegate duty to fix penalty

Naked City, Inc. v. State, 460 N.E.2d 151, 152 (Ind.Ct.App.1984) (trial court improperly delegated its duty to hear and weigh evidence and make determination itself by ordering executed sentence specifying that, if DOC was unable to provide adequate medical care, defendant was to be placed on probation).

2. Cannot exceed statutory power when fixing the penalty

Griffin v. State, 461 N.E.2d 1123 (Ind. 1984) (trial court can only recommend to DOC where defendant should be incarcerated because trial court has no power to dictate terms of defendant's incarceration once control has been given to the DOC, which is part of the executive branch). But see Brock v. State, 558 N.E.2d 872 (Ind.Ct.App. 1990) (while trial court cannot interfere with DOC authority over committed person, it can choose to commit convicted persons to a county "executive branch" (a county jail) as opposed to the state DOC, thereby exerting some control over where a defendant is incarcerated).

Wilson v. State, 5 N.E.3d 759 (Ind. 2014) (nothing in statutory sentencing scheme grants trial court authority to impose partially consecutive, hybrid, or blended sentences for multiple convictions; plain language of IC 35-50-1-2(c) contemplates only consecutive or concurrent terms, not a hybrid of both, for a sentence on one count).

Wampler v. State, 168 N.E.3d 1026 (Ind. Ct. App. 2021) (trial court lacked jurisdiction to resentence defendant who had served sentence and been released from DOC).

Laux v. State, 829 N.E.2d 930 (Ind. 2005) (statutes setting penalties for felonies do not, by their own terms, authorize imposition of a no-contact order as part of an executed sentence; however, when a court suspends part of a sentence, it can certainly condition that suspension on no-contact).

Isom v. State, 31 N.E.3d 469 (Ind. 2015) (trial court exceeded its statutory authority by ordering defendant's three death sentences to be served consecutively).

Jeffries v. State, 744 N.E.2d 1056 (Ind.Ct.App. 2001) (trial court cannot determine sentence to be imposed in another court).

McCotry v. State, 722 N.E.2d 1265 (Ind.Ct.App. 2000) (because statutes are silent as to whether court can order habitual offender sentences to run consecutively, trial court does not have authority to do so). See also Breaston v. State, 907 N.E.2d 992 (Ind. 2009); Starks v. State, 523 N.E.2d 735 (Ind. 1988); Smith v. State, 774 N.E.2d 1021 (Ind.Ct.App. 2002); Ingram v. State, 761 N.E.2d 883 (Ind.Ct.App. 2002).

Barnett v. State, 414 N.E.2d 965 (Ind.Ct.App. 1981) (where there was no statute providing for imposition of restitution, trial court's order of restitution was a nullity).

Ben-Yisrayl v. State, 908 N.E.2d 1223 (Ind. Ct. App. 2009) (trial court lacked authority to impose alternative sentences. Trial court's entry of both sentence of death and sentence of 60 years in the event that death sentence was vacated was not authorized by Ind. Code § 35-50-2-3).

Saddler v. State, 953 N.E.2d 1220 (Ind.Ct.App. 2011) (trial court issued an illegal conditional sentence when it required defendant to pay restitution prior to sentencing if she did not want to be sent to prison).

PRACTICE POINTER: A court has a duty to correct a sentence that exceeds the court's statutory authority at any time and may even do so sua sponte. See Chapter 11, Subsection II, *Modification and Correction of Sentence, Correction of Erroneous Sentence.*

However, when the defendant and the State agree, in the names of judicial economy and equity, a court may, under unusual circumstance, exceed its statutory power when sentencing.

