CHAPTER THIRTEEN

PAROLE

I. IN GENERAL

A. LEGISLATIVE CREATION

A state may establish a parole system, but has no duty to do so. Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2104 (1979). The legislature may abolish all paroles, or it may also make parole more difficult or impossible in certain cases. The terms of parole are a matter of legislative policy. White v. State, 263 Ind. 302, 330 N.E.2d 84, 88 (1975).

Thus, it is within the legislature's discretion to determine when and if inmates are eligible for parole. Equal protection principles are not violated when the Legislature decides to provide for varying opportunities for parole based on varying degrees of criminal responsibility.

Adams v. State, 575 N.E.2d 625 (Ind. 1991) (equal protection principles were not violated by IC 11-13-3-2, which provides for a twenty-year period before those convicted of first or second degree murder can access parole but allows other life prisoners consideration after fifteen years).

Hackett v. State, 661 N.E.2d 1231 (Ind.Ct.App. 1996) (there is rational basis for denying parole to any defendant who has committed two felonies generating two life sentences while permitting parole for those who were given determinate sentences).

B. NATURE OF PAROLE

A "parole" is not a "suspension of sentence," but is a substitution, during continuance of parole, of lower grade of punishment by confinement in legal custody and under control of warden within specified prison bounds outside the prison, for confinement within the prison adjudged by the court. Jenkins v. Madigan, 211 F.2d 904, 906 (7th Cir. 1954). Parole does not toll or suspend running of sentence, nor does it operate to shorten term, and while on parole the parolee remains in legal custody of the warden or superintendent of the institution from which he/she was paroled, but is also subject to the orders of the Indiana Parole Board. Although parole is an amelioration of punishment, it is, in its legal effect, imprisonment. Overlade v. Wells, 234 Ind. 436, 127 N.E.2d 686, 690 (1955).

C. TRIAL COURT'S ROLE

1. Recommendation

Manner in which sentence is served when prisoner has been committed to DOC is matter of discretion of that department together with the parole board and clemency commission and their interactions with the governor.

Propes v. State, 587 N.E.2d 1291, 1293 (Ind. 1992) (sentencing court's statement that life sentence imposed for murder should not exceed sixty years could in no way be considered mandatory upon DOC but only be considered recommendation).

Mayfield v. State, 402 N.E.2d 1301 (Ind.Ct.App. 1980) (discretion to terminate imprisonment of one serving indeterminate sentence is not subject to supervision or control of courts; thus, where court sentenced defendant to term of one to ten years and recommended that he serve at least two years, recommendation was merely suggestion to DOC).

Statement that no parole be allowed, made by trial court while imposing sentence, is merely a recommendation and it is not an order. Although such a recommendation is inappropriate, it does not constitute error unless the defendant can establish harm or prejudice. Hatton v. State, 439 N.E.2d 565, 570 (Ind. 1982); Mott v. State, 273 Ind. 216, 402 N.E.2d 986, 989 (1980). While a plea agreement may limit the trial court's discretion, it does not limit the discretion afforded to the parole board or the DOC.

State ex rel. Goldsmith v. Marion County Superior Ct., 275 Ind. 545, 419 N.E.2d 109 (1981) (fact that plea agreement foreclosed judicial discretion to suspend an executed sentence has no effect on the statutory discretion given to parole board or DOC).

2. Advisements: guilty plea to felony

a. Mandatory nature of parole

Where mandatory parole is not a special penal consequence for those found guilty of the crime to which the defendant is pleading, the court does not need to advise the defendant that parole will be mandatory after release from prison. Greer v. State, 428 N.E.2d 787 (Ind. 1981), *petition for writ of habeas corpus den'd by* Greer v. Duckworth, 555 F.Supp. 725 (N.D.Ind. 1983).

Jones v. State, 491 N.E.2d 542 (Ind. 1986) (trial court did not err by failing to advise defendant that under mandatory special parole time defendant conceivably could serve entire fifteen-year sentence; law does not require advisement of possible future effects parole statutes will have on individual's incarceration).

PRACTICE POINTER: Under the analysis in Greer v. State, a court would be required to advise a defendant who is pleading guilty to a sex crime listed in Ind. Code § 11-8-8-5 that there is a mandatory ten-year parole after being released from prison. Moreover, pursuant to the dissent in Page v. State, 706 N.E.2d 230 (Ind.Ct.App. 1999) (Brooks, J., dissenting), argue that the court has a duty to explain to the defendant the consequences of a parole violation. Also, be aware that it may be ineffective assistance of counsel to give erroneous advice to client as to eligibility for parole. Willis v. State, 498 N.E.2d 1029 (Ind.Ct.App. 1986).

b. Required consecutive sentences

Pursuant to Ind. Code § 35-50-1-2(e), the trial court must now run the sentence for a crime which occurred while the defendant was on parole consecutively to the remainder of the sentence for which the defendant was paroled.

PRACTICE POINTER: Prior to the adoption of IC 35-50-1-2(e), where the trial court advised defendant who was pleading guilty to a felony while on parole that the conviction would result in revocation of parole and of his rights but failed to advise defendant that the parole board had the discretion to hold sentence for conviction in abeyance until defendant was finished serving remainder of sentence for parole violation, the defendant entered into the agreement voluntarily and knowingly. See Odore v. State, 178 Ind.App. 444, 382 N.E.2d 1024 (Ind.Ct.App. 1978) and Baurle v. State,161 Ind.App. 222, 314 N.E.2d 825 (Ind.Ct.App. 1974). Thus, it is now within the court's, rather than the parole board's, authority to order the consecutive sentences and must be specified before the defendant can voluntarily enter into a plea agreement.

II. GRANT OF PAROLE

A. ELIGIBILITY

1. Sentenced under IC 35-50

Release on parole and discharge of an offender sentenced for an offense under IC 35-50 shall be determined under IC 35-50-6. Ind. Code § 11-13-3-2.

a. Misdemeanors - no parole

A person sentenced upon conviction of a misdemeanor shall be discharged when he completes his fixed term of imprisonment, less the credit time he has earned with respect to that term. Ind. Code § 35-50-6-2.

b. Felonies - mandatory

Except as provided in IC 35-50-6-1(d) or (e) (sexual violent predators; murder; or voluntary manslaughter - see subsection c, below), when a person imprisoned for a felony completes the person's fixed term of imprisonment, less the credit time the person has earned with respect to that term, the person shall be

(1) released on parole for not more than twenty-four months, as determined by the parole board;

(2) discharged upon a finding by the committing court that the person was assigned to a community transition program and may be discharged without the requirement of parole; or

(3) released to the committing court if the sentence included a period of probation

Ind. Code § 35-50-6-1(a).

When a sex offender (as defined in IC 11-8-8-4.5) completes the sex offender's fixed term of imprisonment, less credit time earned with respect to that term, the sex offender shall be placed on parole for not more than ten years. Ind. Code § 35-50-6-1(d).

c. Sexually violent predators, murder or voluntary manslaughter

When a sexually violent predator (under IC 35-38-1-7.5) or person convicted of murder or voluntary manslaughter completes the person's fixed term of imprisonment, less credit time earned with respect to that term, the person shall be placed on parole for the

remainder of the person's life. Ind. Code § 35-50-6-1(e) (for offenses committed after June 30, 2006).

Pursuant to Ind. Code § 35-50-6-1(g), if a person being supervised on lifetime parole as described in IC 35-50-6-1(e) is also required to be supervised by a court, a probation department, a community corrections program, a community transition program, or another similar program upon the person's release from imprisonment, the parole board may:

(1) supervise the person while the person is being supervised by the other supervising agency; or

(2) permit the other supervising agency to exercise all or part of the parole board's supervisory responsibility during the period in which the other supervising agency is required to supervise the person if the supervision by the other agency will be, in the opinion of the parole board, at least as stringent and effective as supervision by the parole board.

See also Chapter 3, *Sentencing Procedure, II.D, Sentencing Hearing, Sexually Violent Predator Findings*.

2. Not sentenced under Ind. Code § 35-50

a. Misdemeanors - no parole

A person sentenced upon conviction of a misdemeanor is not eligible for parole, and shall, instead, be discharged when he completes fixed term of imprisonment, less the credit time earned with respect to that term. Ind. Code § 11-13-3-2(b)(4).

b. Indeterminate sentences

A person sentenced upon conviction of a felony to an indeterminate term of imprisonment is eligible for consideration for release on parole upon completion of his/her minimum term, less the credit time earned. Ind. Code § 11-13-3-2 (b)(1).

c. Determinate sentences

A prisoner sentenced upon conviction of a felony to a determinate term of imprisonment is eligible for consideration for release on parole upon completion of one-half of the determinate term or at the expiration of twenty years, whichever comes first, less credit time earned. Ind. Code § 11-13-3-2(b)(2).

d. Life sentences

(1) Murder

A prisoner sentenced upon conviction of first or second degree murder to a term of life imprisonment is eligible for consideration for release on parole upon completion of twenty years of imprisonment. Ind. Code § 11-13-3-2(b)(3).

(2) Other felonies

A prisoner sentenced upon conviction of a felony other than first or second degree murder to a term of life imprisonment is eligible for consideration for release on parole upon completion of fifteen years of imprisonment. Ind. Code § 11-13-3-2(b)(3).

e. Multiple life sentences

Persons who are sentenced upon conviction for more than one felony to more than one term of life imprisonment are not eligible for parole. Ind. Code § 11-13-3-2(b)(3). See also State v. Hernandez, 910 N.E.2d 213 (Ind. 2009); Johnson v. State, 654 N.E.2d 788 (Ind.Ct.App. 1995) and Bean v. Bayh, 562 N.E.2d 1328 (Ind.Ct.App. 1990).

3. Effect of credit time

Credit time only applies to determine eligibility for parole, and not to determine completion of sentence. Page v. State, 517 N.E.2d 427, 430 (Ind.Ct.App. 1988).

Page v. State, 517 N.E.2d 427 (Ind.Ct.App. 1988) (parolee's eligibility for release on parole after serving seven years of fourteen-year sentence and after earning one day of credit for each day of incarceration could not constitute completion of sentence and would not entitle parolee to discharge).

