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IN THE
INDIANA SUPREME COURT

APPELLATE CASE NO. 21A-CR-01315

CHRISTOPHER HARRIS, Appellant,	)	Marion County Superior Court Criminal Division 27
vs.	)	Case No.49D27-1908-F3-032941
STATE OF INDIANA, Appellee.	)	The Honorable Barbara Crawford, Senior Judge

APPELLANT'S PETITION TO TRANSFER

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QUESTION PRESENTED ON TRANSFER

Article 1, Section 19 grants jurors in criminal cases the right to determine **the law** and the facts. In *Seay v. State*, 698 N.E.2d 732, 737 (Ind. 1998), this Court held that juries in habitual offender proceedings may find a defendant to be "a habitual offender (or not to be a habitual offender) irrespective of the uncontroverted proof of prior felonies."

As part of the Criminal Code overhaul in 2014, the General Assembly amended the habitual offender statute to include the following sentence: "The role of the jury is to determine whether the defendant has been convicted of the unrelated felonies." Ind. Code § 35-50-2-8(h). The Court of Appeals found the statute superseded *Seay* because the quoted "sentence is absolutely clear. A jury in a habitual-offender proceeding **only** decides whether the defendant has the requisite prior felonies." Slip op. at 12 (emphasis added).

Is transfer warranted because the published opinion both conflicts with this Court's statutory interpretation and Section 19 precedent and incorrectly decides an important legal question of great importance? Ind. Appellate Rule 57(H)(2)&(4).

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BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

At a jury trial on a habitual offender allegation, defense counsel and the State entered a stipulation of two prior, unrelated felony convictions. Ex. Vol. 1, p. 108. After the State rested on the stipulation, Mr. Harris took the stand briefly to explain his prior offenses and then to discuss his mental health struggles and treatment at the time of the current offense.

When Harris was asked "around the time of your arrest for that robbery, was there anything going on in your life?," the State objected. Tr. Vol. 3, p. 106-07. The trial court declined to allow any such evidence, stating "We're not doing - we are here for one reason and that's determine [sic] whether these two prior felony convictions make him a habitual offender." *Id.* at 107.

The trial court excused the jury to allow the defense to make an offer of proof. *Id.* at 108. As part of the offer of proof, Harris noted he had been diagnosed with PTSD about thirty days before the 2019 offenses. His therapist prescribed medications that were "too strong" for him. *Id.* at 110. Since adjusting his medication while in jail, "everything else has been fine" for him. *Id.* at 111. Defense counsel sought to ask Harris if he had "plans to further rehabilitate himself." *Id.* at 112. The trial court prohibited Harris from answering any of these questions to explain the offense or give the jury any information to weigh and consider in determining whether he was a habitual offender.

After less than ten minutes of deliberations, the jury found that Harris was a habitual offender. Tr. Vol. 3, p. 125-26.

On direct appeal, Mr. Harris argued the jury's right to determine the facts and law under Article 1, Section 19, when it refused to allow him to testify during the habitual offender proceeding. He relied on this Court's precedent *Seay v. State*, 698 N.E.2d 732, 737 (Ind. 1998), which held that juries may find a defendant to be "a habitual offender (or not to be a habitual offender) irrespective of the uncontroverted proof of prior felonies." A few years after *Seay*, in a case where the State admitted evidence in a habitual offender proceeding beyond a stipulation of prior offenses, this Court reaffirmed that a jury "has discretion to determine whether a defendant is a habitual offender 'irrespective of the uncontroverted proof of prior felonies.'" *Hollowell v. State*, 753 N.E.2d 612, 617 (Ind. 2001) (quoting *Seay*, 698 N.E.2d at 737).