> Johnston v. Dobeski, 739 N.E.2d 121 (Ind. 2001), overruled on other grounds by Hernandez v. State, 910 N.E.2d 213 (Ind. 2009) (State and defendant seeking post-conviction relief (PCR) had authority to agree to modify two life sentences to two consecutive 40-year terms, even though sentence was not provided for by statute when defendant committed his 1964 crimes).
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> Lee v. State, 816 N.E.2d 35 (Ind. 2004) (defendant gave up right to challenge imposition of unauthorized consecutive sentence, because he struck a favorable bargain with the State and reduced his penal exposure by thirty years); see also Stites v. State, 829 N.E.2d 527 (Ind. 2005); Gonzales v. State, 831 N.E.2d 845 (Ind.Ct.App. 2005); Parham v. State, 913 N.E.2d 770 (Ind. Ct. App. 2009).
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> Debro v. State, 821 N.E.2d 367 (Ind. 2005) (although plea agreement was in clear violation of Ind. Code § 35-38-1-1(a), withheld judgment agreement provided defendant with a significant benefit, i.e., the possibility of no criminal conviction for his admitted criminal conduct).

But see:

> State v. Arnold, 27 N.E.3d 315 (Ind.Ct.App. 2015) (plea agreement allowing for habitual substance enhancement to be attached to a non-substance offense was contrary to legal and statutory authority; a contract made in violation of a statute is void and unenforceable).

King v. State, 720 N.E.2d 1232 (Ind.Ct.App. 1999) (although parties agreed that violation of probation would increase Class A misdemeanor to Class D felony, trial court was without authority to do so).

State v. K.H., 860 N.E.2d 1284 (Ind.Ct.App. 2007) (trial court's acceptance of juvenile's agreement to be placed on sex offender registry without following requirements of Ind. Code § 11-8-8-5 is not consistent with juvenile code's stated goal of rehabilitation rather than punishment).

Jordan v. State, 676 N.E.2d 352 (Ind.Ct.App. 1997) (court cannot permit defendant to plead to illegal sentence). See also Smith v. State, 717 N.E.2d 239 (Ind.Ct.App. 1999); Reffett v. State, 844 N.E.3d 1072 (Ind.Ct.App. 2006) (sentence that exceeds statutory authority constitutes fundamental error).

3. Plea agreements

Determining the court's authority to impose or modify a sentence upon a guilty plea depends upon whether there has been a plea agreement and, if so, whether the agreement is binding or non-binding. When a guilty plea is entered, a court has three options:

a. Reject the guilty plea

Pannarale v. State, 638 N.E.2d 1247 (Ind. 1994) (trial court always has discretion to reject plea agreement and try case or consider any new plea agreement). See also Ind. Code § 35-35-2 & 3 (listing requirements for ascertaining that defendant is entering a knowing and voluntary guilty plea).

Mabbitt v. State, 703 N.E.2d 698 (Ind.Ct.App. 1998) (trial court was permitted to revoke acceptance of a guilty plea when it had not yet entered a judgment of conviction and there was not significant passage of time between the acceptance and rejection).

Beech v. State, 702 N.E.2d 1132 (Ind.Ct.App. 1998) (trial court, on its own motion, properly set aside plea where defendant asserted his innocence after plea had been accepted but prior to sentencing).

b. Accept the guilty plea and take plea agreement under advisement until sentencing

Lee v. State, 652 N.E.2d 113 (Ind.Ct.App. 1995) (trial court erred in rejecting plea agreement after accepting defendant's guilty plea and entering judgment of conviction, where defendant was not informed that trial court was not party to plea agreement and there was no indication that acceptance of guilty plea was conditional in any way).

Spencer v. State, 634 N.E.2d 72 (Ind.Ct.App. 1994) (because acceptance of guilty plea is separate from acceptance of plea agreement, court properly accepted guilty plea without accepting plea agreement where court clearly advised defendant that it had not accepted plea agreement).

Harris v. State, 159 N.E.3d 988 (Ind. Ct. App. 2020) (interpreting I.C. 35-35-1-2 to mean that once a court accepts a guilty plea it must inform the defendant that *if it accepts* a plea agreement, it will be bound by its terms).