Although credit time can get an offender out of prison early, upon a parole violation the balance of the actual sentence must be served and there is no reduction in the fixed sentence; credit time that accrued prior to the initial release to parole is "lost." Indiana DOC v. Bogus, 754 N.E.2d 27 (Ind.Ct.App. 2001).

Harris v. State, 836 N.E.2d 267 (Ind.Ct.App. 2005) (parolee earned and received benefit of good time credit; however, after earning this time and receiving privilege of parole, he violated terms of his parole and the remainder of his fixed term was reinstated pursuant to Ind. Code § 35-50-6-1(c)); see also Boyd v. Broglin, 519 N.E.2d 541, 543 (Ind. 1988).

A person sentenced to life imprisonment is not entitled to credit time with respect to that term. Ind. Code § 11-13-3-2(b).

However, education credit pursuant to Ind. Code § 35-50-6-3.3 is subtracted from the release date that would otherwise apply to the person by the sentencing court after subtracting all other credit time earned by the person. Ind. Code § 35-50-6-3.3(f).

Prior to the addition of IC 35-50-6-3.3(f) in 2014, there was disagreement in the Court of Appeals as to whether education credit provided by IC 35-50-6-3.3 reduces the length of an individual's sentence. See Renfroe v. Parke, 736 N.E.2d 797, 800 (Ind. Ct. App. 2000) (reduces the length of sentence) and DOC v. Bogus, 754 N.E.2d 27, 31 (Ind.Ct.App. 2001) (only changes date of release on parole).

4. Parole must begin when sentence is concluded

The parole board cannot effectively suspend an inmate's parole on one set of sentences until after he serves the sentences on other unrelated convictions. When an inmate finishes serving

one sentence and is "turned over" to immediately begin serving another, the first sentence is effectively discharged. If the terms of parole are violated, the parole board cannot then order the individual to serve the remainder of the first sentence. Meeker v. Indiana Parole Bd., 794 N.E.2d 1105 (Ind.Ct.App. 2003).

However, only when there is no other evidence of the Parole Board's intent will the courts construe a vote to "turn over" as a vote to discharge the parolee. State v. Metcalf, 852 N.E.2d 585 (Ind. Ct. App. 2006) (where parole board "turned over" parolee from life sentence to theft sentence, parolee was not discharged from life sentence because board included language "life sentence preserved"). Metcalf does not require the Parole Board to explicitly preserve a life sentence.

Pallet v. State, 901 N.E.2d 611 (Ind. Ct. App. 2009) (where Parole Board checked "Granted Parole" and not "Granted Turnover" on Pallet's paperwork when he was released on parole, he was not discharged but remained on parole when he committed a subsequent violation).

Parker v. State, 822 N.E.2d 285 (Ind.Ct.App. 2005) (defendant did not have his parole revoked after having been paroled twice on same convictions and he was never "turned over" to another sentence immediately by parole board; thus, parole board properly revoked defendant's parole and ordered him to serve his remaining sentence).

Tewell v. State, 876 N.E.2d 337 (Ind. Ct. App. 2007) (whereas in Meeker, sentences turned over were two concurrent twelve-year terms, here Parole Board turned over life sentence. Ind. Code § 11-13-3-5(a)(3) provides that "[a] person released on parole from a term of life imprisonment remains on parole for life, except that the parole board may discharge him at any time *after his release on parole."* Because Tewell had not been released on parole for his life sentence before the Parole Board turned it over, the Board could not have discharged the sentence).

Hobbs v. Butts, 83 N.E.3d 1246 (Ind.Ct.App. 2017) (rejecting argument that because the State did not collect parolee's signature on State Form 23R, he was "turned over" and discharged from parole obligation on previous offenses).

Arnold v. Butts, 92 N.E.3d 1123 (Ind.Ct.App. 2018) (fact that parolee remained incarcerated on concurrent and/or consecutive sentences while on parole is of no practical consequence).

B. PROCEDURE

Indiana state prisoners do not have a protectable interest in being paroled. Huggins v. Isenbarger, 798 F.2d 203, 204 (7th Cir. 1986); Averhart v. Tutsie, 618 F.2d 479, 480-82 (7th Cir. 1980). If an inmate in this state has any rights with regards to such release, they must emanate from the parole release statute itself. Jago v. Van Curen, 454 U.S. 14, 20, 102 S.Ct. 31, 35 (1981) (Stevens, Brennan, Marshall, J.J., dissenting); Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 465, 101 S.Ct. 2460, 2464 (1981); Murphy v. Indiana Parole Bd., 272 Ind. 200, 397 N.E.2d 259, 263 (1979).

Huggins v. Isenbarger, 798 F.2d 203 (Ind. 1986) (I.C. 11-13-3-3(j) does not grant prison inmate liberty or property interest in application for parole; rather, it leaves discretion as to whether to grant parole with parole board).

PRACTICE POINTER: Although Indiana inmates do not have a constitutional right to be paroled, they do have a constitutional right to remain on parole once discharged. Whereas the due process clause is not implicated in denying parole, it is implicated in revoking parole. For a detailed discussion on the differences between parole release and revocation, see Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 9-11, 99 S.Ct. 2100, 2105 (1979).

1. Parole release hearing

a. When required

A person sentenced for an offense under laws other than IC 35-50 who is eligible for release on parole, or a person whose parole was revoked and is eligible for reinstatement on parole under the rules and regulations adopted by the parole board shall, before the date of the person's parole eligibility, be granted a parole release hearing to determine whether parole will be granted or denied. Ind. Code § 11-13-3-3(b).

However, persons sentenced under IC 35-50 shall be released on parole or discharged from the term of imprisonment without a parole release hearing. Ind. Code § 11-13-3-3(a).

Gardner v. Jones, 529 U.S. 244, 120 S.Ct. 1362 (2000) (retroactive application of change in frequency of parole hearings did not violate *ex post* facto clause).

b. Decision maker - parole board

The parole release hearing must be conducted by one or more of the parole board members. If one or more members conduct the hearing on behalf of the parole board, the final decision must be rendered by the full parole board based upon the record of the proceedings and the hearing conductor's findings. Ind. Code § 11-13-3-3 (b).

Varner v. Indiana Parole Board, 922 N.E.2d 610 (Ind. 2010) (requirement that decisions be made by "full parole board" does not mean by a vote of all five members, but by a majority of the Board).

c. Procedural safeguards

(1) Due process

Strictures of due process do not apply to parole release procedures of the Indiana parole system. Averhart v. Tutsie, 618 F.2d 479 (7th Cir. 1980).

Young v. Duckworth, 271 Ind. 554, 394 N.E.2d 123, 127 (1979) (procedures which afforded opportunity to be heard and, when parole was denied, informed inmate in what respects he/she fell short of qualifying for parole, afforded process that was due).

Even if constitutional error had been found in procedures used in parole hearings, petitioner is not entitled to immediate discharge but, at most, may be entitled to a new parole hearing. Young v. Duckworth, 408 N.E.2d 1253, 1254 (Ind. 1980).

(2) Statutory safeguards

The hearing prescribed by Ind. Code § 11-13-3-3 may be conducted in an informal manner without regard to rules of evidence. However:

(1) reasonable, advance written notice, including the date, time, and place of the hearing shall be provided to the person being considered;

(2) the person being considered shall be given access, in accordance with IC 11-8-5, to records and reports considered by the parole board in making its parole release decisions;

(3) the person being considered may appear, speak in the person's own behalf, and present documentary evidence;

(4) irrelevant, immaterial, or unduly repetitious evidence shall be excluded; and

(5) a record of the proceeding, to include the results of the parole board's investigation, notice of the hearing, and evidence adduced at the hearing, shall be made and preserved.

Ind. Code § 11-13-3-3(i).

2. Investigation

a. Prior to hearing: by parole board

Before the hearing, the parole board shall order an investigation to include the collection and consideration of:

(1) reports regarding the person's medical, psychological, educational, vocational, employment, economic, and social condition and history;

(2) official reports of the person's history of criminality;

(3) reports of earlier parole or probation experiences;

(4) reports concerning the person's present commitment that are relevant to the parole release determinations;

(5) any relevant information submitted by or on behalf of the person being considered; and

(6) such other relevant information concerning the person as may be reasonably available.

Ind. Code § 11-13-3-3(b).

The Parole Board is not required to investigate every one of the types of evidence under IC 11-13-3-3(b) if any evidence that could be uncovered in other areas will not overcome their judgement in regard to another type.

Holleman v. State, 27 N.E.3d 344 (Ind.Ct.App. 2015) (Parole Board committed, at most, harmless error when it denied defendant's request for parole without ordering an updated mental health evaluation; Barnes, J., concurring, wrote that for this type of prisoner, one of less than 200 "lifers" in the DOC, mostly older than 60, "[t]he

least the parole board could do would be to have a psychological report on the prisoner that is relatively recent….I do think the parole board should do better than it did here").

b. Community attitude investigation

If the Parole Board is considering the release on parole of an offender who is serving a sentence of life in prison, a determinate term of imprisonment of at least ten years or an indeterminate term of imprisonment with a minimum term of at least ten years, in addition to the investigation required under IC 11-13-3-3(b) the board may order and consider a community investigation, which may include an investigation and report that substantially reflects the attitudes and opinions of:

(1) the community in which the crime committed by the offender occurred;

(2) law enforcement officers who have jurisdiction in the community in which the crime occurred;

(3) the victim of the crime committed by the offender, or if the victim is deceased or incapacitated, the victim's relatives or friends; and

(4) friends or relatives of the offender.

Ind. Code § 11-13-3-3(m).

If the board reconsiders for release on parole an offender who was previously released on parole and whose parole was revoked under section 10 of this chapter, the board may use a community investigation prepared for an earlier parole hearing to comply with IC 11-13-3-3(m). However, the board shall accept and consider any supplements or amendments to any previous statements from the victim or the victim's relatives or friends. Ind. Code § 11-13-3-3(m).

However, the parole board shall conduct the community investigation described in IC 11-13-3-3(m) if: (1) the person was convicted of a crime of violence (as defined in IC 35-50-1-2); or (2) the person is a sex offender (as defined in IC 11-8-8-4.5). Ind. Code § 11-13-3-3(n).

c. By inmate

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. However, the statutes and the DOC rules give both the offender and his counsel the right to access to his confidential files with a court order, and the trial court must exercise its own discretion in determining whether such an order is appropriate. Duckworth v. Williams, 494 N.E.2d 368, 370 (1986).

