CHAPTER ELEVEN

MODIFICATION AND CORRECTION OF SENTENCE

I. REDUCTION OR SUSPENSION OF SENTENCE

"Shock probation," as referred to in this chapter, is probation granted after the individual has served part of his or her sentence and the judge suspends the remainder of the sentence.

There is no right to shock probation. Shock probation is merely a sentencing tool available to trial judges to use when and as they wish. McHugh v. State, 471 N.E.2d 293, 298 (Ind. 1984).

A. STATUTORY REQUIREMENTS

1. Authority to modify

At any time after:

(1) a convicted person begins serving the person's sentence; and

(2) the court obtains a report from the DOC concerning the convicted person's conduct while imprisoned;

the court may reduce or suspend the sentence and impose a sentence that the court was authorized to impose at the time of sentencing. However, if the convicted person was sentenced under the terms of a plea agreement, the court may not, without the consent of the prosecuting attorney, reduce or suspend the sentence and impose a sentence not authorized by the plea agreement. The court must incorporate its reasons in the record. Ind. Code § § 35-38-1-17(e).

The defendant must have started serving his or her sentence before the trial court has authority to modify it.

> Liggin v. State, 665 N.E.2d 618 (Ind.Ct.App. 1996) (a defendant who was ordered to serve consecutive sentences does not begin serving his second sentence until he is finished with his first sentence; here, trial court improperly modified second sentence while defendant was still serving first sentence); see also Lewis v. State, 754 N.E.2d 1019 (Ind.Ct.App. 2001).

Compare:

> Redmond v. State, 900 N.E.2d 40 (Ind.Ct.App. 2009) (introductory clause of former version of I.C. 35-38-1-17(a), "within 365 days after a convicted person begins serving the sentence imposed" on him, means within 365 days after a convicted person begins serving the entire sentence imposed on him and not individual sentences under the same cause number).

2. Retroactive application of amended statute

Notwithstanding the savings clause (IC 1-1-5.5-21), the sentence modification amendment applies to a person who:

(1) commits an offense; or

(2) is sentenced; before July 1, 2014.

Ind. Code § 35-38-1-17(a).

In 2015, the legislature amended the statute to expressly provide for retroactivity, thus it applies to any person who commits an offense and is sentenced before July 1, 2014, or after, as long as they meet other requirements. Vazquez v. State, 37 N.E.3d 962 (Ind.Ct.App. 2015).

Before the 2015 amendment, courts were split as to the retroactive application of the statute. Compare Moore v. State, 30 N.E.3d 1241 (Ind.Ct.App. 2015) (revised sentence modification statute is procedural and applies retroactively to persons sentenced before the 2014 amendment); with Swallows v. State, 31 N.E.3d 544 (Ind.Ct.App. 2015) (amended statute is substantive, not procedural, and does not apply retroactively to a sentence arising from an offense committed before 7/1/14).

3. Sentence must be suspendible

A sentence for a felony may be suspended under IC 35-38-1-17 only if suspension is permitted under IC 35-50-2-2.2. Ind. Code § 35-38-1-17(g); Carter v. State, 467 N.E.2d 694, 697 (Ind. 1984).

4. Summary denial; Notice

The trial court may deny a request to suspend or reduce a sentence without making written findings and conclusions. Ind. Code § 35-38-1-17(h). If the court sets a hearing on a sentence modification petition, it must give notice to the prosecuting attorney and the prosecuting attorney must give notice to the victim of the crime for which the convicted person is serving the sentence. Ind. Code § 35-38-1-17(f).

"Victim" means a person who has suffered harm as a result of a crime. Ind. Code § 35-31.5-2-348). It is unclear whether this includes family members of murder victims.

Wallace v. State, 486 N.E.2d 445, 462 (Ind. 1985), *cert. den'd*, 478 U.S. 1010, 106 S.Ct. 3311 (1986) (construed statute to exclude from definition of "victim" members of murder victim's family; thus, members of murder victim's family were not entitled to make statement in presentence report under Code § IC 35-38-19)

PRACTICE POINTER: Be aware that family members of a murder victim have been allowed to testify at the sentencing hearing as victims under IC 35-38-1-8.5. See Brown v. State, 698 N.E.2d 779 (Ind. 1998); Jones v. State, 675 N.E.2d 1084 (Ind. 1996); Loveless v. State, 642 N.E.2d 974 (Ind. 1994). However, these cases have never construed the statutory definition of "victim," but rather have analyzed the purpose of permitting the victim's representatives to testify. In addition, the victim of a dismissed charge was permitted to give a statement for inclusion in the presentence report. Again, the court did not construe the statutory definition of "victim," but rather based its conclusion on a probation officer's discretion of what information to include in the presentence report. Flinn v. State, 563 N.E.2d 536 (Ind. 1990). For a more detailed discussion on victim impact statements, see Chapter 2, *PSR,* Subsection III.B, *Contents and Scope of PSR*, and Chapter 3, *Sentencing Procedure*, Subsection II.I, *Sentencing Hearing; Evidence*.

5. Hearing not required if prosecutor agrees to modification and defendant waives rights

The court is not required to conduct a hearing before reducing or suspending a sentence under IC 35-38-1-17 if:

(1) the prosecuting attorney has filed with the court an agreement of the reduction or suspension of the sentence; and

(2) the convicted person has filed with the court a waiver of the right to be present when the order to reduce or suspend the sentence is considered. Ind. Code § 35-38-1-17(i).

B. TRIAL COURT'S AUTHORITY

1. Jurisdiction

a. Limited by statute

After final judgment, a court retains only such continuing jurisdiction as is permitted by the judgment itself or as is given the court by statute or rule. Beanblossom v. State, 637 N.E.2d 1345, 1347 (Ind.Ct.App. 1994) (Sullivan, J., concurring, providing discussion of differences between void and voidable judgments).

Although a trial judge generally has no authority over a defendant after the sentence is pronounced, Ind. Code § 35-38-1-17 permits a judge to order "shock probation" after the sentence was imposed. Sanders v. State, 638 N.E.2d 840, 841 (Ind.Ct.App. 1994) (interpreting prior version of statute with 365-day jurisdictional limit).

A trial court may retain jurisdiction when violations of the initial sentence occur and has discretion to impose additional punishments for such violations.

State v. Rivera, 20 N.E.3d 857 (Ind.Ct.App. 2014) (trial court's decision to sentence defendant for time served for technical violation of community corrections was not a sentence modification, but a consequence of violation of his initial sentence and fell within trial court's discretion).

b. Limited to sentencing court

Only the sentencing judge has jurisdiction to suspend or modify sentence. State ex rel. Sufana v. Superior Ct. of Lake County, 269 Ind. 466, 381 N.E.2d 475, 480 (1978). Indiana's post-conviction rules do not provide for modification of a sentence which has been established by the legislature as appropriate for the offense and which has been found to be constitutional, thus post-conviction courts have no authority to modify a sentence.

Marts v. State, 478 N.E.2d 63 (Ind. 1985) (explaining differences between courts power of correction versus power of modification).

Osborne v. State, 481 N.E.2d 376 (Ind. 1985) (post-conviction court did not have jurisdiction to modify sentence based on testimony that defendant had already served ample time).

