CHAPTER FIVE

Sentencing Alternatives

	Felony			Misdemeanor			OWVI
	Available?	***Requirements***	***Automatic Exclusions***	***Available?***	***Requirements***	***Automatic Exclusions***	
Treatment in Lieu of Prosecution *(Ind. Code § 12-23)*	*Yes*	Drug abuser or alcoholic	•Offense if forcible felony or Class A/B felony burglary (if committed before 7/1/14), or Level 1-4 felony (if committed after 6/30/14). *Ind. Code § 12-23-6.1-1(1).* •At least 2 prior convictions for forcible felonies or Class A/B felony burglary (if committed before 7/1/14), or Level 1-4 felony (if committed after 6/30/14). *Ind. Code § 12-23-6.1-1(2).* •Pending felony proceedings. *Ind. Code § 12-23-6.1-1(3)* • D had two prior treatments in past two years. *Ind. Code §12-23-6.1-1(4)* **NOTE:** In what may be a legislative oversight, a person charged with a felony is no longer excluded for being on probation or parole but a person charged with a misdemeanor who is on probation or parole is still excluded; see below. Any ambiguity should inure to the defendant's benefit.	Yes, if alcohol/drug abuse or mental illness is a factor/element of crime. *Ind. Code § 12-23-5-1.*	•Drug/alcohol abuse or mental illness •Consent of prosecutor	Under Ind. Code § 12-23-5-7: •Offense involves death or SBI •D has 2 prior forcible felonies •D has pending felony proceedings •D is still on probation or parole •D fails to meet court-imposed eligibility requirements **NOTE:** In what may be a legislative oversight, a person charged with a misdemeanor who is on probation or parole is still excluded under the law but a person charged with a felony is no longer excluded for being on probation or parole; see above. Any ambiguity should inure to the defendant's benefit.	Yes, if no prior dismissal of OVWI charge under statute. *Ind. Code § 12-23-5-8.*
Direct Placement in Community Corrections *(Ind. Code § 35-38-2.6)*	Yes	Any part of sentence is non-suspendible	•Sex crimes •Felonies listed in Ind. Code § 35-38-2.6-1	No	N/A	N/A	No
Forensic Diversion Program *(Ind. Code § 11-12-3.7)*	Yes	Mental Illness, intellectual disability, developmental disability, autism spectrum disorder or addictive disorder. *Ind. Code § 11-12-3.7-7.*	•Violent offenses listed in Ind. Code § 11-12-3.7-6. *Ind. Code § 11-12-3.7-12(a).* •Drug dealing offenses listed in Ind. Code § 11-12-3.7-3, unless D received only minimal gain from drug transaction. *Ind. Code § 11-12-3.7-12(a).*	Yes	Mental illness, intellectual disability, developmental disability, autism spectrum disorder or addictive disorder. *Ind. Code § 11-12-3.7-11(a)*	•Violent offenses *Ind. Code § 11-12-3.7-11(a).*	Yes
Alternative Misdemeanor Sentencing *(Ind. Code § 35-50-2-7)*	Yes, but only for Class D/Level 6. *Ind. Code § 35-50-2-7.*	None	•Prior, unrelated felony entered as misdemeanor in past 3 years. •Domestic battery as a Class D Felony (if committed before 7/1/14) or a Level 6 Felony (if committed after 7/1/14). •Possession of child pornography. *Ind. Code § 35-50-2-7(c).*	N/A	N/A	N/A	--
Conditional Discharge for Marijuana Possession, and Other *(Ind. Code § 35-38-4-12)*	No	N/A	N/A	Yes. *Ind. Code § 35-48-4-12.*	•No prior dismissal under this statute •No prior conviction for controlled substances *Ind. Code § 35-48-4-12.*	None	--
Pre-Trial Diversion *(Ind. Code § 33-39-1-8)*	Yes, but only for Level 5 or 6 Felonies. *Ind. Code § 33-39-1-8(d)(1).*	•Offered by prosecutor; •Recorded in written agreement; and •Notice to victim. *Ind. Code § 33-39-1-8(d).*	•Holder of CDL charged with motor vehicle offense; or •OVWI and related offense. *Ind. Code § 33-39-1-8(a).*	Yes. *Ind. Code § 33-39-1-8(d).*	•Offered by prosecutor; •Recorded in written agreement; and •Notice to victim Ind. Code § 33-39-1-8(d)	•Holder of CDL charged with motor vehicle offense; or •OVWI and related offense. Ind. Code § 33-39-1-8(a).	--

CHAPTER FIVE

SENTENCING ALTERNATIVES

I. IN GENERAL

A. COUNSEL'S DUTY

Defense counsel has a duty to present sentencing alternatives to the court. One method to present sentencing alternatives is to file with the court a written presentence memorandum. Ind. Code § 35-38-1-11. See ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-8.1 (3rd Ed.); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, Guidelines 8.2 and 8.6.

B. COURT'S AUTHORITY

Even if there is no statutory authority for a particular sentencing alternative, if all parties agree to the alternative, the agreement will be upheld.

Debro v. State, 821 N.E.2d 367 (Ind. 2005) (absent express statutory authorization, trial court may not withhold judgment, but is required to enter judgment of conviction immediately unless a temporary postponement is dictated by good cause shown or the interest of justice so requires; here, although plea agreement was in clear violation of Ind. Code § 35-38-1-1(a), agreement provided defendant with a significant benefit: the possibility of no criminal conviction for his admitted criminal conduct).

Johnston v. Dobeski, 739 N.E.2d 121 (Ind. 2000) (*overruled in part by* State v. Hernandez, 910 N.E.2d 213 (Ind. 2009) (State and defendant seeking post-conviction relief (PCR) had authority to agree to modify two life sentences to two consecutive 40-year terms, even though sentence was not provided for by statute when defendant committed his 1964 crimes; reduction of indeterminate sentence was an administrative act, and therefore permissible, because it was conducted through and with the agreement of the county prosecutor).

But see:

State v. Hernandez, 910 N.E.2d 213 (Ind. 2009) (to the extent Johnston held that a life sentence was indeterminate and that a prisoner serving a life sentence was eligible for consideration for parole, it is overruled).

II. TREATMENT IN LIEU OF PROSECUTION - FELONY (E.6.A.1)

A. IN GENERAL

1. Legislative purpose

The office of Family and Social Services ("FSS") was created in 1992 by the Indiana General Assembly. In 1994, the Division of Mental Health ("DMH") of FSSA was established to "apply the division's resources to ensure that Indiana citizens have access to appropriate mental health and additional services that promote individual self-sufficiency." Ind. Code § 12-21-1-1.

2. Constitutionality

a. Equal Protection

Murphy v. State, 265 Ind. 128, 352 N.E.2d 479, 484 (1976) (exclusion from treatment in lieu of prosecution of persons who have committed crimes of violence is reasonably related to protection of public and, therefore, is not denial of equal protection under 14th Amend. or Ind. Const. art. 1, § 23).

b. Due process

Weatherly v. State, 593 N.E.2d 1239 (Ind.Ct.App. 1992) (defendant who asserted eligibility for drug or alcohol treatment in lieu of prosecution was not denied due process by fact that DMH has unlimited authority to deny admission to treatment program in lieu of prosecution).

3. Recovery Works

Recovery Works is a program overseen by the Indiana Department of Mental Health and Addiction (DMHA) that provides mental health and addiction recovery treatment and other wrap-around services, such as transportation and housing, to individuals without health insurance who are at least 18 years old and who are charged with a felony or are charged with a misdemeanor and have a prior felony conviction. Recovery Works can help get clients the treatment they need pretrial, and can help build a record to get a better disposition to their case.

For more information, including referral process steps, a referral form, and a list of approved providers, see DMHA's Recovery Works site. You can also see IPDC seminar materials on this website from the 2016 Annual Update seminar and the 2016 Sentencing seminar.

Recovery Works is NOT a pre-trial diversion program. It is simply a funding source for individuals who need mental health or addiction treatment, and meet the criteria, specifically low income and felony or misdemeanor charging or conviction. This is not a substitute for treatment in lieu of prosecution, but rather an available resource for you to get your client into a treatment program, if financial or program availability is a hurdle for getting treatment.

B. ADVISEMENT OF TREATMENT OPTION AND CONDITIONS

1. When advisement is appropriate

a. Continuance of Prosecution after criminal charge

Pursuant to Ind. Code § 12-23-7.1-1, if:

(1) a court has reason to believe that an individual charged with an offense is a drug abuser or an alcoholic or the individual states that the individual is a drug abuser or an alcoholic;

(2) the court finds that the individual is eligible to make the request for treatment provided in Ind. Code § 12-23-6.1; and

(3) the individual is not disqualified under IC 12-23-6.1-1;

the court may advise the individual that the prosecution of the charge may be continued if the individual requests to undergo treatment and is accepted for treatment by the division.

b. Court has reason to believe defendant is or defendant states he is alcohol or drug abuser

When the court has reason to believe the defendant is or the defendant states he is an alcohol or drug abuser, the court is required to make further inquiries into the defendant's background and eligibility to request treatment; however, the court is not required to, but may choose to advise the defendant of treatment options. Ind. Code § 12-23-7.1-1.

(1) Court has reason to believe

Inquiry by the trial court into the defendant's eligibility and status as a drug abuser is mandatory when the trial court has reason to believe that the defendant could make a request for treatment. Glenn v. State, 163 Ind. App. 119, 322 N.E.2d 106, 109 (1975).

> Glenn v. State, 163 Ind. App. 119, 322 N.E.2d 106 (1975) (where presentence report indicated that defendant had previous drug related offense and twelve-year history of drug abuse, court had duty to inquire into defendant's eligibility and status as drug abuser under former statute, Ind. Code § 16-13-7.5-18).

PRACTICE POINTER: Under the former statute discussed in Glenn, the court was required to order examination by the DMH for eligible defendants who elected treatment. Under the current statute, IC 12-23-7.1-3, it is within the court's discretion to order an examination even if the defendant is eligible for treatment. However, argue that this statutory change did not overrule the Glenn holding that a court has the duty to inquire into the defendant's eligibility and status as a drug abuser when it is apparent that the defendant has a problem.

(2) Statement by defendant that he is alcohol or drug abuser

The defendant's verified petition stating that he/she is a drug abuser is sufficient to require further inquiry by the court. Reas v. State, 323 N.E.2d 274, 279 (Ind. Ct. App. 1975).

> Reas v. State, 323 N.E.2d 274 (Ind. Ct. App. 1975) (where defendant filed petition for treatment, trial court had duty to inquire whether his eligibility and status as a drug abuser could have been established with reasonable certainty).

c. Defendant is eligible to make request

(1) Drug abusers and alcoholics

A drug abuser or an alcoholic charged with or convicted of a felony may request treatment under the supervision of the division and upon the consent of the

authorities concerned as set forth in Ind. Code § 12-23-7.1 instead of prosecution or imprisonment. Ind. Code § 12-23-6.1-1.

(2) Exclusions

(a) Forcible felony

A defendant who is charged with or convicted of an offense that is a forcible felony or a Class A or B burglary (for a crime committed before July 1, 2014, or a Level 1, Level 2, Level 3, or Level 4 felony for a crime committed after June 30, 2014) is not eligible for treatment in lieu of prosecution or imprisonment. Ind. Code § 12-23-6.1-1(1).

A "forcible felony" means a felony that involves the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being. Ind. Code § 35-31.5-2-138.

Olson v. State, 563 N.E.2d 565 (Ind. 1990) (trial court properly denied defendant's request for treatment in lieu of prosecution in Class C robbery case because under IC 35-42-5-1 all robberies are by definition forcible felonies).