The State instead relied on older precedent from *Taylor v. State*, 511 N.E.2d 1036, 1040 (Ind. 1987), which did not allow the defendant to testify about why he should not be found a habitual offender because "[t]he only relevant evidence in a habitual offender proceeding is evidence that proves or disproves the defendant's prior felony convictions." It argued that *Taylor* did not conflict with *Seay* and *Hollowell*. The State briefly noted a statutory change, which it said "made clear [the legislature's] agreement with *Taylor*." Br. of Appellee at 15. That sentence provides: "The role of the jury is to determine whether the defendant has been convicted of the unrelated felonies." Ind. Code § 35-50-2-8(h).

In a published decision, the Court of Appeals went beyond the State's argument in holding that the statutory change supersedes this Court's opinions in

Seay and *Hollowell*. It reasoned that the quoted "sentence is absolutely clear. A jury in a habitual-offender proceeding **only** decides whether the defendant has the requisite prior felonies." Slip op. at 12 (emphasis added). In its view, "the jury no longer has th[e] discretion" to make an independent determination under *Seay* because now the "status is automatic under the statute." Slip op. at 12. The opinion took aim at the jury instructions and verdict form, which were given without objection from the State. The published opinion declared: "Trial courts should give instructions and verdict forms that recognize the jury's limited role as provided in the current statute: determining whether the defendant has the requisite prior convictions." Slip op. at 14.

ARGUMENT

Transfer is warranted because the Court of Appeals has fundamentally altered the jury's role in habitual offender proceedings. Its declaration that a statutory change superseded this Court's precedent conflicts with this Court's statutory construction and constitutional precedent and wrongly decides an important of great public importance. Ind. Appellate Rule 57(H)(2)&(4).

A. Section 19 precedent

Unlike most state constitutions, Indiana's constitution provides, "In all criminal cases whatever, the jury shall have the right to determine **the law** and the facts." Ind. Const. Art. 1, § 19 (emphasis added). Section 19 is not a hollow or meaningless provision. *See generally* Honorable Robert D. Rucker, *The Right to*

Ignore the Law: Constitutional Entitlement Versus Judicial Interpretation, 33 Val. U. L. Rev. 449 (1999).

This Court made clear more than two decades ago that juries may 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) (discussing jury instructions). That unanimous opinion adopted Justice Dickson's view from recent dissenting opinions where he had written "that the jury has a choice and that it may determine that even though the defendant was convicted of two prior unrelated crimes, the defendant should not be given the status of a habitual offender." *Id.* at 736.

A few years after *Seay*, the State admitted evidence in a habitual offender proceeding beyond a stipulation of prior offenses; this Court upheld the trial court because "the facts regarding the predicate convictions are relevant to the jury's decision whether or not to find a defendant to be a habitual offender." *Hollowell v. State*, 753 N.E.2d 612, 617 (Ind. 2001). The opinion reaffirmed that a jury "has discretion to determine whether a defendant is a habitual offender 'irrespective of the uncontroverted proof of prior felonies.'" *Id.* (quoting *Seay*, 698 N.E.2d at 737).

Justice Rucker, joined by Justice Dickson, dissented from the outcome in *Hollowell* but shared the majority's view that jurors can consider more than the barebones existence of a prior conviction. They wrote that the "right of an Indiana jury in a criminal case not to be bound to convict even in the face of proof beyond a reasonable doubt allows the jury to consider mercy in its deliberations." *Id.* at 618.

But the dissent would have reversed the habitual adjudication because "[a]ny consideration of mercy in this case was very likely eliminated by the erroneous and prejudicial information contained in the case chronology." *Id.*

B. The 2014 Statutory Change

As part of the massive overhaul of the Criminal Code in 2014, the General Assembly added the following bolded language to the habitual offender statute:

> If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing under IC 35-38-1-3. **The role of the jury is to determine whether the defendant has been convicted of the unrelated felonies. The state or defendant may not conduct any additional interrogation or questioning of the jury during the habitual offender part of the trial.**

Ind. Code § 35-50-2-8(h) (P.L. 158-2013, Sec. 661, eff. July 1, 2014).

