CHAPTER TWELVE

PROBATION

I. IN GENERAL

A. NO RIGHT TO PROBATION

Probation is a matter of grace and a conditional liberty that is a favor, not a right. Noethtich v. State, 676 N.E.2d 1078, 1081 (Ind. Ct. App. 1997); Gordy v. State, 674 N.E.2d 190, 191 (Ind. Ct. App. 1996). Thus, there is no constitutional issue presented when a defendant fails to receive consideration of probation regarding a sentence provided for by the legislature or when the legislature, within its enactments, limits the tool of probation available to a sentencing judge. Stroud v. State, 517 N.E.2d 780, 782 (Ind. 1988).

B. TRIAL COURT'S DISCRETION IN GRANTING PROBATION

A decision whether to grant probation is a matter within the sound discretion of the trial court. Monday v. State, 671 N.E.2d 467, 468 (Ind. Ct. App. 1996); Perry v. State, 642 N.E.2d 536, 538 (Ind. Ct. App. 1994).

However, this discretion is limited by statutory guidelines. For example, a sentence must be suspended before one may be placed on probation. Thurman v. State, 162 Ind. App. 576, 320 N.E.2d 795, 797 (1974), and the trial court does not have the authority to set or modify the length of the term of probation beyond the maximum term of the defendant's suspended sentence or sentences. Slayton v. State, 534 N.E.2d 1130, 1131 (Ind. Ct. App. 1989).

1. Felony

a. Discretionary when sentence suspended

With the repeal of Ind. Code § 35-50-2-2, effective July 1, 2014, whenever the court suspends a sentence for a felony, it may place the person on probation under IC 35-38-2.

b. Commencement of probation

Where a defendant is serving consecutive sentences, his actual release from DOC, not the end of his executed sentence, triggers the probationary phase of his sentence. Hart v. State, 889 N.E.2d 1266 (Ind. Ct. App. 2008).

Probation begins when a person is released from incarceration, not when they report to probation. Davis v. State, 35 N.E.3d 261 (Ind. Ct. App. 2015).

c. Length of probation

The length of probation may not exceed the defendant's suspended sentence.

Day v. State, 669 N.E.2d 1072 (Ind. Ct. App. 1996) (trial court had authority to sentence defendant to probation for nine years to begin after his executed term of ten years had been served, where nine-year probation defendant received equaled rather

than exceeded his suspended sentence).

d. Probation while on parole

Sex offenders, sexually violent predators, and those convicted of murder or voluntary manslaughter are simultaneously subjected to the conditions of probation and parole. Ind. Code § 35-50-6-1(d) or (e). However, for other felonies, an offender is either released to parole, discharged completely or released to probation. Ind. Code § 35-50-6-1(a).

The definition of a "sexually violent predator" is set forth in IC 35-38-1-7.5.

Pursuant to Ind. Code § 11-8-8-4.5, "sex offender" refers to:

(a) a person convicted of:

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

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

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

(4) Child exploitation (IC 35-42-4-4(b) or IC 35-42-4-4(c)).

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

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

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

(8) Sexual misconduct with a minor (IC 35-42-4-9) as a Class A, Class B or Class C felony (for a crime committed before July 1, 2014) or a Level 5 felony (for a crime committed after June 30, 2014), unless:

(A) the person is convicted of sexual misconduct with a minor as a class C felony (for a crime committed before July 1, 1024) or a Level 5 felony (for a crime committed after June 30, 2014;

(B) the person is not more than:

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

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

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

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

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

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

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

(13) Possession of child pornography (IC 35-42-4-4(d) or IC 35-42-4-4(e).

(14) Promoting prostitution (IC 35-45-4-4) as a Class B felony (for a crime committed before July 1, 2014) or a Level 4 felony (for a crime committed after June 30, 2014).

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

(16) Promotion of child sexual trafficking of a minor under IC § 35-42-3.5-1.3.

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

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

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

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

(b) The term includes:

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

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

(i) is at least fourteen years of age;

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

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

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

2. Misdemeanor

Fundamental sentencing guidelines with respect to the treatment of felonies likewise apply to misdemeanors. Smith v. State, 621 N.E.2d 325, 326 (Ind. 1993).

a. Discretionary when sentence suspended

Except as provided Ind. Code § 35-50-3-1(c), whenever the court suspends a sentence for a misdemeanor, it may place the person on probation under IC 35-38-2. Ind. Code § 35-50-3-1(b).

b. Length of probation

The court may place the defendant on probation for a fixed period of not more than one year. Ind. Code § 35-50-3-1(b). The combined term of imprisonment and probation for a misdemeanor may not exceed one year. Id.

Whenever the court suspends a sentence for a misdemeanor, if the court finds that the use or abuse of alcohol, drugs, or harmful substance is a contributing factor or a material element of the offense, the court may place the defendant on probation under IC 35-38-2 for a fixed period of not more than two years. However, a court may not place a person on probation for a period of more than twelve months in the absence of a report that substantiates the need for a period of probation that is longer than twelve months for the purpose of completing a course of substance abuse treatment. Ind. Code § 35-50-3-1(c).

Smith v. State, 621 N.E.2d 325 (Ind. 1993) (IC 35-50-3-1 extends maximum probationary sentence for misdemeanors only when use or abuse of alcohol or drugs or similar substances are contributing factor or material element of offense; otherwise, it is error to sentence defendant to combined term of probation and imprisonment exceeding one year). See also Johnson v. State, 659 N.E.2d 194 (Ind. Ct. App. 1995); Judge v. State, 659 N.E.2d 608 (Ind. Ct. App. 1995).

Jones v. State, 982 N.E.2d 417 (Ind. Ct. App. 2013) (fn. 6 observes that the 2001 amendment to IC 35-50-3-1(b) effectively codifies the court's holding in Smith).

Jennings v. State, 982 N.E2d 1003 (Ind. 2013) ("term of imprisonment" for purposes of IC 35-50-3-1 (b) means only the executed portion of the defendant's sentence).

Datzek v. State, 838 N.E.2d 1149 (Ind. Ct. App. 2005) (trial court did not abuse its discretion when it imposed a one-year sentence with ninety days executed and a year of probation because the offense involved the use of alcohol).

Slinkard v. State, 807 N.E.2d 127 (Ind. Ct. App. 2004) (trial judge had statutory authority under IC 9-30-5-15(b) to require defendant convicted of operating with .10% BAC or greater to participate in substance abuse program in addition to serving maximum jail term).

3. Probation user's fees

a. Felony -mandatory

Under IC 35-38-2-1(d), when a person is placed on probation for a felony, the court is required to order the person to pay to the probation department:

a. an initial probation user's fee of not less than twenty-five dollars ($25) nor more than one hundred dollars ($100) as an initial probation user's fee; and

b. a monthly probation user's fee of not less than fifteen dollars ($15) nor more than thirty dollars ($30) for each month the person is on probation;

c. the cost of the laboratory test or series of tests to detect and confirm the presence of the human immunodeficiency virus (HIV) antigen or antibodies to the HIV virus if such tests are required by the court under IC § 35-38-2- 2.3;

d. an alcohol abuse deterrent fee and a medical fee set by the court under IC 9-30-9-8, if the court has referred the defendant to an alcohol abuse deterrent program; and

e. an administrative fee of one hundred dollars.

The court may modify the conditions or terminate the probation at any time. Ind. Code § 35-38-2-1(b).

b. Misdemeanor - discretionary

Under Ind. Code § 35-38-2-1(e), when a person is placed on probation for a misdemeanor, the court may order the person to pay to the probation department:

a. not more than a fifty dollar ($50) initial user's fee;

b. a monthly probation user's fee of not less than ten dollars ($10) nor more than twenty dollars ($20) for each month of probation;

c. the cost of the laboratory test or series of tests to detect and confirm the presence of the human immunodeficiency virus (HIV) antigen or antibodies to the HIV virus if such tests are required by the court under IC 35-38-2-2.3; and

d. an administrative fee of fifty dollars ($50).

The court may modify the conditions or terminate the probation at any time. Ind. Code § 35-38-2-1(b). Fees imposed under subsection (e) must reflect the amount of time that the defendant is actually on probation.

> Johnson v State, 27 N.E.3d 793, 795 (Ind. Ct. App. 2015) ("Since the $340 in probation fees reflected a twelve-month probation and Johnson served only five of those months, the trial court should recalculate Johnson's probation fees, if appropriate, to correspond with the probation time Johnson actually served. IC.35-38-2-1(e).").

c. Priority of fee collection

The probation department or clerk shall collect the administrative fees of one hundred dollars ($100) for a felony and fifty dollars ($50) for a misdemeanor before collecting any other probation user's fees. Ind. Code § 35-38-2-1(f).

d. Multiple convictions

A person placed on probation for more than one crime may be required to pay more than one initial probation user's fee but may not be required to pay more than one monthly probation user's fee per month. Ind. Code § 35-38-2-1(i).

e. Maximum fee after twelve months

Whenever the court suspends a sentence for a misdemeanor pursuant to Ind. Code § 35-50-3-1(c), a probation user's fee that exceeds 50 percent of the maximum probation user's fee allowed under IC 35-38-2-1 may not be required beyond the first twelve months of probation. Ind. Code § 35-50-3-1(c). For more on probation sentences under

IC 35-50-3-1(c), see Section I.B.2.b.

4. Effect of plea agreement

Where a plea agreement does not specifically state that the defendant is to be placed on probation, but instead just suspends part of the defendant's sentence and refers to usual conditions of probation, the court's placing the defendant on probation does not violate the plea agreement. Minor v. State, 641 N.E.2d 85, 90 (Ind. Ct. App. 1994).

However, a defendant's consent to a probationary period exceeding the statutory maximum obtained in the coercive setting in which the court has the power to imprison the defendant and not place him on probation at all, is without effect. Hoage v. State, 479 N.E.2d 1362, 1364 (Ind. Ct. App. 1985), *disapproved on other grounds by* Smith v. State, 621 N.E.2d 325 (Ind. 1993) (whereas part of plea agreement defendant agreed to probation in excess of statutory maximum, appellate court reversed portion of judgment which imposed probation in excess of statutory limitation).

It is too easy to obtain a defendant's consent to such an extension of probation when the alternative is a prison term. This "consent" cannot be used to make an illegal extension of probation legal. United States v. Rodriguez, 682 F.2d 827 (9th Cir. 1982).

II. CONDITIONS OF PROBATION

A. TRIAL COURT'S DISCRETION

The trial court has broad discretion in establishing conditions of probation to safeguard the general public and to create law-abiding citizens. Gordy v. State, 674 N.E.2d 190, 191 (Ind. Ct. App. 1996).

Taylor v. State, 820 N.E.2d 756 (Ind. Ct. App. 2005) (trial court did not act beyond scope of its authority in requiring defendant to establish paternity of child as condition of probation following OWI conviction; public policy favors establishing paternity of a child born out of wedlock and it also prospectively safeguards general public by creating a legal obligation for support and formally establishes familial relationships that create a law-abiding citizen).

Whitener v. State, 982 N.E.2d 439 (Ind. Ct. App. 2013) (although defendant's rape conviction was vacated because it was based on same evidence that supported his burglary conviction and thus violated double jeopardy, requiring defendant to register as a sex offender as a probation condition was proper and reasonably related to his rehabilitation).