Yoder v. State, 574 N.E.2d 929 (Ind. Ct. App. 1991) (use of force is always implied in child molest because victim is unable to consent).

(b) Prior convictions for forcible felonies

A defendant who has a record that includes at least two prior convictions for forcible felonies or a burglary classified as a Class A or B felony (for a crime committed before July 1, 2014, or a Level 1, Level 2, Level 3, or Level 4 felony for a crime committed after June 30, 2014) is not eligible for treatment in lieu of prosecution or imprisonment. Ind. Code § 12-23-6.1-1(2).

(c) Pending felony proceedings

A defendant who has other criminal proceedings, not arising out of the same incident, alleging the commission of a felony pending against him/her is not eligible for treatment in lieu of prosecution or imprisonment. Ind. Code § 12-23-6.1-1(3).

Dyer v. State, 714 N.E.2d 229 (Ind. Ct. App. 1999) (where DMH, which has discretion as to whether to accept defendant for treatment, found that defendant had outstanding warrants pending against her, contrary to what she had averred in her request for treatment in lieu of sentencing, court was required to sentence her to minimum sentence for felony to which she had pled and neither court nor prosecutor could have agreed to treatment in lieu of sentencing).

Miller v. State, 338 N.E.2d 733 (Ind. Ct. App. 1975) (where defendant was originally charged with delivery in two separate indictments alleging deliveries two days apart and was convicted upon one but other was still

pending, defendant was ineligible since circumstances of the first delivery were separate from circumstances of second delivery).

Trabue v. State, 409, 328 N.E.2d 743 (Ind. Ct. App. 1975) (defendant is ineligible for treatment if any charge is pending, regardless of whether charge is for crime of violence).

(d) Prior treatment during past two years

If a defendant was admitted to a treatment program under IC §12-23-7 or IC § 12-23-8 (before their repeal) or under IC 12-23-7.1 or IC 12-23-8.1 (after June 30, 2015) on two (2) or more prior occasions within the preceding two (2) years, the defendant is not eligible for treatment in lieu of prosecution or imprisonment. Ind. Code § 12-23-6.-1-1(4)

d. Treatment and Probation Following Criminal Conviction

Pursuant to Ind. Code § 12-23-8.1-1, if:

(1) a court has reason to believe that an individual convicted of an offense is a drug abuser or an alcoholic or the individual states that the individual is a drug abuser or an alcoholic; and

(2) the court finds that the individual is eligible to make the request for treatment provided for under IC 12-23-6.1;

the court may advise the individual that the individual may be placed on probation, subject to any mandatory minimum or nonsuspendible sentence imposed on the individual, if the individual requests to undergo treatment and is accepted for treatment by the division.

2. Advisement of conditions

a. Statute

Ind. Code § 12-23-7.1-2 provides:

In offering an individual an opportunity to request treatment, the court shall advise the individual of the following:

(1) If the individual requests to undergo treatment and is accepted, the individual may be placed under supervision of the division for a period not to exceed three years.

(2) During treatment the individual may be confined in an institution or, at the discretion of the division, the individual may be released for treatment and supervised aftercare in the community.

(3) If the individual completes treatment, the charge will be dismissed, but if the individual does not complete treatment, the prosecution on the charge may be resumed.

(4) A request constitutes a formal waiver of the right to a speedy trial and constitutes a formal waiver of Criminal Rule 4 concerning discharge for delay in criminal trials.

(5) To make a request the individual must waive a jury trial and consent to a trial by the court or enter a guilty plea, with the general finding to be entered by the court to be deferred until such time as prosecution may be resumed.

b. Withdrawal of jury trial waiver

Once the right to a jury trial has been effectively waived, the accused has no constitutional right to withdraw the waiver. Whether withdrawal is permitted rests in the sound discretion of the trial court.

Hammond v. State, 594 N.E.2d 509 (Ind. Ct. App. 1992) (trial court did not abuse its discretion by denying defendant's request for jury trial after denying his petition for substance abuse treatment in lieu of prosecution because both statute and defendant's petition specifically acknowledge that by making request defendant waived right to jury trial).

Perry v. State, 401 N.E.2d 705 (Ind. Ct. App. 1980) (it was not abuse of discretion for trial court to refuse to permit defendant to withdraw waiver of jury trial when he was prosecuted after unsuccessful completion of program).

C. DEFENDANT'S REQUEST FOR TREATMENT

1. Court's discretion: ordering examination

If an eligible individual requests to undergo treatment, the court may order the division to conduct an examination of the individual to determine whether the individual is a drug abuser or alcoholic and is likely to be rehabilitated through treatment. Ind. Code § 12-23-7.1-3.

Yoder v. State, 574 N.E.2d 929 (Ind. Ct. App. 1991) (trial judge has discretion to decide whether evaluation of defendant should be ordered).

Munger v. State, 420 N.E.2d 1380 (Ind. Ct. App. 1981) (a trial court is not precluded from invoking the drug abuse treatment provisions before deciding whether to accept or reject a plea agreement if it has reason to believe the defendant is a drug abuser eligible for treatment. However, once trial court accepts plea agreement, drug abuse treatment is no longer a sentencing alternative.).

a. Ineligible for probation

The court may deny a request if after conducting a pretrial or pre-plea investigation the court finds the individual would not qualify under the criteria of the court to be released on probation if convicted. Ind. Code § 12-23-7.1-4. In order to be eligible for probation, a defendant's sentence must be suspendible. For a detailed discussion on suspendibility of sentences, see Chapter 4, *Sentencing Decision,* Subsection V, *Suspendibility of sentence*.

Fullen v. State, 505 N.E.2d 493 (Ind. Ct. App. 1987) (probation is prerequisite to treatment, and since applicant could not simultaneously be on probation and be serving an executed sentence, he was eligible for treatment contemplated by former Ind. Code § 16-13-6.1-18 only if execution of his sentence was suspended).

PRACTICE POINTER: Although a defendant may be ineligible for treatment in lieu of prosecution, after serving the executed sentence, the defendant may receive treatment as a condition of probation. See Ind. Code § 12-23-8.1-1 et. seq. Further, the trial court has discretion to order defendant to serve an executed sentence in a treatment facility.

Mogle v. State, 471 N.E.2d 1146 (Ind. Ct. App. 1984) (overruled in part on other grounds by Pierce v. State, 737 N.E.2d 1211, 1213 n.2 (Ind. Ct. App. 2000)) (defendant who was not eligible for probation may be technically eligible to request treatment as alternative under IC 16-13-6.1-16 (now IC 12-23-6.1-1) but could not actually receive treatment as alternative).

b. Former statute

Under the former statute, where the trial court had "reason to believe" that the defendant was a drug abuser and that he may be eligible for drug treatment pursuant to Ind. Code § 12-23-6-1 (now IC 12-23-6.1-1) and Ind. Code § 12-23-8 et. seq. (now IC 12-23-8.1 et. seq.) the trial court was required to order an examination to determine whether the defendant is qualified for rehabilitation. Glenn v. State, 322 N.E.2d 106, 109 (Ind. Ct. App. 1975); Scholl v. State, 404 N.E.2d 1154 (Ind. Ct. App. 1980); McNary v. State, 297 N.E.2d 853 (Ind. Ct. App. 1973).

George v. State, 403 N.E.2d 339, 342 (Ind. Ct. App. 1980) (even if court abused its discretion by failing to order examination, error was harmless where court considered report made by Illinois authorities concerning defendant's drug abuse which was favorable to defendant, because the trial court, in its discretion, can still decline to grant a request for treatment in lieu of imprisonment, even if the examination results show that the defendant can be rehabilitated).

2. Timeliness of request and court ruling

a. Defendant going to trial

If a petition for treatment in lieu of prosecution is filed prior to trial, the court should also act on it before trial. Harrington v. State, 421 N.E.2d 1113, 1114 (Ind. 1981).

Harrington v. State, 421 N.E.2d 1113 (Ind. 1981) (although court waited until after trial to rule on petition for treatment in lieu of prosecution that defendant filed prior to trial, error was harmless where defendant did not challenge trial court's exercise of discretion in denying petition nor suggest in what manner lapse of time might have prejudiced merits).

b. Defendant plea bargaining

A defendant must request treatment in lieu of prosecution or punishment prior to the trial court accepting a tendered plea agreement. Thus, if defendant makes request after the court accepts a negotiated sentence, treatment in lieu of prosecution is no longer available. Williams v. State, 427 N.E.2d 708, 711 (Ind. Ct. App. 1981). However, drug abuse treatment remains as a sentencing alternative even when a plea agreement has been submitted to the trial court for approval. Munger v. State, 420 N.E.2d 1380, 1384 (Ind. Ct. App. 1981).

PRACTICE POINTER: Although a defendant who tenders a plea agreement cannot later request treatment in lieu of prosecution, argue that a defendant who is found guilty by a court or jury may still request treatment in lieu of prosecution. See Ind. Code § 12-23-6.1-1 ("a drug abuser or an alcoholic charged with or convicted of a felony may request treatment under the supervision of the division . . ."). Compare IC 12-23-6.1-1 and IC 12-23-7.1-1 et. seq. with IC 12-23-5-2 in which the legislature actually limits the time which a court can defer prosecution for a misdemeanor to before conviction.

3. Grant of request

Pursuant to Ind. Code § 12-23-7.1-5, if a request is granted, the court shall do the following:

(1) Certify to the division that the individual may request treatment.

(2) Transmit to the division the following:

(a) A summary of criminal history of the individual.

(b) A copy of the report of all background investigations conducted by or for the court.

D. DIVISION OF MENTAL HEALTH'S ("DMH") RECOMMENDATION

Within a reasonable time after receiving an order to conduct an examination, together with the court's certification of eligibility and required supporting documents, the division shall report to the court the results of the examination and recommend if an individual should be placed under supervision for treatment. Ind. Code § 12-23-7.1-6.

1. Challenging evaluator's impartiality

If defendant properly challenges an evaluator's impartiality by filing a motion to suppress the DMH's report and by establishing a prima facie case of bias, the court may, in its discretion, order that the DMH assign a new evaluator from a different agency to perform another evaluation of a defendant. Bess v. State, 657 N.E.2d 185, 187 (Ind. Ct. App. 1995).

Bess v. State, 657 N.E.2d 185 (Ind. Ct. App. 1995) (fact that evaluator worked at same establishment as victim of crime, without more, did not establish that evaluator was prejudiced against defendant).

2. DMH's refusal to accept defendant

An individual may not be placed under the supervision of the division for treatment under this chapter unless the division accepts the individual for treatment. Ind. Code § 12-23-7.1-10.

Bess v. State, 657 N.E.2d 185 (Ind. Ct. App. 1995) (if DMH submits report denying defendant admission to program, judge may not unilaterally override that decision and force DMH to accept defendant).
Weatherly v. State, 593 N.E.2d 1239 (Ind. Ct. App. 1992) (DMH was not required to state reasons for its refusal to consent to allow drug abusers or alcoholics charged with or convicted of a crime to receive treatment under supervision of department in lieu of prosecution or imprisonment; there was no limitation on department's discretion to allow treatment, and since statute's terms were discretionary, defendant was offered opportunity, not constitutional right).

E. COURT'S CONCLUSION

Considering the results of the DMH's examination and recommendation, together with other available information, the court exercises its discretion in submitting the individual for treatment or pronouncing sentence as in other cases. Reas v. State, 323 N.E.2d 274, 279 (Ind. Ct. App. 1975). The trial court's decision will only be reversed upon a showing of an abuse of discretion. One example of an abuse of discretion would be adopting a blanket policy denying treatment or for all, even for individuals who had never previously received treatment. Scholl v. State, 404 N.E.2d 1154 (Ind. Ct. App. 1980).