If a plea agreement is not accepted, subsequent plea agreements may be filed with the court. Ind. Code § 35-35-3-3(b).

c. Accept the guilty plea and the plea agreement

If the court accepts a plea agreement, it shall be bound by its terms. Ind. Code § 35-35-3-3(e).

Reffett v. State, 571 N.E.2d 1227 (Ind. 1991) (court should consider presentence report prior to accepting plea agreement; however, once plea is accepted court is bound by all of its terms and could not revoke its acceptance).

Hatton v. State, 499 N.E.2d 259 (Ind. 1986) (court cannot enhance sentence proposed under accepted agreement).

Bennett v. State, 802 N.E.2d 919 (Ind. 2004) (trial court was required to apply consecutive sentence agreed to in plea agreement, and therefore it was not error for the court to omit articulation of reasons for imposing consecutive sentences).

State v. Barkdull, 708 N.E.2d 58 (Ind.Ct.App. 1999) (where trial court had already accepted both guilty plea and plea agreement, it did not have authority to order production of police reports for sentencing purposes because court was bound by agreement).

Rogers v. State, 715 N.E.2d 428 (Ind.Ct.App. 1999) (where trial court accepted oral plea agreement in which sentences for all burglary and sexual battery charges were concurrent, and sentence for driving while intoxicated would be consecutive to burglary and sexual battery sentences, court erred by ordering defendant's burglary charges to be served consecutively to one another, and same for sexual battery charges). See also Shepperson v. State, 800 N.E.2d 658 (Ind.Ct.App. 2003).

Payne v. State, 531 N.E.2d 216 (Ind.Ct.App. 1988) (although prosecutor and defendant agreed that defendant's record would be expunged, court was not bound to enforce expungement because court never accepted term and prosecutor lacked authority to waive rights of other agencies regarding record expungement).

Bartzis v. State, 502 N.E.2d 1347 (Ind.Ct.App. 1987) (trial court was bound by terms of agreement once court accepted agreement although child molesting victim's mother later testified that she felt pressured into acquiescence of plea to probation and court later discovered prior unrelated offense in presentence investigation).

d. Binding vs. non-binding ("open") plea agreements

A binding plea agreement requires the court to order the terms of the agreement, if the court accepts the agreement.

State ex rel. Goldsmith v. Marion County Superior Court, 275 Ind. 475, 419 N.E.2d 109 (1981) (if tendered plea bargain recommendation calls for executed sentence, court may either accept or reject recommendation but may not alter plea agreement).

Steele v. State, 638 N.E.2d 1338 (Ind.Ct.App. 1994) (where court accepted plea agreement with specific four-year sentence, court was required to sentence defendant to four years).

In a non-binding plea agreement, either side may recommend the sentence which it thinks is appropriate. However, the court is not required to accept either recommendation and is left with the ultimate sentencing discretion. State ex rel. Goldsmith v. Marion County Superior Court, 275 Ind. 545, 419 N.E.2d 109 (1981).

Walker v. State, 420 N.E.2d 1374 (Ind.Ct.App. 1981) (where court rejected prosecutor's recommendation to sentence defendant to five-year term of imprisonment, court retained authority to accept plea and sentence defendant to eight years because defendant's plea was not made dependent on imposition of five-year sentence and, thus, was non-binding on court).

e. Sentence modification

For a detailed discussion on sentence modification, see Chapter 11, *Modification and Correction of Sentence*.

(1) Reducing sentence

A sentence may not be reduced after sentencing pursuant to a plea agreement unless the court had the discretion to order the reduced sentence under the original non-binding plea agreement or the plea agreement specifically reserved such authority for the court.

(a) Discretion within plea

Pannerale v. State, 638 N.E.2d 1247 (Ind. 1994) (where plea agreement was "open-ended," containing recommendation from prosecutor that sentence not exceed ten years, judge retained authority to reduce sentence).