2. Trial court's discretion

A trial court's decision to reduce or suspend a sentence is discretionary. Marshall v. State, 563 N.E.2d 1341, 1343 (Ind.Ct.App. 1990).

a. Summary denial of request

The court may deny a request to suspend or reduce a sentence under IC 35-38-1-17 without making written findings and conclusions. Ind. Code § 35-38-1-17(h). Thus, the mere fact that the process of rehabilitation may have started does not compel a reduction or other modification of a defendant's sentence, which may be true when the post-incarceration conduct is balanced against the aggravating circumstances recited in the original sentencing order. Marshall v. State, 563 N.E.2d 1341 (Ind. Ct. App. 1990). See also Catt v. State, 749 N.E.2d 633 (Ind. Ct. App. 2001).

b. Limitations on discretion

(1) Credit restricted felons are ineligible

Pursuant to Ind. Code § 35-38-1-17(b), credit restricted felons (as defined in IC 35-31.5-2-72) may not petition for modification of their sentences. For a discussion regarding credit restricted felon status and procedure, See Chapters 3 and 12.

(2) "Violent criminals" need prosecutor's consent after 365 days

Pursuant to Ind. Code § 35-38-1-17(k), a violent criminal may file one (1) petition for sentence modification without the consent of the prosecuting attorney within 365 days from the date of sentencing. After the elapse of the 365-day period, a violent criminal may not file a petition for sentence modification without the consent of the prosecuting attorney. **Exception:** A person who commits an offense between June 30, 2014, and May 15, 2015 may file one (1) petition for sentence modification

without the consent of the prosecuting attorney, even if the person has previously filed a petition for sentence modification. Ind. Code § 35-38-1-17(m).

"Violent criminal" means a person convicted of any of the following offenses:

(1) Murder
(2) Attempted murder
(3) Voluntary manslaughter
(4) Involuntary manslaughter
(5) Reckless homicide
(6) Aggravated battery
(7) Kidnapping
(8) Rape
(9) Criminal deviate conduct (before its repeal)
(10) Child molesting
(11) Sexual misconduct with a minor as a Level 1 or Level 2 felony
(12) Robbery as a Level 2 or Level 3 felony
(13) Burglary as a Level 1, Level 2, Level 3 or Level 4 felony
(14) Unlawful possession of a firearm by a serious violent felon.

Ind. Code § 35-38-1-17(b).

A lack of response from the prosecutor's office does not constitute consent to modify a sentence, absent indication the prosecutor is aware of the request for modification but did not object. Mance v. State, 163 N.E.3d 367 (Ind. Ct. App. 2021); Cf. State v. Harper, 8 N.E.3d 694 (Ind. 2014).

Further, the authority to review placement of non-violent offenders due to Covid-19 does not override substantive Indiana law on sentence modifications. Merkel v. State, 160 N.E.3d 1139 (Ind. Ct. App. 2020).

(3) Nonviolent criminals--No more than 2 sentence modification filings per sentence/1 per year without prosecutor's consent

A convicted person who is not a violent criminal may file a petition for sentence modification under IC 35-38-1-17:

(1) Not more than one (1) time in any three hundred sixty-five (365) day period; and
(2) a maximum of two (2) times during any consecutive period of incarceration; without the consent of the prosecuting attorney.

Ind. Code § 35-38-1-17(j).

For any person who petitions for sentence modification under the 2015 amended version of IC 35-38-1-17, any petitions filed before July 1, 2015, do not count toward the two-petition limit. Woodford v. State, 58 N.E.3d 282 (Ind. Ct. App. 2016).

A motion to participate in the Purposeful Incarceration Program does not count as a request for sentence modification under Ind. Code § 35-38-1-17(j).

> Sargent v. State, 158 N.E.3d 783 (Ind. Ct. App. 2021) (trial court erroneously concluded that it lacked statutory authority to consider the merits of defendant's current petition for modification because he had already filed two such petitions during his consecutive period of incarceration; but his pro se request to participate in the Purposeful Incarceration Program was not a request for sentence modification).

(4) No illegal sentence

The court only has authority to modify a sentence under a sentencing scheme which was in effect at the time the defendant committed the crime, or at the time the defendant was originally sentenced if the sentencing statute is ameliorative. See Elkins v. State, 659 N.E.2d 563 (Ind.Ct.App. 1995). See Chapter 9, *Constitutional Limitations,* Subsection IV.B., *Which statute to apply; Doctrine of Amelioration*, for a discussion of ameliorative statutes.

Any modification must meet other statutory sentencing guidelines, and the trial court may not avoid a mandatory sentencing enhancement or the like by modifying the sentence to overcome the mandatory sentencing element.

> Liggins v. State, 665 N.E.2d 618 (Ind. Ct. App. 1996) (trial court erroneously modified defendant's sentences so they ran concurrently when it was mandatory that those sentences run consecutively).

In addition, a sentence for a felony may be suspended under IC 35-38-1-17 only if suspension is permitted under IC 35-50-2-2.2. Ind. Code § Ind. Code § 35-38-1-17(g); Carter v. State, 467 N.E.2d 694, 697 (Ind. 1984).

However, pursuant to a joint agreed proposal submitted by the defendant and the State, the trial court may impose a sentence which was illegal at the time the defendant committed the crime. Johnston v. Dobeski, 739 N.E.2d 121 (Ind. 2000).

> Johnston v. Dobeski, 739 N.E.2d 121 (Ind. 2000) (trial court should accept agreement between State and defendant that reduced defendant's sentence to illegal sentence because: (1) affirming agreement facilitates resolution of meritorious post-conviction proceeding; (2) as part of agreement, defendant dismissed his claim for post-conviction relief with prejudice; (3) original life sentences had been imposed under indeterminate sentencing regime that

expressly provided for later review; practice under indeterminate sentencing system regularly authorized parole from life sentences after periods of time much less than revised sentence in this case; and (5) sentence provided for in agreement corresponds to consecutive presumptive terms under sentencing regime in effect at time agreement was approved).

But see:

State v. Hernandez, 910 N.E.2d 213 (Ind. 2009) (to the extent that Johnston held that a life sentence was indeterminate and that a prisoner serving a life sentence was eligible for consideration for parole, it is overruled).

(3) No sentence modification in violation of plea agreements

If the defendant was sentenced pursuant to a plea agreement, the court may modify the defendant's sentence only if the court has the statutory authority to modify the sentence and if the modified sentence falls within the terms of the plea agreement. See Rodriguez v. State, 129 N.E.3d 789 (Ind. 2019); and State v. Stafford, 128 N.E.3d 1291 (Ind. 2019) (holding trial court had no discretion to modify defendant's sentence imposed under a fixed term plea agreement, despite recent amendments to Ind. Code § 35-38-1-17).

NOTE: A person may no longer waive the right to sentence modification as part of a plea agreement. Any purported waiver of the right to sentence modification in a plea agreement is invalid and unenforceable as against public policy. Ind. Code § 35-38-1-17(l). This subsection does not prohibit the finding of waiver of the right to have a court modify a sentence and impose a sentence not authorized by the plea agreement, as described under IC 35-38-1-17(e). Id.

(a) Plea to a specific term

The trial court does not have authority to grant shock probation when a plea agreement for an executed sentence is accepted by the court, unless the prosecutor agrees. The prosecutor could agree to the right to a future sentence modification by agreeing to a plea that contains a specific reservation for the trial judge to consider shock probation. State ex rel. Goldsmith v. Marion County Superior Court, 275 Ind. 545, 419 N.E.2d 109, 114 (1981). Further, the plea condition must be one submitted to the court jointly by the prosecutor and the defendant, rather than a condition added by the judge after accepting the agreement.

Owens v. State, 886 N.E.2d 64 (Ind.Ct.App. 2008) (where defendant pled guilty to a specific term of years, but the State, in the plea agreement, specifically consented and approved of defendant filing a motion to modify after one year, trial court had authority to grant the modification despite the additional language that nothing in the agreement shall foreclose the State objecting to the modification and, in fact, the State did object).

State v. Fulkrod, 753 N.E.2d 630 (Ind. 2001) (court does not have the authority to modify sentence that was originally part of plea agreement, even if court reserves right to modify sentence at time of sentencing; court cannot circumvent requirement of prosecutor's consent by reserving right to modify at original sentencing).