1. Limitations

Conditions of probation should effectuate the supervision required to achieve probation goals and, therefore, must be functionally and rationally related to the probationer's rehabilitative needs and to society's interests. McCloud v. State, 452 N.E.2d 1053, 1056 (Ind. Ct. App. 1983); Alspach v. State, 440 N.E.2d 502 (Ind. Ct. App. 1982); Ewing v. State, 160 Ind. App. 138, 310 N.E.2d 571 (1974). In addition, a court may only prescribe probation conditions that are within statutorily prescribed parameters. Gordy v. State, 674 N.E.2d 190, 191 (Ind. Ct. App. 1996).

Carroll v. State, 740 N.E.2d 1225 (Ind. Ct. App. 2000) (because purpose of probation

condition requiring defendant to give clean-up statement was not rehabilitation of defendant but rather coercion, probation condition was improper; thus, requiring non-immunized clean-up statement was beyond court's authority in this case).

2. Constitutional challenges

When a defendant contends that a probation condition is unduly intrusive upon a constitutional right, the following three factors must be balanced: (1) the purpose sought to be served by probation; (2) the extent to which constitutional rights enjoyed by law-abiding citizens should be afforded to probationers; and (3) the legitimate needs of law enforcement. A defendant does not waive his right to challenge a probation condition by failing to object to the condition at the trial level and by signing a probation condition form. Smith v. State, 779 N.E.2d 111, 117 (Ind. Ct. App. 2002); Bratcher v. State, 999 N.E.2d 864 (Ind. Ct. App. 2013).

For more on constitutional issues with probation conditions*, see* Section II.G, *Constitutional Issues.*

3. Effect of plea agreement

If the court accepts a plea agreement, it shall be bound by its terms. Ind. Code § 35-35-3-3(e). Thus, once an agreement is accepted, the trial court is precluded from imposing any term or condition in a sentence that imposes a substantial obligation of a punitive nature other than what is required by the plea agreement. Restitution or fines may not be added by the court if not included in the plea agreement, but administrative or ministerial terms of probation may be added by the court even though not specified in the plea agreement. The trial court cannot vary the terms of a plea agreement simply by seeking the defendant's verbal assent. Jackson v. State, 968 N.E.2d 328 (Ind. Ct. App. 2012).

Examples of substantial obligations that are punitive in nature:

- Restitution. See Disney v. State, 441 N.E.2d 489 (Ind. Ct. App. 1982) and Sinn v. State, 693 N.E.2d 78 (Ind. Ct. App. 1998).
- Work Release. See Berry v. State, 10 N.E.3d 1243 (Ind. 2014).
- Home Detention. See Freije v. State, 709 N.E.2d 323 (Ind. 1999) and S.S. v. State, 827 N.E.2d 1168 (Ind. Ct. App. 2005).
- Community Service. See Freije v. State, 709 N.E.2d 323 (Ind. 1999).
- License Suspension. See Freije v. State, 709 N.E.2d 323 (Ind. 1999).

Examples of non-penal or non-punitive conditions that can be imposed even if not included in the plea agreement:

- Reporting to Probation Department. See Buck v. State, 580 N.E.2d 730 (Ind. Ct. App. 1991).
- Notifying Probation Officer of Changes in Address or Employment. See Buck v. State, 580 N.E.2d 730 (Ind. Ct. App. 1991).
- Supporting Dependents. See Buck v. State, 580 N.E.2d 730 (Ind. Ct. App. 1991).
- Remaining Within the Jurisdiction of the Court. See Buck v. State, 580 N.E.2d 730 (Ind. Ct. App. 1991).
- Pursuing Course of Vocational or Educational Training. See Buck v. State, 580 N.E.2d 730 (Ind. Ct. App. 1991) and Freije v. State, 709 N.E.2d 323 (Ind. 1999).

- Attending Victim Impact Panel. See Freije v. State, 709 N.E.2d 323 (Ind. 1999).
- Completing Counseling Program. See Freije v. State, 709 N.E.2d 323 (Ind. 1999).
- Attend and complete classes in anger management or conflict resolution. Coleman v. State, 162 N.E.3d 1184 (Ind. Ct. App. 2021).
- Abstinence from Alcohol Use. See Malone v. State, 571 N.E.2d 329 (Ind. Ct. App. 1991).
- Drug Screening. Bryce v. State, 545 N.E.2d 1094 (Ind. Ct. App. 1989).
- Informal Home Detention for juvenile. See L.W. v. State, 798 N.E.2d 904 (Ind. Ct. App. 2003); but see S.S. v. State, 827 N.E.2d 1168 (Ind. Ct. App. 2005) (trial court erred in imposing informal home detention after accepting plea in exchange for receiving suspended commitment).

However, a court may impose substantial probation conditions that were not part of the plea agreement if the agreement expressly reserves the court the power to do so.

Antcliff v. State, 688 N.E.2d 166 (Ind. Ct. App. 1997), superseded by statute on other grounds (where plea agreement left terms of defendant's probation to court's discretion, court did not err in imposing restitution and home detention as conditions of probation).

PRACTICE POINTER: When entering into a plea agreement, keep in mind the difference between a split sentence (partially executed and partially suspended) and a straight executed sentence. Although a split sentence and a straight executed sentence may result in the same initial prison stay, the straight executed sentence does not come with probation and a chance for revocation. See Page v. State, 706 N.E.2d 230 (Ind. Ct. App. 1999). Thus, whenever work release or home detention could be served as an executed sentence or a condition of probation, it may be best to serve the time as an executed sentence.

4. Modification of conditions

Ind. Code § 35-38-2-1.8 permits a court to hold a new probation hearing and modify a probationer's conditions of probation at any time during the probationary period, even though the probationer has not committed a violation. However, terms of probation which impose a substantial obligation of a punitive nature that are not specified in the plea agreement may not be imposed. Freije v. State, 709 N.E.2d 323 (Ind. 1999). This rule applies on original sentencing as well as modifications under IC 35-38-2-1.8, unless a violation or other substantial change in circumstances has occurred requiring the modification. Collins v. State, 911 N.E.2d 700 (Ind. Ct. App. 2009).

Knight v. State, 155 N.E.3d 1242 (Ind. Ct. App. 2020) (trial court complied with procedural requirements of IC 35-38-2-1.8(c) when conducting a new probation hearing but imposing 600 hours of community service condition was beyond the trial court's discretion because that condition was not specified in the plea agreement and the agreement contained language that limited the court's discretion).

B. NOTICE OF CONDITIONS

The court is required to enter the conditions of probation on the record at the sentencing, and to give the person being placed on probation a written statement of the conditions of his probation at the time of sentencing. Disney v. State, 441 N.E.2d 489 (Ind. Ct. App. 1982). A term of probation not entered into the record at sentencing and not furnished in writing to the defendant at sentencing has no effect. Lucas v. State, 501 N.E.2d 480 (Ind. Ct. App. 1986). However, Ind.

Code § 35-38-2-1.8 permits a court to hold a new probation hearing and modify a probationer's conditions of probation at any time during the probationary period.

Atkins v. State, 546 N.E.2d 863 (Ind. Ct. App. 1989) (trial court erred by not providing defendant with condition of his probation requiring him to obtain permission before leaving the premises of retirement center either orally or in writing at sentencing; thus, defendant's probation could not be revoked for violation of this non-existent condition of his probation).

Richardson v. State, 890 N.E.2d 766 (Ind. Ct. App. 2008) (the defendant could not be violated for living with his parents in Kentucky when neither the State nor the trial court advised him of the alleged travel-restriction condition of probation).

1. Written notice of conditions

When a person is placed on probation, the person shall be given a written statement specifying the conditions of probation. Ind. Code § 35-38-2-2.3(b).

2. Failure to give both oral and written notice

The court's failure to provide written statement of conditions is harmless if the court otherwise complies with the statutory intent behind the notice statutes or the defendant's probation is revoked due to his committing another crime.

a. Compliance with statutory intent through oral advisement

Trial court's error in not providing defendant with written statement of terms of probation is harmless if there is otherwise substantial compliance with intent of statute. Menifee v. State, 600 N.E.2d 967, 969 (Ind. Ct. App. 1992), *clarified on denial of rehearing*, 605 N.E.2d 1207. The error is harmless when the trial court orally, on the record, explains conditions to the defendant and the defendant acknowledges his understanding of said conditions. Gil v. State, 988 N.E.2d 1231 (Ind. Ct. App. 2013); Ratliff v. State, 546 N.E.2d 309, 311 (Ind. Ct. App. 1989).

However, to be sufficient, oral advisement of conditions of probation must apprise the defendant in adequately definite terms of the behavior required of him, must be addressed to the defendant, must be administered by the sentencing court, and must be identified as a condition of the defendant's continued probation. Menifee v. State, 600 N.E.2d 967, 969 (Ind. Ct. App. 1992), *clarified on denial of rehearing*, 605 N.E.2d 1207; Ratliff v. State, 546 N.E.2d 309, 311 (Ind. Ct. App. 1989).

White v. State, 560 N.E.2d 45 (Ind. 1990) (where court orally instructed defendant to serve ten days of alternative service but failed to set specific dates for the completion of such service, court's advisement was adequate in order to make delay in giving defendant written statement of conditions harmless).

State v. Allen, 809 N.E.2d 845 (Ind. Ct. App. 2004) (although sentencing court gave a "fairly specific" oral advisement of probation conditions, the probation violation was properly dismissed because defendant did not acknowledge that he understood the conditions and was not given a written copy of the conditions); see also Gil v. State, 988 N.E.2d 1231 (Ind. Ct. App. 2013).

Seals v. State, 700 N.E.2d 1189 (Ind. Ct. App. 1998) (where court informed probationer that he was required as condition of probation to report to his probation officer as directed, probationer claimed that he understood this condition, and probation officer later contacted probationer and ordered him to report to probation office, fact that probationer did not receive written statement of this condition was harmless).

Malone v. State, 571 N.E.2d 329 (Ind. Ct. App. 1991) (oral advisement that defendant abstain from alcohol use apprised her, in adequately definite terms, of behavior required of her, was addressed to her, was administered by sentencing court, and was identified as condition of her continued probation, was sufficient to fulfill intent of notice statute although court failed to provide written statement of condition).

Ratliff v. State, 546 N.E.2d 309 (Ind. Ct. App. 1989) (trial court's colloquy with counsel concerning conditions of probation was not adequate advisement to defendant of terms of his continued probation; while sentencing court's order book entry complied with statute requiring advisement at sentencing hearing, it failed to fulfill notice requirement because defendant was not informed of contents of order book entry).

Harder v. State, 501 N.E.2d 1117 (Ind. Ct. App. 1986) (although trial court orally advised defendant of three probation conditions, it failed to be sufficiently specific because it failed to advise defendant that he had to submit to conditions by specific date; also, court failed to inform defendant at hearing or through written statement that he must report to probation officer, notify department of change of address, employment or telephone number, or remaining in the jurisdiction; thus, trial court erred by not providing sufficient notice of conditions).

b. Commission of another crime

Although the trial court must specify conditions of probation in the record, it is always a condition of probation that probationer not commit an additional crime. Braxton v. State, 651 N.E.2d 268, 270 (Ind. 1995). Thus, it is harmless error where the trial court fails to provide the defendant with a statement of conditions of his probation but revokes the probation for a commission of an additional crime. Wilburn v. State, 671 N.E.2d 143, 147 (Ind. Ct. App. 1996).

Lucas v. State, 501 N.E.2d 480 (Ind. Ct. App. 1986) (probation could not be revoked for alleged violation of term of probation due to defendant's possession of firearm in his home because defendant did not receive notice of such condition of probation and possession of firearm in home was not a crime).