Bess v. State, 657 N.E.2d 185, 187 (Ind. Ct. App. 1995) (citing Thurman v. State, 320 N.E.2d 795, 798 (Ind. Ct. App. 1974)) (trial court was not obligated to order substance abuse treatment even when report following evaluation recommended such treatment).

1. Defendant is not in need of treatment

Ind. Code § 12-23-7.1-7 provides:

If the court, acting on the report and other information coming to the court's attention, determines that:

(1) an individual is not a drug abuser or an alcoholic; or

(2) the individual is not likely to be rehabilitated through treatment;

(3) the individual may be held to answer the charge.

2. Defendant is in need of treatment

a. Court's options

Pursuant to Ind. Code § 12-23-7.1-8, if the court determines that an individual is a drug abuser or an alcoholic and is likely to be rehabilitated through treatment, the court may, with the consent of the prosecuting attorney:

(1) defer the trial; or

(2) without a jury, conduct the trial of the individual but may, with the consent of the prosecuting attorney, do the following:

  (a) Defer entering general findings with respect to the individual until the time that prosecution may be resumed.

  (b) Place the individual under the supervision of the division for treatment for a maximum of three years.

b. Consent of prosecutor

Court may only defer the trial or withhold the judgment with the consent of the prosecutor. Ind. Code § 12-23-7.1-8. However, where the State fails to lodge an objection to participation in treatment in lieu of prosecution, waiver occurs.

State v. Nix, 833 N.E.2d 541 (Ind. Ct. App. 2005), *trans. denied* (State must object to treatment in lieu of prosecution; here, defendant completed treatment prior to State

seeking a trial date; as defendant successfully completed treatment, trial court did not err in granting his request to dismiss case).

c. Placing defendant in program

(1) Program requirements

The division may not release an offender under IC 12-23-7.1-2(2) to an alcohol and drug services treatment program that is not a program administered by a court under IC 12-23-14 or that has not complied with the certification requirements of the division of mental health and addition. Ind. Code § 12-23-7.1-14.

(2) Progress reports

The court may require progress reports on an individual if the court finds necessary. Ind. Code § 12-23-7.1-9.

F. DISPOSITION OF CRIMINAL CHARGE

1. Continuance or dismissal of criminal charge.

Ind. Code § 12-23-7.1-11 provides:

If an individual is placed under the supervision of the division for treatment under this chapter, the criminal charge against the individual shall be:

(1) continued without final disposition; and

(2) dismissed if the division certifies to the court that the individual has successfully completed the treatment program.

2. Criminal proceeding resumed

a. Failure to complete treatment program

Ind. Code § 12-23-7.1-12 provides:

(a) If by the expiration of the supervisory period the division has not been able to certify that an individual has completed the treatment program, the pending proceeding may be resumed upon motion of the prosecuting attorney.

(b) If, before the supervisory period expires, the division determines that further treatment of the individual is not likely to be successful, the division shall so advise the court. The court shall terminate the supervision, and the pending criminal proceeding may be resumed upon motion by the prosecuting attorney.

b. Appellate review

Although the decision to enter conviction based on defendant's failure to complete the treatment conditions is reviewable, it is not an appealable judgment until after sentencing. Barlow v. State, 526 N.E.2d 1212, 1214 (Ind. Ct. App. 1988).

3. Credit time

If a criminal proceeding is resumed and the individual subsequently completes the treatment program, the individual is entitled to accrued time for the time spent in institutional care. Ind. Code § 12-23-7.1-13.

PRACTICE POINTER: Although the statute does not state whether credit time classification statutes apply, argue that Ind. Code § 35-50-6-4 requires the court to assign the defendant a Class I credit time classification for the time the defendant spends in institutional care for treatment. The defendant thereby would earn credit time for the time spent in institutional care. Ind. Code § 35-50-6-3 (for crimes committed before July 1, 2014) and Ind. Code § 35-50-6-3.1 (for crimes committed after June 30, 2014); Ind. Code § 35-50-6-4.

G. TERMINATION OF TREATMENT

1. Protected liberty interest

An individual placed under a drug treatment program has a protected liberty interest in remaining in that program and he\she must be afforded procedural due process before a court can terminate treatment and resume prosecution pursuant to Ind. Code § 12-23-7.1-12.

> Hopper v. State, 546 N.E.2d 106 (Ind. Ct. App. 1989) (because defendant's status during treatment is akin to individual's status while on probation or parole, defendant must be afforded same due process protections as individual on probation or parole, including: (1) written notice of claimed violation; (2) disclosure of evidence; (3) opportunity to be heard; (4) right to confront and cross examine witnesses; (5) neutral and detached hearing body; (6) written statement describing evidence relied upon for action taken; (7) burden of proof of violation on state; and (8) a hearing before the trial court makes its determination.).

III. TREATMENT IN LIEU OF PROSECUTION - MISDEMEANORS / INFRACTIONS (E.6.A.2)

A. INITIATED BY COURT / JUDICIAL NOTICE

Ind. Code § 12-23-5-1 provides:

> In a criminal proceeding for a misdemeanor or infraction in which:
>
> (1) the use or abuse of alcohol, drugs, or harmful substances is a contributing factor or a material element of the offense; or
>
> (2) the defendant's mental illness other than substance abuse, is a contributing factor;
>
> the court may take judicial notice of the fact that proper early intervention, medical, advisory, or rehabilitative treatment of the defendant is likely to decrease the defendant's tendency to engage in antisocial behavior.

B. DEFERRED PROSECUTION

Subject to Ind. Code § 12-23-5-8, before conviction a court may, with the consent of the defendant and the prosecuting attorney, conditionally defer the proceedings described in IC 12-23-5-1 for up to one year. Ind. Code § 12-23-5-2(a).

1. Conditions

Pursuant to Ind. Code § 12-23-5-2(b), the court may do the following:

(1) Order the defendant to satisfactorily complete an alcohol and drug services treatment program, if the court makes a determination under IC 12-23-5-1(1).

(2) Order the defendant to undergo treatment for the defendant's mental illness, if the court makes a determination under IC 12-23-5-1(2).

(3) Impose other appropriate conditions upon the defendant.

2. Eligibility

a. Alcohol, drug abuse or mental illness was contributing factor

Prosecution may be deferred under IC 12-23-5-2 through IC 12-23-5-5 if a defendant has been charged with a misdemeanor or infraction in which the use of alcohol or drugs was a contributing factor or material element of the offense or the defendant's mental illness was a contributing factor. Ind. Code § 12-23-5-7.

b. Exclusions

(1) Offense involves death or serious bodily injury

A defendant charged with an offense which involves death or serious bodily injury is not eligible. Ind. Code § 12-23-5-7(1).

(2) Two prior forcible felonies

A defendant with a record of at least two prior convictions of forcible felonies (as defined in IC 35-31.5-2-138) is not eligible. Ind. Code § 12-23-5-7(2).
A "forcible felony" means a felony that involves the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being. Ind. Code § 35-31.5-2-138.

(3) Pending felony proceedings

A defendant with other criminal proceedings, not arising out of the same incident, alleging commission of a felony, pending against him/her is not eligible. Ind. Code § 12-23-5-7(3).

(4) Defendant is on probation or parole

If a defendant is on probation or parole and the appropriate parole or probation authority does not consent to the defendant's participation, the defendant is not eligible. Ind. Code § 12-23-5-7(4).

(5) Court imposed requirements

A defendant who fails to meet additional eligibility requirements imposed by the court is not eligible. Ind. Code § 12-23-5-7(5).

(6) Previous deferred OVWI

If a defendant has already had an OVWI charge dismissed under this treatment statute, he cannot do so a second time for the same crime.

Pursuant to Ind. Code § 12-23-5-8, if:

(1) a defendant was previously charged under IC 9-4-1-54 (before its repeal September 1, 1983), IC 9-11-2 (before its repeal July 1, 1991), or IC 9-30-5; and

(2) the previous charges were dismissed under this chapter; the individual is not eligible to have subsequent charges under IC 9-30-5 dismissed under this chapter.

Ind. Code § 9-30-5 deals with operating a vehicle while intoxicated.

(7) Motor vehicle offenses - commercial driver's license

Pursuant to Ind. Code § 12-23-5-0.5, after June 30, 2005, this chapter does not apply to a person who:

(1) holds a commercial driver's license; and

(2) has been charged with an offense involving the operation of a motor vehicle in accordance with the federal Motor Carrier Safety Improvement Act of 1999.

PRACTICE POINTER: If the court is reluctant to defer prosecution or the defendant is ineligible, the court may alternatively impose treatment as a condition of probation where the offense is a misdemeanor or infraction in which the use or abuse of alcohol, drugs, or harmful substances is a contributing factor or a material element of the offense or where the defendant's mental illness is a contributing factor. Ind. Code § 12-23-5-6.

3. License Suspension – OVWI Ignition Interlock Device

Ind. Code § 12-23-5-5 provides:

(a) Subject to subsection (b), if a court enters an order conditionally deferring charges that involve a violation of IC 9-30-5, the court shall do the following:

(1) Suspend the person's driving privileges for at least ninety days but not more than two years.

(2) Impose other appropriate conditions.

(b) A defendant may be granted probationary driving privileges only after the defendant's license has been suspended for at least thirty days under IC 9-30-6-9.

(c) If a defendant has at least one conviction for an offense under IC 9-30-5, the order granting probationary driving privileges under IC 12-23-5-5(b) must, in a county that provides for the installation of an ignition interlock device under IC 9-30-8, prohibit the defendant from operating a motor vehicle unless the motor vehicle is equipped with a functioning certified ignition interlock device under IC 9-30-8.

(d) If a defendant does not have a prior conviction for an offense under IC 9-30-5, the court may, as an alternative to a license suspension under subsection IC 12-23-5-5(a)(1), issue an order prohibiting the defendant from operating a motor vehicle unless the motor vehicle is equipped with a functioning certified ignition interlock device under IC 9-30-8. An order requiring an ignition interlock device must remain in effect for at least two years but not more than four years.

4. Limitation on court's authority

A court may not order a defendant or a convicted individual to complete an alcohol and drug services treatment program under IC 12-23-5-2(b)(1) or IC 12-23-5-6(1) unless the court determines that the program in which the individual is to participate is administered by a court under IC 12-23-14 or is certified by the division of mental health and addiction. Ind. Code § 12-23-5-9.

C. DISPOSITION OF CHARGES

1. Dismissal of charges

Except as provided in IC 12-23-5-8, if a defendant fulfills the conditions set by the court, the court shall dismiss the charges against the defendant. Ind. Code § 12-23-5-4.

2. Proceedings resumed

If a defendant violates a condition imposed by the court, the court may order the criminal proceedings resumed. Ind. Code § 12-23-5-3.

Gilbert v. State, 574 N.E.2d 289 (Ind. Ct. App. 1991) (where both former and existing statute provide that proceedings against defendant could be deferred for up to one year, statute did not require that proceedings, once resumed, must be completed within one year from withholding of judgment, and nothing in statue could be read as prohibiting trial court from continuing proceedings after its consideration had been resumed).

IV. DIRECT PLACEMENT IN COMMUNITY CORRECTIONS

The court may, at the time of sentencing, suspend the sentence and order a person to be placed in a community corrections program as an alternative to commitment to the DOC. The court may impose reasonable terms on the placement or require the director of the community corrections program to impose reasonable terms on the placement. Ind. Code § 35-38-2.6-3(a).