Rodriguez v. State, 129 N.E.3d 789 (Ind. 2019) (trial courts have no discretion to modify sentences entered pursuant to fixed term plea agreements).
Badger v. State, 637 N.E.2d 800, 802 fn. 7 (Ind. 1994) (Ind. Code § 35-35-3-3(e) prohibits reduction of sentence imposed pursuant to a plea agreement containing a binding sentence). See also Schippers v. State, 622 N.E.2d 993 (Ind.Ct.App. 1993); Thompson v. State, 617 N.E.2d 576 (Ind.Ct.App. 1993).

State v. Smith, 71 N.E.3d 368 (Ind. 2017) (unambiguous terms of defendant's 2000 plea agreement precluded converting his felony theft conviction to a misdemeanor, notwithstanding 2012 amended version of Ind. Code § 35-50-2-7(d); not holding defendant to this agreement would deny the State the benefit of its bargain).

(b) Statutory authority

State v. Brunner, 947 N.E.2d 411 (Ind. 2011) (trial court lacked authority to modify defendant's conviction to a misdemeanor years after he had served his sentence; trial court's authority under Ind. Code § 35-50-2-7(b) to enter a

judgment as a misdemeanor is limited to the time of sentencing); see also Boyle v. State, 947 N.E.2d 912 (Ind. 2011).

Note: Ind. Code § 35-50-2-7 was amended in 2012 to add subsection (c) and (d) in response to Brunner. If a person fits the requirements of getting their Class D or Level 6 felony lowered to an A misdemeanor, then the agreement of the prosecutor is no longer required, even if the modification was not provided for in the plea agreement or judgment of conviction. The prosecuting attorney has to be notified but need not consent.

(2) Increasing sentence

A trial court does not have jurisdiction over the defendant after it pronounces sentence. The jurisdiction over the defendant goes to the DOC. Thus, the defendant's breach of a plea agreement after sentencing does not give the trial court jurisdiction to resentence defendant.

Wampler v. State, 168 N.E.3d 1026 (Ind. Ct. App. 2021) (trial court lacked jurisdiction to resentence defendant who had served sentence and been released from DOC).

Moore v. State, 686 N.E.2d 861 (Ind.Ct.App. 1997) (trial court erred in vacating guilty plea and resentencing defendant to greater sentence after defendant refused to testify against other persons in drug cases).

Dier v. State, 524 N.E.2d 789 (Ind. 1988) (trial court erred in vacating defendant's 30-year sentence and reinstating original 154- year sentence after defendant recanted trial testimony in PCR five years after sentencing; court rejected State's argument that defendant committed fraud on State and breached his contract with State in plea agreement).

Jackson v. State, 968 N.E.2d 328 (Ind.Ct.App. 2012) (upon revocation of defendant's probation, the express terms of plea agreement indicated that defendant would receive a two-year executed sentence; thus, trial court erred by imposing the original suspended sentence of four years contrary to the accepted plea agreement under IC 35-35-3-3(e)).

f. Additional sentencing sanctions - punitive vs. administrative

Once an agreement is accepted, the trial court is precluded from imposing any term or condition in a sentence that imposes a substantial obligation of a punitive nature other than required by the plea agreement. Additional sanctions may be imposed if the plea agreement explicitly leaves it to the court's discretion. Thus, restitution or fines may not be added by the court if not included in the plea agreement. Administrative or ministerial terms of probation may be added by the court even though not specified in the plea agreement. The trial court cannot vary the terms of a plea agreement simply by seeking the defendant's verbal assent. Jackson v. State, 968 N.E.2d 328 (Ind.Ct.App. 2012).

Freije v. State, 709 N.E.2d 323 (Ind. 1999) (where plea agreement neither restricted nor expressly reserved trial court's authority to impose additional and material changes to defendant's probation conditions, trial court improperly ordered probation

conditions, home detention and community service, which were not specified in plea agreement).

