CHAPTER FOURTEEN

PARDON AND CLEMENCY

I. IN GENERAL

A. DEFINITIONS/EFFECTS

1. Pardon

The act or an instance of officially nullifying punishment or other legal consequences of a crime. An absolute pardon releases the wrongdoer from punishment and restores the offender's civil rights without qualification. BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. . . if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights, it makes him, as it were, a new man, and gives him a new credit and capacity. Kelley v. State, 204 Ind. 612, 625, 185 N.E. 453 (1933) (quoting Ex parte Garland 71 U.S. 333, 18 L.Ed. 366 (1866)).

> Sparks v. State, 537 N.E.2d 1179 (Ind. 1989) (gubernatorial pardons cannot be used by State to support habitual offender enhancement). See also Kelley v. State, 204 Ind. 612, 625, 185 N.E. 453 (1933).

Evidence of a conviction is not admissible under Ind. R. Evid. 609 if: (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. Ind. R. Evid. 609(c).

> Nunn v. State, 601 N.E.2d 334 (Ind. 1992) (it was improper to use pardoned conviction to impeach witness because it diminished purpose of pardon which is to give person new start by blocking out existence of guilt).

However, there are limitations to a pardon. For example, a pardon cannot retroactively make a convicted felon eligible for a right or position that has already occurred, such as election to public office.

> Patterson v. Dykes, 804 N.E.2d 849 (Ind.Ct.App. 2004) (statute barring convicted felon from running for or being elected to public office is not overcome by a pardon granted after the date of the election, otherwise an ineligible person would be allowed to sidestep statutory requirements for political candidacy).
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> 1950 Ind. Op. Atty. Gen. 270 (person who is convicted of criminal offense and whose license is revoked because of conviction does not have such license restored to him from granting of unconditional pardon, though such pardon purports to restore all rights and

privileges forfeited by conviction).

2. Reprieve

Temporary postponement of the carrying out of a criminal sentence. BLACK'S LAW DICTIONARY 1329 (8th ed. 2004).

3. Commutation

In criminal law, the executive's substitution in a particular case of a less severe punishment for a more severe one that has already been judicially imposed on the defendant. BLACK'S LAW DICTIONARY 297 (8th ed. 2004).

B. AUTHORITY

1. To grant pardons, reprieves and commutations: Governor only

The Governor has the power to grant reprieves, commutations, and pardons, after conviction, for all offenses except treason and cases of impeachment, subject to such regulations as may be provided by law. . . The Governor may remit fines and forfeitures, under such regulations as may be provided by law. . . Ind. Const. Art. 5, § 17.

The governor may issue a pardon that conditions the removal of all disabilities applicable to holding a handgun permit or other license issued under IC 35-47-2 upon a determination by the superintendent of state police that circumstances have changed to such an extent since the pardoned conviction was entered that the applicant for the permit or license is likely to handle handguns in compliance with the law. Ind. Code § 11-9-2-4.

a. No judicial authority

Release from prison for purposes unrelated to the case in which prisoner was convicted must be by the Governor, who has exclusive power to grant reprieves, commutations, and pardons after conviction.

> Rogers v. Youngblood, 226 Ind. 165, 78 N.E.2d 663 (1948) (only governor, and not court, had jurisdiction to permit defendant to be brought from prison to courtroom hundreds of miles away in order to act as own attorney in civil action in which he was plaintiff).

The judicial department cannot interfere with the executive department in the granting or withholding of executive clemency. Misenheimer v. State, 268 Ind. 274, 374 N.E.2d 523 (1978). Therefore, judicial review of a Governor's decision is never permitted. Trueblood v. State, 790 N.E.2d 97 (Ind.Ct.App. 2003).

> Misenheimer v. State, 268 Ind. 274, 374 N.E.2d 523 (1978) (despite defendant's contention that references to old, dismissed charges in his presentence report would inhibit his chances at clemency, trial court properly refused to expunge old charges which were dismissed, but not pardoned, and allowed old charges to be cited on presentence report).
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> Trueblood v. State, 790 N.E.2d 97 (Ind. 2003) (there is no provision in the state

constitution or statutes for judicial review of the Governor's decision concerning a clemency petition; such review would infringe on the separation of powers).