However, pursuant to Ind. Code § 35-38-2.6-3(b) and (d), the court's authority to order placement is subject to the availability of residential beds or home detention units in a community corrections program and the community corrections program receiving a written presentence report or memorandum from a county probation agency.

Million v. State, 646 N.E.2d 998 (Ind. Ct. App. 1995) (defendant is not entitled to serve sentence

in community corrections program; as with probation, placement in program is "matter of grace" and conditional liberty that is favor, not right)

A. DEFINITION

Pursuant to Ind. Code § 35-38-2.6-2, a community corrections program is a program consisting of residential and work release, electronic monitoring, day treatment, or day reporting that is:

(1) operated under a community correction plan of a county and funded at least in part by the state subsidy provided under IC 11-12-2; or

(2) operated by or under contract with a court or county.

B. ELIGIBILITY

Pursuant to Ind. Code § 35-38-2.6-1(a) , direct placement in a community corrections program applies to the sentencing of a person convicted of a felony whenever any part of the sentence may not be suspended under IC 35-50-2-2.2 (general suspension statute) or IC 35-50-2-2.1 (suspension statute for persons with juvenile record);

Direct placement in a Community Corrections program does not apply to persons convicted of any of the following:

(1) Sex crimes under IC 35-42-4 or IC 35-46-1-3.

(2) The felonies listed in IC 35-38-2.6-1(b)(2).

(3) An offense under IC 9-30-5-4 (OWI causing serious bodily injury).

(4) An offense under IC 9-30-5-5 (OWI causing death).

Ind. Code § 35-38-2.6-1(b).

Simmons v. State, 773 N.E.2d 823 (Ind. Ct. App. 2002) (under pre-2005 version of IC 35-38-2.6-1, non-suspendible six-month portion for third OWI as felony was ineligible for placement in community corrections program).

PRACTICE POINTER: Although it is clear that a person with a suspendible sentence or who was convicted of certain sex or drug offenses cannot be directly committed to community corrections, there is nothing in the statute saying those offenders cannot be sentenced to a community corrections program as a condition of probation. Ind. Code § 35-38-2.5-7(c) provides that a person who has been convicted of a sex offense under IC 35-42-4 or IC 35-46-1-3 may not be ordered to home detention unless: (1) the home detention is supervised by a court approve home detention program; and (2) the conditions include 24-hour supervision of the offender and use of GPS monitoring systems. Following the rules of statutory construction, the courts cannot read a restriction into a statute where the legislature was silent as to the subject. "Penal statutes cannot be construed to include anything beyond their letter, though within their spirit, and such statutes cannot be enlarged by construction, implication, or intendment beyond the fair meaning of the language used." Gore v. State, 456 N.E.2d 1030 (Ind. Ct. App. 1983).

A community corrections program shall establish written criteria and procedures for determining if an offender or an alleged offender is eligible for direct placement supervision under IC 35-38-2.6. Ind. Code § 35-38-2.6-4.2(a).

The criteria and procedures must establish a record keeping system that allows the department or community corrections program to quickly determine if an offender or alleged offender is in violation of the terms of a direct placement order issued under IC 35-38-2.6. Ind. Code § 35-38-2.6-4.2(b).

C. TERMS AND CONDITIONS

1. Reasonable conditions

As part of the conditional liberty of a community corrections program, a judge may set reasonable terms of the community corrections placement. Jester v. State, 746 N.E.2d 437 (Ind. Ct. App. 2001).

> Jester v. State, 746 N.E.2d 437 (Ind. Ct. App. 2001) (160 hours of community service was reasonable term of placement for person completing executed one-year misdemeanor sentence on work release).

However, the length of time that a person may be placed in a community corrections program is limited to the statutory maximum term length of the original conviction. Jester v. State, 746 N.E.2d 437, 439 (Ind. Ct. App. 2001). The only exception to this rule is contained in IC 35-50-3-1(b), which allows for a person to be placed on probation for up to one year for any misdemeanor, even though the maximum terms of each misdemeanor may be less than one year. Terms of community corrections placement, as a condition of probation, thus may exceed the statutory maximum allowed for a misdemeanor, but only up to a total period of one year. However, if the court finds that the use or abuse of alcohol, drugs, or harmful substances is a contributing factor or a material element of the offense, this period can be extended up to two years under IC 35-50-3-1(c).

> Jester v. State, 746 N.E.2d 437 (Ind. Ct. App. 2001) ("[A] prison sentence, the imposition of probation, or any combination of the two may not exceed the maximum term for the conviction").

The community corrections program shall, at the beginning of a period of direct placement, set any monitoring device and surveillance equipment to minimize the possibility that the offender may enter another residence or structure without the detection of a violation. Ind. Code § 35-38-2.6-4.2(d).

2. DNA sample

A court shall require a person:

(1) who is described in IC 10-13-6-10(a);

(2) who has not previously provided a DNA sample in accordance with IC 10-13-6; and

(3) whose sentence does not involve a commitment to the department of correction;

(4) to provide a DNA sample as a term of placement. Ind. Code § 35-38-2.6-3(a).

3. Warrantless, suspicionless searches

Community corrections participants who have consented or been clearly informed that their conditions of placement unambiguously authorize warrantless and suspicionless searches may

be subject to such searches. State v. Vanderkolk, 32 N.E.3d 775 (Ind. 2015); but see United States v. Knights, 534 U.S. 112 (2001) (notwithstanding probationer's waiver of Fourth Amendment rights, subsequent search must be based on reasonable suspicion).

However, even if a community corrections participant waives her Fourth Amendment rights as a condition of being placed in the program, although lack of suspicion may no longer be a valid objection, a subsequent search still must be reasonable. See Vanderkolk (above); State v. Terrell, 40 N.E.3d 501 (Ind. Ct. App. 2015). A consent to search provision that permits unreasonable searches is unconstitutionally overbroad. Fitzgerald v. State, 805 N.E.2d 857 (Ind. Ct. App. 2004). See Chapter 12, *Probation*, for more detailed analysis of consent to search provisions for community corrections participants and probationers.

4. Advisement of conditions and terms

The defendant is entitled to notice of conditions of his placement in a community corrections program; such notice may be written or oral given after sentencing and before placement begins.

> Million v. State, 646 N.E.2d 998 (Ind. Ct. App. 1995) (defendant was adequately advised of terms of his placement in community corrections program where defendant was informed at sentencing that he would be placed in program with all components and was orally advised of rules governing his participation in work release program prior to his placement).
>
> Pavey v. State, 710 N.E.2d 219 (Ind. Ct. App. 1999) (where court instructed that "all components of work release program applied to defendant," and defendant acknowledged that he understood phrase "all components" and signed work release agreement which read, "I agree not to violate any rules of the [jail]", court properly advised defendant that jail rules were also conditions of work release).

But see:

> Decker v. State, 704 N.E.2d 1101 (Ind. Ct. App. 1999) (commission of crime while serving time in community corrections program is always grounds for revocation even if sentencing court fails to notify person of such condition).

D. SUPERVISION

A community corrections program charged by the court with supervision of offenders and alleged offenders ordered to be placed directly in a community corrections program shall provide all law enforcement agencies, including any contract agency having jurisdiction in the place where a community corrections program is located a list of offenders and alleged offenders under direct placement supervision. The required contents of the list are listed at IC 35-38-2.6-4.2(c).

E. EFFECT OF PLACEMENT

1. Suspension of sentence

If the court places a person in a community corrections program under this chapter, the court shall suspend the sentence for a fixed period to end not later than the date the suspended sentence expires. Ind. Code § 35-38-2.6-4. There is confusion within the courts as to whether, in light of IC 35-38-2.6-4, a person can be sentenced to work release as part of that

person's executed sentence or whether all individuals sentenced to work release are automatically serving a suspended sentence.

State v. Purcell, 721 N.E.2d 220 (Ind. 1999) (for purposes of credit time, Indiana Supreme Court distinguishes between community corrections placement as condition of probation and community corrections placement as executed sentence).

But see:

Shaffer v. State, 755 N.E.2d 1193 (Ind. Ct. App. 2001) (because IC 35-38-2.6-4 requires court to suspend sentence when ordering individual to community corrections program, all community corrections programs are conditions of suspended, not executed, sentences; Vaidik, J., concurring on basis that court can order community corrections as condition of probation or as part of executed sentence).

Gardener v. State, 678 N.E.2d 398, 401 (Ind. Ct. App. 1997) ("The bright line between suspended-sentence punishments and executed-sentence punishments has been blurred by the implementation of the new alternative programs. Therefore, it may no longer be appropriate to make broad-sweeping assertions of punishments in either category.").

2. Credit time

A person who is placed in a community corrections program under this chapter is entitled to earn credit time under IC 35-50-6. Ind. Code § 35-38-2.6-6(b).

Pursuant to Ind. Code § 35-38-2.6-6(a), "home" means the actual living area of the temporary or permanent residence of a person.

a. Work release and/or residential treatment facility

According to Ind. Code § 35-38-2.6-6(c), an individual directly committed to a community corrections program will earn credit time, meaning two days for every actual day spent in the program.

PRACTICE POINTER: Although in Senn v. State, 766 N.E.2d 1190 (Ind. Ct. App. 2002), the Court held that a person on work release as condition of probation is only entitled to credit for time served, arguably the 2010 amendment to Ind. Code § 35-38-2.6-6, providing two-for-one credit for home detention as an executed sentence, evidenced a different legislative intent. A statutory scheme providing more credit for home detention than work release, a greater restriction on one's liberty, violates the Proportionality Clause, Article I, Section 16, of the Indiana Constitution. See, e.g., State v. Moss-Dwyer, 686 N.E.2d 109, 112 (Ind. 1997).

b. Home detention

An individual placed on home detention as a direct commitment to a community corrections program is entitled to earn credit time under IC 35-50-6. See Ind. Code § 35-38-2.6-6(b).

PRACTICE POINTER: An individual on home detention as a condition of probation earns day-for-day credit time. Ind. Code § 35-38-2.5-5(e). However, the statutory restrictions on the detainee's freedom remain the same regardless of whether he is on probation or an executed sentence. Ind. Code § 35-38-2.6-4 (if a court places a person on home detention as part of a community corrections program, the placement must comply with all applicable provisions in IC 35-38-2.5). Work release is work release, and home detention is home detention. See Dishroon v. State, 722 N.E.2d 385 (Ind. Ct. App 2000). Thus, awarding less credit time for home detention as a condition of probation is a violation of the Equal Privileges and Immunities Clause of the Indiana Constitution. Although the equal probation argument has been rejected in the context of pre-trial home detention, Lewis v. State, 898 N.E.2d 1286 (Ind. Ct. App 2009), arguably Lewis is wrong and distinguishable.

c. Deprivation of credit time

A person who is placed in a community corrections program under this chapter may be deprived of earned credit time as provided under rules adopted by the DOC under IC 4-22-2. Ind. Code § 35-38-2.6-6(d).

Shepard v. State, 84 N.E.3d 1171 (Ind. 2017) (because the community corrections director lacked authority to deprive defendant of good time credit he had earned, the trial court's determination as to defendant's good time credit was reversed; the trial court erred because in absence of rules promulgated by DOC, the program director had no authority to take away defendant's credit time).

d. Education credit time

A person placed in community corrections program is entitled to earn educational credit time while in the program, regardless of if the person is on probation. Rodgers v. State, 705 N.E.2d 1039 (Ind. Ct. App. 1999); see Chapter 10, Subsection V, *Education Credit Time*.