L.W. v. State, 798 N.E.2d 904 (Ind.Ct.App. 2003) (informal home detention, requiring a juvenile to remain at home unless at school or accompanied by a parent or guardian, does not add to the punitive obligation, but merely assists the juvenile's parents in monitoring his behavior, and therefore is authorized in delinquency cases unless specifically excluded by a plea agreement).

S.S. v. State, 827 N.E.2d 1168 (Ind.Ct.App. 2005) (trial court erred in imposing informal home detention after accepting plea in exchange for receiving suspended commitment; imposition of informal home detention in this case was a substantial obligation of a punitive nature and not an administrative or ministerial condition).

Jackson v. State, 968 N.E.2d 328 (Ind.Ct.App. 2012) (trial court erroneously imposed community service as a condition of probation, which was not included in written plea agreement; trial court cannot vary terms of plea agreement simply by seeking defendant's verbal assent).

Coleman v. State, 162 N.E.3d 1184 (Ind. Ct. App. 2021) (ordering defendant to attend and complete classes in anger management or conflict resolution after pleading guilty to strangulation was an obligation that is rehabilitative in nature and does not materially add to punitive obligation of sentence).Collins v. State, 911 N.E.2d 700, 708 (Ind. Ct. App. 2009) (Ind. Code § 35-38-2-1.8 authorizes trial court to revise terms of probation and add conditions after probation begins even though the probationer has not committed a violation).

In re G.B., 709 N.E.2d 352 (Ind.Ct.App. 1999) (because the court is required by statute to place the defendant on the sex offender registry if there is evidence that he is likely to be a repeat sex offender, the lack of specific reference to the Registry in the plea agreement is irrelevant).

Sinn v. State, 693 N.E.2d 78 (Ind.Ct.App. 1998) (because restitution imposes substantial obligation of punitive nature, order of restitution must be specified in plea agreement). See also Disney v. State, 441 N.E.2d 489 (Ind.Ct.App. 1991).

Antcliff v. State, 688 N.E.2d 166 (Ind.Ct.App. 1997) (where plea agreement specifically left terms of defendant's probation to court's discretion, court did not err in imposing restitution and home detention as conditions of probation).
Tubbs v. State, 888 N.E.2d 814 (Ind.Ct.App. 2008) (where plea agreement did not afford the trial court broad discretion in fixing terms of probation, imposition of three years in community corrections after a nine-year executed sentence constituted an additional substantial obligation of a punitive nature not authorized by agreement).

Knight v. State, 155 N.E.3d 1242, 1253 (Ind. Ct. App. 2020) (because the specific language of plea agreement controls the general language, trial court did not have authority under plea agreement to impose community service probation condition).

Gipperich v. State, 658 N.E.2d 946 (Ind.Ct.App. 1995) (trial court erred in imposing $10,000 fine on each of four felony counts for which no such provision existed in plea agreement).

Buck v. State, 580 N.E.2d 730 (Ind.Ct.App. 1991) (administrative or ministerial terms such as reporting to probation department, notifying probation officer concerning changes in address or place of employment, supporting dependants, remaining within jurisdiction of court, and pursuing course of vocational training are proper terms of probation which court may order although they are not specified in plea agreement).

PRACTICE POINTER: Be aware that if conditions of probation are explicitly left to the discretion by the plea agreement, the trial court can impose any condition of probation, whether punitive or administrative, such as work release or home detention. See Shaffer v. State, 755 N.E.2d 1193 (Ind.Ct.App. 2001) (although plea agreement included a cap of three years executed time, trial court did not err in sentencing defendant to two years executed and four years probation, two of which would be served on work release).

B. DETERMINING CONSTITUTIONALITY OF STATUTES

The judiciary will disturb the legislative determination as to the appropriate penalty for a crime only upon showing of a clear constitutional infirmity. Vacendak v. State, 264 Ind. 101, 340 N.E.2d 352, *cert. den'd,* 97 S.Ct. 141 (1976).

