

PETITION FOR MODIFICATION OF SENTENCE

The Defendant, by counsel, respectfully requests this Court to modify, pursuant to I.C. 35-38-1-17, the sentence imposed in the above captioned cause. In support of this request, the Defendant would show the Court as follows:

1. On [insert date], the Petitioner was sentenced to [insert sentence] for [insert offense].

The Petitioner received credit for [insert days] awaiting sentencing.

2. The Petitioner is currently serving his time in [insert prison and location].

3. [If your client was relatively young, insert the following: The Petitioner was [insert age] at the time of the offense].

4. Since being incarcerated, the Petitioner has participated in [insert programs and any achievements associated with the programs].

5. [CHOOSE ONE, IF APPROPRIATE: Since being incarcerated, the Petitioner has received his [insert degree(s)]. OR Since being incarcerated, the Petitioner has been attending college, and has accumulated [insert number of credits]].

6. Since being incarcerated, the Petitioner has consistently maintained employment with the institution.

7. On [insert date], the Petitioner's counselor, [insert counselor's name], filed a Progress Report, detailing Petitioner's conduct. [insert any positive details from the Progress Report].

8. The Petitioner has demonstrated a pattern of behavior consistent with evidence of rehabilitation. The Petitioner's willingness to avail himself of the multitude of drug rehabilitation and educational chances demonstrates a pattern of rehabilitation consistent with a person who has learned his lesson.

9. The Petitioner has support in the local community that could assist him in a transition. [Briefly specify family and/or community support].

WHEREFORE, the Petitioner, by counsel, respectfully requests this Court hold a hearing upon his Petition to Modify Sentence, thereafter grant the Petition by modifying the original sentence imposed by this Court, in whatever manner this court deems appropriate, and all other relief just and proper in the premises.

(Signature)

REFERENCES

CASEBANK E.13

I.C. 35-38-1-17(a)

I.C. 35-38-1-17(b)

I.C. 35-38-1-17(h) (the court may deny a request to suspend or reduce a sentence under I.C. 35-38-1-17 without making written findings and conclusions).

CASE LAW

Robinett v. State, 798 N.E.2d 537 (Ind.Ct.App. 2003) (trial court did not abuse its discretion by denying prisoner's motion to modify sentence under I.C. 35-38-1-17(b) without providing prosecuting attorney time to respond to motion).

Pannarale v. State, 638 N.E.2d 1247 (Ind. 1994) (trial court retains authority to modify sentence so long as modified sentence could not have violated plea agreement had it been originally imposed; trial court had no authority to modify sentence adduced through plea agreement to a specific number of years because once the trial court has accepted a plea agreement recommending a specific sentence, the terms of the agreement constrain the discretion the court would otherwise employ in sentencing).

Banks v. State, 847 N.E.2d 1050 (Ind.Ct.App. 2006) (trial court did not err in denying Defendant's Motion for Sentence Modification without ordering or considering a DOC progress report).

Owens v. State, 886 N.E.2d 64 (Ind.Ct.App. 2008) (I.C. 35-38-1-17(b) provides that if more than 365 days have elapsed since Defendant began serving sentence, trial court may reduce or suspend sentence subject to approval of prosecuting attorney; here, State waived its right to object because plea agreement stated that it "consents and approves" Defendant's filing a petition to modify her sentence after one year).

Williams v. State, 494 N.E.2d 1001 (Ind.Ct.App. 1986) (when sentence imposed by the trial court is found to be improper, trial court has the power to vacate illegal sentence and impose proper one which results in increased sentence; imposition of corrected sentence does not run afoul of prohibition against double jeopardy).

Jaco v. State, 49 N.E.3d 171 (Ind.Ct.App. 2015) (amended sentence modification statute not retroactive; based on Hobbs v. State, 26 N.E.3d 983 (Ind.Ct.App. 2015), subsequent cases, and language of the savings clause found at Ind. Code § 1-1-5.5-21, the 2014 amendment eliminating the requirement of prosecutor approval for sentence modifications filed over 365 days after sentencing does not apply retroactively).