Because the interests of the DOC and of the offender vary with respect to each document, the trial court, before granting the offender access to the document 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 (1986).

Murphy v. Indiana Parole Bd., 272 Ind. 200, 397 N.E.2d 259 (1979) (parole board did not violate prisoner's due process rights by failing to allow him access to information contained in his institutional file).

3. Victim notification

Unless the victim has requested in writing not to be notified, the department shall notify a victim of a felony (or the next of kin of the victim if the felony resulted in the death of the victim) or any witness involved in the prosecution of an offender imprisoned for the commission of a felony when the offender is:

(1) to be discharged from imprisonment;

(2) to be released on parole under IC 35-50-6-1;

(3) to have a parole release hearing under IC 11-13-3;

(4) to have a parole violation hearing;

(5) an escaped committed offender; or

(6) to be released from departmental custody under any temporary release program administered by the department, including:

(a) Placement on minimum security assignment to a program authorized by IC 11-10-1-3 or IC 35-38-3-6 and requiring periodic reporting to a designated official, including a regulated community assignment program.

(b) Assignment to a minimum-security work release program.

Ind. Code § 11-13-3-3(c).

a. Time limit

The department shall make the notification required under IC 11-13-3-3(c):

(1) not later than twenty-four (24) hours after the escape of a committed offender;

(2) at least forty (40) days before:

(a) the discharge or release of a committed offender; or

(b) the date of a hearing concerning a committed offender's possible discharge or release; and

(3) if the date of a committed offender's discharge or release as referred to in subdivision (2)(A) is changed during the forty (40) day notification period referred to in subdivision (2), as soon as possible but not more than forty-eight (48) hours after the change in the discharge or release date.

The department shall supply the information to a victim (or a next of kin of a victim in the appropriate case) and a witness at the address supplied to the department by the victim (or next of kin) or witness. A victim (or next of kin) is responsible for supplying the department with any change of address or telephone number of the victim (or next of kin).

Ind. Code § 11-13-3-3(d).

b. Contents

The notice required must specify whether the prisoner is being discharged, released on parole, released on lifetime parole, having a parole release hearing, having parole violation hearing, or has escaped. The notice must contain the following:

(1) the name of the prisoner;

(2) the date of the offense;

(3) the date of the conviction;

(4) the felony of which the inmate was convicted;

(5) the sentence imposed;

(6) the amount of time served; and

(7) the date and location of the interview (if applicable).

Ind. Code § 11-13-3-3(g).

c. Advisement of right

The probation officer conducting the presentence investigation shall inform the victim and the witness described in IC 11-13-3-3(c), at the time of the interview with the victim or witness, of the right of the victim or witness to receive notification from the department under IC 11-13-3-3(c). The probation department for the sentencing court shall forward the most recent list of the addresses or telephone numbers, or both, of victims to the DOC. The probation department shall supply the department with the information required by this section as soon as possible but not later than five days from the receipt of the information from the victim. A victim (or next of kin) is responsible for supplying the department with the correct address and telephone numbers of the victim (or next of kin). Ind. Code § 11-13-3-3(e).

The department shall supply the information to a victim (or a next of kin of a victim in the appropriate case) and a witness at the address supplied to the department by the victim (or next of kin) or witness. Ind. Code § 11-13-3-3(d).

d. "Victim" defined

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 § 11-13-3-3(o).

4. Parole release criteria

An offender may be released on parole only if the parole board determines that the offender is able and willing to fulfill the obligations of a law-abiding citizen. Release on parole shall be ordered only for the best interest of society. 220 IAC 1.1-2-3(m).

To ensure that the state-created parole system serves the public interest purposes of rehabilitation and deterrence, the state may be specific or general in defining the conditions for release and the factors that should be considered by the parole authority. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 7-8, 99 S.Ct. 2100, 2104

(1979).

The criteria listed in Ind. Code § 11-13-3-3(h) leave the parole officers with the discretion on whether to grant parole and do not provide an inmate with the right to parole. See Huggins v. Isenbarger, 798 F.2d 203, 206 (7th Cir. 1986). The parole board shall adopt under Ind. Code § 4-22-2 and make available to offenders the criteria considered in making parole release determinations.

a. Mandatory considerations

The criteria considered in making parole release determinations must include the:

(1) nature and circumstances of the crime for which the offender is committed;

(2) offender's prior criminal record;

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

(4) offender's parole plan.

Ind. Code § 11-13-3-3(h).

220 IAC 1.1-2-3(k) provides additional criteria the parole board "must consider" in making parole release determinations:

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

(6) the offender's participation in educational, vocational or counseling programs during incarceration; and

(7) the best interests of society.

b. Discretionary considerations

220 IAC 1.1-2-3(l) provides that, "[i]n making parole release determinations, the board may consider:

(1) the offender's previous social history;

(2) the offender's employment during commitment;

(3) the offender's education 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 parole release 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 friends and relatives of the offender;

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

c. Reformation

Reformation is not the sole criteria to be considered in determining whether parole should be granted in accordance with the Indiana Constitution, Article 1, §18, but reformation is included among the recommended guidelines in this section.

> Huggins v. Indiana Parole Bd., 605 N.E.2d 229 (Ind.Ct.App. 1992) (parole board properly denied murder defendant's release on parole, notwithstanding defendant's claim that he was reformed after twenty-eight years imprisonment; board properly balanced reformation of defendant with other legitimate factors in setting forth criteria to be used in making parole release decisions).

d. Seriousness of offense

"Seriousness of the offense" is a sufficient reason for denial of parole under requirements of due process. See Murphy v. Indiana Parole Bd., 272 Ind. 200, 397 N.E.2d 259 (1979); Young v. Duckworth, 271 Ind. 554, 394 N.E.2d 123 (1979); and Colvin v. Bowen, 399 N.E.2d 835 (Ind.Ct.App. 1980).

e. Prior statute

The former statutory provisions on parole release were constitutional when challenged for failure to give the parole board reasonable and adequate guidelines for reaching its parole release determinations. Murphy v. Indiana Parole Bd., 272 Ind. 200, 397 N.E.2d 259, 264 (1979).

5. Denial of parole

a. When mandatory

The parole board may not parole a person if it determines that there is substantial reason to believe that the person:

(1) will engage in further specified criminal activity; or

(2) will not conform to appropriate specified conditions of parole.

Ind. Code § 11-13-3-3(j).

b. Notification

Where parole is denied, the parole board shall give the person written notice of the denial and reasons for the denial. Ind. Code § 11-13-3-3(j).

However, the parole board need not specify the particular evidence upon which their discretionary determination is based. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 15, 99 S.Ct. 2100, 2108 (1979).

c. Next parole release hearing

If parole is denied, the parole board shall conduct another parole release hearing not earlier than five years after the date of the hearing at which parole was denied. However, the board may conduct a hearing earlier than five years after the denial of parole if the board:

(1) finds that special circumstances exist for the holding of a hearing; and

(2) gives reasonable notice to the person being considered for parole.

Ind. Code 11-13-3-3(k).

6. Offender in another jurisdiction

The parole board may parole a person who is outside Indiana on a record made by the appropriate authorities of the jurisdiction in which that person is imprisoned. Ind. Code § 11-13-3-3(l).

III. TERM OF PAROLE

A. WRITTEN STATEMENT OF CONDITIONS REQUIRED

If a person is released on parole, the parolee shall be given a written statement of the conditions of the parole. Signed copies of the statement of conditions shall be retained by the parolee, forwarded to any person charged with the parolee's supervision, and placed in the parolee's master file. Ind. Code § 11-13-3-4(c). A parolee's signature is not a prerequisite to the enforceability of a parole agreement. Parole may be revoked based on a violation of conditions without signature. Page v. State, 517 N.E.2d 427 (Ind.Ct.App. 1988).

B. CONDITIONS

1. Mandatory

a. Not committing another crime

A condition to remaining on parole is that the parolee not commit a crime during the period of parole. Ind. Code § 11-13-3-4(a).

b. Sex and violent offender registry and living restriction

As a condition of parole, the parole board shall:

(A) require a parolee who is a sex offender (as defined in IC 11-8-8-4.5) to register with a local law enforcement authority under IC 11-8-8);

(B) prohibit the parolee who is a sex offender from residing within one thousand feet of school property (as defined in IC 35-41-1-24.7) for the period of parole, unless the offender obtains written approval from the parole board; Gaither v. Ind. Dep't

Correction, 971 N.E.2d 690 (Ind. Ct. App. 2012) (no *ex post* facto problem with applying this provision to parolee whose offenses occurred before it took effect).

Hevner v. State, 919 N.E.2d 109 (Ind. 2010) (trial court has discretion to impose this condition on parolees convicted of "non-mandatory" offenses, as long as it is reasonably related to the parolee's successful reintegration into the community and is not unduly restrictive of a fundamental right).

(C) prohibit a parolee who is a sex offender convicted of a sex offense (as defined in IC 35-38-2-2.5) from residing within one mile of the victim of the sex offender's sex offense unless the offender obtains a waiver under IC 35-38-2-2.5;

(D) prohibit a parolee who is a sex offender from owning, operating, managing, being employed by, or volunteering at any attraction designed to be primarily enjoyed by children less than sixteen (16) years of age;

(E) require a parolee who is a sex offender to consent:

(i) to the search of the sex offender's personal computer at any time; and

(ii) to the installation on the sex offender's personal computer or device with Internet capability, at the sex offender's expense, or one or more hardware or software systems to monitor Internet usage; and

(F) prohibit the sex offender from:

(i) accessing or using certain web sites, chat rooms, or instant messaging programs frequented by children; and

(ii) deleting, erasing, or tampering with information on the sex offender's personal computer with intent to conceal an activity prohibited by item (i).

Ind. Code § 11-13-3-4(g).