State v. Bergman, 558 N.E.2d 1111 (Ind.Ct.App. 1990) (trial court had no choice but to clear defendant's name by expunging record of defendant's conviction after defendant received gubernatorial pardon; governor issued pardon to enhance defendant's career opportunities and to clear his name, and there was nothing in pardon to suggest that there were conditions attached to grant of executive clemency).

b. No police authority

Sheriffs do not have power of pardon. State ex rel. Smith v. Dowd, 234 Ind. 152, 124 N.E.2d 208, 209 (1955).

c. Exceptions

(1) Treason

Upon conviction for treason, the Governor may suspend the execution of the sentence, until the case has been reported to the General Assembly, at its next meeting, when the General Assembly shall either grant a pardon, commute the sentence, direct the execution of the sentence, or grant a further reprieve. Ind. Const., art. 5, §17.

The General Assembly may, by law, constitute a council composed of officers of State, without whose advise and consent the Governor may not grant pardons, in any case, except those left to his sole power by law. Ind. Const., art. 5, §17.

PRACTICE POINTER: The crime of treason has been repealed in Indiana.

(2) Contempt

The governor does not have power to pardon a person convicted of contempt of court. By reason of the court's inherent power to receive a charge of contempt and try the cause, it has the power to enforce the execution of its judgment, notwithstanding the power to pardon granted to the executive department. State v. Shumaker, 200 Ind. 716, 725, 164 N.E. 408 (1928) (Martic, C.J., and Gemmill, J., dissenting).

2. To recommend pardons

a. Judge and prosecutors

Although prosecutors and judges do not have the authority to grant pardons or clemency, it is entirely proper and a common practice for prosecuting attorneys and judges to make recommendations to the parole board or clemency commission and to the Governor concerning the possibility of clemency or parole. This may be done at the time of sentencing or at any time prior to the action of the parole board or the Governor.

Ware v. State, 567 N.E.2d 803 (Ind. 1991) (judge did not violate plea agreement by making recommendation against parole and clemency).

The statements of the trial judge and the trial prosecuting attorney must be included in the petition for clemency. If either the trial judge or the trial prosecuting attorney is deceased or otherwise unavailable, then a statement from the successor(s) in office will be accepted. If either or both parties decline making a statement, this fact shall be recorded in the petition along with the name and office of the person(s) contacted to make a statement. 220 Ind. Admin. Code 1.1-4-4(a).

b. Parole board

The parole board is authorized to make pardon, clemency, reprieve, and remission recommendations to the governor. Ind. Code § 11-9-1-2(a)(3).

However, the parole board has no authority to pardon. If the parole board attempts to discharge a defendant before time permitted by statute, the action will be void. Stuck v. State, 259 Ind. 291, 286 N.E.2d 652, 653 (1972).

C. NO RIGHT TO PARDON/CLEMENCY

Executive clemency, if any, can only be considered to be a matter of grace and is not a right of the offender. Misenheimer v. State, 268 Ind. 274, 374 N.E.2d 523, 532 (1978). An inmate has no constitutional or inherent right to commutation of his sentence. Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464, 101 S.Ct. 2460, 2464 (1981). The fact that a particular form of clemency has been granted in the vast majority of previous cases standing alone generates no constitutional protection. Id., 452 U.S. at 465, 101 S.Ct. at 2465.

A person who has no right to demand clemency has no right to procedural due process over a decision not to grant clemency. Colvin v. Bowen, 399 N.E.2d 835, 840 (Ind.Ct.App. 1980).

PRACTICE POINTER: It is arguable that at some point an inmate has a protectable interest in clemency, which, in return, would require minimal due process protections. In Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 118 S.Ct. 1244 (1998), the U.S. Supreme Court split on the issue of whether the due process clause applies to capital clemency proceedings. Four justices (Rehnquist, Scalia, Kennedy, & Thomas, J.J.) found that petitioner had no life interest in clemency beyond the life interest which was adjudicated -- and extinguished -- at the original trial and sentencing. They found that all an inmate has when seeking clemency is a "unilateral hope" and that recognizing due process rights in clemency proceedings would be inconsistent with the principle that granting clemency is a matter of grace. Clemency proceedings "are not part of the trial – or even of the adjudicatory process." Four justices (O'Connor, Souter, Ginsburg, and Breyer, J.J.) concurring and one justice (Stevens, J.) dissenting, all agreed that minimal due process rights should be afforded in clemency proceedings. For instance, it would be a violation of due process if an inmate was denied clemency by a flip of a coin. Although Woodard was a death penalty case, the conclusion that some process is due is arguably applicable to noncapital cases.