C. STATUTORY CONDITIONS

Pursuant to Ind. Code § 35-38-2-2.3(a)(1) to (24), Ind. Code § 35-38-2-2.3(c), Ind. Code § 35-38-2-2.3(g), Ind. Code § 35-38-2-2.1, and Ind. Code § 35-38-2-1(b), the court may impose any combination of the following requirements on a defendant. Only the first condition is automatic. The statutory conditions are:

CONDITION	*IND. CODE §*	*§ II.C.*
Refrain from Commission of Another Crime	35-38-2-1(b)	1
Halfway House -- Work Release	35-38-2-2.3(a)(3)	2
Home Detention	35-38-2-2.3(a)(16)	3
Imprisonment	35-38-2-2.3(c)	4
Supporting Family and Dependents	35-38-2-2.3(a)(5)	5.a
Restitution	35-38-2-2.3(a)(6)	5.b
Fines	35-38-2-2.3(a)(8)	5.c
Repayment to Government	35-38-2-2.3(a)(7)	5.d
Payment Agreement for Missing Child	35-38-2-2.3(a)(19)	5.e
Reimbursement for Cost of Incarceration	35-38-2-2.3(a)(21)	5.f
Drug and Alcohol Countermeasures Fee	35-38-2-2.1	5.g
Reporting to Probation Officer	35-38-2-2.3(a)(10)	6.a
Visits from Probation Officer	35-38-2-2.3(a)(11)	6.b
Keeping Probation Officer Informed	35-38-2-2.3(a)(13)	6.c
Mental or Psychiatric Treatment	35-38-2-2.3(a)(2)	7.a
Drug and Alcohol Testing	35-38-2-2.3(a)(20)	7.b
Drug and Alcohol Treatment and Counseling	35-38-2-2.3(a)(24)	7.c
Employment or Career/Technical Education	35-38-2-2.3(a)(1)	8
Community Service	35-38-2-2.3(a)(14)	9
Remain in Jurisdiction	35-38-2-2.3(a)(12)	10
No Contact Orders	35-38-2-2.3(a)(18)	11
Refrain from Possessing a Firearm	35-38-2-2.3(a)(9)	12
Refrain from Owning an Animal	35-38-2-2.3(a)(22)	13
Participation in a Reentry Court Program	35-38-2-2.3(a)(23)	14
Treatment Program, Educational Class, or Rehabilitative Service	35-38-2-2.3(a)(4)	15
HIV Testing	35-38-2-2.3(a)(17)	16
DNA Sample	35-38-2-2.3(g)	17
Other Reasonably Related Rehabilitative Conditions	35-38-2-2.3(a)(15)	18

1. Refrain from commission of another crime

The condition that the defendant not commit another crime is implicit in Ind. Code § 35-38-2-1(b), which grants the court authority to revoke probation if the defendant commits an additional crime. Thus, the condition that a probationer not commit another crime is automatically a condition of probation by operation of law. Benton v. State, 691 N.E.2d 459, 465 (Ind. Ct. App. 1998).

It is not necessary that the criminal conviction precede revocation of parole for unlawful conduct; it is only necessary that a trial judge find unlawful conduct to have occurred. Hoffa v. State, 267 Ind. 133, 368 N.E.2d 250 (Ind. 1977). See subsection V.C.1.a, below, for full explanation of sufficiency of evidence concerns for commission of a crime.

2. Halfway House - Work Release

Attend or reside in a facility established for the instruction, recreation, or residence of persons on probation. Ind. Code § 35-38-2-2.3(a)(3). Also known as a "halfway house" or "community residential center."

This section permits the court to directly commit a defendant to a work release center by suspending the sentence and placing the defendant under probation upon the condition that he reside at the work release center.

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).

3. Home detention

Undergo home detention under IC 35-38-2.5. Ind. Code § 35-38-2-2.3(a)(16). For definitions of "home," "monitoring device" and "offender," see Ind. Code § 35-38-2.5-2, Ind. Code § 35-38-2.5-3, and Ind. Code § 35-38-2.5-4, respectively.

Home detention is not treated differently than other conditions of probation. Thus, where the plea agreement specifically provides that the trial court would have authority and discretion to establish terms of probation, home detention could be ordered even though it was not specifically listed in the plea agreement. Antcliff v. State, 688 N.E.2d 166 (Ind. Ct. App. 1997).

However, home detention must be considered executed time rather than time suspended to probation.

> Barker v. State, 994 N.E.2d 306 (Ind. Ct. App. 2013) (plea agreement capped the executed time at 40 years and trial court violated the plea agreement by ordering an additional 120 days of home detention).

a. Eligibility

Ind. Code § 35-38-2.5 applies to adult offenders and to juveniles who have committed a delinquent act that would be a crime if committed by an adult. Ind. Code § 35-38-2.5-1.

In order to qualify, an offender must agree to abide by all of the requirements set forth in the court's order issued under IC 35-38-2.5. Ind. Code § 35-38-2.5-7(a).

If a person is being held under a detainer, warrant, or process issued by a court of another jurisdiction, the person will not qualify for home detention. Ind. Code § 35-38-2.5-7(b).

Similarly, 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. Ind. Code § 35-38-2.5-7(c).

b. Time period

The period of home detention may be consecutive or nonconsecutive, as the court orders. Ind. Code § 35-38-2.5-5(b).

The aggregate time actually spent on home detention as a condition of probation must not exceed the maximum term of imprisonment prescribed for a misdemeanor under IC 35-50-3 or for a felony under IC 35-50-2 for the crime committed by the offender. Ind. Code § 35-38-2.5-5(b). However, where a defendant is sentenced to home detention via direct placement under IC 35-38-2.6-3, the statutory maximums proscribed in Ind. Code § 35-38-2.5-5(b) do not apply.

> Perry v. State 25 N.E.3d 771 (Ind. Ct. App. 2015) (defendant was not sentenced to home detention as a condition of probation, but rather via direct placement, so he was not subject to statutory maximum six months for home detention ordered as a condition of probation following his class D felony conviction).

c. Supervision

The court may order supervision of an offender's home detention to be provided by the probation department for the court or by a community corrections program that provides supervision of home detention. Ind. Code § 35-38-2.5-5(c). The probation statutes do not bar community corrections programs from making decisions about electronic monitoring terms and conditions when the trial court orders a defendant to home detention monitoring by the community corrections department. Madden v. State, 25 N.E.3d 791 (Ind. Ct. App. 2015).

Except as provided in Ind. Code § 35-38-2.5-5.5(b), a court in one county may not place an offender who resides in another county on home detention in the other county unless:

(1) the offender is eligible for home detention in the county in which the person resides: and

(2) supervision of the offender will be conducted by the probation department or community corrections program located in the county in which the offender resides. Ind. Code § 35-38-2.5-5.5(a).

However, if an offender resides in an adjacent county to the county in which the sentencing court is located, the supervision of the offender may be conducted by either the probation department or community corrections program located in the county in which the sentencing court is located. Ind. Code § 35-38-2.5-5.5(b).

The probation department or community corrections department charged by the court with supervision of the offenders and alleged offenders on home detention shall provide all law enforcement agencies (including any contract agencies) having jurisdiction over the place where the probation department or a community corrections program is located

with a list of offenders and alleged offenders under home detention supervision. The required contents of the list are listed. Ind. Code § 35-38-2.5-10.

d. Credit time

A person's term of home detention is based on accrued time on home detention plus any good time credit. Ind. Code § 35-38-2.5-5(d). A person confined on home detention as a condition of probation earns credit time and good time credit. Ind. Code § 35-38-2.5-5. See also Ind. Code § 35-38-2-3(i) and (k).

Those who were placed on home detention as a condition of probation prior to July 1, 2001, when the statute was amended to give credit for actual time served, are still entitled to credit for actual time served. Martin v. State, 774 N.E.2d 43 (Ind. 2002); Senn v. State, 766 N.E.2d 1190 (Ind. Ct. App. 2002); Stith v. State, 766 N.E.2d 1266 (Ind. Ct. App. 2002).

Credit time for home detention is not limited to non-suspendible sentences. Arthur v. State, 950 N.E.2d 343 (Ind. Ct. App. 2011). See also Harding v. State, 27 N.E.3d 330 (Ind. Ct. App. 2015).

For a more detailed analysis of credit time issues, see Chapter 10, *Credit Time.*

e. Conditions/Contents of order

Pursuant to Ind. Code § 35-38-2.5-6, an order for home detention of an offender under IC 35-38-2.5-5 must include the following:

(1) A requirement that the offender be confined to the offender's home at all times except when the offender is:

(A) working at employment approved by the court or traveling to or from approved employment;
(B) unemployed and seeking employment approved for the offender by the court;
(C) undergoing medical, psychiatric, mental health treatment, counseling, or other treatment programs approved for the offender by the court;
(D) attending an educational institution or a program approved for the offender by the court;
(E) attending a regularly scheduled religious service at a place of worship;
(F) participating in a community work release or community restitution or service program approved for the offender by the court; or
(G) participating in any other activity approved for the offender by the court.

(2) Notice to the offender that violation of the order for home detention may subject the offender to prosecution for the crime of escape under IC 35-44.1-3-4;

(3) A requirement that the offender abide by a schedule prepared by the probation department, or by a community corrections program ordered to provide supervision of the offender's home detention, specifically setting forth the times

when the offender may be absent for the offender's home and the locations the offender is allowed to be during the scheduled absences;

(4) A requirement that the offender is not to commit another crime during the period of home detention ordered by the court;

(5) A requirement that the offender obtain approval from the probation department or from a community corrections program ordered to provide supervision of the offender's home detention before the offender changes residence or the schedule described in subdivision (3);

(6) A requirement that the offender maintain:

(A) a working telephone, cellular telephone, or other wireless or cellular communications device in the offender's home; and
(B) if ordered by the court, a monitoring device in the offender's home or on the offender's person, or both;

(7) A requirement that the offender pay a home detention fee set by the court in addition to the probation user's fee required under IC 35-38-2-1 or IC 31-40. However, the fee set under this subdivision may not exceed the maximum fee specified by the DOC under IC 11-12-2-12;

(8) A requirement that the offender abide by other conditions of probation set by the court under IC 35-38-2-2.3;

(9) A requirement to provide a DNA sample if the offender:

(A) was convicted of an offense described in IC 10-13-6-10(a);
(B) has not previously provided a DNA sample in accordance with IC 10-13-6; and
(C) has a sentence that does not involve a commitment to the DOC;

In order for a probationer to obtain relief from a violation of home detention based on the court's failure to include the required notices in the home detention order, the probationer must demonstrate how he was prejudiced by the failure.

Braxton v. State, 651 N.E.2d 268 (Ind. 1995) (although failure of court to advise defendant that conditions of home detention are also conditions of probation, due process is not violated where defendant received written notice of claimed probation violations together with actual notice that State was seeking revocation of probation); see also McCauley v. State, 22 N.E.3d 743 (Ind. Ct. App. 2014).

Brock v. State, 558 N.E.2d 872 (Ind. Ct. App 1990) (defendant failed to demonstrate he was prejudiced by conceded failure of home detention order to include statutory conditions or by his failure to be advised of those conditions at sentencing; to extent defendant was not released from period of home detention ordered, court would be required on remand to enter home detention order in compliance with probation statute; however, court suggested in footnote three that probationer would be prejudiced by probation being violated based on condition of home detention which was not set forth in order).