(b) Plea to open sentence

However, the existence of a plea agreement does not always divest the trial court of its discretion to consider sentence modification. When the plea agreement is open and silent as to sentence, the matter is wholly within the trial court's discretion to consider modification. Kurtz v. State, 647 N.E.2d 692 (Ind. Ct. App. 1995). While the trial court may not impose a sentence greater or lesser than that contained in the plea agreement, it does not lose any discretion it possessed at the time of initial sentencing when subsequent petitions for modification are presented. Rather, the court retains the authority to modify a sentence so long as the modified sentence would not have violated the plea agreement had it been the sentence originally imposed. Pannarale v. State, 638 N.E.2d 1247, 1248-49 (Ind. 1994).

PRACTICE POINTER: Although a plea agreement may limit the court's authority to later modify the sentence, a court is not required to advise the defendant of his or her eligibility for shock probation before allowing the defendant to plead guilty. McHugh v. State, 471 N.E.2d 293, 298 (Ind. 1984).

(c) Plea to illegal sentence

Courts may be bound to correct an illegal sentence even though it was the product of a plea agreement. However, where the defendant receives a significant benefit from an illegal sentence in a plea agreement, the defendant cannot later complain about illegality. Debro v. State, 821 N.E.2d 367 (Ind. 2005).

Parrett v. State, 800 N.E.2d 620 (Ind.Ct.App. 2003) (though part of a plea agreement, trial court imposed an illegal sentence on defendant when it enhanced his sentence for operating vehicle after driving privileges are forfeited for life under Indiana's habitual offender statute).

C. WAIVER OF SENTENCE MODIFICATION PROHIBITED

A person may not waive the right to sentence modification under IC 35-38-1-17 as part of a plea agreement. Any purported waiver of the right to sentence modification in a plea agreement is invalid and unenforceable as against public policy. This subsection does not prohibit the finding of waiver of the right to have a court modify a sentence and impose a sentence not authorized by the plea agreement, as described under IC 35-38-1-17(e). Ind. Code § 35-38-1-17(l).

This subsection does not prohibit the finding of a waiver of the right to sentence modification for any other reason, including failure to comply with the provisions of this section.

PRACTICE POINTER: Courts have long disapproved of waiver provisions. Majors v. State, 568 N.E.2d 1065 (Ind.Ct.App. 1991) (plea agreement provisions waiving right to seek PCR are void and unenforceable). By enacting the anti-waiver provision with the 2014 amendment to the sentence modification statute, the Legislature has now codified its disapproval of waiver provisions. Thus, this provision is arguably remedial, "intended to cure a defect or mischief" existing before July 1, 2014, and should be applied retroactively. See, e.g., Martin v. State, 774 N.E.2d 43 (Ind. 2002).

D. COPY TO DEPARTMENT OF CORRECTION ("DOC")

Whenever a court corrects an erroneous sentence or modifies a previously imposed sentence, and the convicted person is incarcerated or is to be incarcerated by the DOC, the court shall immediately send certified copies of the corrected or modified sentence to the DOC. Ind. Code § 35-38-1-16.

Dawson v. Newman, 845 N.E.2d 1076 (Ind.Ct.App. 2006) (statute applied when a judge did not correct or modify a sentence, but set it aside entirely pursuant to a decision holding that parole had been improperly revoked; the setting aside of an erroneous sentence is both the act or an instance of making right what is wrong (i.e., a "correction") and a change to something or an alteration (i.e., a "modification")).

E. EFFECT OF SENTENCE SUSPENSION: PROBATION

When the trial court suspends the remainder of a sentence pursuant to Ind. Code § 35-38-1-17(e), the defendant is released to probation by operation of the statute requiring the court, when suspending a sentence for a felony, to place a person on probation for a fixed period to end not later than the date that the maximum sentence that may be imposed for the felony will expire. Wilburn v. State, 671 N.E.2d 143, 147 (Ind.Ct.App. 1996).

F. ATTACKING MODIFICATION

1. Procedure

The state may attack modification of a sentence through a motion to correct error where the modification was rendered by a court without jurisdiction. Beanblossom v. State, 637 N.E.2d 1345 (Ind. Ct. App. 1994). A modification ordered by a court which lacks statutory authority is considered an erroneous sentence and can be raised by any of the procedural mechanisms listed in Subsection II.B., Correction of Erroneous Sentence, Procedural mechanisms.

2. Standing

A victim's family does not have legal standing to file a motion to vacate a sentence modification. Johnston v. Dobeski, 739 N.E.2d 121 (Ind. 2000), *overruled in part on other grounds*, 910 N.E.2d 213 (Ind. 2009).

II. CORRECTION OF ERRONEOUS SENTENCE

A. COURT'S ROLE

1. Duty to correct

Where a sentence imposed is erroneous, the court has not only the power to correct it, but a duty to do so. Elkins v. State, 659 N.E.2d 563, 564 (Ind.Ct.App. 1995); Watkins v. State, 588 N.E.2d. 1342, 1344 (Ind.Ct.App. 1992) (sentencing error may be raised for first time on appeal). A court has the power to correct erroneous sentence whether the sentencing error followed a trial or a guilty plea or whether the sentence has been partially executed. Niece v. State, 456 N.E.2d 1081, 1084 (Ind.Ct.App. 1983). The court also may correct a sentence even when the correction results in an increase in the sentence. Williams v. State, 494 N.E.2d 1001, 1004 (Ind.Ct.App. 1986).

Fields v. State, 825 N.E.2d 841 (Ind.Ct.App. 2005) (notwithstanding plea agreement, trial court properly merged attempted robbery and conspiracy to commit robbery at sentencing to comply with IC 35-41-5-3).

Parrett v. State, 800 N.E.2d 620 (Ind.Ct.App. 2003) (rejecting State's arguments of waiver and res judicata, court noted that it was duty bound to correct illegal sentence in response to defendant's challenge even though it was product of plea agreement).

Weaver v. State, 725 N.E.2d 945 (Ind.Ct.App. 2000) (because trial court has duty to correct erroneous sentence at any time, res judicata cannot bar consideration of modification of erroneous sentence). See also Senn v. State, 766 N.E.2d 1190 (Ind.Ct.App. 2002).

Chism v. State, 807 N.E.2d 798 (Ind.Ct.App. 2004) (trial court did not err in vacating that portion of defendant's sentence that exceeded parameters of his plea agreement and simultaneously extending length of his probation and adding home detention as a condition of probation, which did not exceed statutory authority or terms of plea agreement).

2. Exception

When the defendant obtains a substantial benefit from a plea to an illegal sentence, the plea, and thus, the illegal sentence will not be vacated. Debro v. State, 821 N.E.2d 367 (Ind. 2005) (plea to illegal withheld judgment upheld). The defendant may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence. Lee v. State, 816 N.E.2d 35 (Ind. 2004) (plea to illegal consecutive sentences upheld).

3. Sua sponte correction

a. Trial court

A trial court may, on its own motion, correct its judgment within thirty days after the

entry of the judgment or final appealable order. T.R. 59(C) and 52(B).

Sweet v. State 533 N.E.2d 136 (Ind. 1989) (trial court, sua sponte, entered order correcting sentence which was based on court's mistaken belief that there was agreement between prosecutor and defendant as to sentence).

b. Appellate court

An appellate court may correct an erroneous sentence sua sponte.

Cuppett v. State, 448 N.E.2d 298 (Ind. 1983) (court, sua sponte, addressed issue of trial court's characterization of habitual offender determination as separate offense and not enhancement). See also Beesley v. State, 533 N.E.2d 112 (Ind.Ct.App. 1989); Stepp v. State, 470 N.E.2d 66 (Ind.Ct.App. 1984).