D. JURY INSTRUCTIONS ON CLEMENCY

Ind. Code § 35-50-2-9(d) provides that when a defendant facing the death penalty or life without parole is convicted of murder, at the penalty phase hearing "the court shall instruct the jury concerning. . . the availability of educational credit, good time credit and clemency."

Dye v. State, 717 N.E.2d 5 (Ind. 1999) (trial court did not err in denying defendant's tendered instruction that Governor's power of clemency is used sparingly and clemency should not be considered a likely result; such an instruction is a historical observation rather than a

statement of law and in no way provides a guide to future behavior of executive branch).

II. ELIGIBILITY

The parole board is authorized to and has promulgated administrative rules to properly discharge its functions. Ind. Code § 11-9-1-2(b)(6); see 220 Ind. Admin. Code 1.1-4-1 et seq.

PRACTICE POINTER: Indiana has adopted legislation regarding the expungement of criminal records. If your client qualifies, this process is often quicker than the pardon process and provides many of the same benefits of a pardon. For more information regarding expungements, see § 35-38-9-1 et. seq. and IPDC's Expungement Pamphlet - a guide to expunging arrests and convictions, with links to sample petitions and orders. The Pamphlet is available on our website at https://www.in.gov/ipdc/.

A. INITIALLY

1. Persons sentenced under IC 35-50

a. Less than 10-year sentence

An offender sentenced under IC 35-50 who has an executed sentence of ten years or less is not eligible to petition for clemency while incarcerated. 220 Ind. Admin. Code 1.1-4-1(b).

b. 10 – 60- year sentence

Petitions of offenders sentenced under IC 35-50, except those sentenced to life in prison and who have sentences in excess of ten years, may be considered after the offender has served one-third of the sentence. 220 Ind. Admin. Code 1.1-4-1(b).

c. Over 60-year sentence

Petitions of offenders sentenced under IC 35-50, except those sentenced to life in prison or to death, with a sentence exceeding sixty years may be considered after the offender has served twenty years on the sentence. 220 Ind. Admin. Code 1.1-4-1(b).

2. Persons not sentenced under IC 35-50

Petitions of offenders sentenced under laws other than Ind. Code § 35-50, except those with life sentences, may be considered after the offender has served sixty months (five years) on the sentence. 220 Ind. Admin. Code 1.1-4-1(a).

Offenders sentenced under laws other than Ind. Code § 35-50 and who have served their minimum sentences may not petition for clemency. 220 Ind. Admin. Code 1-1.4-1(h).

3. Life sentences

Petitions of offenders serving life sentences (whether or not the offender is also serving a determinate or indeterminate sentence) may be considered after the offender has served ten years. 220 Ind. Admin. Code 1.1-4-1(c). See also Jennings v. State, 270 Ind. 699, 389 N.E.2d 283 (1979).

Daniels v. State, 531 N.E.2d 1173 (Ind. 1988) (while it may be that eligibility for clemency or parole would occur at same time in both first and second degree murders who were sentenced to life, one convicted of second degree murder would be more likely to receive clemency or become paroled than would one convicted of first degree murder; thus, plea agreement to second degree murder provided defendant benefit of increased possibility of earlier clemency or parole).

Lock v. State, 273 Ind. 315, 403 N.E.2d 1360 (1980) (sentence to serve term of defendant's "natural life" was proper, despite contention that statute provided for sentence of "life" and that use of term "natural life" would cause clemency commission to believe that defendant should never be granted clemency).

4. Death sentences

An offender under sentence of death may not petition unless at the time of petition there is an execution date set that has not been stayed by a court. If an execution date is stayed by a court, investigation and consideration of any petition of that offender will be terminated until another execution date is set by a court and another petition for clemency is made. 220 Ind. Admin. Code 1.1-4-1(d).

For more information, see "Defending a Capital Case," available on IPDC's website.