PRACTICE POINTER: A trial court is required to record pre-sentence confinement time and credit time earned on the sentencing judgment; if it omits reference to credit time, the presumption will be that the credit time for pre-sentence confinement is equal to the actual days served. Robinson v. State, 805 N.E.2d 783 (Ind. 2004) (The credit time may then be amended by the DOC or county jail. See Ind. Code § 35-50-6-4, 35-50-6-5). Defendants facing any ambiguities in whether alternative sentencing programs earn credit time or contesting a denial of credit time should argue that the court must follow the presumption in Robinson that credit time is equal to days served unless specific reasons exist for alteration by the court or DOC.

3. Escape

An individual who intentionally flees from lawful detention or fails to return to lawful detention or violates a home detention order or removes an electronic monitoring device or GPDS tracking device, commits escape, a Level 4-6 felony depending on the type of detention and level of force used. Ind. Code § 35-44.1-3-4. Under IC 35-31.5-2-186(a)(7), (8), the definition of "lawful detention includes "placement in a community corrections program's residential facility or electronic monitoring."

Grabarczyk v. State, 772 N.E.2d 428 (Ind. Ct. App 2002) (because Ind. Code § 35-44-3-5(b) requires only the violation of a home detention order and omits reference to "lawful

detention" as required in sections (a) and (c), it was irrelevant whether defendant had been lawfully detained for purpose of escape conviction).

Long v. State, 717 N.E.2d 1238, 1241 n.3 (Ind. Ct. App 1999) (attempting to fix a broken electronic monitoring device does not constitute criminal behavior).

4. Probation on completion of program

When a person completes a placement program under this chapter, the court shall place the person on probation. Ind. Code § 35-38-2.6-7.

5. Modification of placement

Although an individual's sentence is suspended under IC 35-38-2.6-4, the individual must meet the requirements under IC 35-38-1-17 (modification of sentence) in order for the trial court to have discretion to modify placement after the individual has begun serving his sentence. Keys v. State, 746 N.E.2d 405 (Ind. Ct. App 2001).

F. VIOLATION OF TERMS OF PLACEMENT

1. Effect of violation

(a) If a person who is placed under this chapter violates the terms of the placement, the community corrections director may do any of the following:

(1) Change the terms of the placement.

(2) Continue the placement.

(3) Reassign a person assigned to a specific community corrections program to a different community corrections program.

(4) Request that the court revoke the placement and commit the person to the county jail or department of correction for the remainder of the person's sentence.

The community corrections director shall notify the court if the director changes the terms of the placement, continues the placement, or reassigns the person to a different program.

(b) If a person who is placed under this chapter violates the terms of the placement, the prosecuting attorney may request that the court revoke the placement and commit the person to the county jail or department of correction for the remainder of the person's sentence.

Ind. Code § 35-38-2.6-5.

When revoking placement in community corrections (especially for technical violations), judges also have the authority to sentence the person to time served, even if it is less than the length of sentence originally suspended.

Notwithstanding a fixed sentence set forth in the plea agreement, trial courts should have flexibility in sentencing when revoking placement in community corrections. Stephens v. State, 818 N.E.2d 936 (Ind. 2004). Following the rationale set forth in Stephens, as long as

the plea agreement implicitly contemplates that the trial court retains the power to decide consequences of violating terms and conditions regarding the person's placement, then it has discretion to sentence the person to time served for technical violations, even if the sanction is less than the sentence originally suspended. A "time-served" sanction is not an illegal sentence modification, but a consequence of violation of the person's initial sentence. See State v. Rivera, 20 N.E.3d 857 (Ind. Ct. App. 2014) (noting that although other sanctions were available to trial court, ultimately it is the trial court's discretion as to what sanction to impose under IC 35-38-2.6-4).

In lieu of a violation of terms of placement, the program director of the community corrections program does not have the statutory authority to revoke a defendant's credit time.

> Shepard v. State, 84 N.E.3d 1171 (Ind. 2017) (because the community corrections director lacked authority to deprive defendant of good time credit he had earned, the trial court's determination as to defendant's good time credit was reversed; the trial court erred because in absence of rules promulgated by DOC, the program director had no authority to take away defendant's credit time).

In Morgan v. State, 87 N.E.3d 506 (Ind. Ct. App. 2017), *trans. denied* (3-2), the Court rejected constitutional challenges to IC 35-38-2.6-5. First, the Court found no violation of separation of powers because the statute does not impose a "coercive influence" on the trial court. Although the community corrections director may take certain "administrative measures" to manage the program and may recommend revocation of placement, the trial court retains the power and responsibility to determine if revocation will be ordered. Nor did the appellate court find a facial or as-applied Due Process infirmity. Although the amended statute does not include an explicit requirement of a hearing, the court looked to analogous probation statutes and decisional law in holding that a hearing is still required. Id. at 511. Moreover, defendant was given written notice of the alleged violations, the State presented evidence against him, he cross-examined the State's witness, and he presented his own evidence before a neutral body. Id. at 512. Thus, the hearing was not "merely a judicial review of the administrative process" but rather "comported with principles of due process." Id.

See also Breda v. State, 142 N.E.3d 382 (Ind. Ct. App. 2020) (statute authorizing a community corrections program director to change the terms of a placement, continue the placement, reassign a defendant to a different community corrections program, or request that a trial court revoke the placement, does not violate separation of powers, facially or as applied, by interfering with a trial court's discharge of its duties when eliminating the court's discretion in determining an appropriate sanction for a defendant's violation of community corrections conditions, because it remained a trial court's duty to determine whether revocation would be ordered).

2. Revocation procedure

The procedural rules applicable to probation revocation hearings are also applicable to community corrections placement revocation proceedings. Cox v. State, 706 N.E.2d 547 (Ind. 1999) (quoting Brooks v. State, 692 N.E.2d 951, 953 (Ind. Ct. App. 1998)).

For a discussion of the procedural rules in a probation revocation hearing, see Chapter 12, *Probation*, Subsection V.B., *Revocation Procedure*.

Toomey v. State, 887 N.E.2d 122 (Ind. Ct. App. 2008) (court can revoke defendant's three-year placement in community corrections and his subsequent three-year home detention placement based on his failure to return to the community corrections program for four days).

Johnson v. State, 62 N.E.3d 1224 (Ind. Ct. App. 2016) (trial court's determination that defendant's violation of the requirement that he not leave his apartment warranted serving the entirety of the remaining portion of his executed sentence in the DOC was an abuse of discretion, because the circumstances also included that defendant's limited mental functioning, scant financial resources, previous successful placement on work release, and the nature of the violation warranted placement in work release instead of the DOC).

a. Due process rights

A defendant in community corrections is entitled to written notice of the claimed violation of the terms of his placement, disclosure of the evidence against him, the opportunity to be heard and present evidence, and the right to confront and cross-examine adverse witnesses in a neutral hearing before the trial court. Davis v. State, 669 N.E.2d 1005, 1008 (Ind. Ct. App. 1996).

Pope v. State, 853 N.E.2d 970 (Ind. Ct. App. 2006) (although defendant agreed that decision to revoke home detention would be made by community corrections rather than trial court, she did not waive her due process rights to notice and hearing when she entered into the agreement).

Million v. State, 646 N.E.2d 998 (Ind. Ct. App. 1995) (trial court violated defendant's due process right to hearing by deferring to administrative decision made by community corrections personnel; trial court erroneously believed that its function was to determine whether administrative hearing was properly conducted).

Luster v. State, 130 N.E.3d 131 (Ind. Ct. App. 2019) (failure to consider evidence of defendant's competency prior to proceeding with the petition to revoke placement in community corrections was a violation of due process).

Monroe v. State, 899 N.E.2d 688 (Ind. Ct. App. 2009) (Crawford v. Washington does not apply in community corrections revocation placement hearings).

Crump v. State, 740 N.E.2d 564 (Ind. Ct. App. 2000) (fact that community corrections program terminated defendant's work release after defendant admitted at administrative hearing that he had consumed alcohol did not violate due process, because defendant was eventually given court hearing as to community corrections placement revocation at which he was represented by counsel; further, admission of defendant's statements at administrative hearing did not violate Sixth Amendment because defendant did not have right to attorney at administrative hearing, and even if statements were in violation of Fifth Amendment, admission into evidence was harmless).

Arrowood v. State, 152 N.E.3d 663 (Ind. Ct. App. 2020) (the right to counsel at all criminal prosecutions, as guaranteed by Ind. Const. art. I, § 13, does not extend to revocation hearings, which are civil, not criminal, in nature; more lenient due process

standard applies; here, no right to counsel violation where counsel appeared and represented probationer in a procedurally fair setting in the revocation of her placement in community corrections).

McQueen v. State, 862 N.E.2d 1237 (Ind. Ct. App. 2007) (in light of defendant's own testimony that he illegally took OxyContin and as a result tested positive for oxycodone in violation of Work Release Center rules, there was no prejudice to him in admission of hearsay testimony regarding results of toxicology report).

Withers v. State, 15 N.E.3d 660 (Ind. Ct. App. 2014) (trial court was authorized to take judicial notice of attendance reports in hearing to terminate placement in drug court program).

Pavey v. State, 710 N.E.2d 219 (Ind. Ct. App. 1999) (although defendant was placed on work release for one-and-half years followed by probation under two cause numbers, State filed under one cause number work release violation alleging that defendant had violated jail rules; there was sufficient notice that work release and suspended sentences could be revoked under both cause numbers).

b. Timeliness of revocation

Trial court can revoke a defendant's placement in a community corrections program for conduct occurring before the commencement of the placement. Million v. State, 646 N.E.2d 998, 1002 (Ind. Ct. App. 1995); Johnson v. State, 606 N.E.2d 881, 882 (Ind. Ct. App. 1993).

Gardner v. State, 678 N.E.2d 398 (Ind. Ct. App. 1997) (defendant's probation could be revoked before he began serving sentence in community corrections program, regardless of whether such sentence, which was followed by probation, constituted "executed sentence," rendering probation revocation prospective, or "suspended sentence" akin to probation).

PRACTICE POINTER: If probation files a petition to revoke a defendant's probationary period based on the defendant's revocation of his direct placement in a community corrections program, and the first revocation was unsuccessful for the State, argue the second revocation violates the principles of res judicata. Cf. Shumate v. State, 718 N.E.2d 1133 (Ind. Ct. App. 1999).

c. Evidence Rules

Because community corrections placement revocation procedures are to be flexible, strict rules of evidence do not apply. Rather, in revocation hearings, judges may consider any relevant evidence bearing some substantial indicia of reliability, including reliable hearsay. 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(d)(2).

Cox v. State, 706 N.E.2d 547 (Ind. 1999) (test results from urinalysis conducted by independent toxicology lab were admissible in probation revocation hearing although they constituted hearsay).

Withers v. State, 15 N.E.3d 660 (Ind. Ct. App. 2014) (even if not electronically signed, attendance records constitute reliable hearsay evidence for purposes of hearing to terminate participation in drug court program, and trial court was authorized to take judicial notice of attendance reports).

Monroe v. State, 899 N.E.2d 688 (Ind. Ct. App. 2009) (hearsay that officers found gun in home where defendant was staying on home detention was reliable and its admission did not violate the Sixth Amendment).

d. Standard of review

The State's burden of proof for a petition to terminate defendant's involvement in a community corrections program is the same as the burden for proof to revoke probation; the State must prove the violation by a preponderance of the evidence.

Bennett v. State, 119 N.E.3d 1057, 1059 (Ind. 2019) (insufficient evidence defendant violated community corrections placement condition of possessing obscene material where trial court made "conflicting statements," finding first that it believed the State "met their burden and [the court] would find the Defendant in violation" before pivoting at sentencing to state, "I don't find that paragraph two is necessarily met").