Lockhart v. State, 671 N.E.2d 893 (Ind.Ct.App. 1996) (court, sua sponte, addressed issue on appeal of trial court's authority to give consecutive sentences).

Hoage v. State, 479 N.E.2d 1362 (Ind.Ct.App. 1985), *disapproved on other grounds*, 621 N.E.2d 325 (Ind. 1993) (court, sua sponte, addressed issue that defendant was not given written conditions of probation).

Morgan v. State, 417 N.E.2d 1154 (Ind.Ct.App. 1981) (where trial court sentenced defendant to more than statutory maximum for crime, appellate court properly addressed issue on appeal sua sponte).

4. Delay in correcting error

a. Generally: no effect on court's authority

The length of time intervening between the original erroneous sentence and the correction does not affect the court's power to correct the sentence. Niece v. State, 456 N.E.2d 1081, 1084 (Ind.Ct.App. 1983). Double jeopardy does not even prohibit a court from correcting an illegal sentence after the defendant commences serving the sentence. Golden v. State, 553 N.E.2d 1219 (Ind.Ct.App. 1990).

Niece v. State, 456 N.E.2d 1081 (Ind.Ct.App. 1983) (delay of eight months in correcting erroneous sentence was inconsequential, particularly since State sought correction within matter of three weeks).

b. Exceptions

(1) Due process

Be aware that due process requires that the power of a sentencing court to correct even a statutorily invalid sentence must be subject to some temporal limit. Breest v. Helgemoe, 579 F.2d 95 (1st Cir. 1978), *cert. den'd*. Thus, a trial court may lose their authority to commence a defendant's sentence due to passage of time and harm that it

would cause, especially to a defendant who had already been released from prison and was staying out of trouble. Woods v. State, 583 N.E.2d 1211 (Ind. 1992).

The mere passage of time, even many years, does not per se prejudice the defendant. Something more, such as a concrete injury, must be shown to be considered sufficient prejudice and harm beyond frustrated expectations to be constitutionally redress able.

> Beliles v. State, 663 N.E.2d 1168 (Ind.Ct.App. 1996) (prisoner's due process rights are not violated merely by dashed hopes attendant in correction of sentence which delays prisoner's expected release date).
>
> Vance v. State, 949 N.E.2d 1269 (Ind.Ct.App. 2011) (trial court had jurisdiction to enter order recommitting defendant to the DOC after he was released prematurely on parole in 2007; his case differs from Woods in that he committed other crimes after he was mistakenly released from the DOC).

(2) Ind. Code § 33-23-2-4

All courts shall retain power and control over their judgments for a period of 90 days after the rendering thereof in the same manner and under the same conditions as they have heretofore retained such power and control during the term of court in which the judgments were rendered. Ind. Code § 33-23-2-4. The time limits contained within are jurisdictional and may have been superseded by Ind. Trial Rule 59.

> Hossman v. State, 525 N.E.2d 340 (Ind.Ct.App. 1988) (although trial court erroneously modified defendant's sentence to eliminate provision imposing consecutive sentence, trial court lost jurisdiction to correct mistake when State and court waited two years and nine months to fix problem).

(3) Trial Rule 53.1 & 53.2

A defendant filing a motion to correct sentence pursuant to Ind. Code § 35-38-1-15 should argue that T.R. 53.1, which requires a trial judge to rule on or set a motion for hearing within thirty days, applies.

> Robinson v. State, 805 N.E.2d 783 (Ind. 2004) (motions to correct sentence are not in the nature of post-conviction petitions, implicitly overruling State ex rel. Gordon v. Vanderburgh Circuit Court, 616 N.E.2d 8 (Ind. 1993), which held that Trial Rule 53.1 does not apply to motions to correct sentence because of the exemption for post-conviction petitions).

However, if a court does not permit a defendant to use Ind. T.R 53.1 to compel a court to act, Ind. T.R. 53.2 also applies. Whenever a cause has been tried to the court and taken under advisement by the judge, and the judge fails to determine any issue of law or fact within ninety days, the submission of all the pending issues and the cause may be withdrawn from the trial judge and transferred to the Supreme Court for the appointment of a special judge. Ind. T.R. 53.2(A).

Williams v. State, 716 N.E.2d 897 (Ind. 1999) (T.R. 53.2 applies to petitions for PCR; proper remedy for challenging denial of "lazy judge" motion under this rule is to seek writ of mandate from Indiana Supreme Court to compel clerk to give notice and disqualify judge).

PRACTICE POINTER: If the defendant has completed serving the correct sentence and the defendant is now being held illegally, a relatively quick way to obtain relief for the defendant would be to file a petition for habeas corpus in the county where the defendant is being held. For a discussion on habeas procedure, see the chapter dealing with interlocutory appeals, habeas and mandamus proceedings in the *Pre-Trial Manual*. For example, see Partlow v. State, 756 N.E.2d 978 (Ind.Ct.App. 2001) (because defendant was arguing that he was entitled to immediate release if he was properly awarded education credit time, defendant correctly filed his petition as writ of habeas corpus).

B. PROCEDURAL MECHANISMS

When an error related to sentencing occurs, it should be immediately corrected. Such errors are best corrected by an optional motion to correct error under Ind. Trial Rule 59 (subsection 1 below), on direct appeal pursuant to Ind. Appellate Rule 9(a) (subsection 2 below); or by an immediate motion to correct sentence (which is available only for certain claims; see subsection 4 below). Robinson v. State, 805 N.E.2d 783 (Ind. 2004). Thereafter, a defendant may seek recourse via post-conviction proceedings (subsection 3 below). Id.

1. Motion to correct errors: any sentencing error within thirty days

Within thirty days of entry of the final judgment, a defendant may file a Motion to Correct Errors pursuant to Trial Rule 59 and designate an erroneous sentence as the complained error. Thompson v. State, 270 Ind. 677, 389 N.E.2d 274, 276 (1979). If within the time limit, a motion to correct errors is a preferred method for directly challenging a sentencing error. Robinson v. State, 805 N.E.2d 783 (Ind. 2004).

The trial court has the power to correct a sentence which violates the penalty mandated by the applicable statute regardless of whether the sentencing error followed a trial or a guilty plea. Jones v. State, 789 N.E.2d 1008 (Ind.Ct.App. 2003). However, if the defendant received a substantial benefit from the erroneous sentence, the guilty plea and/or the erroneous sentence need not be vacated. Debro v. State, 821 N.E.2d 367 (Ind. 2005).

a. Time limits

A motion to correct error, if any, shall be filed not later than thirty days after the entry of a final judgment or an appealable final order. T.R. 59(C); Thompson v. State, 270 Ind. 677, 389 N.E.2d 274, 276 (1979).

b. Failure to raise sentencing issue in motion

Generally, failure to raise a sentencing issue, not based on new evidence or juror misconduct, in a motion to correct errors does not waive the issue for appeal. Trial Rule 59(A). The reviewing court is required to correct an improper sentence although the issue may not have been raised in the motion to correct errors. Atkins v. State, 437

N.E.2d 114, 119 (1982).

Haskett v. State, 271 Ind. 648, 395 N.E.2d 229 (1979) (defendant convicted of rape did not waive error occurring when judge, rather than jury, sentenced defendant by failure to present issue in motion to correct errors where defendant, in his general allegations of error, referred to trial court's error in sentencing and in his accompanying statement of facts and grounds relating to legality of sentence).