The parole board may not grant a sexually violent predator (as defined in IC 35-38-1-7.5) or a sex offender who is an offender against children under IC 35-42-4-11 a waiver under subdivision (2)(B) or (2)(C). As a condition of parole, the parole board shall require a parolee who is a sexually violent predator under IC 35-38-1-7.5 or who is a sex or violent offender (as defined in IC 11-8-8-5) to wear a monitoring device (as described in IC 35-38-2.5-3) that can transmit information twenty-four (24) hours each day regarding a person's precise location, subject to a validated sex offender risk assessment, and subject to the amount appropriated to the department for a monitoring program as a condition of parole. Ind. Code § 11-13-3-4(j).

When an offender is placed on lifetime parole, the parole board shall inform the sheriff and the prosecuting attorney of the county in which the offender committed the offense: (1) that the offender has been placed on lifetime parole; and (2) whether the offender is required to wear a monitoring device as described in subsection (j). Ind. Code § 11-13-3-4(o).

A parolee who is a sexually violent predator or convicted of murder or voluntary

manslaughter and whose parole supervision is transferred to Indiana is subject to the same conditions of parole as a person convicted of those offenses in Indiana (*i.e.*, lifetime parole and monitoring device). Ind. Code § 35-50-6-1(f).

If a court orders the parole board to place a sexually violent predator whose sentence does not include a commitment to the department of correction on lifetime parole under IC 35-38-1-29, the parole board shall place the sexually violent predator on lifetime parole and supervise the person in the same manner in which the parole board supervises a sexually violent predator on lifetime parole whose sentence includes a commitment to the department of correction. Ind. Code § 35-50-6-1(i).

If the parole board allows the sex offender to reside within one thousand feet of school property under subdivision (2)(B), the parole board shall notify each school within one thousand feet of the sex offender's residence of the order. Ind. Code § 11-13-3-4(g)(2)(B). For a list of offenders that fall within this statute, see section III.C.2., *Duration and Discharge of Parole; Sentenced under Ind. Code § 35-50.*

PRACTICE POINTER: Before entering a guilty plea to a sex offense, clients should be advised of the above consequences. For additional registration and notification requirements for sexually violent predators, e.g., absence from principal residence for more than 72 hours, see Ind. Code § 11-8-8-18 (as added by P.L. 140-2006). Additional registration and notification requirements for sex offenders can also be found at 11-8-8 et. seq.

2. Discretionary conditions

a. Discretionary conditions set out in statute

(1) Reside in particular area

As a condition of parole, the parole board may require the parolee to reside in a particular parole area. In determining a parolee's residence requirement, the parole board shall:

(1) consider:

(A) the residence of the parolee prior to his incarceration; and

(B) the parolee's place of employment; and

(2) assign the parolee to reside in the county where the parolee resided prior to the parolee's incarceration unless assignment on this basis would be detrimental to the parolee's successful reintegration into the community.

Ind. Code § 11-13-3-4(e).

(2) Drug tests

As a condition of parole, the parole board may require the parolee to periodically undergo a laboratory chemical test (as defined in IC 14-15-8-1) or series of tests to detect and confirm the presence of a controlled substance (as defined in IC 35-48-1-9); and have the results of any test under this subsection reported to the parole board by the laboratory. Ind. Code § 11-13-3-4(f).

The parolee is responsible for any charges resulting from a test required under IC 11-13-3-4(f). However, a person's parole may not be revoked on the basis of inability to pay for a test under this section. Ind. Code § 11-13-3-4(f).

(3) Sex offender treatment/No contact order - other conditions

As a condition of parole, the parole board may require a parolee who is a sex offender (as defined in IC 11-8-8-4.5) to:

(A) participate in a treatment program for sex offenders approved by the parole board; and

(B) avoid contact with any person who is less than sixteen years of age unless the parolee:

(i) receives the parole board's approval; or

(ii) successfully completes the treatment program referred to in clause (A).

Ind. Code § 11-13-3-4(g)(1).

Harris v. State, 836 N.E.2d 267 (Ind.Ct.App. 2005) (parole condition to not possess any items that attract children or may be used to coerce children to engage in inappropriate or illegal sexual activities was unconstitutionally vague; restrictions on internet/computer use, employment, and residential conditions were valid).

Weiss v. State, 838 N.E.2d 1048 (Ind. Ct. App. 2005) (no error in imposing sex offender parole conditions on parolee who was not convicted of a sex offense, when the conditions are reasonably related to parolee's successful reintegration into community. See Ind. Code § 11-13-3-4(b), below. Although conviction was for aggravated battery, crime involved rape of minor victim.)

Bleeke v. Lemon, 6 N.E.3d 907 (Ind. 2014) (parole conditions aimed at restricting parolee from being near, communicating with, or associating with, children were not reasonably related to his successful reintegration into the community, where there was no evidence parolee poses a risk or threat to any minor; evidence in this case showed that parolee is affirmatively not a threat to children, nor is he likely to be).

(4) Reentry court programs

As a condition of parole, the parole board may require a parolee to participate in a reentry court program. Ind. Code § 11-13-3-4(i).

(5) Wear monitoring device

As a condition of parole, the parole board may require a parolee who is a sexually violent predator under IC 35-38-1-7.5 or is a sex or violent offender (as defined in IC 11-8-8-5) to wear a monitoring device (as described in IC 35-38-2.5-3) that can transmit information twenty-four (24) hours each day regarding a person's precise location, subject to a validated sex offender risk assessment, and subject to the

amount appropriated to the department for a monitoring program as a condition of parole. Ind. Code § 11-13-3-4(j).

When an offender is placed on lifetime parole, the parole board shall inform the sheriff and the prosecuting attorney of the county in which the offender committed the offense: (1) that the offender has been placed on lifetime parole; and (2) whether the offender is required to wear a monitoring device as described in subsection (j). Ind. Code § 11-13-3-4(o).

(6) Stalking convictions

As a condition of parole, the parole board may prohibit, in accordance with IC 35-38-2-2.6, a parolee who has been convicted of stalking from residing within one thousand (1,000) feet of the residence of the victim of the stalking for a period that does not exceed five (5) years. Ind. Code § 11-13-3-4(k).

(7) Addiction Assistance

As a condition of parole, the parole board may require a parolee to receive:

(1) addiction counseling

(2) inpatient detoxification

(3) case management

(4) daily living skills; and

(5) medication assisted treatment, including using a FDA approved long acting non-addictive medication for the treatment of alcohol or opioid dependence.

Ind. Code § 11-13-3-5(m).

b. Other discretionary conditions

The parole board may also adopt, under IC 4-22-2, additional conditions for remaining on parole and require a parolee to satisfy one or more of these conditions. Parole conditions must be reasonably related to the parolee's successful re-integration into the community and not unduly restrictive of a fundamental right. Ind. Code § 11-13-3-4(b).

(1) No associating with ex-convicts

As a condition of parolee, parolees may be prohibited from associating with ex-convicts. However, incidental contacts between a parolee and another ex-convict in the course of work on a legitimate job for a common employer do not establish "association" forbidden by term of parole. Zizzo v. United States, 470 F.2d 105, 107 (1972).

PRACTICE POINTER: In the absence of applicable case law on terms of parole, one should draw analogies from cases that deal with conditions of probation. Probation revocation and parole revocation both result in a loss of liberty, Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756, 1759-60 (1973), and law dealing with probation revocations can provide direction and precedent. For example, to revoke probation based on a defendant's association with a convicted felon, the State must show that the defendant knew he was associating with a convicted felon. Monroe v. State, 419 N.E.2d 831 (Ind.Ct.App. 1981). The court in Monroe found insufficient evidence of association with a convicted felon, even though the probationer had been acquainted with the companion for about one and half years and they had once been arrested together for drinking, because a reasonable trier of fact cannot just assume that the past conviction was known. See generally Chapter 12, Probation, subsection V.C, Grounds for Revocation.

(2) Drug abuse treatment

Acceptance of treatment for drug abuse under the supervision of the Mental Health Division may be made a condition of parole under IC 11-13-3-4(b). Failure to comply with treatment may be treated as a violation of parole. Ind. Code § 12-23-11-2(a).

The division shall establish the conditions under which a parolee is accepted for treatment. A parolee may not be placed under supervision of the division for treatment unless the division accepts the individual for treatment. The division shall make periodic progress reports regarding each parolee to the appropriate parole authority and shall report failures to comply with the prescribed treatment program. Ind. Code § 12-23-11-2.

(3) Polygraph Exams

The parole board was authorized to order parolee to submit to polygraph examinations pursuant to Ind. Code § 11-13-3-4(b). Receveur v. Buss, 919 N.E.2d 1235 (Ind. Ct. App. 2010).

3. Improper conditions

Attendance at substance abuse programs with explicit religious content cannot be made a condition of probation, parole, or inmate security classification.

Kerr v. Farrey, 95 F.3d 472 (7th Cir. 1996) (prison officials improperly required inmate to attend Narcotics Anonymous, upon pain of being rated a higher security risk and suffering adverse effects for parole eligibility; religious content permeated meetings and program, constituting coerced religious practice).

4. Modification of conditions

The parole board may modify parole conditions if the parolee receives notice of that action and had ten days after receipt of the notice to express the parolee's views on the proposed modification. This section does not apply to modifications of parole conditions after a revocation proceeding. Ind. Code § 11-13-3-4(d).

5. Costs

A parolee may be responsible for the reasonable expenses, as determined by the department,

of the parolee's participation in a treatment or other program required as a condition of parole under this section. However, a person's parole may not be revoked solely on the basis of the person's inability to pay for a program required as a condition of parole under this section.

C. SUPERVISION OF PAROLEES

1. Duties of DOC

The DOC shall supervise and assist persons on parole. Its duties in this regard include:

(1) establishing methods and procedures for parole administration, including investigation, supervision, workload, record keeping, and reporting;

(2) providing information to and otherwise assisting the parole board in making parole decisions;

(3) assisting persons in preparing parole release plans;

(4) providing employment counseling and assistance in job and residential placement;

(5) providing family and individual counseling and treatment placement;

(6) providing financial counseling;

(7) providing vocational and educational counseling placement;

(8) supervising and assisting out-of-state parolees accepted under an interstate compact;

(9) assisting the parole board in transferring supervision of a parolee to another jurisdiction;

(10) notifying the parole board of any modification in the conditions of parole considered advisable;

(11) notifying the parole board when violation of parole occurs; and

(12) cooperating with public and private agencies and with individual citizens concerned with the treatment or welfare of parolees and assisting the parolee in obtaining services from those agencies and citizens.

