Filed: 7/7/2022 7:39 PM

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 REPLY IN SUPPORT OF TRANSFER

Joel M. Schumm
530 W. New York Street #229
Indianapolis, IN 46202
(317) 278-4733
JoelSchumm@aol.com

Attorney for Appellant

ARGUMENT

The State's response is striking; it largely ignores the Court of Appeals' resounding reliance on "absolutely clear" statutory language. Slip op at 12. The eschewal further bolster's Harris's argument that the 2014 amendment, unnoticed and unremarkable for eight years, did not supersede this Court's precedent and obliterate the jury's role to determine the law in habitual offender proceedings.

The following two sentences were added to the habitual statute as part of the massive overhaul of the Criminal Code in 2014: "[1] The role of the jury is to determine whether the defendant has been convicted of the unrelated felonies. [2]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 State does not dispute Harris's argument that the second sentence simply makes clear that counsel cannot conduct additional *voir dire* of the jury, which was selected before the guilty phase and is tasked in the habitual phase with making the additional determination. For whatever reason, the General Assembly thought it important to codify this long-settled practice—a decision that decimates the State's argument about the first sentence: "if the legislature did not intend to make any change to existing practice, there would have been no need to add the new language in the first place." Trans. Resp. at 10.

As to the first sentence, which addresses the jury's role, the State relies on a single canon that cuts against it while also ignoring others that further undermine

its argument. Trans Rep. at 10. The statute never says "only"—a critical word that highlights the importance of considering "not only what the statute says but what it does not say." Trans. Resp. at 10 (quoting *Curley v. Lake Cnty. Bd. of Elections & Registration*, 896 N.E.2d 24, 37 (Ind. Ct. App. 2008), *trans. denied*.).

If there is any doubt about the meaning of statutory text, the doubt must be resolved in the favor of Harris under the rule of lenity and because the statute is in derogation of the common law. Pet. Trans. at 10. No one in the courtroom—the judge who instructed the jury, the prosecutor who did not object to the instructions or verdict form, or defense counsel whose stipulation would have been a de facto guilty plea—shared the Court of Appeals' view of the 2014 amendment. If it was of such sweeping significance, one would not expect the Criminal Instructions Committee to take eight years to review and address it. *Cf.* Trans. Resp. at 12.

Moreover, the State does not dispute that 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 the reasons previously argued, the "General Assembly has [not] made clear that it is not its intent for a jury to determine a defendant's habitual offense status." Trans. Resp. at 11.

Finally, returning to the issue raised on appeal, reversal and a new habitual 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 v. State*, 753 N.E.2d 612, 617-18 (Ind. 2001). Although incorrect about the statutory amendment, the Court of Appeals correctly recognized the "compelling" significance of *Hollowell* in allowing the presentation of evidence about the underlying crimes in a habitual proceeding. Slip op. at 11.[1]

CONCLUSION

For these reasons and those previously argued, transfer is warranted because the Court of Appeals' declaration that a statutory change superseded this Court's precedent conflicts with this Court's statutory construction and constitutional precedent and wrongly decided an issue of great public importance. Ind. Appellate Rule 57(H)(2)&(4).

Respectfully submitted,

/s/ Joel M. Schumm
Joel M. Schumm
Attorney No. 20661-49

[1] Harris's Section 19 claim is not waived for the reasons argued in his reply brief. Reply Br. at 5-7. The authorities cited by the Court of Appeals are readily distinguishable because the offer of proof was timely and clear as part of a factually developed record. *Cf. McCallister v. State*, 91 N.E.3d 554, 563 (Ind. 2018) ("We do not consider McCallister's constitutional argument because he waived it in two respects: by failing to raise it at trial, and by failing to explain how the privilege was implicated on this record."); *Layman v. State*, 42 N.E.3d 972, 976 (Ind. 2015) ("judicial intervention to address constitutional claims for the first time at the appellate level is not appropriate, especially here where for the most part Appellants' claims are **dependent on potentially disputed facts**") (emphasis added).

WORD COUNT VERIFICATION

I verify that this brief contains no more than 1,000 words.

/s/ Joel M. Schumm
Joel M. Schumm

CERTIFICATE OF SERVICE

I certify the foregoing Reply in Support of Transfer was served electronically on Deputy Attorney General George Sherman through the IEFS on July 7, 2022.

/s/ Joel M. Schumm
Joel M. Schumm