5. Exceptions: ineligible

a. Less than one year left to serve

No petition will be considered unless the offender will have at least one year remaining to be served between the date of an appearance before the board for a clemency hearing and that offender's projected release date as shown in DOC records. 220 Ind. Admin. Code 1.1-4-1(l).

b. Authorized for work release

No petition will be considered unless otherwise authorized by the chairman if the offender is authorized for participation in the work release program and has been assigned a work release activation date that is less than six months from the date of the clemency hearing. 220 Ind. Admin. Code 1.1-4-1(l).1

c. Institutional record

No petition will be considered if the offender does not have a clear institutional record for the year immediately preceding consideration. An offender does not have a clear institutional record if the record shows a major violation or two or more minor violations. 220 Ind. Admin. Code 1.1-4-1(i).

The board may declare an offender ineligible for clemency upon a review by the board of the offender's conduct record for the twelve months preceding the offender's clemency eligibility date. The board may conduct this review at its offices, and the offender is not entitled to be present. An offender who is declared ineligible for clemency consideration is not entitled to meet with the board. 220 Ind. Admin. Code 1.1-4-1(j).

B. RECONSIDERATION

1. Less than 60-year sentence

An offender who is not serving a sentence of life in prison (whether single or multiple and whether or not the offender is also serving a determinate or indeterminate sentence) and whose sentence is sixty years or less may not petition for reconsideration of the denial of clemency until one year has elapsed from the date of the governor's last decision denying clemency. 220 Ind. Admin. Code 1.1-4-1(e).

2. Greater than 60-year sentence under IC 35-50

An offender who is sentenced under IC 35-50 to a sentence of greater than sixty years may not petition for reconsideration of the denial of clemency until two years have elapsed from the date of the governor's last decision denying clemency. 220 Ind. Admin. Code 1.1-4-1(e).

3. Single life sentence

An offender who is serving a single sentence of life in prison (whether or not the offender is also serving a determinate or indeterminate sentence) and who is eligible to petition for clemency may not petition for reconsideration of the denial of clemency until two years have elapsed from the date of the governor's last decision denying clemency. 220 Ind. Admin. Code 1.1-4-1(e).

4. Multiple life sentences

An offender who is serving more than one sentence of life in prison for more than one felony (whether or not the offender is also serving a determinate or indeterminate sentence) and who is eligible to petition for clemency may not petition for reconsideration of the denial of clemency until five years have elapsed from the date of the last governor's decision denying clemency. 220 Ind. Admin. Code 1.1-4-1(e).

C. COMPUTING TIME

1. Amount of sentence imposed

a. Term of executed years

For purposes of this rule, the sentence is the term of executed years of incarceration imposed and is not diminished by reason of credit time or good time earned. 220 Ind. Admin. Code 1.1-4-1(f).

b. Consecutive sentences under Ind. Code § 35-50

For purposes of this rule, the sentence of an offender sentenced under IC 35-50 to consecutive determinate sentences is the total number of years of the consecutive sentences or consecutive parts of sentences, corresponding to the maximum release date as determined by the Department of Correction. 220 Ind. Admin. Code 1.1-4-1(f).

c. Life sentence

An offender sentenced to life in prison, either under IC 35-50 or another statute, has a

sentence of life in prison for purposes of this rule regardless of whether that offender also has been sentenced to a determinate or indeterminate term. 220 Ind. Admin. Code 1.1-4-1(f).

2. Amount of time served

For purposes of this rule, the amount of time that has been served on a sentence is determined without regard to credit time or good time that has been earned either prior to or following sentencing. Credit for time served prior to sentencing (jail time credit) shall be counted toward the amount of time served on a sentence to the extent that it reflects the actual number of days incarcerated prior to sentencing. 220 Ind. Admin. Code 1.1-4-1(g).

D. REMISSION OF FINES / BOND FORFEITURES

1. Fine is $1000 or more

Persons with fines of $1000 or more may request remission of fines. Such petitions will be considered after minimum time (or completion of day sentence) has been served. Petitions for remission of fines cannot be considered unless the statutory requirement is met, that a majority of the county officers having charge of the school fund recommend remission. 220 Ind. Admin. Code 1.1-4-1(m).

2. Bond forfeiture

A person may apply for remission of judgment on bond forfeiture at any time after the judgment is entered. 220 Ind. Admin. Code 1.1-4-1(n).

3. Excludes criminal costs

The words "fines and forfeitures," in Article 5, §17 of the Indiana Constitution do not include costs in a criminal case. Ryan v. State, 176 Ind. 281, 95 N.E. 561 (1911).