For a detailed discussion on constitutional challenges to sentencing statutes, see Chapter 9, *Limitations on Sentences.*

II. ROLE OF THE JURY

A. NO INSTRUCTIONS RE: PENALTIES

Except in murder cases where the State seeks a sentence of death or life imprisonment without parole under Ind. Code § 35-50-2-9(a), a trial court should not instruct the jury on punishments applicable to various classes of crimes. Johnson v. State, 518 N.E.2d 1073, 1076 (Ind. 1988); Pearson v. State, 441 N.E.2d 468, 474 (Ind. 1982); Wells v. State, 441 N.E.2d 1366, 1368 (Ind. 1982).

Kalady v. State, 462 N.E.2d 1299 (Ind. 1984) (error to instruct jury as to penalty involved upon finding under habitual offender statute).

Wilson v. State, 169 Ind.App. 33, 346 N.E.2d 279 (1976) (conviction was reversed where trial court instructed jury concerning credit for time served awaiting sentencing).

But see:

Yeagley v. State, 467 N.E.2d 730, 735 (Ind. 1984) (it is not error to instruct jury concerning class of offense so long as jury is not advised of possible sentence involved).

Willis v. State, 510 N.E.2d 1354 (Ind. 1987), *cert. denied*, 484 U.S. 1015 (1988) (trial court properly instructed jury that there were no instructions concerning penalties because judge

sentences defendant although instruction needlessly elaborated on procedure which judge goes through when sentencing defendant).

Horne v. State, 572 N.E.2d 1333 (Ind.Ct.App. 1991) (because Ind. Code § 35-50-1-1 does not apply to civil judgment entered on finding of infraction violation, jury may impose judgment or fine).

PRACTICE POINTER: It is misconduct for a prosecutor to comment on the defendant's possible sentence, or lack thereof, in argument or voir dire. Lainhart v. State, 916 N.E.2d 924 (Ind.Ct.App. 2009) (prosecutor told jury that defendant could get a slap on the hand, no fine, no jail time and just probation or could get some time "with a ceiling that's not that high because it's a Misdemeanor;" although prosecutor did not cite the exact range of punishment, the explanation of the penalties was inappropriate).

B. SENTENCING FACT-FINDING

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The relevant "statutory maximum" is not the maximum sentence a judge may impose after a finding of additional facts, but the maximum he may impose without any additional findings. Id. For a more detailed analysis of how Blakely affects Indiana law, see Chapter 4, Sentencing Decision, and Smylie v. State, 823 N.E.2d 329 (Ind. 2005).

C. JURY NULLIFICATION

1. Definition

Jury nullification is a recognition that juries have the right and power to nullify a law by refusing to return guilty verdicts when they consider the applicable law unjust or when its application might lead to injustice.

Ind.Const. Article 1, §19, provides: "In all criminal cases whatever, the jury shall have the right to determine the law and the facts."

2. Jury can determine law in any enhancement proceeding

In Indiana, jurors have the right to determine the law and the facts in habitual offender proceedings. The jury has the ability to find a defendant to be a habitual offender or not to be a habitual offender irrespective of the uncontroverted proof of prior felonies. Seay v. State, 698 N.E.2d 732, 737 (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)).

Womack v. State, 738 N.E.2d 320 (Ind.Ct.App. 2000) (same jury nullification law applies to enhancement phase of marijuana as class D felony as does to habitual offender proceedings).

a. Jury instructions violating Ind. Const., art. I, § 19

Parker v. State, 698 N.E.2d 737 (Ind. 1998) (trial court committed reversible error by instructing jury over defendant's objection that jury "should" find defendant to be habitual offender if it found that State had proved predicate felonies).

Seay v. State, 698 N.E.2d 732 (Ind. 1998) (it was error, but not fundamental error, for trial court to instruct jury in habitual offender phase that they were not to determine law but only facts).