Chism v. State, 824 N.E.2d 334 (Ind. 2005) (trial court did not abuse its discretion by

modifying conditions of defendant's probation to allow use of monitoring by global positioning satellites, which permitted community corrections to identify defendant's exact location at any given moment with the aid of a satellite; fact that GPS will tell corrections where defendant is when he is not at home does not destroy its status as a "monitoring device" defined at Ind. Code § 35-38-2.5-3(a)(1) as a device that broadcasts only location).

f. Fees and costs

Ind. Code § 35-38-2.5-8 sets forth the distribution of home detention fees collected and the payment of expenses.

An offender ordered to undergo home detention under IC 35-38-2.5-5 is responsible for providing food, housing, clothing, medical care, and other treatment expenses. Ind. Code § 35-38-2.5-9. The offender is eligible to receive government benefits allowable for persons on probation, parole, or other conditional discharge from confinement. Id.

g. Violent offenders

Probation department/community corrections determination

Each probation department or community corrections department shall establish written criteria and procedures for determining whether an offender or alleged offender that the department supervises on home detention qualifies as a violent offender. Ind. Code § 35-38-2.5-10(a).

Contact law enforcement agency

A probation department or community corrections program charged by the court with supervision of a violent offender placed on home detention shall cause a local law enforcement agency or contract agency described in Ind. Code § 35-38-2.5-10 to be the initial agency contacted upon determining that the violent offender is in violation of a court order for home detention. Ind. Code § 35-38-2.5-12(b).

Constant supervision

A probation department or community corrections program charged by the court with supervision of a violent offender placed on home detention under this chapter shall:

(1) maintain constant supervision of the violent offender using surveillance equipment and a monitoring device that can transmit information twenty-four hours each day regarding an offender's precise location by either: using the supervising entity's equipment and personnel or contracting with a contract agency; and

(2) have adequate staff available twenty-four hours each day to respond if the violent offender violates the conditions of a home detention order. IC 35-38-2.5-12(a).

"Constant supervision" means monitoring a violent offender twenty-four hours each day by means described above. Ind. Code § 35-38-2.5-2.3.

h. Unauthorized absence from home detention

Pursuant to Ind. Code § 35-38-2.5-13, an offender commits unauthorized absence from home detention, a Class A misdemeanor, when the offender: (1) leaves the offender's home in violation of IC 35-38-2.5-6(1) or without documented permission from the supervising entity; (2) remains outside the offender's home in violation of IC 35-38-2.5-6(1) or without documented permission from the supervising entity; or (3) travels to a location not authorized under IC 35-38-2.5-6(1) or not authorized in writing by the supervising entity. Home detention does not require a defendant to be absent from his home during times in which the offender is scheduled to be absent from the home.

J.J.C. v. State, 792 N.E.2d 85 (Ind. Ct. App. 2003) (finding of violation of home detention was invalid when defendant was permitted to leave home between 10 a.m. and 7 p.m. to attend church and allegation was that defendant left home later than 10 a.m. and returned earlier than 7 p.m.; home detention does not require defendant to be absent during stated hours; court also found evidence of home detention violation insufficient where State failed to prove reliability of home detention monitoring system).

4. Imprisonment

As a condition of probation, the court may require that the person serve a term of imprisonment in an appropriate facility at whatever time or intervals (consecutive or intermittent) within the period of probation the court determines. Ind. Code § 35-38-2-2.3(c).

a. Limitations

Imprisonment as a condition of probation may be ordered to be served consecutively or at intermittent intervals. Intermittent service may be required only for a term of not more than sixty days, must be served in the county or local penal facility, and must be completed within one year. Ind. Code § 35-38-2-2.3(d).

Strowmatt v. State, 779 N.E.2d 971 (Ind. Ct. App. 2002) (trial court has discretion to order either intermittent or consecutive imprisonment as condition of probation, and there need not be suspended portion of sentence for probation to attach).

A term of imprisonment may not exceed an offender's term of probation.

Sharp v. State, 817 N.E.2d 644 (Ind. Ct. App. 2004) (assuming that 18-month term of imprisonment exceeded remaining amount of probation, trial court erred by imposing 18-month term of imprisonment as condition of defendant's probation because that term exceeded remaining amount of defendant's probation).

While a trial court is permitted to order less than the entire amount of a sentence originally suspended when a trial court revokes a defendant's probation, the defendant is entitled to dispute on appeal the terms of a sentence ordered to be served in a probation revocation proceeding that differ from those terms originally imposed. Stephens v. State, 818 N.E.2d 936 (Ind. 2004). See also Pugh v. State, 819 N.E.2d 936 (Ind. 2004).

b. Credit time

The term is computed on the basis of the actual days spent in confinement. Ind. Code § 35-38-2-2.3(d). The defendant does not earn good time credit while serving a term of imprisonment under intermittent service as a condition of probation. Ind. Code § 35-38-2-2.3(d); Sales v. State, 464 N.E.2d 1336, 1339 (Ind. Ct. App. 1984). However, under IC 35-50-6-3, for an offense committed before July 1, 2014, or Ind. Code § 35-50-6-3.1 for an offense after June 30, 2014, the defendant is arguably entitled to receive good time credit during his incarceration awaiting trial and sentencing, regardless of whether he is sentenced to incarceration as a condition of probation. Williams v. State, 759 N.E.2d 661 (Ind. Ct. App. 2001) (disagreeing with majority in Sutton v. State, 562 N.E.2d 1310, 1313 (Ind. Ct. App. 1990) (Baker, J., dissenting)).

For an explanation of the differences between good time credit and time for days actually served, see Chapter 10, *Credit Time*.

c. Contents of court order

Whenever the court orders intermittent service as a condition of probation, the court shall state as follows:

(1) the term of imprisonment;

(2) the days or parts of days during which the person is to be confined; and

(3) the conditions.

Ind. Code § 35-38-2-2.3(d).

Bunton v. State, 511 N.E.2d 325 (Ind. Ct. App. 1987) (sentence comported with statute where court sentenced defendant to five years with one year suspended and to probation for five years commencing from date of sentence although court did not suspend entire sentence and failed to state that four-year imprisonment was probation condition).

5. Financial

a. Supporting family

Support the person's dependents and meet other family responsibilities. Ind. Code § 35-38-2-2.3(a)(5). Payment of child support is a proper condition of an offender's probation for criminal nonsupport, regardless of the offender's indigence. Gustman v. State, 660 N.E.2d 353 (Ind. Ct. App. 1996).

Gordy v. State, 674 N.E.2d 190 (Ind. Ct. App. 1996) (condition of probation that defendant establish paternity for his four children for whom paternity was not established was permissible, following convictions for conspiracy to commit forgery and theft in connection with attempt to cash check from Aid for Families to Dependent Children, made out to mother of defendant's five children; this condition was part of effectuating goal of requiring defendant to support his children).

PRACTICE POINTER: Although support payments may be imposed as a condition of probation on an indigent probationer, probation may only be revoked based on a willful failure to make the required payments. Gustman v. State, 660 N.E.2d 353 (Ind. Ct. App. 1996). See also Snowberger v. State, 938 N.E.2d 294 (Ind. Ct. App. 2010). For more on this issue, see Chapter 6, *Court Costs, Fines, Restitution and Other Punishments*, Subsection III, *Restitution*.

b. Restitution

Make restitution or reparation to the victim of his crime for the damage or injury that was sustained by the victim. When a restitution or reparation is a condition of probation, the court shall fix the amount, which may not exceed an amount that the person can or will be able to pay and shall fix the manner of performance. Ind. Code § 35-38-2-2.3(a)(6).

The trial court, not the probation department, is responsible for fixing the amount and manner of restitution payments. McGuire v. State, 625 N.E.2d 1281 (Ind. Ct. App. 1993). The order must be specific and based on a set amount, taking into account the length of time it would take to pay it back and fix the manner of payment.

> Clausen v. State, 612 N.E.2d 147 (Ind. Ct. App. 1993), *vacated in part on other grounds*, 622 N.E.2d 925 (trial court failed to properly fix restitution where it ordered defendant to pay cost of victim's counseling without inquiring into the cost of counseling and length of time it would take and failed to fix manner of performance). See also Jaramillo v. State, 803 N.E.2d 243 (Ind. Ct. App. 2004) and Iltzsch v. State, 981 N.E.2d 55 (Ind. 2013).

For a more detailed analysis of restitution, see Chapter 6, *Court Costs*, *Fines, Restitution and Other Punishments*, Subsection IV, *Restitution*.

c. Fines

Pay a fine authorized by Ind. Code § 35-50. Ind. Code § 35-38-2-2.3(a)(8).

d. Repayment to government

Execute a repayment agreement with the appropriate governmental entity to repay the full amount of public relief or assistance wrongfully received and make repayments according to a repayment schedule set out in the agreement. Ind. Code § 35-38-2-2.3(a)(7).

e. Payment agreement for missing child

Execute a repayment agreement with the appropriate governmental entity or with a person for reasonable costs incurred because of the taking, detention, or return of a missing child (as defined in IC 10-13-5-4). Ind. Code § 35-38-2-2.3(a)(19).

f. Reimbursement for cost of imprisonment

Pursuant to Ind. Code § 35-38-2-2.3(a)(21), if a person was confined in a penal facility, execute a reimbursement plan as directed by the court and make repayments under the plan to the authority that operates the penal facility for all or part of the costs of the person's confinement in the penal facility. The court shall fix an amount that:

(1) may not exceed an amount the person can or will be able to pay;

(2) does not harm the person's ability to reasonably be self-supporting or to reasonably support any dependent of the person; and

(3) takes into consideration and gives priority to any other restitution, reparation, repayment, or fine the person is required to pay under this section.

Brock v. State, 558 N.E.2d 872 (Ind. Ct. App. 1990) (trial court was required on remand to clarify its order that defendant pay ten dollars per day for room and board at county jail, in view of State's concession that ten dollar per day obligation presupposed that defendant might earn money upon work release and that if such employment never materialized obligation would not accrue).

g. Drug and alcohol countermeasures fees

As a condition of probation for a person who is found to have committed an offense under IC 9-30-5 or been adjudicated a delinquent for an act that would be an offense under IC 9-30-5, if committed by an adult, the court shall require the person to pay the alcohol and drug countermeasures fee under IC 33-37. Ind. Code § 35-38-2-2.1.

6. Supervision by probation officer

a. Reporting to probation officer

Report to a probation officer at reasonable times as directed by the court or the probation officer. Ind. Code § 35-38-2-2.3(a)(10).

b. Visits from probation officer

Permit the person's probation officer to visit the person at reasonable times at the person's home or elsewhere. Ind. Code § 35-38-2-2.3(a)(11).

c. Keeping probation officer informed

Answer all reasonable inquiries by the court or the person's probation officer and promptly notify the court or probation officer of any change in address or employment. Ind. Code § 35-38-2-2.3(a)(13).

7. Mental or psychiatric treatment

Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose. Ind. Code § 35-38-2-2.3(a)(2).

8. Drug and alcohol testing

Periodically undergo a laboratory chemical test (as defined in IC 9-13-2-22) or series of chemical tests as specified by the court to detect and confirm the presence of a controlled substance (as defined in IC 35-48-1-9). The person on probation is responsible for any charges resulting from a test and shall have the results of any test under this subdivision reported to the person's probation officer by the laboratory. Ind. Code § 35-38-2-2.3(a)(20).

The probationer does not have to be convicted of a crime involving drug or alcohol abuse to

be required to submit to testing as a condition of probation.

> Carswell v. State, 721 N.E.2d 1255 (Ind. Ct. App. 1999) (it was proper to require defendant who had been convicted of child molesting to abstain from use of drugs or alcohol and to undergo testing for those substances, although illegal substances had played no role in his crimes, since possession of drugs is illegal and ordering him to abstain from alcohol was reasonably related to need to protect children and to assist in his rehabilitation).