PRACTICE POINTER: Older case law that holds a defendant waives a challenge to an inappropriate sentence by failing to raise the issue in a motion to correct errors was decided under the prior TR 59 and should be questioned. See, e.g., Coleman v. State, 409 N.E.2d 647 (Ind.Ct.App. 1980) (defendant waived issue of unreasonable sentence by failing to object to sentence at sentencing hearing or in motion to correct error because sentence was within statutory guidelines established by the legislature).

c. Effect of improper use

Although the State's motion to correct errors used as a method for obtaining correction of an erroneous sentence may not be the proper procedural method to obtain a sentence correction, courts generally will not exalt form over substance and dismiss the motion.

Thus, the State's motion to correct error may not be fatally defective where: (1) the motion specifies the alleged sentencing error with a degree of specificity, as required under the motion to correct erroneous sentence statute; (2) the motion was accompanied by memorandum of law as required; and (3) evidentiary hearings are held on that motion. Niece v. State, 456 N.E.2d 1081 (Ind. Ct. App. 1983).

2. Direct appeal of sentence: any sentencing error based on the record

A defendant may raise the issue of an erroneous sentence on direct appeal regardless of whether the defendant was sentenced pursuant to a plea agreement. Robinson v. State, 805 N.E.2d 783, 786 n.2 (Ind. 2004); Browning v. State, 576 N.E.2d 1315 (Ind.Ct.App. 1991). Moreover, if a defendant does not raise a challenge to the sentence on appeal, the defendant will waive the issue for post-conviction relief. Collins v. State, 817 N.E.2d 230 (Ind. 2004).

Taylor v. State, 780 N.E.2d 430 (Ind.Ct.App. 2002) (defendant forfeited his claim of sentencing error by failing to present it on direct appeal, despite fact that State did not properly plead or prove affirmative defense of waiver in post-conviction proceedings).

A defendant may not collaterally attack his sentence on appeal from a different proceeding, such as a probation revocation hearing. The only options are direct appeal or post-conviction relief when appropriate. Schlichter v. State, 779 N.E.2d 1155 (Ind. 2002).

a. Belated appeal

If the time has run for challenging a sentence on direct appeal, defendant must file a belated notice of appeal pursuant to Ind. Rules of Post-Conviction Remedies, Rule PC 1 § 2. Collins v. State, 817 N.E.2d 230 (Ind. 2004). A belated appeal is appropriate when the failure to file a timely notice of appeal was not due to the fault of the defendant and

the defendant had been diligent in requesting permission to file a notice of appeal. Ind. Post-Conviction Rule 2. A defendant must be informed by the trial court that he has a right to directly challenge his sentence. Failure to so inform a defendant is grounds for granting a belated notice of appeal. Baysinger v. State, 835 N.E.2d 223 (Ind. Ct. App. 2005). However, once a defendant learns of this right, he must diligently and promptly pursue his belated notice of appeal. Id.

b. Failure to raise to trial court

(1) Defendant

An incorrect sentence, apparent on the face of the record, is fundamental error and can be considered for the first time on appeal. Woodson v. State, 178 Ind.App. 692, 383 N.E.2d 1096 (1978); Watkins v. State, 588 N.E.2d 1342 (Ind.Ct.App. 1992). Such an error can be considered even if the appellant fails to object at the sentencing hearing or fails to file a motion to correct an erroneous sentence. Abron v. State, 591 N.E.2d. 634, 638 (Ind.Ct.App. 1992).

Further, a defendant is entitled to dispute on appeal the terms of a sentence ordered to be served in a probation revocation proceeding that differ from those terms originally imposed. Stephens. v. State, 818 N.E.2d 936 (Ind. 2004).

(2) State

The State may challenge an illegal sentence on appeal without first filing a motion to correct erroneous sentence, and such appeal need not be commenced within thirty days of the sentencing judgment. Thus, a challenge to an incorrect sentence can be made for the first time in the State's reply brief. Hardley v. State, 905 N.E.2d 399 (Ind. 2009).

c. When used

A defendant may use a direct appeal to address any sentencing error. A direct appeal from a sentence imposed pursuant to a guilty plea is not limited to errors on the face of the record in the same sense that an appeal from a denial of a motion to correct an erroneous sentence is limited. Browning v. State, 576 N.E.2d 1315, 1317 (Ind.Ct.App. 1991) (court could address issue of reasonableness of sentence on appeal of sentence although trial court could not address same issue in a motion to correct erroneous sentence). See Subsection II.B.4.c, *Motion to Correct Erroneous Sentence, when used*, for discussion on what errors can be addressed in motion to correct erroneous sentence.

d. Bar to post-conviction relief

Post-conviction relief with regard to the constitutionality of the defendant's sentence is barred by principles of res judicata where the defendant argued unsuccessfully on direct appeal that his sentence was manifestly unreasonable. Marts v. State, 478 N.E.2d 63, 64 (Ind. 1985). However, if the sentencing error based on the record is not raised on appeal, it may be waived on a petition for post-conviction relief. State v. Lopez, 676 N.E.2d

1063, 1065 (Ind.Ct.App. 1997).

e. Effect of appellate court's order on remand

Because the trial court has no jurisdiction to change a sentence after judgment has been issued, trial court is compelled to follow mandate of remand order.

Lane v. State, 727 N.E.2d 454 (Ind.Ct.App. 2000) (where trial court originally sentence defendant to presumptive sentence under improper version of murder statute and appellate court remanded case with instructions to impose sentence under proper version of statute, trial court could not impose enhanced sentence upon remand by re-evaluating aggravators and mitigators).

3. Post-conviction relief: sentencing errors based on new evidence, bad advice or lack of authority

The preferred procedure for correcting an erroneous sentence is filing a petition for Post-Conviction Relief pursuant to PCR §1(a)(3). Robinson v. State, 805 N.E.2d 783 (Ind. 2004); Gee v. State, 508 N.E.2d 787, 788 (Ind. 1987); Thompson v. State, 270 Ind. 677, 389 N.E.2d 274, 276 (1979). However, PCR cannot be used as a super appeal. Thus, any sentencing errors that should have been raised on appeal may be waived on PCR.

a. Post-conviction Rule 1, § 1

"Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state, or that the sentence exceeds the maximum authorized by law or is otherwise erroneous may institute at any time a proceeding under this Rule to secure relief." PCR 1, § 1.

b. When not used

A PCR is not a substitute for an appeal and cannot be used to address the appropriateness of a sentence under Appellate Rule 7(B). Collins v. State, 817 N.E.2d 230 (Ind. 2004). Thus, a defendant may waive his right to petition for post-conviction relief if the defendant did not file a direct appeal. Meadows v. State, 823 N.E.2d 739 (Ind. Ct. App. 2005).

Taylor v. State, 780 N.E.2d 430 (Ind. Ct. App. 2002) (defendant forfeited his claim of sentencing error by failing to present it on direct appeal; despite fact that State had not properly plead or proved affirmative defenses of waiver in PCR proceedings).

c. When used

Because IC 35-38-1-15 is only appropriate when sentence is facially defective in that it violates express statutory authority at time sentence is pronounced, all other attacks upon sentence along with other alleged defects should be made in post-conviction proceeding or are waived. Jones v. State, 544 N.E.2d 492, 496 (Ind. 1989). Post-conviction

proceeding has benefit of advancing policy of finality. See Reffett v. State, 571 N.E.2d 1227, 1229 (Ind. 1991).

A petition for post-conviction relief can be used to challenge: (1) a facially defective sentence; (2) involuntary pleas or ineffective assistance of counsel; (3) denials of credit time; or (4) habitual offender enhancements.

(1) Challenges to facially defective sentence

Post-conviction relief procedure takes precedence only over other remedies that were available *prior* to passage of post-conviction rules. Ind. PC Rule 1(1)(b). Because the motion to correct sentence remedy statute was passed after the post-conviction rules, a motion to correct sentence is the proper method to challenge a facially defective sentencing judgment, both before and after post-conviction proceedings. Ind. Code § 34-38-1-15; see also Robinson v. State, 805 N.E.2d 783 (Ind. 2004). A post-conviction relief petition is not preferred for such a claim, although Robinson does not hold that a PCR petition cannot be used.