Ind. Code § 11-13-3-6(a).

The department shall cause the name of any person released on parole to be entered into the Indiana data communications system (IDACS). Ind. Code § 11-13-3-6(c).

2. Powers of DOC

An employee of the DOC assigned to supervise and assist parolees may:

(1) execute warrants issued by the parole board;

(2) serve orders, subpoenas, and notices issued by the parole board;

(3) conduct investigations necessary to the performance of his/her duties;

(4) visit and confer with any parolee under his/her supervision, even when a parolee is in custody;

(5) act as a probation officer if requested by the appropriate court and if that request is

approved by the department;

(6) search a parolee's person or property if he/she has reasonable cause to believe that the parolee is violating or is in imminent danger of violating a condition to remaining on parole;

(7) arrest a parolee without a warrant if he/she has reasonable cause to believe that the parolee has violated or is about to violate a condition to remaining on parole and that an emergency exists, so that awaiting action by the parole board under IC 11-13-3-8 would create an undue risk to the public or to the parolee; and

(8) exercise any other power reasonably necessary in discharging his/her duties and powers.

Ind. Code § 11-13-3-7(a).

Conquest v. State Employees' Appeals Com., 565 N.E.2d 1086 (Ind. Ct. App. 1991) (parole officer had to follow office's rule not to schedule home visits that would cause parolee to miss work).

States and the federal government are free to do away with probable cause, reasonable suspicion, and search warrants when stopping and searching parolees, because parolees, like prisoners, have a reduced expectation of privacy. Samson v. California, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006) (parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment).

Allen v. State, 743 N.E.2d 1222 (Ind.Ct.App. 2001) (parole search of defendant's home was reasonable where it was condition of parole agreement and where there was hearsay that defendant was seen with gun).

State v. Harper, 135 N.E.3d 962 (Ind. Ct. App. 2019) (under totality of the circumstances, parole and law enforcement officers had reasonable suspicion to believe defendant, who had actual knowledge of the search terms of his parole conditions, was engaged in criminal activity; thus, warrantless search of his storage unit was lawful).

Note: Samson does not represent a blanket approval for warrantless parolee searches by general law enforcement officers without reasonable suspicion; rather, the Court approved the constitutionality of such searches only when authorized under state law. See United States v. Freeman, 479 F.3d 743 (10th Cir. 2007). Thus, a warrantless parolee search without "reasonable cause" to believe the parolee has violated a parole condition would be invalid under IC 11-13-3-7(a)(6).

Note: An employee of the DOC assigned to supervise and assist parolees is not considered a "law enforcement officer" under IC 5-2-1-2 (training of law enforcement personnel) or Ind. Code § 35-41-1-17 (definition of "law enforcement officer"). Ind. Code § 11-13-3-7(b).

3. Interaction with court and other public officials

Courts, probation officers, and other public officials shall cooperate with the department in obtaining information relating to persons committed to the department. Ind. Code § 11-13-3-6(b).

4. Transfer of supervision

The provisions for the supervision and transfer of parolees out of state is the same as for transfer of probationers out of state. See Ind. Code § 11-13-4-1 et. seq.; Chapter 12, *Probation*, Subsection III.C., *Supervision; Transfer of probation*.

D. DURATION/DISCHARGE OF PAROLE

1. Sentenced under law other than Ind. Code § 35-50

a. Indeterminate sentence

A person released on parole from an indeterminate term of imprisonment remains on parole until the expiration date of his/her term of imprisonment except that the parole board may discharge the person from that term any time after release on parole. Ind. Code § 11-13-3-5(a)(1).

b. Determinate sentence

A person released on parole who was sentenced to a determinate term of imprisonment remains on parole until his/her determinate term expires, except that the parole board may discharge the person from that term any time after release on parole. Ind. Code § 11-13-3-5(a)(2).

c. Life sentence

A person released on parole who was sentenced to life imprisonment under laws other than Ind. Code § 35-50 remains on parole for life, except that the parole board may discharge the person at any time after release on parole. Ind. Code § 11-13-3-5(a)(3).

2. Sentenced under Ind. Code § 35-50

Except as provided in subsection (d) or (e), when a person imprisoned for a felony completes the person's fixed term of imprisonment, less the credit time the person has earned with respect to that term, the person shall be:

(1) released on parole for not more than twenty-four (24) months, as determined by the parole board, unless:

  (a) the person is being placed on parole for the first time;
  (b) the person is not being placed on parole for a conviction for a crime of violence (as defined in IC 35-50-1-2);
  (c) the person is not a sex offender (as defined in IC 11-8-8-4.5); and
  (d) in the six (6) months before being placed on parole, the person has not violated a rule of the department of correction or a rule of the penal facility in which the person is imprisoned;

(2) discharged upon a finding by the committing court that the person was assigned to a community transition program and may be discharged without the requirement of parole; or

(3) released to the committing court if the sentence included a period of probation.

A person described in subsection (1) shall be released on parole for not more than twelve (12) months, as determined by the parole board.

Ind. Code § 35-50-6-1(a), effective July 1, 2010.

However, when a sex offender (as defined in IC 11-8-8-4.5) completes the sex offender's fixed term of imprisonment, less credit time earned with respect to that term, the sex offender shall be placed on parole for not more than ten years. Ind. Code § 35-50-6-1(d).

When a sexually violent predator (under IC 35-38-1-7.5) or a person convicted of murder or voluntary manslaughter completes the person's fixed term of imprisonment, less credit time earned with respect to that term, the person shall be placed on probation for the remainder of the person's life. Ind. Code § 35-50-6-1(e).

Pursuant to Ind. Code § 11-8-8-4.5, "sex offender" refers to a person on parole as the result of a conviction for any of the following:

(1) Rape (IC 35-42-4-1);

(2) Criminal deviate conduct (IC 35-42-4-2)(before its repeal);

(3) Child molesting (IC 35-42-4-3);

(4) Child exploitation (IC 35-42-4-4(b);

(5) Vicarious sexual gratification (including performing sexual conduct in presence of a minor) (IC 35-42-4-5);

(6) Child solicitation (IC 35-42-4-6);

(7) Child seduction (IC 35-42-4-7);

(8) Sexual misconduct with a minor as a Class A, Class B or Class C felony (IC 35-42-4-(9), unless:

   (a) the person is convicted of sexual misconduct with a minor as a class C felony;

   (b) the person is not more than:

      (i) four (4) years older than the victim if the offense was committed after June 30, 2007;

      (ii) five (5) years older than the victim if the offense was committed before July 1, 2007; and

   (c) the sentencing court finds that the person should not be required to register as a sex offender.

(9) Incest (IC 35-46-1-3);

(10) Sexual battery (IC 35-42-4-8);

(11) Kidnapping (IC 35-42-3-2), if the victim is less than eighteen years of age, and the person who kidnapped the victim is not the victim's parent or guardian;

(12) Criminal confinement (IC 35-42-3-3), if the victim is less than eighteen years of age, and the person who confined or removed the victim is not the victim's parent or guardian;

(13) Possession of child pornography (IC 35-42-4-4(c);

(14) Promoting prostitution (IC 35-45-4-4) as a Class B felony;

(15) Promotion of human sexual trafficking (IC 35-42-3.5-1.1));

(16) Promotion of child sexual trafficking under IC 35-42-3.5-1.2(a));

(17) Promotion of sexual trafficking of a younger child (IC 35-42-3.5-1.2(c));

(18) Child sexual trafficking.(IC 35-42-3.5-1.3)

(19) Human trafficking under IC 35-42-3.5-1.4 if the victim is less than eighteen (18) years of age;

(20) Sexual misconduct by a service provider with a detained or supervised child (IC 35-44.1-3-10(c);

Pursuant to Ind. Code § 11-8-8-4.5(b), the term includes:

(1) a person who is required to register as a sex offender in any jurisdiction; and

(2) a child who has committed a delinquent act and who:

(a) is at least fourteen years of age;

(b) is on probation, is on parole, or is discharged from a facility by the DOC, is discharged from a secure private facility (as defined in IC 31-9-2-115), or is discharged from a juvenile detention facility as a result of an adjudication as a delinquent child for an act that would be an offense described above if committed by an adult; and

(c) is found by a court by clear and convincing evidence to be likely to repeat an act that would be an offense described above if committed by an adult.

In making a determination under subsection (b)(2)(C), the court shall consider expert testimony concerning whether a child is likely to repeat an act that would be an offense described in subsection (a) if committed by an adult.

3. Discharge

Except as provided in IC 35-50-6-1(d), (e) or (f), a person who is released on parole remains on parole from the date of his release until his fixed term expires, unless the person's parole is revoked, or he is discharged from that term by the parole board. In any event, if his parole is not revoked, the parole board shall discharge him after the period set in Ind. Code § 35-50-6-1(a) above or the expiration of the person's fixed term, whichever is shorter. Ind. Code § 35-50-6-1(b).

See also Ind. Code § 35-50-6-1(d), which provides that sex offenders shall be placed on probation for not more than ten years; and Ind. Code § 35-50-6-1(e), which provides that sexually violent predators and parolees convicted of murder or voluntary manslaughter shall be placed on probation for the remainder of their lives.

Meeker v. Indiana Parole Bd., 794 N.E.2d 1105 (Ind.Ct.App. 2003) (when petitioner's dealing sentences are "turned over" to serve unrelated alcohol-related sentences, the dealing sentences are effectively discharged and cannot be used as the basis for a subsequent parole revocation).

Mills v. State, 840 N.E.2d 354 (Ind.Ct.App. 2006) (unlike Meeker, defendant presented no evidence that Parole Board took action to discharge or "turn over" his burglary sentence; defendant still had to serve a consecutive sentence for failure to appear after completing his time for burglary).

State v. Metcalf, 852 N.E.2d 585 (Ind.Ct.App. 2006) (where parole board "turned over" parolee from life sentence to theft sentence, parolee was not discharged from life sentence because board included language "life sentence preserved").