9. Drug and alcohol treatment and counseling

Receive addiction counseling; mental health counseling; inpatient detoxification; and medication assisted treatment, including a federal FDA approved long acting, non-addictive medication for the treatment of opioid or alcohol dependence. Ind. Cod 35-38-2-2.3(a)(24). The purpose of this statute is to reduce drug-related crimes by treating drug abusers who rely on the fruits of crime for their drug habit. McNary v. State, 156 Ind. App. 582, 297 N.E.2d 853 (1973).

A defendant may be eligible for the forensic diversion program (IC 11-12-3.7-11) or treatment by any treatment facility as a condition of probation. An individual who is receiving treatment as a condition of probation does not earn credit time. Ind. Code § 35-50-6-6.

This probation condition is not satisfied by defendant's mere participation in drug treatment, but rather implicitly requires defendant's successful participation in the program. Bryce v. State, 545 N.E.2d 1094, 1098 (Ind. Ct. App. 1989).

10. Employment or career/technical education

Work faithfully at suitable employment or faithfully pursue a course of study or career and technical education that will equip the person for suitable employment. Ind. Code § 35-38-2-2.3(a)(1).

The trial court is precluded from requiring both employment and education simultaneously. The court has the option for one or the other as a condition of probation, but not both. Meunier-Short v. State, 52 N.E.3d 927 (Ind. Ct. App. 2015).

11. Community service

Perform uncompensated work that benefits the community. Ind. Code § 35-38-2-2.3(a)(14).

> Jester v. State, 746 N.E.2d 437 (Ind. Ct. App 2001) (160 hours of community service was condition of defendant's work release and not sentence above and beyond one-year maximum imposed; community service is reasonable term of placement for person completing sentence on work release).

12. Remain within jurisdiction

Remain within the jurisdiction of the court, unless granted permission to leave by the court or by the person's probation officer. Ind. Code § 35-38-2-2.3(a)(12).

13. No contact orders

Refrain from any direct or indirect contact with an individual and, if convicted of an offense under IC 35-46-3, any animal belonging to the individual. Ind. Code § 35-38-2-2.3(a)(18). "Contact" is not commonly understood to occur by mere presence alone. It requires more such as face-to-face contact or interaction.

> Hunter v. State, 883 N.E.2d 1161 (Ind. 2008) (defendant's presence on multiple occasions in his sister's mobile home when children came home from school was insufficient to prove he had contact with the children when the evidence also showed the defendant immediately left the home and did not have face-to-face contact or interaction with the children).

Courts may include in the probation terms an order to refrain from contact with any persons with criminal convictions or engaging in criminal activity.

> Brock v. State, 558 N.E.2d 872 (Ind. Ct. App. 1990) (order that defendant not associate with anyone having prior criminal conviction, "whether it be family or not," did not violate Eighth Amendment, though as consequence of order defendant could not visit with his father).
>
> Mosley v. State, 171 N.E.3d 1031 (Ind. Ct. App. 2021) (trial court lacked authority to issue no-contact order barring Defendant's contact with victim, who unbeknownst to court had earlier died; the order was void at the outset).

The no contact prohibition must be reasonably related to the treatment of defendant and protection of public safety.

> Jackson v. State, 816 N.E.2d 868 (Ind. Ct. App. 2004) (prohibition against contact with anyone under age eighteen for defendant convicted of rape was reasonably related to treatment of defendant and protection of public safety).
>
> Cox v. State, 792 N.E.2d 878 (Ind. Ct. App. 2003) (trial court did not abuse discretion in applying conditions of probation from one conviction, including a no-contact order, to a separate, unrelated conviction because the conditions still served to safeguard public and mold a law-abiding citizen).
>
> Rodriguez v. State, 714 N.E.2d 667 (Ind. Ct. App. 1999) (condition of home detention that defendant could not have in-home visitation with daughter was proper because court explained that condition was to protect child and mother of child, who was victim of defendant's crime for which he was place on home detention).

When a court imposes a no contact order as a condition of probation: (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. Ind. Code § 35-38-2-2.3(f).

14. Refrain from possessing firearm

Refrain from possessing a firearm or other deadly weapon unless granted written permission by the court or the person's probation officer. Ind. Code § 35-38-2-2.3(a)(9).

Wilder v. State, 91 N.E.3d 1016 (Ind. Ct. App. 2018) (condition prohibiting D from possessing firearms was proper because he was convicted of battery resulting in bodily injury, a crime of violence, and purpose of the condition is to keep dangerous weapons out of the hands of "those who have shown a propensity for violence").

15. Refrain from having animals

Refrain from owning, harboring, or training an animal. Ind. Code § 35-38-2-2.3(22).

16. Participate in a reentry court program

See Ind. Code § 35-38-2-2.3(23).

17. Participate in a treatment program, education class or rehabilitative service

Participate in a treatment program, educational class, or rehabilitative service provided by a probation department or by referral to an agency. Ind. Code § 35-38-2-2.3(a)(4).

Skipworth v. State, 68 N.E.3d 589 (Ind. Ct. App. 2017) (domestic violence counseling was reasonably related to defendant's treatment and public safety; permitted under IC 35-38-2-2.3(a)(4) even though domestic battery charge was dismissed).

18. HIV testing

Pursuant to Ind. Code § 35-38-2-2.3(a)(17), undergo a laboratory test or series of tests approved by the state department of health to detect and confirm the presence of the human immunodeficiency virus (HIV) antigen or antibodies to the HIV virus, if:

a) the person had been convicted of an offense relating to a criminal sexual act and the offense created an epidemiologically demonstrated risk of transmission of the human immunodeficiency virus (HIV); or

b) the person has been convicted of an offense related to a controlled substance and the offense involved:

   (i) the delivery by any person to another person; or

   (ii) the use by any person on another person; of a contaminated sharp (as defined in IC 16-41-16-2) or other paraphernalia that creates an epidemiologically demonstrated risk of transmission of HIV by involving percutaneous contact.

19. DNA sample

Pursuant to Ind. Code § 35-38-2-2.3(g), a court shall order a person to provide a DNA sample as a condition of probation if the person:

(1) was convicted of an offense described in IC 10-13-6-10;

(2) 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.

20. Any other conditions that reasonably relate to rehabilitation

Satisfy any other conditions reasonably related to the person's rehabilitation. Ind. Code § 35-38-2-2.3(a)(15).

Examples of conditions found to be reasonably related to a defendant's rehabilitation:

Pavey v. State, 710 N.E.2d 219 (Ind. Ct. App. 1999) (compliance with jail rules of which notice was given during work release program may also serve as condition of probation).

Patton v. State, 580 N.E.2d 693 (Ind. Ct. App. 1991) (condition that probationer submit to polygraph tests bears a reasonable relationship to rehabilitative aspect of probation, e.g., deterrence from violating other terms of probation by instilling fear of detection or where examination provides probation officials with indication of probationer's progress; however, these rehabilitative benefits must be obtained without examination results being admissible in any subsequent court proceeding). See also Johnson v. State, 716 N.E.2d 983 (Ind. Ct. App. 1999).

Brock v. State, 558 N.E.2d 872 (Ind. Ct. App. 1990) (condition that defendant can have no visitors while on home detention as condition of probation was reasonably related to defendant's rehabilitation).

Whitener v. State, 982 N.E.2d 439 (Ind. Ct. App. 2013) (although defendant's rape conviction was vacated because it was based on the same evidence that supported his burglary conviction and thus violated double jeopardy, requiring him to register as a sex offender as a probation condition was proper and reasonably related to his rehabilitation).

Hale v. State, 888 N.E.2d 314 (Ind. Ct. App. 2008) (in prosecution for OWI of at least .15 causing death, trial court did not abuse its discretion in imposing as a term of probation that the defendant not operate any type of motor vehicle for his ten years of probation).

Johnson v. State, 659 N.E.2d 194 (Ind. Ct. App. 1995) (because there was no evidence that court applied law in discriminatory fashion, court could order probation condition that required defendants to attend reproductive health lecture sponsored by family planning clinic that had not been target of defendant's protest).

Examples of conditions not reasonably related to a defendant's rehabilitation:

Weida v. State, 94 N.E.3d 682 (Ind. 2018) (general prohibition on internet access without prior approval from probation officer).

Carroll v. State, 740 N.E.2d 1225 (Ind. Ct. App. 2000) (non-immunized clean-up statement as condition of probation was not reasonably related to defendant's rehabilitation, but only benefitted police).

Trammell v. State, 751 N.E.2d 283 (Ind. Ct. App. 2001) (because there are less intrusive means of protecting unborn child and condition is not related to rehabilitation, condition that defendant may not become pregnant was unconstitutional, or at least, erroneous).

Hurst v. State, 717 N.E.2d 883 (Ind. Ct .App. 1999) (denying defendant hunting privileges for two years is reasonably related to rehabilitation and safeguarding the public

and does not violate IC 14-22-11-15(d), which provides that courts may revoke a hunting license for up to one year for an offense committed in violation of laws protecting wildlife).

Hurd v. State, 9 N.E.3d 720 (Ind. Ct. App. 2013) (condition imposing a 2-mile ban that prevented defendant from "being within hundreds of city blocks in the central part of Indianapolis" was not reasonably related to the defendant's treatment or the protection of the public).

Cf. Berry v. State, 23 N.E.3d 854 (Ind. Ct. App. 2015) (trial court's statement ordering defendant to stay away from all properties managed by the Indianapolis Housing Agency was merely a reminder of the ban but not part of an obligation imposed on defendant by trial court as part of his sentence).

D. CONDITIONS SPECIFIC TO SEX OFFENDER

1. Mandatory conditions

Pursuant to Ind. Code § 35-38-2-2.2, as a condition of probation for a sex offender (as defined in IC 11-8-8-4.5), the court shall:

(1) require the offender to register with the local law enforcement authority under IC 11-8-8; and

(2) prohibit the sex offender from residing within one thousand feet of school property (as defined in IC 35-41-1-24.7), as measured from the property line of the sex offender's residence to the property line of the school property, for the period of probation, unless the sex offender obtains written approval from the court;

(3) require the sex offender to consent:

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

  (b) to the installation on the sex offender's personal computer or device with Internet capability, at the sex offender's expense, of one (1) or more hardware or software systems to monitor Internet usage; and

(4) prohibit the sex offender from:

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

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

If the court allows the sex offender to reside within one thousand (1,000) feet of school property under subdivision (2), the court shall notify each school within one thousand feet of the sex offender's residence of the order. However, a court may not allow a sex offender who is a sexually violent predator (as defined in IC 35-38-1-7.5) or an offender against children under IC 35-42-4-11 to reside within one thousand (1,000) feet of school property.

Jones v. State, 789 N.E.2d 1008 (Ind. Ct. App. 2003) (after failing to impose conditions required by IC 35-38-2-2.2 at sentencing, trial court had authority to impose conditions later; however, trial court went too far and abused its discretion when it imposed fourteen additional conditions of probation not required by statute, absent a violation of

probation).

2. Discretionary conditions for SVP and offenders against children

As a condition of probation for a sex offender who is a sexually violent predator under IC 35-38-1-7.5 or an offender against children under IC 35-42-4-11, the court may:

(1) subject to subdivision (2), prohibit the sex offender from having any:

(a) unsupervised contact; or

(b) contact;
with a person less than sixteen (16) years of age; and

(2) if the court finds it is in the best interests of the child, prohibit the sex offender from having any:

(a) unsupervised contact; or

(b) contact;

with a child or stepchild of the sex offender, if the child or stepchild is less than sixteen (16) years of age.