Decker v. State, 704 N.E.2d 1101 (Ind. Ct. App. 1999) (results of urine screen, showing that there were increased levels of marijuana in defendant's system, coupled with defendant's admission that he had taken a couple puffs of marijuana cigarette were sufficient to show defendant possessed marijuana and, thus, violated terms of work release).

Brooks v. State, 692 N.E.2d 951 (Ind. Ct. App. 1998) (because court was entitled to infer from arresting officer's testimony that cocaine and drug paraphernalia found on ground where defendant had been standing belonged to defendant, evidence was sufficient to support in-home detention termination).

V. FORENSIC DIVERSION PROGRAM

A. DEVELOPMENT AND COMPONENTS OF FORENSIC DIVERSION PLAN

Pursuant to Ind. Code § 11-12-3.7-7(a), the community corrections advisory board or forensic diversion program advisory board (if there is not a community corrections advisory board in the county) shall develop a forensic diversion plan to provide an adult who:

(1) has an intellectual disability, a developmental disability, an autism spectrum disorder, a mental illness, an addictive disorder, or both a combination of those conditions; and

(2) has been charged with a crime that is not a violent crime;

an opportunity, pre-conviction or post-conviction, to receive community treatment and other services addressing mental health and addictions instead of or in addition to incarceration.

In developing a plan, the advisory board must consider the ability of existing programs and resources within the community, including:

(1) a problem solving court established under IC 33-23-16.

(2) a court alcohol and drug program certified under IC 12-23-14-13.

(3) treatment providers certified by the division of mental health and addiction under IC 12-23-1-6 or IC 12-21-2-3(5); and

(4) other public and private agencies.

Ind. Code § 11-12-3.7-7(c).

PRACTICE POINTER: Ind. Code § 35-36-12 authorizes a court to appoint a "court appointed forensic advocate" at any time to assist a person with an intellectual disability, a developmental disability, or an autism spectrum disorder who has been charged with a criminal offense.

The forensic diversion plan may include any combination of the following components:

(1) Pre-conviction diversion for adults with mental illness.

(2) Pre-conviction diversion for adults with addictive disorders.

(3) Pre-conviction diversion for adults with developmental disabilities.

(4) Pre-conviction diversion for adults with intellectual disabilities.

(5) Pre-conviction diversion for individuals with autism spectrum disorder.

(6) Post-conviction diversion for adults with mental illness.

(7) Post-conviction diversion for adults with addictive disorders.

(8) Post-conviction diversion for adults with intellectual disabilities.

(9) Post-conviction diversion for adults with developmental disabilities

(10) Post-conviction diversion for adults with autism spectrum disorder.

Ind. Code § 11-12-3.7-7(b).

Lomont v. State, 852 N.E.2d 1002 (Ind. Ct. App. 2006) (lack of a forensic diversion program in Steuben County when five other counties and cities have such a program did not deny defendant equal protection of law under Fourteenth Amendment to U.S. Constitution or violate defendant's rights guaranteed by Privileges and Immunities clause of Indiana Constitution).

Morales v. State, 991 N.E.2d 619 (Ind. Ct. App. 2013) (if a county decides to implement a forensic diversion program, that county has the discretion to decide its program's scope).

B. DEFINITIONS

Pursuant to Ind. Code § 11-12-3.7-4, "forensic diversion program" means a program designed to provide an adult who has an intellectual disability, an autism spectrum disorder, a mental illness, an addictive disorder or a combination of those conditions, who has been charged with a non-violent offense an opportunity to receive community treatment and other services addressing mental health and addiction instead of or in addition to incarceration.

"Addictive disorder" means a diagnosable chronic substance use disorder of sufficient duration to meet diagnostic criteria within the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. Ind. Code § 11-12-3.7-1.

"Autism spectrum disorder" has the meaning set forth in the most recent edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. Ind. Code § 11-12-3.7-2.5.

"Developmental disability" has the meaning set forth in IC 12-7-2-61. Ind. Code § 11-12-3.7-2.8.

"Mental illness" means a psychiatric disorder that is of sufficient duration to meet diagnostic criteria within the most recent edition of the Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association. Ind. Code § 11-12-3.7-5.

C. ELIGIBILITY

An adult who has an intellectual disability, an autism spectrum disorder, or a combination of those conditions and who has been charged with or convicted of a crime that is not a violent offense (as defined in IC 11-12-3.7-6) may request treatment under this chapter, or the court may order evaluation of the individual to determine if the person is an appropriate candidate for forensic diversion. Ind. Code § 11-12-3.7-4. As used in this chapter, "violent offense" means one (1) or more of the following offenses:

(1) Murder (Ind. Code 35-42-1-1);

(2) Attempted murder (Ind. Code 35-41-5-1);

(3) Voluntary manslaughter (Ind. Code 35-42-1-3);

(4) Involuntary manslaughter (Ind. Code 35-42-1-4);

(5) Reckless homicide (Ind. Code 35-42-1-5);

(6) Aggravated battery (Ind. Code 35-42-2-1.5);

(7) Battery as a Class A, B, or C felony (Ind. Code 35-42-2-1) for a crime committed before July 1, 2014, or a Level 2 felony, Level 3 felony or Level 5 felony, if committed after June 30, 2014);

(8) Kidnapping (Ind. Code 35-42-3-2);

(9) A sex crime listed in Ind. Code 35-42-4-1 through Ind. Code 35-42-4-8 that is a Class A felony, B felony, or Class C felony, if committed before July 1, 2014, or a Level 1-5 felony if committed after June 30, 2014;

(10) Sexual misconduct with a minor as a Class A or B felony (Ind. Code 35-42-4-9), if committed before July 1, 2014, or a Level 1-4 felony if committed after June 30, 2014;

(11) Incest (Ind. Code 35-46-1-3);

(12) Robbery as a Class A or B felony (Ind. Code 35-42-5-1), if committed before July 1, 2014, or a Level 2 or 3 felony if committed after June 30, 2014;

(13) Burglary as a Class A or B felony (Ind. Code 35-43-2-1), if committed before July 1, 2014, or a Level 1-4 felony if committed after June 30, 2014;

(14) Carjacking (Ind. Code 35-42-5-2) (repealed effective July 1, 2014);

(15) Assisting a criminal as a Class C felony (Ind. Code 35-44.1-2-5) if committed before July 1, 2014, or a Level 5 felony if committed after June 30, 2014;

(16) Escape as a Class B or C felony (Ind. Code 35-44.1-3-4) if committed before July 1, 2014, or a Level 4 or 5 felony if committed after June 30, 2014;

(17) Trafficking with an inmate as a Class C felony (Ind. Code 35-44.1-3-5) if committed before July 1, 2014, or a Level 4 or 5 felony if committed after June 30, 2014;

(18) Causing death or catastrophic injury when operating a motor vehicle (Ind. Code 9-30-5-5);

(19) Criminal confinement as a Class B felony (Ind. Code 35-42-3-3) if committed before July 1, 2014, or a Level 3 felony if committed after June 30, 2014;

(20) Arson as a Class A or B felony (Ind. Code 35-43-1-1) if committed before July 1, 2014, or a Level 2-4 3 felony if committed after June 30, 2014;

(21) Possession, use, or manufacture of a weapon of mass destruction (IC 35-46.5-2-1) (or IC 35-47-12-1 before its repeal).

(22) Terroristic mischief (IC 35-46.5-2-3) (or IC 35-47-12-3 before its repeal) as a Class B felony if committed before July 1, 2014, or a Level 4 felony if committed after June 30, 2014;

(23) Hijacking or disrupting an aircraft (Ind. Code 35-47-6-1.6);

(24) A violation of Ind. Code 35-47.5 (Controlled explosives) as a Class A or B felony if committed before July 1, 2014, or a Level 2 or Level 4 felony if committed after June 30, 2014;

(25) Domestic battery (IC 35-42-2-1.3) as a Level 2 felony, Level 3 felony, or Level 5 felony; or

(26) Any other crimes evidencing a propensity or history of violence.

Ind. Code § 11-12-3.7-6

1. Pre-conviction forensic diversion plan (misdemeanors and Class D and Level 6 felonies)

A person is eligible to participate in a pre-conviction forensic diversion program only if the person meets the following criteria:

(1) The person has an intellectual disability, a developmental disability, an autism spectrum disorder, a mental illness, an addictive disorder, or a combination of those conditions.

(2) The person has been charged with an offense that is:

(a) not a violent offense; and

(b) a Class A, B, or C misdemeanor, or a Class D felony if committed before July 1, 2014, or a Level 6 felony if committed after June 30, 2014, that may be reduced to a Class A misdemeanor in accordance with IC 35-50-2-7 .

(3) The person does not have a conviction for a violent offense in the previous ten (10) years.

(4) The court has determined that the person is an appropriate candidate to participate in a pre-conviction forensic diversion program.

(5) The person has been accepted into a pre-conviction forensic diversion program.

Ind. Code § 11-12-3.7-11(a).

PRACTICE POINTER: Ind. Code § 35-36-12 (effective July 1, 2015) authorizes a court to appoint a "court appointed forensic advocate" at any time to assist a person with an intellectual disability, a developmental disability, or an autism spectrum disorder who has been charged with a criminal offense.

a. Conditions

Before an eligible person may participate in a pre-conviction forensic diversion program, the person must plead guilty to the offense with which the person is charged. After the person has pleaded guilty, the court shall stay entry of judgment of conviction and place the person in the pre-conviction forensic diversion program for not more than:

(1) two years, if the person has been charged with a misdemeanor; or

(2) three years, if the person has been charged with a felony.

Ind. Code § 11-12-3.7-11(c) and (e).

b. Required advisements

Before an eligible person is permitted to participate in a pre-conviction forensic diversion program, the court shall advise the person of the following:

(1) Before the individual is permitted to participate in the program, the individual will be required to enter a guilty plea to the offense with which the individual has been charged.

(2) The court will stay entry of the judgment of conviction during the time in which the individual is successfully participating in the program. If the individual stops successfully participating in the program, or does not successfully complete the program, the court will lift its stay, enter a judgment of conviction, and sentence the individual accordingly.

(3) If the individual participates in the program, the individual may be required to remain in the program for a period not to exceed three (3) years.

(4) During treatment the individual may be confined in an institution, be released for treatment in the community, receive supervised aftercare in the community, or may be required to receive a combination of these alternatives. Programs for addictive orders may include:

(a) addiction counseling:

(b) inpatient detoxification;

(c) case management;

(d) daily living skills; and

(e) medication assisted treatment, including a federal Food and Drug Administration approved long acting, non-addictive medication for the treatment of opioid or alcohol dependence.

(5) If the individual successfully completes the forensic diversion program, the court will waive entry of the judgment of conviction and dismiss the charges.

(6) The court shall determine, after considering a report from the forensic diversion program, whether the individual is successfully participating in or has successfully completed the program.

Ind. Code § 11-12-3.7-11(b).

c. Consequences of completion or failure to complete program

If, after considering the report of the forensic diversion program, the court determines that the person has:

(1) failed to successfully participate in or complete the program, the court shall lift its stay, enter judgment of conviction, and sentence the person, accordingly; or

(2) successfully completed the forensic diversion program, the court shall waive entry of the judgment of conviction and dismiss the charges.

Ind. Code § 11-12-3.7-11(f).

2. Post-conviction forensic diversion program

A person is eligible to participate in a post-conviction forensic diversion program only if the person meets the following criteria:

(1) The person has an intellectual disability, a developmental disability, an autism spectrum disorder, or a combination of those conditions.