Majors v. Broglin, 531 N.E.2d 189 (Ind. 1988) (felon who has served his fixed term of imprisonment less credit time that he has earned with respect to that term was by operation of law on parole and was not discharged until Indiana Parole Bd. acted to discharge him. That action must take place within the time specified in Ind. Code § 35-50-6-1).

When parole is terminated by discharge, the parole board shall enter an order discharging the person from parole and term of imprisonment. A copy of the order shall be given to the discharged person and a copy shall be forwarded to the clerk of the sentencing court. Upon receipt of the order, the clerk shall make an entry on the record of judgment that the sentence has been satisfied. Ind. Code § 11-13-3-5(b).

4. Effect of credit time

A person does not earn credit time while on parole. Ind. Code § 35-50-6-6. Thus, although credit time affects an inmate's eligibility for parole, credit time does not affect the duration of parole.

IV. PAROLE REVOCATION

The parole board is authorized to revoke parole if it determines that the parolee violated a condition to remaining on parole. Ind. Code § 11-13-3-10(c).

PRACTICE POINTER: Probation revocation, like parole revocation, is not a stage of a criminal prosecution but does result in a loss of liberty. Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S.Ct. 1756, 1759-60 (1973). Thus, when determining the rights of a parolee during a parole revocation, law dealing with probation revocations (above) can provide direction and precedent.

A. INITIATION OF REVOCATION PROCEEDINGS

1. Report of parole officer

If an employee of the department assigned to supervise and assist parolees believes that a parolee has violated a condition to remaining on parole, he or she may submit a written report of the violation to the parole board. Ind. Code § 11-13-3-8(a).

2. Actions by Parole Board

a. Informal disposition

After considering the report and making any further investigation it considers appropriate, the parole board may:

(1) dismiss all further proceedings on the alleged violations;

(2) instruct the parole officer to handle the matter informally;

(3) request the parolee to meet informally with the parole board to review his parole obligations; or

(4) intensify parole supervision and reporting.

Ind. Code § 11-13-3-8(a).

b. Order to appear

Upon a showing of probable cause to believe the parolee violated a condition to remaining on parole, the chairman (or a member of the parole board designated by the chairman to act in the absence of he chairman) may issue an order for the parolee to appear for a revocation hearing on the alleged violation. Ind. Code § 11-13-3-8(b).

If the parole board issues an order, under IC 11-13-3-8(b), for the parolee to appear for a revocation hearing, the parolee shall be given written notice of:

(1) the date, time, and place of the hearing;

(2) the condition alleged to have been violated;

(3) the procedures and rights applicable to that hearing; and

(4) the possible sanctions if a violation is found.

Ind. Code § 11-13-3-8(e).

c. Warrant for arrest

Upon a showing of probable cause to believe the parolee violated a condition to remaining on parole, the chairman (or a member of the parole board designated by the chairman to act in the absence of he chairman) may issue a warrant for the arrest and confinement of the parolee pending a preliminary hearing. Ind. Code § 11-13-3-8(c).

Strauss v. Smith, 417 F.2d 132 (7th Cir. 1969) (parolee who was arrested on November 10, 1966, on robbery charge was not prejudiced by delay until June 19, 1967, before parole revocation arrest warrant was issued where delay was result of continuance granted by criminal court which heard criminal case).

Upon a showing of probable cause to believe that an alleged parole violator has fled the state, the chairman (or a member of the parole board designated by the chairman to act in the absence of the chairman) may issue a warrant for the arrest and confinement of the parolee, and order that the parolee be returned to the state to ensure the appearance of the parolee at a parole revocation hearing. Ind. Code § 11-13-3-8(d).

An employee of the department or any person authorized to execute warrants may execute the warrant. Ind. Code § 11-13-3-8(c).

If the parole board issues a warrant, under IC 11-13-3-8(c), for the arrest and confinement of the parolee pending a preliminary hearing, the parolee shall be given written notice of:

(1) the date, time, and place of the hearing;

(2) the condition alleged to have been violated;

(3) the procedures and rights applicable to that hearing;

(4) the right to a revocation hearing and the procedures and rights applicable to that hearing if probable cause is found to exist; and

(5) the possible sanctions if a violation is found at a revocation hearing.

Ind. Code § 11-13-3-8(f).

B. PRELIMINARY HEARING

Upon the arrest and confinement of a parolee for an alleged violation of a condition to remaining on parole, an employee of the department (other than the employee who reported or investigated the alleged violation or who recommended revocation) shall hold a preliminary hearing to determine whether there is probable cause to believe violation of a condition has occurred. Ind. Code § 11-13-3-9(a); Gagnon v. Scarpelli, 411 U.S. 778, 781, 93 S.Ct. 1756, 1759 (1973) (hearing required by due process in probation revocation); Morrissey v. Brewer, 408 U.S. 471, 485, 92 S.Ct. 2593, 2602 (1972) (hearing required in parole revocation).

Russell v. Douthitt, 261 Ind. 428, 304 N.E.2d 793 (1973) (where parolee admitted parole violations, probable cause existed for arrest of parolee even though parolee later denied parole violation at hearing).

Harrison v. Knight, 127 N.E.3d 1269 (Ind. Ct. App. 2019) (under Indiana law, individuals may challenge their parole revocation by filing the appropriate petition in State court; parolees cannot simply be held until their original sentence expires, with no determination of probable cause for a parole violation under IC 11-13-3-9).

1. When not required

a. Parolee not detained

The requirement of a preliminary hearing is only applicable when the parolee is held in custody to await the final revocation hearing. Curtis v. State, 175 Ind.App. 76, 370 N.E.2d 385, 387 (1977).

b. Parolee convicted of crime

If the alleged violation of parole is the parolee's conviction of a crime while on parole, neither due process nor Ind. Code § 11-13-3-9 requires a preliminary hearing to be held despite the fact that the parolee is being detained. See Ind. Code § 11-13-3-9(d). When a parolee is arrested and prosecuted on criminal charges, the criminal prosecution itself is adequate protection against the abuses Morrissey v. Brewer was designed to prevent. Jamerson v. State, 182 Ind.App. 99, 394 N.E.2d 222, 224 (1979).

PRACTICE POINTER: Although a parolee is not entitled to a preliminary hearing when the basis of the revocation is an additional conviction, the parolee is still entitled to a final revocation hearing, so she can submit mitigation evidence.

c. Waiver of right

A parolee may waive his right to a preliminary hearing. Ind. Code § 11-13-3-9(f).

Strauss v. Smith, 417 F.2d 132 (1969) (parolee who was arrested for violation of parole and who was read and given form advising him of right to preliminary interview but who refused to fill out form both before and after he had discussed form with counsel waived right to preliminary interview in locale of parole violation).

Harrison v. Knight, 127 N.E.3d 1269 (Ind. Ct. App. 2019) (notwithstanding fact that parolee signed a DOC parole service document "Waiver of Preliminary Hearing" and signed an acknowledgment that he would not be heard by the parole board under final disposition of his pending criminal matters, parolee in this case was wrongfully detained for parole violation and cannot be held until his original sentence expires with no determination of probable cause for a parole violation).

2. Time limit

The preliminary hearing shall be held without unnecessary delay. Ind. Code § 11-13-3-9(a). Unless good cause for the delay is established in the record of the proceeding, the parole revocation charge shall be dismissed if the preliminary hearing is not held within ten (10) days after arrest. Ind. Code § 11-13-3-9(e).

3. Procedural safeguards

In connection with the hearing, the parolee is entitled to:

(1) appear and speak in his own behalf;

(2) call witnesses and present evidence;

(3) confront and cross-examine witnesses, unless the person conducting the hearing finds that to do so would subject the witness to a substantial risk of harm; and

(4) a written statement of findings of fact and evidence relied upon.

Ind. Code § 11-13-3-9(a).

Minimum requirements of due process require: (1) notice of the alleged violation; (2) an opportunity to appear and present evidence in her own behalf; (3) a conditional right to confront adverse witnesses; (4) an independent decision-maker; and (5) a written report of the hearing. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972).

a. Independent decision-maker

An independent decision-maker does not have to be a judicial officer or even a neutral and detached officer, but does have to be some person other than one initially dealing with the case. Morrissey v. Brewer, 408 U.S. 471, 486, 92 S.Ct. 2593, 2603 (1972).

b. Notice and hearing

The parolee's notice of the hearing must include when the hearing will take place and

that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged. Morrissey v. Brewer, 408 U.S. 471, 486-87, 92 S.Ct. 2593, 2603 (1972). See also Hardley v. State, 893 N.E.2d 740 (Ind. Ct. App. 2008) (if a parolee is not given advance notice of the conditions he is alleged to have violated, the revocation hearing violates due process).

Grayson v. State, 58 N.E.3d 998 (Ind.Ct.App. 2016) (where trial court corrected its earlier finding that defendant's new crime violated his parole for an earlier attempted robbery conviction by finding it actually violated parole for another conviction, it denied defendant's right to due process by doing so without holding a hearing; defendant was entitled to an opportunity to be heard on the allegation that he violated parole for the correct sentence).

c. Right to cross

On request of the parolee, a person who has given adverse information on which the parole revocation is to be based is to be made available for questioning in his presence. However, if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross. Morrissey v. Brewer, 408 U.S. 471, 487, 92 S.Ct. 2593, 2603 (1972).

4. Effect of findings

a. Dismissal

If it is determined that there is not probable cause to believe that the parolee violated a condition to remaining on parole the charge shall be dismissed. Ind. Code § 11-13-3-9(b).

b. Continued confinement

However, if it is determined from the evidence presented that there is probable cause to believe the parolee violated a condition to remaining on parole, confinement of the parolee may be continued pending a parole revocation hearing. Ind. Code § 11-13-3-9(c).

c. Tolling of parole period

The issuance of an order to appear or arrest warrant under IC 11-13-3-8 tolls the period of parole until he parole board's final determination of the charge. However, the tolled period shall be restored if there is a finding of no violation, if a finding of a violation is later overturned, or if the parole violation charge is dismissed. Ind. Code § 11-13-3-8(g).