3. Participate in treatment program

As a condition of probation, the court may require a sex offender (as defined in IC 11-8-8-4.5) to participate in a treatment program for sex offenders approved by the court. Ind. Code § 35-38-2-2.4(1).

PRACTICE POINTER: Although the trial court can require treatment for sex offender, court may not also require successful treatment that involves admission of offense that offender has been consistently denying. See Gilfillen v. State, 582 N.E.2d 821, 824 (Ind. 1991); Bluck v. State,716 N.E.2d 507 (Ind. Ct. App. 1999); Moore v. State, 909 N.E.2d 1053 (Ind. Ct. App. 2009) (implying that SOMM requirements that prisoner admit to crime under threat of credit time deprivation violates the Fifth Amendment); and Bleeke v. Lemmon, 6 N.E.3d 907, 937 fn. 21 (Ind. 2013) (acknowledges the rationale in Gilfillen was implicitly grounded in the Fifth Amendment).

4. Avoid contact with children

As a condition of probation, the trial court may require a sex offender (as defined in IC 11-8-8-4.5) to avoid contact with any person who is less than sixteen years of age unless the probationer receives the court's approval or successfully completes the treatment program referred to in IC 35-38-2-2.4(1). Ind. Code § 35-38-2-2.4(2). "Contact" is not commonly understood to occur by mere presence alone. Hunter v. State, 883 N.E.2d 1161 (Ind. 2008). *For more on degrees of Contact, see II.C.11.*

Conditions of probation that reduce the potential for access to potential victims are reasonable. However, any condition restricting a defendant's access to a location must be specific enough to provide a defendant with a predictable standard for identifying forbidden places.

Fitzgerald v. State, 805 N.E.2d 857 (Ind. Ct. App. 2004) (where probation condition prohibiting defendant from visiting parks, schools, playgrounds, and day care centers

could be read to prohibit defendant from visiting even parks where children do not congregate, such as state parks, probation order was remanded to trial court to clarify and limit condition to restrictions relevant to goals of probation). See also McVey v. State, 863 N.E.2d 434 (Ind. Ct. App. 2007).

Hunter v. State, 883 N.E.2d 1161 (Ind. 2008) (condition defining "contact" as including "face-to-face, telephonic, written, electronic, or any indirect contact via third parties" lacked sufficient clarity to provide the defendant with fair notice that his conduct at issue, i.e., merely being present in home when children came home from school, constituted a probation violation).

Carswell v. State, 721 N.E.2d 1255 (Ind. Ct. App. 1999) (probation condition ordering defendant not to reside within two blocks of any area where children congregate was too vague and, thus, improper condition of probation).

But see:

Smith v. State, 727 N.E.2d 763 (Ind. Ct. App. 2000) (probation condition prohibiting contact with children under age sixteen until completion of sex offenders treatment program was neither vague nor overbroad under Indiana and U.S. Constitutions; it is inherent in statute that probationer is not required to avoid inadvertent or unintentional contact with persons under sixteen).

Jackson v. State, 816 N.E.2d 868 (Ind. Ct. App. 2004) (prohibition against contact with anyone under age eighteen for defendant convicted of rape was reasonably related to treatment of defendant and protection of public safety; if trial court imposes more severe age restriction than that listed in IC 35-38-2-2.4(2), it has discretion to do so if court felt such a condition would protect community and rehabilitate defendant).

Stott v. State, 822 N.E.2d 176 (Ind. Ct. App. 2005) (prohibition from being within 1000 feet of schools and daycare centers is specific and accurately defined as well as serving purpose of keeping defendant from being where potential victims congregate).

5. Definition of Sex Offender

Pursuant to Ind. Code § 11-8-8-4.5, a "sex offender" is a person convicted of any of the following offenses:

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

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

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

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

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

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

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

(8) Sexual misconduct with a minor (IC 35-42-4-9) as a Class A, Class B or Class C felony (for a crime committed before July 1, 2014) or a Level 1, Level 2, Level 4, or

Level 5 felony (for a crime committed after June 30, 2014), unless:

(a) the person is convicted of sexual misconduct with a minor as a class C felony or a Level 5 felony;
(b) the person is not more than:
    (i) four (4) years older than the victim if the offense was committed after June 30, 2007;
    (ii) five (5) years older than the victim if the offense was committed before July 1, 2007; and
(c) the sentencing court finds that the person should not be required to register as a sex offender.

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

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

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

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

(13) Possession of child pornography (IC 35-42-4-4(d) or (e);

(14) Promoting prostitution (IC 35-45-4-4) as a Class B felony (for a crime committed before July 1, 2014) or a Level 4 felony (for a crime committed after June 30, 2014);

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

(16) Promotion of child sexual trafficking of a minor under IC § 35-42-3.5-1.3. (17) Promotion of sexual trafficking of a younger child (IC 35-42-3.5-1.2(c)).

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

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

(20) Sexual misconduct by a service provider with a detained or supervised child (IC

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

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

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

(a) is at least fourteen (14) years of age;

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

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

In making a determination under subsection (b)(2)(C), the court shall consider expert testimony concerning whether a child is likely to repeat an act that would be an offense described in subsection (a) if committed by an adult. Ind. Code § 11-8-8-4.5(c).

6. Collection of DNA samples from convicted offenders

All sex offenders are covered under the mandatory DNA sample requirement of Ind. Code § 10-13-6-10(a). For more on the DNA sample requirement, see II.C.17.

Balding v. State, 812 N.E.2d 169 (Ind. Ct. App. 2004) (after probation revocation on defendant convicted of sexual battery, trial court properly granted State's motion to compel defendant to submit a DNA sample to be included in Indiana DNA database; State's delay in requesting collection of DNA sample from defendant until after probation revocation did not make requirement to submit a sample a new term of defendant's sentence); see also Keeney v. State, 873 N.E.2d 187 (Ind. Ct. App. 2007).

7. Miscellaneous conditions

McVey v. State, 863 N.E.2d 4343 (Ind. Ct. App. 2007) (the conditions that the defendant not travel alone after 10:00 p.m., unless given prior permission by probation officer and that the defendant receive prior approval for internet use were reasonable and sufficiently clear conditions of probation; however, requiring defendant to notify probation officer of establishment of "a dating, intimate and/or sexual relationship" and prohibiting possession of pornographic or sexually explicit material or any materials "related to illegal or deviant interests or behaviors were unconstitutionally vague probation conditions).

Patton v. State, 990 N.E.2d 511 (Ind. Ct. App. 2013) (probation condition prohibiting defendant from visiting websites children commonly access was narrowly tailored to defendant's rehabilitative needs and society's interests).

E. RESIDENCY REQUIREMENTS FOR SEX OFFENDERS

1. Sex offender definition

Pursuant to Ind. Code § 35-38-2-2.5(b), a sex offender is an individual convicted of any of the following crimes:

(1) Rape;

(2) Criminal deviate conduct (repealed);

(3) Child molesting;

(4) Child exploitation;

(5) Vicarious sexual gratification;

(6) Child solicitation;

(7) Child seduction;

(8) Sexual battery;

(9) Sexual misconduct with a minor as a felony; or

(10) Incest.

2. Residency requirement

A condition of remaining on probation or parole after conviction of a sex offense is that the offender not reside within one mile of the residence of the victim of the offender's sex offense. Ind. Code § 35-38-2-2.5(c).

> Custance v. State, 128 N.E.3d 8 (Ind. Ct. App. 2021) (residency restriction applied to defendant convicted of child exploitation/possession of child pornography was not reasonably susceptible of compliance as written under the unique circumstances of this case, where victims were unidentified; Court remanded for clarification that defendant will be in violations of conditions only if he acts with criminal culpability).

3. Reporting requirement

Pursuant to Ind. Code § 35-38-2-2.5(d)(1), an offender placed on probation shall provide the sentencing court and the probation department with the address where he or she intends to reside during the period of probation:

(a) at the time of sentencing if the offender is not to be incarcerated; or

(b) before the offender's release from incarceration if placed on probation after completing a term of incarceration.

4. Waiver of residency restrictions

An offender may not establish a new residence within one mile of the residence of the victim of the offender's sex offense unless the offender first obtains a waiver from the court for the change of address. Ind. Code § 35-38-2-2.5(e).

The court or parole board may waive the requirement only if, at a hearing at which the offender is present and of which the prosecuting attorney has been notified, the court or parole board determines that:

(1) the offender has successfully completed a sex offender treatment program during the period of probation;

(2) the offender is in compliance with all terms of probation; and

(3) good cause exists to allow the offender to reside within the restricted area.

Ind. Code § 35-38-2-2.5(f).

However, the court or parole board may not grant a waiver if the offender is a sexually violent predator under IC 35-38-1-7.5 or if the offender is an offender against children under IC 35-42-4-11.

If the court grants a waiver, it shall state in writing the reasons for granting it. Ind. Code § 35-38-2-2.5(g). The written statement shall be incorporated into the record. Id. The address of the victim is to remain confidential even if the court grants a waiver. Ind. Code § 35-38-2-2.5(h).

F. RESIDENCY REQUIREMENTS AFTER STALKING CONVICTION

1. Residency requirement

A condition of remaining on probation or parole after a conviction for stalking (IC 35-45-10-5) is that a court may prohibit a person from residing within one thousand (1,000) feet of the residence of the victim of the stalking for a period that does not exceed five (5) years. Ind. Code § 35-38-2-2.6(a).

2. Reporting requirement

Pursuant to Ind. Code § 35-38-2-2.6(b), a person placed on probation shall provide the sentencing court and the probation department with the address where he or she intends to reside during the period of probation:

(a) at the time of sentencing if the person is not to be incarcerated; or

(b) before the person's release from incarceration if placed on probation after completing a term of incarceration.

3. Waiver of residency restrictions

A person, while on probation or parole, may not establish a new residence within one thousand (1,000) feet of the residence of the victim of the stalking unless the offender first obtains a waiver from the court. Ind. Code § 35-38-2-2.6(c).

Pursuant to Ind. Code § 35-38-2-2.6(d), the court may waive the requirement only if, at a hearing at which the person is present and of which the prosecuting attorney has been notified, the court determines that:

(1) the person is in compliance with all terms of the person's probation or parole; and

(2) good cause exists to allow the offender to reside within one thousand (1,000) feet of the residence of the victim of the stalking.

If the court grants a waiver, it shall state in writing the reasons for granting it. Ind. Code § 35-38-2-2.6(e). The written statement shall be incorporated into the record. Id. The address of the victim of the stalking is to remain confidential even if the court grants a waiver. Ind. Code § 35-38-2-2.6(f).

G. CONSTITUTIONAL ISSUES

Conditions of probation, within certain parameters, may infringe upon the probationer's exercise of an otherwise constitutionally protected right. Johnson v. State, 659 N.E.2d 194, 199 (Ind. Ct. App. 1995). In cases where defendant contends that the probation condition is unduly intrusive on a constitutional right, the court in determining whether the condition is permissible balances the purpose sought to be served by the probation, the extent to which the constitutional rights enjoyed by the law-abiding citizens should be afforded to probationers, and the legitimate needs of law enforcement. Gordy v. State, 674 N.E.2d 190, 192 n. 3 (Ind. Ct. App. 1996); Johnson v. State, 659 N.E.2d 194, 199 (Ind. Ct. App. 1995).