(2) Challenges to involuntary pleas or ineffective assistance of counsel

Whether viewed as ineffective assistance of counsel or as an involuntary plea, post-conviction relief may be granted if guilty plea can be shown to have been influenced by counsel's incorrect advice as to the law and penal consequences. Segura v. State, 749 N.E.2d 496 (Ind. 2001). Moreover, a sentence may be vacated if the sentence was based on counsel's failure to investigate. Kellett v. State, 716 N.E.2d 975 (Ind.Ct.App. 1999).

In fact, any sentencing error, such as improper use of aggravators or mitigators, or an inappropriate sentence, may be challenged via a petition for post-conviction relief if framed as an ineffective assistance of appellate counsel claim for failure to raise the issue on appeal. See, e.g., Reed v. State, 856 N.E.2d 1189 (Ind. 2006) (improper consecutive sentences); Duncan v. State, 862 N.E.2d 322 (Ind.Ct.App. 2007) (improper maximum sentence).

(3) Challenges to denial of credit time

A petitioner requesting education credit time must also comply with the post-conviction rules as the petition will be treated as one for post-conviction relief. Moshenek v. Anderson, 718 N.E.2d 811 (Ind.Ct.App. 1999); see also Diaz v. State, 753 N.E.2d 724 (Ind.Ct.App. 2001). In order for a trial court to have jurisdiction over a petition for education credit time, the petitioner must present all evidence of his diploma and credentials of the school that awarded it, that he meets each requirement of any necessary statute and that he exhausted the DOC grievance procedures along with evidence of the DOC grievance procedures. Young v. State, 888 N.E.2d 1255 (Ind. 2008).

Moshenek v. Anderson, 718 N.E.2d 811 (Ind.Ct.App. 1999) (where defendant

filed petition for habeas corpus after DOC denied defendant's petition for education credit for second associate's degree he earned, trial court should have treated petition as petition for post-conviction relief and credited defendant's sentence with appropriate education credit time). See also Diaz v. State, 753 N.E.2d 724 (Ind.Ct.App. 2001).

(4) Challenges to habitual offender enhancement

(a) Challenging underlying felony

Attacks upon formerly valid sentences that subsequently become subject to attack because of a change in circumstances must be made in a post-conviction proceeding. Thus, a petition for post-conviction relief, and not a statutory motion to correct erroneous sentence, is the appropriate procedural mechanism to challenge a habitual offender enhancement when a conviction underlying the enhancement is subsequently vacated. Poore v. State, 613 N.E.2d 478, 480 (Ind.Ct.App. 1993).

(b) Challenging sequence of felonies

Under the reasoning set forth in Poore, challenges to the sequence of habitual offender enhancements can be brought forth through a motion to correct an erroneous sentence because the sentence was erroneous at the time it was originally ordered. However, in Bauer v. State, 591 N.E.2d 564 (Ind.Ct.App. 1992), the court held that post-conviction relief was the proper procedure for raising such a claim.

State v. Arnold, 27 N.E.3d 315 (Ind.Ct.App. 2015) (trial court should have treated defendant's "motion to set aside habitual offender enhancement" as a petition for PCR).

PRACTICE POINTER: Attacks on the trial court's authority to run defendant's habitual offender enhancement consecutively to sentences for other convictions can be raised in a motion to correct an erroneous sentence. Smith v. State, 559 N.E.2d 338 (Ind.Ct.App. 1990).

d. Effect of improper use

If a defendant files with the trial court an unverified petition, purportedly under Ind. P.C.R. 1, § 1(a)(3), in which sentencing only is at issue, the court should treat that unverified petition as a motion to correct sentence. Thompson v. State, 270 Ind. 677, 389 N.E.2d 274, 276 (1979).

4. Motion to correct erroneous sentence: facially erroneous sentences

Although the preferred procedure for most sentencing challenges is through post-conviction relief, a claim of a facially erroneous sentencing judgment should be raised in a Motion to Correct Erroneous Sentence pursuant to Ind. Code § 35-38-1-15. Robinson v. State, 805

N.E.2d 783 (Ind. 2004); Jones v. State, 544 N.E.2d 492, 496 (Ind. 1989); Thompson v. State, 270 Ind. 677, 389 N.E.2d 274, 276 (1979). A motion to correct an erroneous sentence pursuant to Ind. Code § 35-38-1-15 may only be used to correct sentencing errors that are clear from the face of the judgment imposing the sentence in light of statutory authority. Robinson v. State, 805 N.E.2d 783 (Ind. 2004); Mitchell v. State, 726 N.E.2d 1228 (Ind. 2000).

If the convicted person is erroneously sentenced, the mistake does not render the sentence void. The sentence shall be corrected after written notice is given to the convicted person. Ind. Code § 35-38-1-15.

a. Purpose

The purpose of IC 35-38-1-15 is to provide prompt, direct access to an uncomplicated legal process for correcting the occasional erroneous or illegal sentence. Gaddie v. State, 566 N.E.2d 535, 537 (Ind. 1991); Thompson v. State, 634 N.E.2d 775, 777 (Ind.Ct.App. 1994).

Ind. Code § 35-38-1-15 is not available to defendant as a means to challenge his juvenile disposition, because a juvenile defendant is not a "convicted person" and the juvenile's disposition does not constitute a "sentence." Newsom v. State, 851 N.E.2d 1287 (Ind. Ct. App. 2006).

b. State's motion not limited to "facially erroneous" sentencing errors

Unlike a defendant, the State's motion to correct erroneous sentence is not limited to sentencing errors that are "facially erroneous." Rather, sound policy and judicial economy favor permitting the State to present claims of illegal sentences on appeal when the issue involves a pure question of law that does not require resort to any evidence outside the appellate record. Thus, the State may challenge the legality of a criminal sentence by appeal without first filing a motion to correct erroneous sentence, and such appeal need not be commenced within thirty days of the sentencing judgment.

Hardley v. State, 905 N.E.2d 399 (Ind. 2009) (defendant was illegally sentenced to concurrent terms for crimes that were committed while he was on recognizance for other charges; State's appellate claim of sentence illegality, raised for first time in its reply brief, was not waived by its failure to file a motion to correct erroneous sentence in trial court or its failure to otherwise assert the claim within thirty days of sentencing judgment).

State v. Lotaki, 4 N.E.3d 656 (Ind. 2014) (while court of appeals correctly noted that statute most commonly associated as authority for State appeals, I.C. 35-48-4-2, does not authorize State appeals for illegal sentences, trial court nonetheless erred in dismissing appeal because IC 35-38-1-15 authorized State's appeal).

c. Procedure

(1) May be raised at any time

The statutory motion to correct sentence may be filed regardless of the potential availability of post-conviction relief. Robinson v. State, 805 N.E.2d 783 (Ind. 2004). Because motions to correct sentence based on clear facial error are not in the nature of post-conviction petitions, they may be filed after a post-conviction proceeding without seeking the prior authorization necessary for successive petitions for post-conviction relief under Indiana PC Rule 1(12). Id.

(2) Must exhaust all DOC remedies

When a prisoner files a motion to correct erroneous sentence for any reason, the prisoner must first demonstrate that he has exhausted the remedies available through the DOC offender grievance process. Neff v. State, 888 N.E.2d 1249 (Ind. 2008).

(3) Motion requirements

A motion to correct sentence must be in writing and supported by a memorandum of law specifically pointing out the defect in the original sentence. Ind. Code § 35-38-1-15. See also Gaddie v. State, 566 N.E.2d 535,537 (Ind. 1991).