Moore v. State, 30 N.E.3d 1241 (Ind.Ct.App. 2015) (amended sentence modification statute governed petition, Tr.Ct. erred in finding it lacked authority to review D's petition to modify sentence under the 2014 amendment to I. C. § 35-38-1-17, which dispensed with the requirement of prosecutorial consent to any modification requested more than 365 days after a person began serving their sentence. D was sentenced before the 2014 amendment. Because the revised statute defines the process to modify a sentence, the date of the petition controls. Neither does the savings clause in the 2014 overhaul of the criminal code – in which the revised statute is found – mandate review of Defendant's petition under the pre-2014 modification statute. Robb,

J., dissenting, finding that the amended statute is not procedural but substantive because it gives trial court a power it previously lacked: unilateral authority to modify a sentence at any time).

Woodford v. State, 58 N.E.3d 282 (Ind.Ct.App. 2015) (for persons who petition for sentence modification under the 2015 amended version of Ind. Code § 35-38-1-17, any petitions filed before July 1, 2015, do not count toward the two-petition limit. The statute does not provide for retroactive application of the two-petition limit, and reading the statute that way would produce an absurd result: it would deny Defendant the opportunity for sentence modification under the new statutory terms, even though Section 35-38-1-17(a) explicitly extends the new scheme to persons like Defendant who were convicted and sentenced before July 1, 2014. It would also undermine the legislative goal of letting long-incarcerated but non-violent offenders like Defendant seek review on the merits of their requests to modify sentence and letting trial courts determine whether scarce prison resources could be better used).

MODIFY TO ILLEGAL SENTENCE

Johnston v. Dobeski, 739 N.E.2d 121 (Ind. 2000) (State and the 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 the Defendant committed his 1964 crimes; although law in effect at time the Defendant committed crime generally controls his or her sentencing, this rule does not prohibit the trial court from considering agreement tendered jointly by State and the Defendant that, among other things, includes sentence different than that imposed at trial).

Hernandez v. State, 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).

PLEA AGREEMENTS

State ex rel. Goldsmith v. Marion County Superior Court, 275 Ind. 545, 419 N.E.2d 109, 114 (1981) (the 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 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).

Kurtz v. State, 647 N.E.2d 692 (Ind. 1995) (specific reservation of authority is unnecessary when plea agreement is silent as to sentencing; thus, a defendant can move to modify a sentence entered as part of an open plea agreement). See also Pannarale v. State, 638 N.E.2d 1247, 1248-49 (Ind. 1994).

State v. Fulkrod, 753 N.E.2d 630, 633 (Ind. 2001) (the prosecutor has to agree to the reservation of the court authority to modify sentence; absent prosecutor's approval, court had no authority to modify sentence after 365 days and fact that trial court specifically reserved the right to modify Defendant's sentence at any time was irrelevant; telling a defendant that the court would reconsider sentence modification at a later date only raises false hope on the defendant's part).

WHEN SENTENCE BEGINS

Lewis v. State, 754 N.E.2d 1019 (Ind.Ct.App. 2001) (the Defendant was sentenced to two years on home detention followed by two years of executed time; the 365 days did not begin to run until executed portion of sentence began being served).

Liggin v. State, 665 N.E.2d 618 (Ind.Ct.App. 1996) (because the Defendant had not yet begun serving his sentence at time the trial court purported to modify it, the trial court was without authority to grant shock probation); Cf. Redmond v. State, 900 N.E.2d 40 (Ind.Ct.App. 2009) (noting that in 2005, the legislature amended I.C. 35-38-1-17(a) to include the words "imposed on him" to modify sentence; thus, the introductory clause, "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)).

Hawkins v. State, 951 N.E.2d 597 (Ind.Ct.App. 2011) (365-day time limit in which to file sentence modification does not restart after Defendant is resentenced following successful appeal of sentence under Appellate Rule 7(B); 365-day period applies only to sentence originally imposed).

CONSTITUTIONALITY

Schweitzer v. State, 700 N.E.2d 488 (Ind.Ct.App. 1998) (provision requiring prosecutor's consent does not violate Article 3, Section 22, or Article 7, Section 1 with respect to separation of powers and judicial powers, nor does it violate the Defendant's rights to due process, equal protection of laws, and equal access to the court, and Article I, Sections 16 and 18 of Indiana Constitution, which require criminal justice system to provide a Defendant with opportunity for rehabilitation). See also Reed v. State, 796 N.E.2d 771 (Ind.Ct.App. 2003).