(2) The person has been convicted of an offense that is:

(a) not a violent offense; and

(b) not a drug dealing offense.

(3) The person does not have a conviction for a violent offense in the previous ten (10) years.

(4) The court has determined that the person is an appropriate candidate to participate in a post-conviction forensic diversion program.

(5) The person has been accepted into a post-conviction forensic diversion program.

Ind. Code § 11-12-3.7-12(a).

Members v. State, 857 N.E.2d 1019 (Ind. Ct. App. 2006) (trial court did not abuse its discretion by denying defendant's request for placement in a post-conviction forensic diversion program, where defendant offered no evidence of his current mental state; psychiatrist testified that it was very unlikely that significant progress would have been made with respect to mental illness since 1994 diagnosis).

A "drug dealing offense" means one (1) or more of the following offenses:

(1) Dealing in cocaine or a narcotic drug (Ind. Code § 35-48-4-1), unless the person only received minimal consideration as a result of the drug transaction.

(2) Dealing in methamphetamine (Ind. Code § 35-48-4-1.1), unless the person received only minimal consideration as a result of the drug transaction.

(3) Dealing in a schedule I, II, III, IV, or V controlled substance (Ind. Code § 35-48-4-2 through Ind. Code § 35-48-4-4), unless the person received only minimal consideration as a result of the drug transaction.

(4) Dealing in marijuana, hash oil, hashish, salvia, or a synthetic cannabinoid (Ind. Code § 35-48-4-10), unless the person received only minimal consideration as a result of the drug transaction.

Ind. Code § 11-12-3.7-3.

a. Conditions

(1) Suspendible offenses

If the person meets the eligibility criteria described in IC 11-12-3.7-12(a) and has been convicted of an offense that may be suspended, the court may:

(a) suspend all or a portion of the person's sentence;

(b) place the person on probation for the suspended portion of the person's sentence; and

(c) require as a condition of probation that the person participate in and successfully complete the post-conviction forensic diversion program.

Ind. Code § 11-12-3.7-12(b).

Ruble v. State, 859 N.E.2d 338 (Ind. 2007) (trial court had the authority to determine, based on an evaluation of defendant's suitability for diversion, as well as nature of offense and offender, whether to order defendant placed on Forensic Diversion; Legislature did not intend mandatory suspension and referral of all persons meeting the minimum criteria in IC 11-12-3.7-12).

(2) Non-suspendible offenses

If the person meets the eligibility criteria described in IC 11-12-3.7-12(a) and has been convicted of an offense that is non-suspendible, the court may:

(a) order the execution of the non-suspendible sentence; and

(b) stay execution of all or part of the non-suspendible portion of the sentence pending the person's successful participation in and successful completion of the post-conviction forensic diversion program.

The court shall treat the suspendible portion of a non-suspendible sentence in accordance with subsection IC 11-12-3.7-12(b). Ind. Code § 11-12-3.7-12(c).

(3) Length of program

The person may be required to participate in the post-conviction forensic diversion program for no more than:

(a) two years, if the person has been charged with a misdemeanor; or

(b) three years, if the person has been charged with a felony.

The time periods described in this section only limit the amount of time a person may be placed on probation.

Ind. Code § 11-12-3.7-12(d).

b. Consequences of completion or failure to complete program

(1) Suspendible offenses

If, after considering the report of the forensic diversion program, the court determines that a person convicted of an offense that may be suspended has failed to successfully participate in the forensic diversion program, or has failed to successfully complete the program, the court may do any of the following:

(a) Revoke the person's probation.

(b) Order all or a portion of the person's suspended sentence to be executed.

(c) Modify the person's sentence.

(d) Order the person to serve all or a portion of the person's suspended sentence in:

(i) a work release program established by the department under IC 11-10-8 or Ind. Code § 11-10-10; or

(ii) a county work release program under IC 11-12-5.

Ind. Code § 11-12-3.7-12(e).

(2) Non-suspendible offenses

If, after considering the report of the forensic diversion program, the court determines that a person convicted of a non-suspendible offense failed to successfully participate in the forensic diversion program, or failed to successfully complete the program, the court may do any of the following:

(a) Lift its stay of execution of the non-suspendible portion of the sentence and remand the person to the department.

(b) Order the person to serve all or a portion of the non-suspendible portion of the sentence that is stayed in:

(i) a work release program established by the department under IC 11-10-8 or IC 11-10-10; or

(ii) a county work release program under IC 11-12-5.

(c) Modify the person's sentence.

However, if the person failed to successfully participate in the forensic diversion program or failed to successfully complete the program while serving the suspendible portion of a non-suspendible sentence, the court may treat the suspendible portion of the sentence in accordance with subsection Ind. Code § 11-12-3.7-12(e) (see above).

Ind. Code § 11-12-3.7-12(f).

If the court determines that a person convicted of a non-suspendible offense has successfully completed the program, the court shall waive execution of the non-suspendible portion of the person's sentence.

Ind. Code § 11-12-3.7-12(g).

VI. ALTERNATIVE MISDEMEANOR SENTENCING

A. JUDGMENT AS MISDEMEANOR AT TIME OF SENTENCING

1. Ind. Code § 35-50-2-7(c)

Pursuant to Ind. Code § 35-50-2-7(c), if a person has committed a Class D felony, if committed before July 1, 2014, or a Level 6 felony, if committed after June 30, 2014, the court may enter judgment of conviction of a Class A misdemeanor and sentence accordingly. However, the court shall enter a judgment of conviction of a Class D felony if committed before July 1, 2014, or a Level 6 felony, if committed after June 30, 2014 if:

(1) the court finds that:

(a) the person has committed a prior, unrelated felony for which judgment was entered as a conviction for a Class A misdemeanor; and

(b) the prior felony was committed less than three years before the second felony was committed;

(2) the offense is domestic battery as a Class D felony if committed before July 1, 2014, or a Level 6 felony, if committed after June 30, 2014, under IC 35-42-2-1.3; or

(3) the offense is possession of child pornography (Ind. Code § 35-42-4-4(d)).

The court shall enter in the record, in detail, the reason for its action whenever it exercises the power to enter judgment of conviction of a Class A misdemeanor granted in this subsection.

Fox v. State, 916 N.E.2d 708 (Ind. Ct. App. 2009) (although IC 35-50-2-7(b) (now subsection (c)) requires a court to explain why it grants misdemeanor sentencing, it does not require it to explain why misdemeanor sentencing is not granted; neither is trial court required to find or balance aggravating or mitigating factors when deciding whether to

grant a defendant's request for leniency; a trial court has broad discretion whether to grant leniency under IC 35-50-2-7(b) (now subsection (c)) moreover, App. R. 7(B) appropriateness analysis does not apply to trial court's rejection of request of alternative misdemeanor sentencing).

2. Ind. Code § 35-50-2-7(d)

Pursuant to Ind. Code § 35-50-2-7(d), the sentencing court may convert a Class D felony conviction (for a crime committed before July 1, 2014) or a Level 6 felony conviction (for a crime committed after June 30, 2014) to a Class A misdemeanor conviction if, after receiving a verified petition as described in subsection (e) and after conducting a hearing of which the prosecuting attorney has been notified, the court makes the following findings:

(1) The person is not a sex or violent offender (as defined in IC 11-8-8-5).

(2) The person was not convicted of a Class D felony (for a crime committed before July 1, 2014) or a Level 6 felony (for a crime committed after June 30, 2014) that resulted in bodily injury to another person.

(3) The person has not been convicted of perjury under IC 35-44.1-2-1 (or IC 35-44-2-1 before its repeal) or official misconduct under IC 35-44.1-1-1 (or IC 35-44-1-2 before its repeal).

(4) The person has not been convicted of domestic battery as a Class D felony (for a crime committed before July 1, 2014) or a Level 6 felony (for a crime committed after June 30, 2014) under IC 35-42-2-1.3 in the fifteen (15) year period immediately preceding the commission of the current offense.

(5) At least three (3) years have passed since the person:

(a) completed the person's sentence; and

(b) satisfied any other obligation imposed on the person as part of the sentence;

for the Class D or Level 6 felony.

(6) The person has not been convicted of a felony since the person:

(a) completed the person's sentence; and

(b) satisfied any other obligation imposed on the person as part of the sentence;

for the Class D or Level 6 felony.

(7) No criminal charges are pending against the person.

3. Plea agreements foreclosing misdemeanor treatment

Terms of a plea agreement between the State and the defendant are contractual in nature. When a trial court accepts a plea agreement, it shall be bound by its terms.

State v. Smith, 71 N.E.3d 368 (Ind. 2017) (unambiguous terms of defendant's 2000 plea agreement precluded converting his felony theft conviction to a misdemeanor pursuant to the 2012 amended version of I.C. 35-50-2-7(d); not holding defendant to this agreement would deny the State the benefit of its bargain. Thus, trial court exceeded its authority when it later granted defendant's request of misdemeanor treatment).

4. A petition filed pursuant to Ind. Code § 35-50-2-7(d) or (f) must be verified and set forth:

(1) the crime the person has been convicted of;

(2) the date of the conviction;

(3) the date the person completed the person's sentence;

(4) any obligations imposed on the person as part of the sentence;

(5) the date the obligations were satisfied; and

(6) a verified statement that there are no criminal charges pending against the person.

Ind. Code § 35-50-2-7(e).

If a person whose Class D or Level 6 felony conviction has been converted to a Class A misdemeanor conviction under subsection (d) is convicted of a felony not later than five years after the conversion under IC 35-50-2-7(d), a prosecutor may petition a court to convert the person's Class A misdemeanor conviction back to a Class D or Level 6 felony conviction. Ind. Code § 35-50-2-7(f). The prosecutor's petition must comport with the requirements of IC 35-50-2-7(e), set out above.

B. "CONVERTED" LEVEL 6 FELONIES

1. Ind. Code § 35-38-1-1.5

Pursuant to Ind. Code § 35-38-1-1.5(a), a court may enter judgment of conviction as a Level 6 felony with the express provision that the conviction will be converted to a conviction as a Class A misdemeanor if the person fulfills certain conditions. A court may enter judgment of conviction as a Level 6 felony with the express provision that the conviction will be converted to a conviction as a Class A misdemeanor only if the person pleads guilty to a Level 6 felony that qualifies for consideration as a Class A misdemeanor under IC 35-50-2-7 (see above), and the following conditions are met:

(1) The prosecuting attorney consents.

(2) The person agrees to the conditions set by the court.

For a judgment of conviction to be entered under this statute, the court, the prosecuting attorney, and the person must all agree to the conditions set by the court under IC 35-38-1-1.5(a). Ind. Code § 35-38-1-1.5(b).

The court is not required to convert a judgment of conviction entered as a Level 6 felony to a Class A misdemeanor if, after a hearing, the court finds:

(1) the person has violated a condition set by the court under IC 35-38-1-1.5(a); or

(2) the period that the conditions set by the court under IC 35-38-1-1.5 (a) are in effect expires before the person successfully completes each condition.

However, the court may not convert a judgment of conviction entered as a Level 6 felony to a Class A misdemeanor if the person commits a new offense before the conditions set by the court under IC 35-38-1-1.5(a) expire. Ind. Code § 35-38-1-1.5(c).

Recker v. State, 904 N.E.2d 724 (Ind. Ct. App. 2009) (where defendant asked for repeated extension of probation in which to fulfill community service condition, trial court had discretion to deny conversion to Class A misdemeanor; where defendant committed new offense during extension of probationary period, trial court had no discretion to convert conviction to misdemeanor).