1. Admission of Guilt

Where a defendant has not plead guilty but is instead convicted while denying guilt, trial courts may not insist on admission of guilt as condition of probation or use continued denial of guilt as basis for revocation of probation; however, such facts could be used by trial courts in determining whether a particular defendant was appropriate candidate for probation in the first instance. Gilfillen v. State, 582 N.E.2d 821, 824 (Ind. 1991).

> Bluck v. State, 716 N.E.2d 507 (Ind. Ct. App. 1999) (although literature states that typical sex offender cannot be rehabilitated until he admits conduct, defendant's sentence cannot be enhanced by refusing to admit sex offense when defendant proclaimed innocence throughout proceedings).

2. No contact with family

A condition that defendant not associate with anyone having a criminal record, which included his father, did not violate Eighth Amendment. Brock v. State, 558 N.E.2d 872 (Ind. Ct. App. 1990). It has been suggested that a condition of probation ordering the defendant to have no contact with his wife, or her mother does not violate the defendant's right to privacy in marriage. The court was unable to perceive that the right to marital privacy exists based upon the unilateral desire of a husband to associate with his wife, where the wife, with good reason, wants no part of the marital relationship. The constitution does not protect a spouse's right to batter, intimidate, and harass his or her marriage partner. Robinette v. State, 641 N.E.2d 1286, 1288 (Ind. Ct. App. 1994).

> Rodriguez v. State, 714 N.E.2d 667 (Ind.Ct.App.1999) (limitation that defendant on home detention not visit with daughter at home because of exposure to mother who was victim was proper condition of home detention).

There must be a nexus between the no contact order and the defendant's crimes.

> Howe v. State, 25 N.E.3d 210 (Ind. Ct. App. 2015) (trial court did not abuse its discretion in denying defendant's petition to modify probation to allow contact with his daughter; there is a nexus between no contact order and defendant's crimes even though daughter was not physically injured or directly attacked during defendant's violent altercation with his mother-in-law).

3. Conditions concerning reproduction

Conditions barring reproduction are not related to rehabilitation and are unconstitutional, or at least erroneous. Trammell v. State, 751 N.E.2d 283 (Ind. Ct. App. 2001). However, a condition that a defendant attend a reproductive health lecture or other classes have been upheld as reasonable. Johnson v. State, 659 N.E.2d 194 (Ind. Ct. App. 1995).

4. Polygraphs/Clean-up statements

Condition that a defendant submit to a polygraph examination, under certain circumstances is proper. However, a condition providing those results of a polygraph examination are admissible in future court proceedings is impermissible. A condition requiring that positive results will constitute a probation violation seems to remove the State's obligation to prove that a violation has, in fact, occurred, thus violating due process. Hoeppner v. State, 918

N.E.2d 695 (Ind. Ct. App. 2010).

a. Defendant is not required to answer all the questions

Condition that any polygraph test taken of defendant would be subsequently admissible in evidence did not violate defendant's Fifth Amendment right against self-incrimination because condition did not require defendant to answer incriminating questions. Patton v. State, 580 N.E.2d 693 (Ind. Ct. App. 1991). However, such a condition can still be improper if the purpose is not based on rehabilitation of offender. Carroll v. State, 740 N.E.2d 1225 (Ind. Ct. App. 2000).

b. Defendant is required to answer all questions

If the probation condition requires the defendant to answer the polygraph questions, the condition that the defendant submit to polygraph examinations for treatment purposes and shall be immune from further prosecution is proper because the only realistic use would be at sentencing. Carswell v. State, 721 N.E.2d 1225 (Ind. Ct. App. 1999).

Patton v. State, 580 N.E.2d 693, 699 (Ind. Ct. App. 1991) (condition that probation's required polygraph examination results can be used in any subsequent proceedings is improperly coercing probationer into stipulating to the admission of otherwise inadmissible evidence; thus, this condition is impermissible).

Johnson v. State, 716 N.E.2d 983 (Ind. Ct. App. 1999) (where defendant was required to submit to polygraph so as to ensure that he stayed away from children under 16 years old, imposition of polygraph condition was to deter defendant from violating other conditions of probation and bore reasonable relationship to rehabilitation).

PRACTICE POINTER: The Court of Appeals' conclusion in Carswell that results of compelled polygraphs are admissible in sentencing is implicitly overruled by Mitchell v. United States, 526 U.S. 314, 119 S. Ct. 1307, 143 L.Ed.2d 424 (1999), in which the Supreme Court held that a defendant retains his privilege against self-incrimination through sentencing. Further, the court in Carswell suggests that results of compelled polygraphs are admissible in probation revocation. However, the Fifth Amendment applies at probation revocations. Minnesota v. Murphy, 465 U.S. 420, 426, 104 S. Ct. 1136, 1141-42 (1984). In addition, polygraphs' unreliability make them inadmissible at probation revocations.

5. Consent to search provision

Condition that defendant waive her Fourth Amendment search and seizure rights and authorize activities such as random drug screens and home visits is constitutional under the U.S. and Indiana Constitutions if the waiver is voluntary. Rivera v. State, 667 N.E.2d 764 (Ind. Ct. App. 1996).

a. Reasonable suspicion

A probationer or community corrections participant may, pursuant to a valid search condition or advanced consent, authorize a warrantless premises search without reasonable suspicion. Vanderkolk v. State, 32 N.E.3d 775 (Ind. 2015). A probation condition stating that the defendant "waives all rights against search and seizure" unambiguously informs the probationer that a search may be conducted without

reasonable suspicion. Additional language specifying that the probationer may be searched without reasonable suspicion and waives the right against "unreasonable" search and seizure is unnecessary. State v. Ellis, 167 N.E.3d 285 (Ind. 2021).

PRACTICE POINTER: Despite the language in Vanderkolk, there are multiple arguments why reasonable suspicion is still necessary even when the probationer agreed to suspicionless searches as a condition of probation: (1) the language in Vanderkolk is only persuasive, and not authoritative because it was unnecessary to the holding of the case, and thus, dicta. See Koske v. Townsend Engineering Co., 551 N.E.2d 437, 443 (Ind. 1990). (2) The Indiana Supreme Court incorrectly concluded that Samson v. California, 547 U.S. 843 (2006) overruled 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). Although the Court in Sampson held that reasonable suspicion is unnecessary when a parolee agrees to suspicionless searches as a condition of parole, the Court noted parolees have fewer expectations of privacy than probationers because parole is more akin to imprisonment. (3) Even if the Vanderkolk Court is correct, a probation search which is constitutional under the Fourth Amendment may not be constitutional under Article I, Section 11 of the Indiana Constitution. State v. Schlechty, 926 N.E.2d 1 (Ind. 2010). There are Indiana cases, even before Knights, that have required reasonable suspicion for a probation search. See, e.g. Purdy v. State, 708 N.E.2d 20 (Ind. Ct. App. 1999).

Examples of courts finding reasonable suspicion lacking:

- Drug counselor claimed probationer lived in "la la land" about his addictions and probationer's status as a high-risk probationer did not give officer reasonable suspicion to search probationer's room. Nowling v. State, 955 N.E.2d 854 (Ind. Ct. App. 2011).
- Presence in area which is allegedly used to grow marijuana does not justify investigatory stop by policeman. Green v. State, 719 N.E.2d 426 (Ind. Ct .App. 1999).
- Where police officers did not know that defendant was probationer, they did not have reasonable suspicion to stop defendant for being in a high crime neighborhood. Polk v. State, 739 N.E.2d 666 (Ind. Ct. App. 2000).1

Examples of courts finding existence of reasonable suspicion:

- Officer smelled marijuana smoke when probationer's ex-wife opened door of home during visit to probationer's home. Purdy v. State, 708 N.E.2d 20 (Ind. Ct. App. 1999).
- Taking of buccal swab where officer mistakenly believed probationer's conviction was entered as a felony rather than a misdemeanor; taking of buccal swab fell under mistake exception. Anderson v. State, 961 N.E.2d 19 (Ind. Ct. App. 2012).
- Defendant tested positive for cocaine and probation officer learned from detective that defendant was suspected of possessing cocaine in his home; held, reasonable grounds existed to search defendant's residence. Rivera v. State, 667 N.E.2d 764 (Ind. Ct. App. 1996).

PRACTICE POINTER: Although Kopkey v. State, 743 N.E.2d 331 (Ind. Ct. App. 2001) held that random, suspicionless urinalysis of home detainees who signed consent form prior to being placed on home detention did not violate the Fourth Amendment, Kopkey was decided before the U.S. Supreme Court decided United States v. Knights, 534 U.S. 112, 122 S. Ct. 587 (2001). Kopkey is implicitly overruled by Knights; but see Vanderkolk v. State, 32 N.E.3d 775 (Ind. 2015), above, stating lack of suspicion may no longer be a valid objection. Further, Kopkey is, by analogy, in conflict with Steiner v. State, 763 N.E.2d 1024 (Ind. Ct. App. 2002), which held that a court cannot impose the condition of random, suspicionless urinalysis as a condition of bail.

b. Reasonable in means and scope

Even if a probationer waives her Fourth Amendment rights as a condition of probation, although lack of suspicion may no longer be a valid objection, a subsequent search still must be reasonable. State v. Terrell, 40 N.E.3d 501 (Ind. Ct. App. 2015). The permissible degree of impingement upon a probationer's right to privacy is not unlimited. Griffin v. Wisconsin, 483 U.S. 868, 875, 107 S. Ct. 3164, 3169 (1987). The special needs of probation system make warrant requirement impracticable and justify replacement of standard of probable cause by "reasonable grounds." Id. at 875, at 3169-70. But a consent to search provision that permits unreasonable searches is unconstitutionally overbroad. Fitzgerald v. State, 805 N.E.2d 857 (Ind. Ct. App. 2004).

Fitzgerald v. State, 805 N.E.2d 857 (Ind. Ct. App. 2004) (a probation condition that waives the defendant's right against unreasonable searches is unconstitutionally overbroad; State's argument that reasonableness is inherent to the probation condition is unsupportable when explicit language of order is to the contrary).

Carswell v. State, 721 N.E.2d 1225 (Ind. Ct. App. 1999) (requiring submission to warrantless searches was not unreasonable simply because "reasonable" was not within language of condition of probation; rather, reasonableness is implied); Bonner v. State, 776 N.E.2d 1244 (Ind. Ct. App. 2002).

State v. Terrell, 40 N.E.3d 501 (Ind. Ct. App. 2015) ("nondestructive daytime search" of probationer's home, safe and nightstand was reasonable under federal and state constitutions).

Requiring a recidivist to wear a GPS device for the rest of his life constitutes a "search" under the Fourth Amendment. Grady v. North Carolina, 135 S. Ct. 1368 (2015). Whether or not the search is reasonable is to be decided based on general Fourth Amendment principles. Id.

c. Purpose of search

Regardless of the purpose of the search, a search supported by reasonable suspicion and authorized by a condition of probation may be reasonable under the Fourth Amendment. United States v. Knights, 534 U.S. 112, 122 S. Ct. 587 (2001). However, the question of what role, if any, that the subjective intentions of a police officer or probation officer play in the determination of a reasonable probation search may be reserved for another day. Id. at 593 (Souter, J., concurring).