E. APPEAL TO BOARD

An offender who is declared ineligible to petition for clemency may appeal the board's decision. Upon receipt by the board of the appeal, one member of the board shall meet with the offender and discuss the reasons for the declaration of ineligibility. The member may request the board to reconsider its declaration of ineligibility. 220 Ind. Admin. Code 1.1-4-1(k).

III. PROCEDURE

Ind. Code § 11-9-2-1 et seq. does not limit the constitutional power of the governor to grant pardons, reprieves, commutations, or remission of fines and forfeitures. Ind. Code § 11-9-2-3.

When an inmate is pardoned by the governor, the court must expunge the inmate's criminal record relating to the pardoned conviction. State v. Bergman, 558 N.E.2d 1111, 1114 (Ind.Ct.App. 1990). Indiana's expungement statute, as amended and expanded in 2014 and 2015, allows for expungement of arrest records related to arrests that do not result in a conviction. See Ind. Code § 35-38-9-1. The expungement statute is silent regarding the expungement of records when there has been a post-conviction pardon, but because a pardon effectively "blots out of existence the guilt," expungement is necessary to clear someone's name, and as such the courts have held that arrest records must be

expunged in accordance with IC 35-38-9-6 following a pardon. J.B. v. State, 27 N.E.3d 336 (Ind. Ct. App. 2015).

A. FILING THE PETITION

An application to the governor for commutation of sentence, pardon, reprieve, or remission of fine or forfeiture shall be filed with the parole board. The application must be in writing and signed by the person seeking gubernatorial relief or by a persons on his behalf. The board may require that applicant to furnish information, on forms provided by the parole board, that it considers necessary to conduct a proper inquiry and hearing regarding the application. Ind. Code § 11-9-2-1.

Boone v. State, 449 N.E.2d 1077 (Ind. 1983) (where post-conviction court refused to set aside sentence, petitioner's remedy, if any, for sentences which he claimed were manifestly unreasonable lay with application to parole board).

1. Required forms

All petitions shall be filed on the form provided by the parole board. 220 Ind. Admin. Code 1.1-4-2(c).

PRACTICE POINTER: The Parole Board website has printable applications and instructions for pardons. See: https://www.in.gov/idoc/2324.htm. Forms can also be picked up at the Indiana Parole Board at E321 in Indiana Government Center - South; Phone (317) 232-5737.

2. Time for response

Four months are usually required after receipt of eligible petitions before they can be considered. This will allow adequate time to schedule appearances and to prepare necessary background information. 220 Ind. Admin. Code 1.1-4-2(a).

Each petitioner for clemency will be advised when the petition is received by the parole board. 220 Ind. Admin. Code 1.1-4-2(b).

3. Required contents

The statements of the trial judge and the trial prosecuting attorney must be included in the petition for clemency. If either the trial judge or the trial prosecuting attorney is deceased or otherwise unavailable, then a statement from the successor(s) in office will be accepted. If either or both parties decline making a statement, this fact shall be recorded in the petition along with the name and office of the person(s) contacted to make a statement. 220 Ind. Admin. Code 1.1-4-4(a).

B. PAROLE BOARD RECOMMENDATION

The parole board is authorized to make pardon, clemency, reprieve, and remission recommendations to the governor. Ind. Code § 11-9-1-2(a)(3). The parole board shall submit to the governor its recommendation regarding an application for commutation of sentence, pardon, reprieve, or remission of fine or forfeiture. Ind. Code § 11-9-2-2(b).

1. Required notification

Before submitting its recommendation to the governor concerning an application for commutation of sentence, pardon, reprieve, or remission of fine or forfeiture, the parole board shall notify:

(1) the sentencing court;

(2) the victim of the crime for which the person was convicted (or the next of kin of the victim if the victim is deceased or incompetent for any reason), unless the victim has made a written request not to be notified; and

(3) the prosecuting attorney of the county where the conviction was obtained.

Ind. Code § 11-9-2-2(b)(1).

As used in this section "victim" means a person who has suffered direct harm as a result of a violent crime (as defined in IC 5-2-6.1-8). Ind. Code § 11-9-2-2(a).

The notice to a victim or the next of kin of a victim must comply with the requirements for notices to victims that are established under IC 11-13-3-3. Ind. Code § 11-9-2-2(c).