(4) Right to be present

The convicted person and his counsel must be present when the corrected sentence is ordered. Ind. Code § 35-38-1-15; see also Edwards v. State, 518 N.E.2d 1137, 1141 (Ind.Ct.App. 1988); Flowers v. State, 421 N.E.2d 632, 635 (Ind. 1981). The proper remedy for failure to comply with this section is remand to the trial court with instructions to re-impose the order correcting the sentence in the defendant's presence. Collier v. State, 572 N.E.2d 1299, 1303 (Ind.Ct.App. 1991).

Be aware that not all punishments which are imposed after sentencing are modifications to sentence which require presence of defendant and counsel. For example, a defendant's presence is not required at the time the trial court enters an order recommending a suspension of driving privileges.

> Dixon v. State, 685 N.E.2d 715 (Ind.Ct.App. 1997) (after defendant was afforded full sentencing hearing, his presence was not required at time court entered order recommending five-year suspension of his license pursuant to statute requiring recommendation of suspension of driving privileges for defendants convicted of certain offenses; statute is not sentencing statute, court was statutorily required to recommend sentence and statute did not provide for pre-deprivation hearing).

(5) No right to counsel if not requested

The trial court is not required to appoint counsel for a defendant who does not request appointment of counsel even if court is aware of the defendant's indigency. Gee v. State,

508 N.E.2d 787, 790 (Ind. 1987). Thus, a defendant cannot prevail on a claim of lack of due representation when he files a pro se motion to correct errors and not a petition for post-conviction relief. Gaddie v. State, 566 N.E.2d 535 (Ind. 1991).

(6) Court's denial of motion without hearing

Where a defendant's motion to correct an erroneous sentence does not present issues showing that the sentencing judgment was erroneous on its face, a trial court may summarily deny the motion without a hearing. Robinson v. State, 805 N.E.2d 783 (Ind. 2004). This includes errors pertaining to the accuracy of pre-sentence confinement and the amount of credit time earned for the confinement but does not include entries or omissions in the trial court's abstract of judgment. Jackson v. State, 806 N.E.2d 773 (Ind. 2004); Laycock v. State, 805 N.E.2d 796 (Ind. 2004).

Osborn v. State, 919 N.E.2d 1228 (Ind.Ct.App. 2009) (trial court did not abuse its discretion in summarily denying defendant's motion to correct erroneous sentence regarding his habitual offender enhancement, because defendant did not claim his sentence was erroneous on its face but claimed that State failed to prove commission and conviction dates for underlying predicate offenses).

Funk v. State, 714 N.E.2d 746 (Ind.Ct.App.1999) (when trial court has all the information needed in hand, it can rule without the defendant being present and without conducting a formal hearing).

Sentencing judgments that report only days spent in pre-sentence confinement and fail to expressly designate credit time earned shall be understood by courts and by the DOC to automatically award the number of credit time days equal to the number of pre-sentence confinement days; no motion to correct is needed. Robinson v. State, 805 N.E.2d 783, 792 (Ind. 2004). However, where the sentencing judgement states only that the defendant is entitled to a number of days of credit time, without stating the number of days of pre-trial confinement or how they arrived at the amount of credit time, the judgment is sufficiently ambiguous as to constitute an erroneous sentence on the face of the judgment. Crow v. State, 805 N.E.2d 780 (Ind. 2002).

Washington v. State, 805 N.E.2d 795 (Ind. 2004) (where trial court's order of judgment simply states the number of days spent in pretrial confinement, the presumption to credit time applies no motion to correct sentence is needed and it should be dismissed).

Bonds v. State, 165 N.E.3d 1011 (Ind.Ct.App. 2021) (trial court erroneously denied defendant's motion to correct erroneous sentence, where sentencing judgment failed to reflect time spent in confinement prior to sentencing).

d. When used

Use of Ind. Code § 35-38-1-15 is proper only for errors that can be resolved solely by considering the face of the judgment and applicable statutory authority. Robinson v.

State, 805 N.E.2d 783 (Ind. 2004). A facially defective sentence is defined as a sentence that violates express statutory authority at the time the sentence is pronounced. Poore v. State, 613 N.E.2d 478, 480 (Ind.Ct.App. 1993). Claims that require consideration of the proceedings before, during, or after trial may only be raised on direct appeal or in post-conviction proceedings and may not be presented by way of a motion to correct sentence. Robinson v. State, *supra*.

> Woodcox v. State, 30 N.E.3d 748 (Ind.Ct.App. 2015) (although it first appears the sentencing judgment for class B felony rape is facially defective because defendant received a 50-year sentence for class A felony rape (for which he was actually convicted), this clerical error is one of form rather than substance and is not the type contemplated by the correction of erroneous sentence statute; defendant carefully omitted from appellate record any documents indicating he was convicted of Class A felony rather than B felony rape, and his claim is "nothing more than a manipulative attempt to excise thirty years from his sentence;" it would be contrary to the interests of justice to change defendant's sentence to 20 years).

In Robinson v. State, 805 N.E.2d 783 (Ind. 2004), the Supreme Court attempted to simplify and clarify the means by which a defendant may raise a claim of an erroneous sentence. Robinson limits the use of a motion to correct erroneous sentence to situations where the error is clear on the face of the sentencing order. Id. Although it is preferred that all trial courts issue judgments of convictions, where a court does not (as in Marion County where the volume of criminal cases is large), it is appropriate to refer to the abstract of judgment. Neff v. State, 888 N.E.2d 1249 (Ind. 2008).

There are various claims that a defendant may pursue to challenge the sentencing judgment in a motion to correct erroneous sentence. Examples include:

- Failure to include statutorily required statement of credit time earned for time spent in confinement before sentencing. Robinson v. State, *supra*.
- Erroneous interpretation of a penalty provision of a statute. Jones v. State, 544 N.E.2d 492 (Ind. 1989).
- Partially consecutive sentences that are not authorized by statute. Wilson v. State, 5 N.E.3d 759 (Ind. 2014).
- No statutory authority for reinstatement of lifetime suspension of driving privileges for violating terms of restricted license. Gressel v. State, 653 N.E.2d 139 (Ind. Ct. App. 1995).
- Sentence falling outside the parameters for a particular class or level of a misdemeanor or felony. Poore v. State, 613 N.E.2d 478, 480 (Ind. Ct. App. 1993).

e. When not used

Not all errors that are apparent on the face of the sentencing judgment can be corrected on a motion to correct erroneous sentence. The error must be related to an aspect of the sentence.

Goodby v. State, 976 N.E.2d 1235 (Ind. Ct. App. 2012) (error in failing to include judgment of conviction amount of court costs, whether defendant was indigent, and method of satisfying court costs; costs imposed are not part of the sentence; error did not relate to a provision of the defendant's sentence and thus is not type of fundamental sentencing error appropriate for a motion to correct erroneous sentence).

Hobbs v. State, 71 N.E.3d 46 (Ind. Ct. App. 2017) (claim that crimes constituted a single criminal episode and that he was entitled to a sentence reduction was not reviewable on erroneous sentence motion).

Further, a motion to correct erroneous sentence does not contemplate the defendant's activity and behavior subsequent to sentencing. These considerations can only be raised on a motion requesting a suspension or reduction of sentence pursuant to Ind. Code § 35-38-1-17. Edwards v. State, 518 N.E.2d 1137 (Ind. Ct. App. 1988).

Robinson, *supra*, *overruled* cases that broadened the definition of "facially erroneous" sentencing judgments, such as:

Mitchell v. State, 726 N.E.2d 1228 (Ind. 2000) (double jeopardy claim addressed in response to a motion to correct sentence).

Reffett v. State, 571 N.E.2d 1227 (Ind. 1991) (motion to correct sentence could be used to assert claim that trial court contravened statute that required guilty plea court to be bound by terms of accepted plea agreement).