Sample v. State, 932 N.E.2d 1230 (Ind. 2010) (it was reversible error to instruct jury during habitual phase that if it found the State had proven the prior felonies, then it "must" find defendant a habitual offender; although the jury was instructed that they were given the right to decide both the law and the facts of the case, they were also instructed that they were to apply the law as they actually found it to be and not to disregard it for any reason, and the final instructions are the best source in determining what the law is; thus, error was not cured).

Johnson v. State, 717 N.E.2d 887 (Ind.Ct.App. 1999) (fact that court gave jury instruction which violated Ind. Const., art. I, § 19 did not require reversal; error was harmless because there was one-day delay between habitual offender phase and guilt phase, court instructed jury that they were judge of law and facts during final instructions of guilt phase, and jury was not given special verdict form).

PRACTICE POINTER: Indiana Pattern Jury Instructions No. 15.1240, 15.1260 and 15.1280 Habitual Offender Elements properly instruct that the jury "may" find the defendant to be a habitual offender/habitual substance offender only if the State meets its burden.

However, it is unresolved whether the Parker v. State holding that an instruction claiming the jury should find a defendant to be a habitual offender if they make certain factual findings violates Article. I, § 19, 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 3.0100 setting forth the elements of murder may be in violation of Article 1, Section 19. Preliminary Pattern Instruction 1.0300 on the jury's right to determine the law and the facts should be given with these instructions.

b. Jury instruction not violating Ind. Const., art. I, § 19

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, they 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) (trial court could have given the proposed instruction: "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;" however, the trial court did not abuse its discretion by refusing the proposed instruction and instead giving the pattern instruction on jury nullification).

NOTE: Dissenting in Walden, *supra*, Justice Rucker suggested the following instruction be given in the guilt phase of trials: "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." But see Holden v. State, 788 N.E.2d 1253 (Ind. 2003).

c. Failure to instruct on nullification

When a defendant requests the trial court to instruct the jury on its role as finders of law and fact during the habitual offender phase of a trial, it is reversible error for the trial court to refuse the request. Warren v. State, 725 N.E.2d 828, 837 (Ind. 2000).

Warren v. State, 725 N.E.2d 828 (Ind. 2000) (court committed reversible error in refusing to re-read guilt phase preliminary instruction dealing with jury nullification as final instruction in habitual phase, even though instruction did not impinge on right to jury nullification and only two days lapsed between guilt and habitual phases).

Hancock v. State, 737 N.E.2d 791 (Ind.Ct.App. 2000) (court did not err when during habitual phase of trial it refused to read defendant's tendered jury instruction informing jury of its power to nullify under Art. I, § 19 because court read its own instruction that covered jury nullification).

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

PRACTICE POINTER: The following is a defense-oriented instruction which has been previously given. "The Indiana Constitution provides that in all criminal trials, the jury shall have the right to determine the law and the facts. While this provision does not entitle you to return false verdicts or decide for yourselves what the law should be, it does allow you to latitude to refuse to enforce the law's harshness when justice so requires." Ind. Const. art. I, § 19; Rucker, *The Right to Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation*, 33 Val.U.L.Rev. 449 (1999); Bivins v. State, 642 N.E.2d 928, 946 (Ind. 1994); but see Holden v. State, 788 N.E.2d 1253 (Ind. 2003) (trial court did not err by refusing to give this instruction in guilt phase).

d. Verdict forms

Just as instructions must not violate the right to jury nullification, verdict forms must also conform, with the right to jury nullification.

Womack v. State, 738 N.E.2d 320 (Ind.Ct.App. 2000) (verdict form which only gave jury two options: defendant is guilty of possession as class A misdemeanor if find defendant does not have prior conviction or defendant is guilty of class D felony if find he has prior conviction, violated Art. I, §19).

Smock v. State, 766 N.E.2d 401 (Ind.Ct.App. 2001) (erroneous verdict form utilized during habitual offender phase did not constitute fundamental error).