2. Investigation

a. By parole board

(1) Required

Before submitting its recommendation to the governor concerning an application for commutation of sentence, pardon, reprieve, or remission of fine or forfeiture, the parole board shall conduct an investigation, which must include the collection of records, reports, and other information relevant to consideration of the application. Ind. Code § 11-9-2-2(b)(2).

An investigation of the attitudes and opinions of the community in which the crime occurred, of the victim or of the relatives and friends of the victim, or of the friends and relatives of the offender shall be required by the board prior to recommending that the governor grant any petition for commutation. 220 Ind. Admin. Code 1.1-4-4(b).

A report of the offender's medical, psychological and psychiatric condition and history shall be required by the board prior to recommending that the governor grant any petition for commutation. 220 Ind. Admin. Code 1.1-4-4(c)

(2) Inmate interview

A state's requirement that an inmate go through an interview if he petitions for clemency does not violate the Fifth Amendment privilege against self-incrimination.

Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 118 S.Ct. 1244 (1998) (providing capital clemency petitioner with opportunity for non-immunized participation in clemency interview, without benefit of counsel, was not

compelled testimony so as to invoke Fifth Amendment).

PRACTICE POINTER: Unlike Ohio, Indiana does not require an inmate petitioning for clemency to be interviewed.

b. By inmate

An inmate investigation may be limited. Due process permits a weighing of the state's interest of security and inmate management against the interest of the inmate in determining an inmate's access to information contained in his/her institutional file. Murphy v. Indiana Parole Bd., 272 Ind. 200, 397 N.E.2d 259, 264 (1979). The offender's interests must outweigh the DOC's in order to get disclosure. Duckworth v. Williams, 494 N.E.2d 368, 370 (Ind.Ct.App. 1986).

Because the interests of the DOC and the offender vary with respect to each document, before granting the offender access to the document the trial court must conduct an in-camera inspection of the files to determine their respective interests on a document by document basis. Duckworth v. Williams, 494 N.E.2d 368, 370 (Ind.Ct.App. 1986). If the inmate fails to request the files, then the DOC is not required to make this inspection. See Colvin v. Bowen, 399 N.E.2d 835 (Ind.Ct.App. 1980).

PRACTICE POINTER: In Duckworth, the Court of Appeals suggested that the DOC would be justified in restricting an inmate's access to criminal intelligence reports concerning the inmate's conduct while incarcerated, letters from private citizens protesting the inmate's release and names and addresses of the victims.

3. Hearing

Before submitting its recommendation to the governor concerning an application for commutation of sentence, pardon, reprieve, or remission of fine or forfeiture, the parole board shall conduct a hearing where the petitioner and other interested persons are given an opportunity to appear and present information regarding the application. The hearing may be conducted in an informal manner without regard to formal rules of evidence. Ind. Code § 11-9-2-2(b)(3).

The board may hold public hearings at its offices or elsewhere in the state to receive information pertaining to pending cases. 220 Ind. Admin. Code 1.1-4-4(f).

Each petitioner for clemency will be advised when and where appearances will be held. 220 Ind. Admin. Code 1.1-4-2(b).

4. Considerations

a. Mandatory

Pursuant to 220 Ind. Admin. Code 1.1-4-4(d), in making its recommendation to the governor, the board shall consider:

(1) the nature and circumstances of the crime for which the offender is committed, and the offender's participation in that crime;

(2) the offender's prior criminal record;

(3) the offender's conduct and attitude during commitment; and

(4) the best interests of society.

b. Discretionary

Pursuant to 220 Ind. Admin. Code 1.1-4-4(e), in making its recommendation to the governor, the board may consider:

(1) the offender's previous social history;

(2) the offender's employment during commitment;

(3) the offender's educational and vocational training both before and during commitment;

(4) the offender's age at the time of committing the offense and his age and level of maturity at the time of the clemency appearance;

(5) the offender's medical condition and history;

(6) the offender's psychological and psychiatric condition and history;

(7) the offender's employment history prior to commitment;

(8) the relationship between the offender and the victim of the crime;

(9) the offender's economic condition and history;

(10) the offender's previous parole or probation experiences;

(11) the offender's participation in substance abuse programs;

(12) the attitudes and opinions of the community in which the crime occurred, including those of law enforcement officials;

(13) the attitudes and opinions of the victim of the crime, or of the relatives or friends of the victim;

(14) the attitudes and opinions of the friends and relatives of the offender;

(15) any other matter reflecting upon the likelihood that the offender, if released upon parole, is able to and will fulfill obligations of a law-abiding citizen;

(16) the offender's proposed places of employment and of residence were he to be released on parole.