C. FINAL HEARING

Due process and the Indiana Code require the parole board to conduct a final revocation hearing concerning an alleged violation of parole. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972). See also Russell v. Douthitt, 261 Ind. 428, 304 N.E.2d 793 (1973); Ind. Code § 11-13-3-10. The revocation hearing shall be conducted by at least one member of the parole board, and the purpose of the hearing is to determine whether a violation of a condition of parole has occurred and, if so, the appropriate action. Ind. Code § 11-13-3-10(a).

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972) (revocation of parole is a denial of liberty within the meaning of the due process clause, so a simple factual hearing is required even though parolee is not entitled to the full panoply of rights due a defendant in a criminal proceeding).

The first step in a revocation decision involves a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation. Morrissey v. Brewer, 408 U.S. 471, 479-80, 92 S.Ct. 2593, 2599 (1972).

Young v. Harper, 520 U.S. 143, 117 S.Ct. 1148 (1997) (where State established "pre-parole" program which was contingent upon compliance with conditions similar to conditions of parole, state could not revoke pre-parole release without fulfilling due process requirements of Morrissey).

PRACTICE POINTER: Use Young v. Harper to argue that revocation of other parole-like programs also requires identical or similar due process protections. For example, in Lampe v. Indiana, 2002 U.S. Dist. LEXIS 17373 (S.D.Ind. 2002) (not intended for publication in print), the District Court held that Indiana's now defunct "regulated community assignment" (RCA) was not distinguishable from parole for purposes of due process protections).

1. Waiver of right

In its 2014 session, the General Assembly created a procedure for waiving a final hearing where intermediate sanctions are appropriate.

Pursuant to Ind. Code § 11-13-3-10(f), a parolee may admit to a violation of parole and waive the right to a parole revocation hearing if the parole officer notifies the parolee of the alleged violation in writing and provides notice of the parole revocation hearing before the parole revocation hearing. If the parolee:

(1) admits to a violation and requests to waive the parole revocation hearing, the parole officer shall advise the person that by waiving the right to a parole revocation hearing, the person forfeits the rights provided under section 9(a) of this chapter; and

(2) waives the right to a parole revocation hearing, the person can be subjected only to sanctions that have been approved under IC 11-9-1-2.

The 2014 General Assembly also amended Ind. Code § 11-9-1-2 to require the Parole Board to review and accept new DOC policies creating a schedule of progressive parole sanctions. It is these sanctions that are referred to above.

At this writing, no new schedule of sanctions has been adopted pursuant to Ind. Code § 11-9-1-2, and the Parole Board is not allowing hearing waivers at this time. The intent of this provision is to facilitate the imposition of intermediate sanctions in a stream-lined manner.

2. Time limits

a. Parolee confined

A parolee who is confined due to an alleged violation of parole shall be afforded a parole revocation hearing within sixty days after the parolee is made available to the department by a jail or state correctional facility, if:

(1) there has been a final determination of any criminal charges against the parolee; or

(2) there has been a final resolution of any other detainers filed by any other jurisdiction against the parolee.

Ind. Code § 11-13-3-10(a)(1).

Constitutionally, a revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2603-04 (1972). Pursuant to Ind. Trial Rule 6(A), in computing any period of time, the day of the event shall not be included, thus the 60-day tolling period under IC 11-13-3-10(a)(1) does not start until the day after a defendant is in custody.

Ward v. Indiana Parole Bd., 805 N.E.2d 893 (Ind.Ct.App. 2004) (parole was properly revoked July 11, exactly 60 days after being extradited, because clock began to run May 13, the day after parolee's extradition).

The 60-day hearing requirement does not apply if a defendant is not confined due solely to an alleged violation of parole, but also as a result of a sentence imposed or other lawful detention.

Lawson v. State, 845 N.E.2d 185 (Ind.Ct.App. 2006) (statute requiring that a parole revocation hearing be held within 60 days if parolee is confined due to alleged violation of parole was inapplicable where parolee was not confined due solely to an alleged violation of parole, but also as a result of sentence imposed for his theft and resisting law enforcement convictions).

Risner v. Indiana Parole Bd., 779 N.E.2d 49 (Ind.Ct.App. 2002) (where parolee was convicted of new crime, abstract of judgment embodies final judgment of the trial court and until signed by the judge and custody is given to the DOC, the parolee is not available to the parole department and therefore the 60-day clock has not begun to run).

But see:

Robinson v. State, 805 N.E.2d 783 (Ind. 2004) (overruling Risner to extent it holds that abstract of judgment is judgment of conviction).

PRACTICE POINTER: Although Robinson overrules Risner's reference to the abstract of judgment as a final judgment of conviction, Risner's holding that the parolee is not available to the DOC until the abstract of judgment is signed may still be valid. But parolees in the position of the parolee in Risner should argue that Robinson undermines Risner's primary holding and that the 60-day clock begins to run on the entry of judgment of conviction.

b. Parolee not confined

A parolee who is not confined and against who is pending a charge of parole violation shall be afforded parole revocation hearing within one hundred eighty (180) days after the earlier of:

(1) the date an order was issued for the parolee's appearance at a parole revocation hearing; or
(2) the date of the parolee's arrest on the parole violation warrant.

Ind. Code § 11-13-3-10(a)(2).

Unless good cause for the delay is established in the record of the proceeding, the parole revocation charge shall be dismissed if the revocation hearing is not held within the time established by IC 11-13-3-10(a). Ind. Code § 11-13-3-10(e).

3. Procedural safeguards

a. Statutory rights

In connection with the hearing, the parolee is entitled to those procedural safeguards enumerated in IC 11-13-3-9(a). Ind. Code § 11-13-3-10(a).

In connection with the hearing, the parolee is entitled to:

(1) appear and speak in his own behalf;
(2) call witnesses and present evidence;
(3) confront and cross-examine witnesses, unless the person conducting the hearing finds that to do so would subject the witness to a substantial risk of harm; and
(4) receive a written statement of findings of fact and evidence relied upon.

Ind. Code § 11-13-3-9(a).

The parolee may offer evidence in mitigation of the alleged violation. Ind. Code § 11-13-3-10(a).

b. Due process rights

Minimum requirements of due process require the following: (1) written notice of the claim violations of parole; (2) disclosure to the parolee of evidence against him/her; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a neutral and detached

hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (6) a written statement by the fact-finders as to the evidence relied on and reasons for revoking probation. Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604 (1972).

Hawkins v. Jenkins, 268 Ind. 137, 374 N.E.2d 496 (1978) (parolees who were not told of specific reasons for parole revocation hearing or allegations against them, who were given no time to prepare or to have witnesses appear on their behalf, and who were not given opportunity to speak at hearings were deprived of their constitutional rights to due process of law). See also Catt v. Phend, 270 Ind. 267, 384 NE.2d 1034 (1979).

c. Right to counsel

The decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness. . . will require that the State provide at its expense counsel for indigent probationers or parolees. Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 1763 (1973). See also Hawkins v. Jenkins, 268 Ind. 137, 374 N.E.2d 496 (1978).

(1) Considerations

Counsel should be provided in cases where, after being informed of the right to request counsel, the parolee makes such a request, based on a timely and colorable claim (I) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In deciding upon a request for counsel, the Parole Board should consider whether the parolee appears to be capable of speaking effectively for himself. Gagnon v. Scarpelli, 411 U.S. 778, 790-91, 93 S.Ct. 1756, 1764 (1973); Hawkins v. Jenkins, 268 Ind. 137, 374 N.E.2d 496 (1978).

Russell v. Douthitt, 261 Ind. 428, 304 N.E.2d 793 (1973) (where parolee did not request attorney and hearing was conducted before Morrissey v. Brewer, parolee was not entitled to representation).

(2) Written record

Where the Parole Board refuses the request for counsel, the grounds for the refusal should be stated succinctly in the record. Gagnon v. Scarpelli, 411 U.S. 778, 791, 93 S.Ct. 1756, 1764 (1973).

4. Evidence

Because parole revocation procedures are to be flexible, strict rules of evidence do not apply. Rather, in parole revocation hearings, judges may consider any relevant evidence bearing some substantial indicia of reliability. Judges are not, of course, bound to admit all evidence

presented to the court. In fact, the absence of strict evidentiary rules places a particular importance on the fact-finding role of judges in assessing the weight, sufficiency and reliability of proffered evidence. Cox v. State, 706 N.E.2d 547 (Ind. 1999); Ind.R.Evid. 101(c). For a detailed analysis of evidentiary issues in probation and parole revocations, *see* IPDC Sentencing Manual, Chapter 12, *Probation*, Subsection V.B.4, *Revocation of probation; Final hearing*.

a. Hearsay

Reyes v. State, 868 N.E.2d 438 (Ind. 2007) (Court adopts the "substantial trustworthiness" test for determining admissibility of hearsay at parole revocation hearings).

b. Expert testimony

Carter v. State, 706 N.E.2d 552 (Ind. 1999) (although lab technician's testimony that he had been operator of urinalysis equipment for five years, has tested more than ten thousand samples, received all of training necessary to become operator and knew how equipment worked may not have been sufficient to qualify his as expert under Frye or Rules of Evidence, it was adequate to find testimony reliable).

c. Medical tests

Black v. State, 794 N.E.2d 561 (Ind.Ct.App. 2003) (testimony by State's toxicology technician that Med-Tox laboratories are trustworthy, reliable, and nationally certified was sufficient foundation for admission of results of Med-Tox test in probation revocation hearing, although it would have been insufficient foundation in criminal trial).

d. Exclusionary rule

The U. S. Supreme Court has held that the exclusionary rule does not prohibit use in state parole revocation proceeding of evidence seized in violation of parolee's Fourth Amendment rights. Pennsylvania Bd. of Probation & Parole v. Scott, 524 U.S. 357, 118 S.Ct. 2014 (1998). A number of Indiana cases follow this holding.