Petitioning for post-conviction relief is the proper mechanism to challenge errors in the abstract of judgment, because such errors are not evident from the face of the sentencing judgment.

Jackson v. State, 806 N.E.2d 773 (Ind. 2004) (motion to correct sentence may not be used to challenge abstract of judgment which did not properly credit inmate's sentence with time served and credit time).

f. Effect of improper use

If a motion to correct sentence presents a claim that is not clear on the face of the sentencing order in light of statutory authority, the motion should be dismissed. Robinson v. State, 805 N.E.2d 783 (Ind. 2004).

Davis v. State, 935 N.E.2d 1215 (Ind.Ct.App. 2010) (trial court properly denied defendant's motion to amend motion to correct erroneous sentence; even if amendment to pleading were permissible, his claim lacks merit because defendant's challenge to his conviction and sentence for corrupt business influence required Court to look beyond the face of sentencing judgment).

g. Appeal of denial of motion

Once a trial court has ruled upon the unverified petition (addressed to the issue of an erroneous sentence) or to the motion to correct sentence, that ruling is subject to appeal

via normal appellate procedures (filing of a motion to correct errors, denial of same, notice of appeal, etc.). Thompson v. State, 270 Ind. 677, 389 N.E.2d 274, 276-77 (1979). A defendant may challenge, on direct appeal, a denied motion to correct erroneous sentence, even when the sentence was based on a guilty plea. Griffin v. State 540 N.E.2d 1187 (Ind. 1989).

However, once an appealed decision on an unverified petition addressed to the issue of an erroneous sentence has been finalized in the appellate courts, the decision operates as a bar to further consideration of that issue in a later verified petition for post-conviction relief. Thompson v. State, 270 Ind. 677, 389 N.E.2d 274, 277 (1979). Further, defendant's failure to appeal the error regarding his motion to correct erroneous sentence may constitute a waiver of that right on post-conviction relief, regardless of whether the State argues waiver. Chism v. State, 807 N.E.2d 798 (Ind.Ct.App. 2004).

h. Failure to raise issue on appeal: no bar

If a trial court fails to sentence a defendant in accordance with the statutory requirements and the defendant fails to raise the issue on appeal but later raises it on a motion to correct an erroneous sentence, defendant does not waive the issue.

> Watkins v. State 588 N.E.2d 1342 (Ind.Ct.App. 1992) (when erroneous consecutive sentences were apparent from face of record, they were properly corrected on subsequent motion to correct erroneous sentence although issue was not raised on appeal).

5. Nunc pro tunc entry

When a sentencing order merely contains a clerical error such that it does not reflect the sentence that should have been imposed, the trial court can properly correct the error through a nunc pro tunc entry instead of through a motion to correct an erroneous sentence. Beliles v. State, 663 N.E.2d 1168, 1173 (Ind.Ct.App. 1996). A nunc pro tunc entry is an entry made now of something which was actually done previously to have effect as of the former date. Id. at 1171.

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the trial court at any time before the record is filed on appeal of its own initiative or on the motion of any party and after such notice, if any, as the court orders. TR 60(A).

> Beliles v. State, 663 N.E.2d 1168 (Ind.Ct.App. 1996) (court properly used nunc pro tunc entry to correct sentencing order to reflect sentence in plea agreement which was accepted by court).

C. COPIES TO DEPARTMENT OF CORRECTION

Whenever a court corrects an erroneous sentence or modifies a previously imposed sentence; and the convicted person is incarcerated or is to be incarcerated by the DOC, the court shall immediately send certified copies of the corrected or modified sentence to the DOC. Ind. Code §

35-38-1-16.

Dawson v. Newman, 845 N.E.2d 1076 (Ind.Ct.App. 2006) (statute applied when a judge did not correct or modify a sentence, but set it aside entirely pursuant to a decision holding that parole had been improperly revoked; the setting aside of an erroneous sentence is both the act or an instance of making right what is wrong (i.e., a "correction") and a change to something or an alteration (i.e., a "modification")).

D. EFFECT OF CORRECTION

1. On guilty plea

A court has the power to correct an erroneous sentence whether the sentencing error followed a trial or a guilty plea or whether the sentence has been partially executed. Niece v. State, 456 N.E.2d 1081, 1087 (Ind.Ct.App. 1983). However, when the defendant obtains a substantial benefit from a plea to an illegal sentence, the plea, and thus, the illegal sentence will not be vacated. Debro v. State, 821 N.E.2d 367 (Ind. 2005).

Lee v. State, 816 N.E.2d 35 (Ind. 2004) (defendant may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence).

Koontz v. State, 975 N.E.2d 846 (Ind.Ct.App. 2012) (defendant was not entitled to correction of an erroneous sentence under IC 35-38-1-15 because although the combined term of incarceration and probation was longer than that permitted by IC 35-50-3-1(b), defendant had agreed to the sentence in his plea agreement; he had obtained a benefit from the plea agreement because the dismissal of one operating while intoxicated charge reduced defendant's exposure if he was arrested again for OWI based on IC 9-30-5-3).

2. On other counts

When the court corrects an erroneous sentence on one count, the court does not have jurisdiction to increase the sentences on the other counts.

Sizemore v. State, 531 N.E.2d 201 (Ind. 1988) (in correcting erroneous sentence on theft charge, trial court did not have jurisdiction to resentence defendant on related forgery charges, where defendant had already fully served and satisfied sentences on those charges which were served prior to consecutive sentence for theft).

III. REDUCTION OF SENTENCE BASED ON BEHAVIOR IN PRISON

Prior to July 1, 1999, a person's sentence could be reduced pursuant to Ind. Code § 35-18-1-23 for completion of a vocational or substance abuse program; however, as of July 1, 1999, IC 35-18-1-23 was repealed and replaced with IC 35-50-6-3.3(b), which provides credit time for completion of a vocational, substance abuse, literacy and basic life skills or reformative program approved by the department of correction. See Chapter 10, *Credit Time,* Subsection VII, *Education Credit Time*.

PRACTICE POINTER: For the few individuals who completed a vocational or substance abuse program prior to July 1, 1999, but were not within three years of release, as required by repealed Ind. Code § 35-18-1-23 and who are now ineligible for credit time under IC 35-30-6-3.3(b) because they completed the program prior to July 1, 1999, argue that denying them credit violates the equal protection clause, the prohibition against *ex post* facto laws, and due process. (See The Indiana Defender, *Can an individual who does not fall within the new educational credit time state, Ind. Code § 35-50-6-3.3(b), still receive a time cut under the repealed Ind. Code § 35-38-1-23?,* p. 14 (June 2000).

A. GUILTY PLEAS – CANNOT MODIFY FIXED TERM AGREEMENTS

When a defendant enters into a fixed plea where the trial court has no discretion, the defendant cannot later ask the trial court to modify the sentence when the trial court did not have discretion when accepting the plea agreement. Rodriguez v. State, 129 N.E.3d 789 (Ind. 2019); State v. Stafford, 128 N.E.3d 1291 (Ind. 2019). However, where an accepted plea agreement is not to a specific term of imprisonment, the court may reduce a sentence so long as the reduced sentence would not have violated the plea agreement had it been the sentence originally imposed. Pannarale v. State, 638 N.E.2d 1247, 1248-49 (Ind. 1994).

State v. Rivera, 20 N.E.3d 857 (Ind.Ct.App. 2014) (trial court's decision to sentence defendant for time served for technical violation of community corrections was not a sentence modification, but a consequence of violation of his initial sentence and fell within trial court's discretion).

B. CALCULATION OF TIME REMAINING ON SENTENCE

For a detailed discussion on how to calculate good time, see Chapter 10, *Credit Time*.