3. Use in sentencing

The possible penalty is not a proper subject for the jury's consideration on jury nullification grounds. Inman v. State, 271 Ind. 491, 393 N.E.2d 767, 769-70 (1979).

PRACTICE POINTER: Counsel may request instructions on jury nullification and the level of the offense charged and argue jury nullification, without discussing penalties.

III. ROLE OF LEGISLATURE

Cruel and Unusual Punishment and Principles of Reformation are only two of the many constitutional limitations of the legislature when enacting statutes dealing with sentencing. For a detailed analysis of constitutional challenges to sentencing statutes, see Chapter 9, *Limitations on Sentences*.

A. CRUEL AND UNUSUAL PUNISHMENT

The duration and amount of punishment are legislative decisions subject only to the constitutional limitation that the penalty not be so disproportionate as to constitute cruel and unusual punishment. U.S. Const. amend. XIII, XIV; Ind. Const., art. 1, §16; State v. Moss-Dwyer, 686 N.E.2d 109 (Ind. 1997); Schnitz v. State, 650 N.E.2d 717, 724 (Ind.Ct.App. 1995), *aff'd*, 666 N.E.2d 919. The determination of the length of sentences is one of legislative policy as long as the minimum constitutional requirements are met. Whitacre v. State, 274 Ind. 554, 412 N.E.2d 1202, 1207 (Ind. 1980).

Johnson v. State, 654 N.E.2d 788 (Ind.Ct.App. 1995) (sentence is not so disproportionate as to be unconstitutional unless no reasonable person could find sentence appropriate to particular offense and offender).

Clark v. State, 561 N.E.2d 759 (Ind. 1990) (thirty-five-year sentence for operating while intoxicated was not proportionate to offense and therefore violated Art. I, § 16).

Giden v. State, 150 N.E.3d 654 (Ind. Ct. App. 2020) (penalties under escape statute do not violate the Proportionality Clause but legislature encouraged to consider amending statute to stagger penalties based on the type of violation).

Graham v. Florida, 130 S.Ct. 2011 (2010) (Eighth Amendment's Cruel and Unusual Punishment Clause does not permit a juvenile offender to be sentenced to life in prison without parole for a non-homicide crime).

Miller v. Alabama, 132 S.Ct. 2455 (2012) (Eighth Amendment forbids a sentencing scheme mandating life in prison without the possibility of parole for juvenile homicide offenders).

Perry v. State, 401 N.E.2d 792 (Ind.Ct.App. 1980) (prohibition against cruel and unusual punishment is limitation upon legislature and not upon trial court's discretion when such is exercised without limitations of penalty imposing statute).

Poling v. State, 853 N.E.2d 1270 (Ind.Ct.App. 2006) (where cruel confinement of a dependent can constitute either a Class D or C felony, the Class C felony sentence is disproportionate).

B. PRINCIPLES OF REFORMATION

Ind. Const., art. 1, § 18, which provides that the penal code shall be founded on the principles of reformation and not vindictive justice, is merely an admonition to the legislature to consider reformation in enacting penal laws. Fleenor v. State, 514 N.E.2d 80, 90 (Ind. 1987); Williams v. State, 430 N.E.2d 759, 766 (Ind. 1982). Courts are not free to set aside legislatively sanctioned penalties because they seem too severe. Schnitz v. State, 650 N.E.2d 717, 724 (Ind.Ct.App. 1995), *aff'd*, 666 N.E.2d 919.

Ratliff v. Cohn, 693 N.E.2d 530 (Ind. 1998) (Section 18 of the Indiana Constitution applies to the penal code as a whole and not to fact-specific challenges); see also Melton v. State, 993 N.E.2d 253 (Ind. Ct. App. 2013).

Denson v. State, 263 Ind. 315, 330 N.E.2d 734 (1975) (this section is not a proper basis for a jury instruction in a criminal case).