However, there is a viable argument that the exclusionary rule should apply to keep illegally seized evidence out of parole revocation proceedings. The U.S. Supreme Court in Griffin v. Wisconsin, 483 U.S. 868 (1987), dispensed of the warrant requirement for probation searches but did not dispense of the need for reasonable suspicion or reasonableness. Griffin may be read to require reasonable suspicion of a probation violation, while United States v. Knights, 534 U.S. 112 (2000) requires reasonable suspicion of criminal activity. Since parolees retain enough rights to limit parole searches (see III.C.2 and discussion of Samson v. California, above), a corresponding sanction should be available. Otherwise, there is little incentive for law enforcement officers to comply with the law. One Court of Appeals case has applied the exclusionary rule to probation revocation proceedings. Polk v. State, 739 N.E.2d 666 (Ind. Ct. App. 2000).

5. Effect of findings

a. No violation

If it is determined from the evidence presented that the parolee did not commit a parole violation, the charge shall be dismissed. Ind. Code § 11-13-3-10(b).

The issuance of an order to appear or arrest warrant under IC 11-13-3-8 tolls the period of parole until the parole board's final determination of the charge. However, the tolled period shall be restored if there is a finding of no violation, if a finding of violation is later overturned, or if the parole violation is dismissed. Ind. Code § 11-13-3-8(g).

b. Violation

If it is determined that the parolee did violate parole, the parole board may continue parole, with or without modifying the conditions, or revoke the parole and order the parolee imprisoned on either a continuous or intermittent basis. If, however, the violation is the commission of a new level 1 or 2 felony, the parole board shall revoke the parole and order continuous imprisonment. Ind. Code § 11-13-3-10(c). Prior to the 2014 amendment of this statutory provision, the board was required to revoke after finding that the parolee had committed any new felony.

The 2014 General Assembly also amended Ind. Code § 11-8-2-12.4 to add a requirement that the DOC:

Create policies that provide for a schedule of progressive parole incentive and violation sanctions, including judicial review procedures, and submit the policies to the parole board for review.

Ind. Code § 11-8-2-12.4(6).

The General Assembly also amended Ind. Code § 11-9-1-2 to add a requirement that the Parole Board:

[R]eview and approve policies created by the department under IC 11-8-2-12.4(6) that provide for a schedule of progressive parole incentives and violation sanctions, including judicial review procedures.

Ind. Code § 11-9-1-2(a)(6). At this writing, no new schedule of progressive incentives and sanctions have been adopted pursuant to this statute, but this does not prevent the board from imposing intermediate sanctions, including where they have found that a parolee has committed a new level 3 – 6 felony.

c. Revocation

A person whose parole is revoked shall be imprisoned for the remainder of his fixed term. However, he shall again be released on parole when he completes that remainder, less the credit time he has earned since the revocation. The Parole Board may reinstate him on parole at any time after the revocation. Ind. Code § 35-50-6-1(c).

d. Written statement of action

The parolee shall be provided with a written statement of the reasons for the action taken under Ind. Code § 11-13-3-10(c) and (d).

Zizzo v. U.S., 470 F.2d 105 (7th Cir., 1972) (in order for hearing examiner's report to constitute written statement by fact finders as to evidence relied on and reasons for revoking parole, report would have to be adopted by parole board and must be made known to parolee who must be given opportunity to object by written submission before its adoption).

Komyatti v. State, 931 N.E.2d 411 (Ind.Ct.App. 2010) (sufficient evidence supported revocation of probation even though Parole Board's written findings were partial excerpt from boilerplate form; court explicitly encouraged Board to quit using boilerplate form or to individually tailor it to each case to accurately reflect what evidence was actually presented and considered at parole revocation hearing).

e. No double jeopardy

Parole revocation is not a criminal proceeding for purposes of double jeopardy. Johnson v. State, 512 N.E.2d 1090 (Ind. 1987); Ashba v. State, 570 N.E.2d 937, 940 (Ind.Ct.App. 1991*), aff'd by* 580 N.E.2d 244 (Ind. 1991). Thus, the same act can serve as the basis for a parole revocation and a conviction, or parole revocation and probation revocation.

f. Consecutive sentences

The court must impose consecutive sentences if after being arrested for one crime the person commits another crime before the date the person is discharged from probation, parole, or a term of imprisonment for the first crime or while the person is released on the person's own recognizance or on bond. Ind. Code § 35-50-1-2(d).

g. Credit time

A person imprisoned upon revocation of parole is initially assigned to the same credit time class to which he was assigned at the time he was released on parole. A person who, upon revocation of parole, is imprisoned on an intermittent basis does not earn credit time for the days he spends on parole outside the institution. Ind. Code § 35-50-6-6.

Boyd v. Broglin, 519 N.E.2d 541 (Ind. 1988) (parole board's re-incarceration of parolee pursuant to finding of parole violation did not deny parolee due process by depriving him of credit time that he had earned while incarcerated; parolee received benefit of his earned credit time when he was released on parole and remained obligated to State until either his fixed term expired, he successfully completed one year on parole, or parole board acted to discharge him). See also Majors v. Broglin, 531 N.E.2d 189 (Ind. 1988).

6. Revocation for out-of-state parolees

The revocation proceedings are the same as those for revoking out-of-state probationers under Indiana supervision. See IPDC Sentencing Manual, Chapter 12, *Probation*, Subsection III.D, *Supervision; Transfer of Probation.*

V. REINSTATEMENT OF PAROLE

A person whose parole is revoked may be reinstated on parole by the parole board any time after the revocation, regardless of whether the offender was sentenced under IC 35-50 or another law. The parole board may adopt, under IC 4-22-2, rules and regulations regarding eligibility for reinstatement. Ind. Code § 11-13-3-2(c).

The parole board may reinstate a [revoked individual] on parole at any time after the revocation. Ind. Code § 35-50-6-1(c).

VI. REVIEW OF PAROLE BOARD DECISIONS

Due process requires that judicial review of parole board decisions be available to ensure that the requirements of due process have been met and that the Parole Board has acted within the scope of its powers. Murphy v. Indiana Parole Bd., 272 Ind. 200, 397 N.E.2d 259, 261 (1979).

However, an inmate who has been denied parole has no right to appeal from the adverse decision by the parole board based upon the merits of the denial. Young v. Duckworth, 274 Ind. 59, 408 N.E.2d 1253, 1254 (1980).

Once a parole board has fulfilled the minimum due process and statutory requirements, it has almost absolute discretion in making its decision and such discretion would not be interfered with by courts. Hawkins v. Jenkins, 268 Ind. 137, 374 N.E.2d 496, 500 (1978).

> Jamerson v. State, 182 Ind. App. 99, 394 N.E.2d 222 (Ind. Ct. App. 1979) (petitioner was not entitled to post-conviction relief on his complaint that parole revocation hearing was merely pro forma, in absence of showing what evidence, if any, he had to justify more extended hearing).

But see:

> State v. Jeffers, 168 Ind.App. 284, 342 N.E.2d 681 (1976) (record which established that parolee visited house, but which did not show that there was anything questionable about house, failed to sustain revocation of parole on ground of frequenting questionable resort and associating with bad companions).

A. METHOD FOR CHALLENGING: PCR

An inmate challenging her denial of parole by the parole board or revocation of parole, may seek judicial review of the parole board's determination by filing a petition for post-conviction relief pursuant to Ind. Rule Post Conv. 1, §1(a)(5). Murphy v. Indiana Parole Bd.*, supra;* Hawkins v. Jenkins*, supra;* Anderson v. State, 157 Ind. App. 440, 300 N.E.2d 674 (1973); State v. Jeffers, 168 Ind. App. 284, 342 N.E.2d 681, 683 (1976).

The petition for post-conviction relief seeking review of the parole board's determination should be filed in the county where the inmate is being held, since the petition is not attacking the validity of the original conviction or the sentence. Ind. Rule Post Conv. 1, §1(c); State ex rel. Raines v. Madison County Superior Ct., 268 Ind. 623, 377 N.E.2d 1343 (1978).

A petition for writ of habeas corpus is proper when the petitioner is entitled to immediate discharge. Thus, only a petitioner whose legal sentence has expired may use habeas corpus to challenge the parole revocation. Young v. Duckworth, 271 Ind. 554, 394 N.E.2d 123 (1979),

cert. den'd., 445 U.S. 906; Hawkins v. Jenkins, 268 Ind. 137, 374 N.E.2d 496, 498 (1978).

Spencer v. Kemna, 523 U.S. 1, 118 S. Ct. 978 (1998) (where inmate was released from prison prior to disposition of his petition for writ of habeas corpus, issue as to improper parole revocation was moot).

However, where a petition for writ of habeas corpus is improper, but raises the issue of parole revocation or otherwise unlawful custody, the trial court may properly consider the petitions under P.C. 1, §1(a)(5). Murphy v. Indiana Parole Bd., *supra;* Hawkins v. Jenkins, *supra*, Risner v. Indiana Parole Bd., 779 N.E.2d 49 (Ind. Ct. App. 2002) (*overruled* on other grounds); Hardley v. State, 893 N.E.2d 740 (Ind. Ct. App. 2008) (where petition for writ of habeas corpus established that petitioner's parole had been revoked without notice, trial court abused its discretion by dismissing Hardley's petition rather than treating it as a petition for post-conviction relief and granting relief).

B. WAIVER OR REVIEW

A parolee may waive his right to judicial review of an issue if he fails to object at the revocation hearing or at the time a condition is made part of parole.

Alspach v. State, 440 N.E.2d 502 (Ind.Ct.App. 1982) (contention that admission of certain testimony in probation revocation proceeding was error had been waived and could not be raised on appeal where no objection was made when testimony was given, subsequent objection was merely that "we would object to any further questioning along this line" and no motion was made to strike testimony).

C. EFFECT OF SUCCESSFUL CHALLENGE

While a trial court has the discretion to restore a parolee who has suffered a denial of due process to his former parole status, the parole board is not prohibited from conducting a proper revocation proceeding within a reasonable time. Jenkins v. Wilson, 174 Ind.App. 80, 366 N.E.2d 663, 666 (1977). See also State v. Jeffers, 168 Ind.App. 284, 342 N.E.2d 681, 684 (1976).

D. FALSIFIED RECORDS

Parole Board determination based upon false records is void *ab initio*. State ex rel. Raines v. Madison County Superior Ct., 268 Ind. 623, 377 N.E.2d 1343, 1344 (1978) (where court discovered that records showing that inmate was entitled to discharge were falsified in order to permit release prior to actual release date, police had authority to go arrest and return defendant to jail).