The Court of Appeals declared that *Seay* was superseded by the 2014 amendment. Slip op. at 13. That holding is incorrect both as a matter of statutory interpretation and under Article 1, Section 19. Because this Court prefers to "avoid addressing constitutional questions if a case can be resolved on other grounds," *Girl Scouts of S. Illinois v. Vincennes Indiana Girls, Inc.*, 988 N.E.2d 250, 254 (Ind. 2013), Mr. Harris begins with the statutory argument.

C. The statute does not limit the jury's role or supersede *Seay*.

Subsection (h) explains the role of the jury or trial court in a habitual proceeding. The two new sentences merely codified existing practice. The last sentence makes clear that counsel cannot conduct additional *voir dire* of the jury, which was selected before the guilt phase and tasked in the habitual phase with

making the additional determination. The penultimate sentence simply explains that the "role of the jury is to determine whether the defendant has been convicted of the unrelated felonies."

The Court of Appeals held the quoted "sentence is absolutely clear. A jury in a habitual-offender proceeding **only** decides whether the defendant has the requisite prior felonies." Slip op. at 12 (emphasis added). But the statute never says "only." The sentence merely describes the jury's role without limiting it. The other added sentence, in contrast, imposes limitations on *voir dire*.[1]

When the language of a statute is clear and unambiguous, this Court will "simply apply its plain and ordinary meaning, heeding both what it 'does say' and what it 'does not say.'" *Mi.D. v. State*, 57 N.E.3d 809, 812 (Ind. 2016) (quoting *State v. Dugan*, 793 N.E.2d 1034, 1036 (Ind. 2003)). What the Court of Appeals believed was an "absolutely clear" statutory change in 2014 appears to have gone unrecognized for nearly a decade by lawyers and judges around the state. Slip op. at 12 n.4 ("This amendment took effect in 2014, but we have found no Indiana appellate decision addressing it.").

Moreover, the trial court's instructions and verdict form were consistent with *Seay*—not the highly restrained view adopted in the Court of Appeals' opinion. Slip op. at 14; App. Vol. 2, pp. 197, 202-03. The deputy prosecutor did not object to either

[1] Counsel regrets that his reply brief argument regarding the statutory language was not more robust. *See* Reply Br. at 8 n.1. Because the issue on appeal was the limitation on Harris's testimony, the language addressing "questioning" or "interrogation" appeared more pertinent.

the verdict form or instructions, nor did he suggest in any way that they were inconsistent with this statute. The Attorney General did not attach such significance to the statute, addressing it only briefly in the final paragraph of its argument regarding Section 19. Br. of Appellee at 15-16. Finally, defense counsel stipulated to the two prior offenses, which under the Court of Appeals' view of the statute meant there was nothing left for the jury to decide. Ex. Vol. 1, p. 108.

If there is any doubt about the meaning of statutory text, the doubt must be resolved in favor of defendants. The rule of lenity requires courts "to interpret ambiguous criminal statutes in the defendant's favor as far as the language can reasonably support." *Calvin v. State*, 87 N.E.3d 474, 479 (Ind. 2017) (citing reference and emphasis omitted). Moreover,

> When the legislature enacts a statute in derogation of the common law, this Court presumes that the legislature is aware of the common law, and does not intend to make any change therein beyond what it declares either in express terms or by unmistakable implication. In cases of doubt, a statute is construed as not changing the common law.

Bartrom v. Adjustment Bureau, Inc., 618 N.E.2d 1, 10 (Ind. 1993) (internal citation omitted).

In short, the plain language of the statute does not limit the jury's role "only" to determining the existence of two prior felonies. The benefit of any doubt on this point must be given to the defendant.

D. Dictating the jury's role violates Section 19.

If this Court disagrees with the statutory argument advanced in Part C and shares the Court of Appeals' view that juries may only consider two prior

convictions, constitutional concerns must be addressed. Because Article 1, Section 19 provides a right for jurors to determine the law, the Indiana General Assembly cannot infringe upon or alter that right by statute. *See generally Strong v. Daniel*, 5 Ind. 348, 350 (1854) ("[I]f a legislative act conflicts with the constitution, it is a nullity, and inoperative for any purpose.").