5. No explanation required

The parole board is not required to promulgate specific guidelines for reaching clemency determination or to articulate specific reasons for its decision to deny clemency. Colvin v. Bowen, 399 N.E.2d 835, 840 (Ind.Ct.App. 1980). Where a statute merely creates the power to commute a lawfully imposed sentence, the State cannot be required to explain its reasons for a decision. Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 101 S.Ct. 2460 (1981).

C. GOVERNOR'S ACTION

The Governor has the final determination of whether to grant parole. The parole board shall

submit to the governor its recommendation regarding an application for commutation of sentence, pardon, reprieve, or remission of fine or forfeiture. Ind. Code § 11-9-2-2(b).

Each petitioner for clemency will be advised when the final action is taken on the petition by the governor. 220 Ind. Admin. Code 1.1-4-2(b).

The Governor shall report to the General Assembly, at its next meeting, each case of reprieve, commutation, or pardon granted, and also the names of all person in whose favor remission of fines and forfeitures were made, and the several amounts remitted; provided, however, the General Assembly may, by law, constitute a council composed of officers of State, without whose advise and consent the Governor may not grant pardons, in any case, except those left to his sole power by law. Ind.Const. Art. 5, §17.

D. EXCEPTION: EXTRADITION

The Governor of Indiana may, in exercise of his power to grant pardons and reprieves, surrender a prisoner to another state or to the federal government to pay penalty for a crime committed in that state or against the federal government, in a manner which would effectively waive any right to future custody of or jurisdiction of such prisoner, and such action will, in effect, be a commutation of sentence amounting to remaining time which prisoner could be required to serve under commitment in Indiana. Gilchrist v. Overlade, 233 Ind. 569, 122 N.E.2d 93, 96 (1954).

However, where the governor does not act, but rather authorities from another jurisdiction arrest the parolee for commission of a crime in the other jurisdiction while the parolee was on parole in Indiana, Indiana does not waive the right to recommit the parolee to serve out the remainder of his term in Indiana because of the violation of the terms of parole. Gilchrist v. Overlade, 233 Ind. 569, 122 N.E.2d 93, 99 (1954).

IV. MEDICAL CLEMENCY

Notwithstanding the provisions of 220 IAC 1.1-4-1, any offender may be considered for medical clemency upon recommendation by the commissioner of the Department of Correction. If the commissioner declines to recommend the offender for medical clemency, the parole board may decline consideration in evaluating a petition for medical clemency. 220 Ind. Admin. Code 1.1-4-1.5(a).

A. PETITION

An offender applying for special medical clemency shall file the petition with the board. The board will then request the commissioner's recommendation. The four-month waiting period before consideration by the board referenced in 220 Ind. Admin. Code 1.1-4-2(a) does not apply to special medical clemency cases. 220 Ind. Admin. Code 1.1-4-2(d).

B. CONSIDERATIONS

The board shall consider, in addition to the factors enumerated in 220 Ind. Admin. Code 1.1-4-4(d) and (e) [see *supra*, subsection III.B.4, *Parole Board Recommendation, Considerations*], the following factors:

(1) The seriousness of the medical condition.
(2) Whether the medical condition cannot be adequately treated while offender is on inmate

status.

(3) Whether the medical condition would effectively prevent the offender from engaging in any future serious criminal activity.

220 Ind. Admin. Code 1.1-4-1.5(a).

C. EXPEDITED PROCEDURE

The board may waive the full community investigation required under 220 Ind. Admin. Code 1.1-4-4, if the board determines time to be of the essence. However, the board must make every reasonable effort to obtain the views of the victim(s) before rendering its recommendation. 220 Ind. Admin. Code 1.1-4-1.5(b).

D. RECONSIDERATION

An offender whose medical clemency petition is either denied or declined for consideration may not reapply unless a substantial and document change occurs in the medical condition that is the basis for the clemency request or a new and serious medical condition arises. 220 Ind. Admin. Code 1.1-4-1.5(c)