If the defendant does fulfill all conditions set under IC 35-38-1-1.5(a), the court is required to enter a judgment of conviction as a Class A misdemeanor. Ind. Code § 35-38-1-1.5(d).

Leeth v. State, 868 N.E.2d 65 (Ind. Ct. App. 2009) (trial court was required to convert judgment of conviction to misdemeanor where: (1) State consented to proposed modification of conviction in plea agreement; (2) State did not present evidence that defendant violated or did not complete the conditions during probationary period; and (3) probation officer filed a discharge stating he had successfully completed probation).

Ott v. State, 997 N.E.2d 1083 (Ind. Ct. App. 2013) (trial court did not err in denying defendant's motion to convert a D felony to an A misdemeanor pursuant to IC 35-50-2-7(c) where defendant pled guilty to a felony before Indiana started to designate felonies by distinct classes);

State v. Boyle, 947 N.E.2d 912 (Ind. 2011) (IC 35-38-1-1.5 provides trial courts the only authority to grant misdemeanor modification after sentencing; because State did not consent to misdemeanor modification in defendant's plea agreement, defendant was not entitled to modification ten years after conviction; even had the State agreed, trial court, pursuant to Ind. Code § 35-38-1-1.5 only has the authority to grant modification to a misdemeanor within three (3) years of conviction);

State v. Brunner, 947 N.E.2d 411 (Ind. 2011) (trial court lacked authority to modify defendant's conviction to a misdemeanor years after he had served his sentence; trial court's authority under IC 35-50-2-7(b) (now subsection (c)) to enter a judgment as a misdemeanor is limited to the time of sentencing);

Recker v. State, 904 N.E.2d 724 (Ind. Ct. App. 2009) (where defendant asked for repeated extension of probation in which to fulfill community service condition, trial court had discretion to deny conversion to Class A misdemeanor; where defendant committed new offense during extension of probationary period, trial court had no discretion to convert conviction to Class A misdemeanor).

The entry of judgment of conviction under this statute does not affect the application of any statute requiring the suspension of a person's driving privileges. Ind. Code § 35-38-1-1.5(e).

This statute may not be construed to diminish or alter the rights of a victim (as defined in IC 35-40-4-8) in a sentencing proceeding under this chapter.

2. AMS allows reduction of lifetime driving forfeiture to suspension

State v. Vankirk, 955 N.E.2d 765 (Ind. Ct. App. 2011), *trans. denied* (trial court did not err in finding that modification of Defendant's sentence for Operating Vehicle While Habitual Traffic Offender from D felony to A misdemeanor pursuant to AMS meant that defendant's driving privileges were no longer suspended for life.

3. AMS and plea agreements

a. Judicial estoppel

Troxell v. State, 956 N.E.2d 164 (Ind. Ct. App. 2011) (judicial estoppel prevented State from assuming a position in a legal proceeding inconsistent with one previously asserted; because State entered plea agreement that did not permit Defendant to petition for a reduction until after three years had passed, it cannot now claim that Defendant is time barred from petition for a reduction because he did not do so within three years).

VII. CONDITIONAL DISCHARGE FOR MARIJUANA POSSESSION

If a person who has no prior conviction of an offense under this article or under a law of another jurisdiction relating to controlled substances pleads guilty to possession of marijuana, hashish, salvia, or smokable hemp as a misdemeanor, the court, without entering a judgment of conviction and with the consent of the person, may defer further proceedings and place the person in the custody of the court under conditions determined by the court. Upon violation of a condition of the custody, the court may enter a judgment of conviction. However, if the person fulfills the conditions of the custody, the court shall dismiss the charges against the person. There may be only one (1) dismissal under this section with respect to a person. Ind. Code § 35-48-4-12.

Graffenread v. State, 13 N.E.3d 496 (Ind. Ct. App. 2014) (trial court did not err in denying defendant's petition to defer dealing marijuana count, as statute allows deferral of only possession charges).

Perkins v. State, 715 N.E.2d 1016 (Ind. Ct. App. 1999) (where defendant violates conditions of conditional discharge, trial court may enter judgment of conviction and proceed with sentencing).

Hill v. Norfolk & Ry., 814 F.2d 1192 (7th Cir. 1987) (because IC 35-48-4-12 merely provides that no "judgment of conviction" shall be entered and does not provide that defendant punished under it is not "convicted," it is possible to impose criminal punishment such as probation and fine on person whose prosecution is deferred under this section; for purposes of collective bargaining agreement, defendant punished under IC 35-48-4-12 was convicted).

VIII. PRE-TRIAL DIVERSION

A. ELIGIBILITY

Pursuant to Ind. Code § 33-39-1-8(d), a prosecuting attorney may withhold prosecution against an accused person if:

(1) the person is charged with a misdemeanor, a Level 6 felony, or a Level 5 felony;

(2) the person agrees to conditions of a pretrial diversion program offered by the prosecuting attorney;

(3) the terms of the agreement are recorded in an instrument signed by the person and the prosecuting attorney and filed in the court in which the charge is pending; and

(4) the prosecuting attorney electronically transmits information required by the prosecuting attorneys council concerning the withheld prosecution to the prosecuting attorneys council, in a manner and format designated by the prosecuting attorneys council.

B. EXCLUSIONS

After June 30, 2005, this section does not apply to a person who:

(1) holds a commercial driver's license; and

(2) has been charged with an offense involving the operation of a motor vehicle in accordance with the federal Motor Carrier Safety Improvement Act of 1999.

Ind. Code § 33-39-1-8(a).

Pretrial diversion under IC 33-39-1-8 is not available to a person arrested for or charged with:

(1) an offense under Ind. Code § 9-30-5-1 through Ind. Code § 9-30-5-5; or

(2) if a person was arrested or charged with an offense under Ind. Code § 9-30-5-1 through Ind. Code § 9-30-5-5, an offense involving:

(a) intoxication; or

(b) the operation of a motor vehicle;

if the offense involving intoxication or the operation of a motor vehicle was part of the same episode of criminal conduct as the offense under IC 9-30-5-1 through IC 9-30-5-5.

Ind. Code § 33-39-1-8(b).

Pretrial diversion is not available to a person arrested for or charged with:

(1) illegal possession of alcohol by a minor (IC 7.1-5-7-7), if the alleged offense occurred while the person was operating a motor vehicle (IC 7.1-5-7-7);

(2) unauthorized operation of a motor vehicle (IC 9-30-4-8);

(3) obstruction of traffic if offense includes use of a motor vehicle (IC 35-44.1-2-13(b)(1));

(4) criminal mischief, if the alleged offense occurred while the person was operating a motor vehicle (IC 35-43-1-2(a));

who was less than eighteen (18) years of age at the time of the alleged offense.

Ind. Code § 33-39-1-8(c).

C. CONDITIONS

1. Statutory conditions

Pursuant to Ind. Code § 33-39-1-8(e), an agreement to withhold prosecution may include conditions that the person:

(1) pay to the clerk of the court an initial user's fee and monthly user's fees in the amounts specified in IC 33-37-4-1 [**Note**: the monthly user fee may not be collected beyond the maximum length of a possible sentence];

all money collected by the clerk as user's fees under this section shall be deposited in the appropriate user fee fund under IC 33-37-8. Ind. Code § 33-39-1-8(h).

(2) work faithfully at a suitable employment or faithfully pursue a course of study or career and technical education that will equip the person for suitable employment;

(3) undergo available medical treatment or mental health counseling and remain in a specified facility required for that purpose, including:

(a) addiction counseling;

(b) inpatient detoxification; and

(c) medication assisted treatment, including a federal Food and Drug Administration approved long acting, non-addictive medication for the treatment of opioid or alcohol dependence.

(4) receive evidence based mental health and addiction, intellectual disability, developmental disability, autism, and co-occurring autism and mental illness forensic treatment services to reduce the risk of recidivism;

(5) support the person's dependents and meet other family responsibilities;

(6) make restitution or reparation to the victim of the crime for the damage or injury that was sustained;

(7) refrain from harassing, intimidating, threatening, or having any direct or indirect contact with the victim or a witness;

(8) report to the prosecutor at reasonable times;

(9) answer all reasonable inquiries by the prosecuting attorney and promptly notify the prosecuting attorney of any change in address or employment; and;

(10) participate in dispute resolution either under IC 34-57-3 or a program established by the prosecuting attorney.

Pursuant to Ind. Code § 33-39-1-8(i), if a court withholds prosecution under this section and the terms of the agreement contain the above conditions concerning harassment (IC 33-39-1-8(e)(7)):

(1) the clerk of the court shall comply with IC 5-2-9; and

(2) the prosecuting attorney shall file a confidential form prescribed or approved by the office of judicial administration with the clerk.

PRACTICE POINTER: Ind. Code § 35-36-12 (effective July 1, 2015) authorizes a court to appoint a "court appointed forensic advocate" at any time to assist a person with an intellectual disability, a developmental disability, or an autism spectrum disorder who has been charged with a criminal offense.

2. Non-statutory conditions

If a defendant agrees to the provisions, the prosecutor may include other provisions reasonably related to the defendant's rehabilitation, if approved by the court. Ind. Code § 33-39-1-8(f).

3. Denial of indigents to pretrial diversion unconstitutional

Requiring payment of a fee as an absolute condition of participating in a pretrial diversion program discriminates against indigent persons in violation of the Fourteenth Amendment

> Mueller v. State, 837 N.E.2d 198 (Ind. Ct. App. 2005) (denial of defendants' participation in pretrial diversion program based solely on their inability to pay $230 in user fees violated their rights under federal constitution; if found unable to pay fee, an indigent defendant must be offered an alternative to full payment of fee in form of a partial waiver, reasonable payment schedule or community service).

4. Pretrial Release

A person currently participating in a pretrial diversion program is still considered to be under pretrial release for purposes of sentencing enhancements for subsequent offenses committed during the pretrial diversionary period.

> Christmas v. State, 812 N.E.2d 174 (Ind. 2004) (where terms of the withheld prosecution agreement require the resumption of prosecution if the agreement is violated, the charge remains open, and therefore a defendant is considered on pre-trial release during the diversionary period and any sentencing enhancements for subsequent offenses committed during that pretrial release are appropriate).

5. No sentence credit for pretrial diversion

The trial court has discretion to award or deny credit time for time spent on electronic monitoring as part of drug court program. Meadows v. State, 2 N.E.3d 788 (Ind. Ct. App. 2013); Perry v. State, 13 N.E.3d 909 (Ind. Ct. App. 2014); but see House v. State, 901 N.E.2d 598 (Ind. Ct. App. 2009).

D. NOTICE TO VICTIM

The prosecuting attorney shall notify the victim when prosecution is withheld under this section. Ind. Code § 33-39-1-8(g).

E. EQUAL PROTECTION

The unavailability of a pretrial diversion program in a particular county does not deny a defendant equal protection of law when other counties in the State have such a program.

> Lomont v. State, 852 N.E.2d 1002 (Ind. Ct. App. 2006) (lack of a forensic diversion program in Steuben County when five other counties and cities have such a program did not deny defendant equal protection of law under Fourteenth (14) Amendment to U.S. Constitution or violate defendant's rights guaranteed by Privileges and Immunities clause of Indiana Constitution).

F. NO DUE PROCESS RIGHTS

A defendant does not have a protected liberty interest in remaining in a pretrial diversion program and thus is not entitled to a due process hearing prior to termination from the program. Deurloo v. State, 690 N.E.2d 1210, 1213 (Ind. Ct. App. 1998) (Sullivan, J., concurring on basis that

defendant waived issue by not seeking interlocutory appeal; however, if she had done so, she would have been entitled to notice and opportunity to be heard prior to termination from pre-trial diversion program).