Some recidivist statutes expressly provide that the trial court—not the jury—make the determination. *See, e.g., Smith v. State*, 825 N.E.2d 783, 786 (Ind. 2005) (finding no Section 19 violation with Indiana's Repeat Sexual Offender Statute). The habitual offender statute expressly gives that role to the jury—and in so doing, the General Assembly cannot then undermine the jury's constitutional role. For example, outside the habitual offender context, this Court has previously approved an instruction that told jurors they were "the judges of law as well as of the facts. You can take the law as given and explained to you by the court, but, if you see fit, you have the legal and constitutional right to reject the same, and construe it for yourselves." *Holden v. State*, 788 N.E.2d 1253, 1254 (Ind. 2003) (quoting *Blaker v. State*, 130 Ind. 203, 29 N.E. 1077 (1892)).

E. Direction about instructional language is needed.

The penultimate paragraph of the published opinion takes aim at the unchallenged jury instruction and verdict form as "inaccurate" and directs that instructions and verdict forms must now reflect that "the jury's role and inquiry are much narrower than they were under *Seay*." Slip op. at 14. No language is offered, but the opinion seems to suggest jurors should be told they may only consider

whether the defendant had two prior unrelated convictions and must convict if they so find.

Whatever view of the statute this Court takes, some direction would be helpful for trial courts and counsel. The proper contours of a Section 19 instruction deeply divided this Court in *Walden v. State*, 895 N.E.2d 1182 (Ind. 2008). There, the majority concluded that "while a broader jury instruction would not have been wrong, the trial court is certainly not obligated to issue an invitation to the jury to disregard prior convictions in addition to informing the jury of its ability to determine the law and the facts." *Id.* at 1186. Justice Rucker, joined in dissent by Justice Dickson, wrote: "Simply advising the jury that it has the right to determine the law and the facts falls woefully short of explaining how this right may be exercised." *Id*. at 1188. Justice Dickson wrote separately to emphasize, "the defendant was entitled to have the jury meaningfully instructed regarding its right to find in favor of a criminal defendant despite substantial contrary evidence, a historic right of American juries and one additionally preserved in Section 19 of the Indiana Bill of Rights." *Id.* at 1190.

Clarity would help achieve the purpose of jury instructions—"to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict." *Batchelor v. State*, 119 N.E.3d 550, 553 (Ind. 2019) (quoting *Campbell v. State*, 19 N.E.3d 271, 277 (Ind. 2014)).

F. Barring Harris's testimony violated Section 19.

Finally, returning to the issue raised on appeal, the trial court's prohibition on Harris's testimony during the habitual offender phase was grounded in a legally incorrect view that a habitual proceeding was simply about "whether these two prior felony convictions make [Harris] a habitual offender" and thus violated Section 19. Tr. Vol. 3, p. 107. Reversal and a new proceeding are warranted because the jury was given no opportunity to learn about "the facts regarding the predicate convictions" or any basis to "consider mercy in its deliberations." *Hollowell*, 753 N.E.2d at 617-18.

CONCLUSION

For the reasons advanced in this petition, Mr. Harris respectfully requests reversal of the habitual offender enhancement because the trial court refused to allow him to testify about the facts of the predicate offenses in that proceeding. For the reasons previously argued to the Court of Appeals, Mr. Harris believes his convictions for robbery and battery should be vacated based on insufficient evidence.

Respectfully submitted,

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WORD COUNT VERIFICATION

I verify that this Petition to Transfer contains no more than 4,200 words.

/s/ Joel M. Schumm
Joel M. Schumm

CERTIFICATE OF SERVICE

I certify the foregoing Petition to Transfer was served electronically on Deputy Attorney General George Sherman through the IEFS on June 6, 2022.

/s/ Joel M. Schumm
Joel M. Schumm