The fact that a search may be more of an investigatory search rather than a probation search is not a consideration under the Fourth Amendment. Whether the same result

would occur under Article 1, Section 11 of the Indiana Constitution is still unknown. State v. Schlechty, 926 N.E.2d 1 (Ind. 2010). The State must demonstrate that the warrantless search of probationer was a true probation search and not an investigatory search. In contrast to an investigatory search, a probation search should advance the goals of probation that allow the probationer to demonstrate his rehabilitation while serving part of his sentence outside prison walls. Purdy v. State, 708 N.E.2d 20 (Ind. Ct. App. 1999). See also Polk v. State, 739 N.E.2d 666 (Ind. Ct. App. 2000) and Hensley v. State, 962 N.E.2d 1284 (Ind. Ct. App. 2012).

PRACTICE POINTER: Although United States v. Knights has limited the consideration of the purpose of a probation search in the context of the Fourth Amendment, there is a long line of Indiana cases that have held that a court must look at the purpose of the search when determining whether the probation search is reasonable. Thus, argue that an investigatory search performed by police officers under the pretext of a probation search is unreasonable and violates Article I, Section 11 of the Indiana Constitution. A probation search which is constitutional under the Fourth Amendment may or may not be constitutional under Article 1, Section 11. State v. Schlechty, 926 N.E.2d 1 (Ind. 2010).

The mere presence of police officers while conducting a probation search is not enough to make the search an investigatory search instead of a probation search.

Micheau v. State, 893 N.E.2d 1053 (Ind. Ct. App. 2008) (probation officer's "home visit" for safety reasons was reasonable despite presence of police officers where he made police get a warrant as soon as they found evidence of a crime).

Hensley v. State, 962 N.E.2d 1284 (Ind. Ct. App. 2012) (at the point police began their own investigatory search without the probation officer, the officers' search ceased being a probationary search and was unreasonable).

PRACTICE POINTER: Examples of unreasonable searches of probationers may include: (1) a search which stems from an overly broad waiver of rights, i.e., waiver that allow searches at any time of the day or of any place the probationer is located; (2) a search where the police lack any suspicion that the probationer has engaged in a violation of probation; and (3) a search on which the police accompany the probation officer for the purposes of obtaining evidence of a crime. See Rivera v. State, 667 N.E.2d 764, 768 (Ind. Ct. App. 1996) (Staton, J., concurring); State v. Propios, 879 P.2d 1057 (Haw. 1994); Tamez v. State, 534 S.W.2d 686 (Tex. Ct. Crim. App. 1976); People v. Peterson, 233 N.W.2d 250 (Mich. Ct. App. 1975).

6. Overly broad or vague conditions

Conditions of probation must describe with clarity and particularity the misconduct that will result in the defendant being returned to prison. Hunter v. State, 883 N.E.2d 1161 (Ind. 2008). Otherwise, there would be no means of subsequently determining whether or not the conditions have been violated, and the power to revoke would be arbitrary. State ex rel. Gash v. Morgan County Superior Court, 258 Ind. 485, 283 N.E.2d 349, 354 (1972), *overruled on other grounds*, Hoffa v. State, 267 Ind. 133, 368 N.E.2d 250 (1977). The power granted to a trial court to impose such conditions of probation as it may deem best does not override the requirement that the conditions be specific. Dulin v. State, 169 Ind. App. 211, 346 N.E.2d 746, 754 (1976).

Below are some examples of sufficient clarity and particularity in probation conditions:

- Although court only ordered "counseling" without specifying what type of counseling probationer must undergo, order was specific enough to order probationer, who was convicted of child molesting, to undergo sex therapy. Gilfillen v. State, 582 N.E.2d 821 (Ind. 1991).
- Defendant ordered not to travel alone after 10:00 p.m., unless given prior permission by probation officer. McVey v. State, 863 N.E.2d 434 (Ind. Ct. App. 2007).
- Defendant must receive prior approval for Internet use. McVey v. State, 863 N.E.2d 434 (Ind. Ct. App. 2007). See also Bratcher v. State, 999 N.E.2d 864 (Ind. Ct. App. 2013).
- Where conditions specified forbidden places as examples of where children congregate, conditions not to be present at locations where children are known to congregate. Collins v. State, 911 N.E.2d 700 (Ind. Ct. App. 2009).
- Order that probationer attend counseling; although order did not specify that defendant attend sessions regularly. Lind v. State, 550 N.E.2d 823 (Ind. Ct. App. 1990).
- Requirement that a probationer maintain "good behavior," which means lawful behavior, is a condition of every probation. Shumaker v. State, 431 N.E. 2d 862 (Ind. Ct. App. 1982).

Examples of insufficient clarity and particularity in probation conditions:

- Condition prohibiting contact with persons under 18 years-old and which defined "contact" as including "face-to-face, telephonic, written, electronic, or any indirect contact via third parties" lacked sufficient clarity to provide defendant with fair notice that his conduct at issue constituted a probation violation. Hunter v. State, 883 N.E.2d 1161 (Ind. 2008).
- Condition barring defendant from possessing any materials "related to illegal or deviant interests or behaviors" is unconstitutionally vague without definition of what exactly is meant by "deviant interests and behaviors." Fitzgerald v. State, 805 N.E.2d 857 (Ind. Ct. App. 2004).
- Condition prohibiting defendant from visiting parks, schools, playgrounds, and day care centers. Fitzgerald v. State, 805 N.E.2d 857 (Ind. Ct. App. 2004).
- Defendant convicted of child molesting was forbidden from possessing pornographic or sexually explicit materials. See Smith v. State, 779 N.E.2d 111 (Ind. Ct. App. 2002); Fitzgerald v. State, 805 N.E.2d 857 (Ind. Ct. App. 2004); and Foster v. State, 813 N.E.2d 1236 (Ind. Ct. App. 2004).
- Condition prohibiting defendant from visiting "businesses that sell sexual devices or aids" was unfairly broad because it could extend to drug stores. Kelp v. State, 119 N.E.3d 1071 (Ind. Ct. App. 2019); see also Salhab v. State, 153 N.E.3d 297 (Ind. Ct. App. 2020) and Custance v. State, 128 N.E.3d 8 (Ind. Ct. App. 2019).
- Requiring defendant to notify probation officer of establishment of "a dating, intimate and/or sexual relationship." McVey v. State, 863 N.E.2d 434 (Ind. Ct. App. 2007).
- Prohibiting possession of pornographic or sexually explicit material or any materials "related to illegal or deviant interests or behaviors." McVey v. State, 863 N.E.2d 434 (Ind. Ct. App. 2007).
- Condition ordering defendant not to reside within two blocks of any area where children congregate. Carswell v. State, 721 N.E.2d 1255 (Ind. Ct. App. 1999).
- Condition that defendant conduct himself in such a manner that no one has any occasion to question whether or not he has violated law and if anyone has sufficient

grounds to have such suspicions he should be arrested or charged; condition placed defendant at mercy of anyone who may have any reason, whether good or bad, to ever question his behavior. Dulin v. State, 346 N.E.2d 746 (Ind. Ct. App. 1976).

- Condition ordering defendant to not associate with people of bad character or reputation or with people likely to influence her to commit a crime; condition did not define what "associate," "bad character," or "reputation" meant; too subjective to inform defendant what conduct would subject her to probation revocation. Clemons v. State, 83 N.E.3d 104 (Ind. Ct. App. 2017); McCarty v. State, 94 N.E.3d 350 (Ind. Ct. App. 2018).
- Condition requiring defendant to contact probation officer "within 48 hours of being arrested or charged with a new criminal offense" was ambiguous as to whether the condition applies to arrests on offenses that occurred before probation began. Jackson v. State, 29 N.E.3d 151 (Ind. Ct. App. 2015).

Even if there are conditions which are void due to vagueness, if there are other grounds in the record to support the revocation, the appellate court will not remand the case for further proceedings. Culley v. State, 385 N.E.2d 486, 488 (Ind. Ct. App. 1979). See also Dulin v. State, 346 N.E.2d 746, 754 (Ind. Ct. App. 1976).

III. SUPERVISION OF PROBATIONERS

A. ROLE OF PROBATION OFFICER

Probation officers are functionaries of the court who investigate cases, supervise probation, and report to the court. However, it is the court which is empowered to grant, modify, and terminate probation. Ind. Code § 11-13-1-1; Ind. Code § 11-13-1-2; Ind. Code § 11-13-1-3 (duties of probation officer); Ind. Code § 11-13-1-5 (powers of probation officers); Ind. Code § 35-38-2-2.3; Zelmer v. State, 177 Ind. App. 636, 380 N.E.2d 618, 620 (1978). Probation officers serve at the pleasure of the appointing court and are directly responsible to and subject to the orders of the court. Ind. Code § 11-13-1-1(c).

Ind. Code § 11-13-1-3 requires a probation officer to supervise and assist a person on probation, bring to the trial court's attention any modification of probation considered advisable and notify the court when a violation of probation occurs. However, the court is still responsible for specifying the terms of probation and providing the defendant with a written statement of such conditions at sentencing. Disney v. State, 441 N.E.2d 489 (Ind. Ct. App. 1982).

B. MEETINGS WITH PROBATION OFFICER: FIFTH AMENDMENT

Notwithstanding the fact that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled, they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted. Minnesota v. Murphy, 465 U.S. 420, 426, 104 S. Ct. 1136, 1141-42 (1984).

Minnesota v. Murphy, 465 U.S. 420, 426, 104 S. Ct. 1136, 1141 (1984) (where there was no reasonable basis for concluding that State would revoke probation based on defendant's exercise of privilege against self-incrimination during meeting with probation officer and no evidence that defendant feared revocation if he remained silent, defendant's incriminating statements to probationer officer were not compelled; defendant could have but did not exercise his right to remain silent during interview;).

1. Miranda warnings generally not required

A probation officer legitimately engaged in the supervision of the probationer need not give Miranda warnings. Alspach v. State, 440 N.E.2d 502 (Ind. Ct. App. 1982). A probation officer is legitimately engaged in supervision of the probationer if: 1) the probationer is not in custody; 2) the interrogation is reasonably related to the officer's duty to supervise the probationer; and 3) the questioning is reasonable under all the circumstances, including the length of time and the hour of the day or night it is conducted, the manner in which it is conducted, persons present during questioning and place where it is conducted. Id. at 505. A probation officer is not required to assure the probationer that he is not under arrest. Brabandt v. State, 797 N.E.2d 855, 862 (Ind. Ct. App. 2003). Further, the last two prongs of the test in Alspach (above) does not apply when the defendant is not in custody. Id.

For more on custody determination and confessions made to probation officers, see the *IPDC Confessions Manual.*

Minnesota v. Murphy, 465 U.S. 420, 426, 104 S. Ct. 1136, 1141 (1984) (where probation officer learned from third party that defendant had confessed to rape and murder and probation officer went to defendant and got him to confess to crime, Fifth Amendment was not self-executing and interview between defendant and probation officer, despite probation officer's intent to gain confession, did not trigger the "in-custody" demand for Miranda).

Alspach v. State, 440 N.E.2d 502 (Ind. Ct. App. 1982) (probation officer was not required to give defendant Miranda warnings prior to questioning him after petition to revoke probation was filed, in view of fact that such officer was acting as arm of court, and not as governmental agent, and that defendant knew that petition had been filed and he was not under detention).

Brabandt v. State, 797 N.E.2d 855 (Ind. Ct. App. 2003) (defendant who made confession at probation meeting was not in custody when he arrived at probation office on his own, there was no evidence of him being restrained or being behind locked doors, and he was free to leave the probation meeting; court held parts (2) and (3) of Alpach test to be inapplicable when the custody question is dispositive).

2. Invoking privilege of self-incrimination

A defendant may invoke his Fifth Amendment privilege against self-incrimination during a meeting with his probation officer.

Minnesota v. Murphy, 465 U.S. 420, 426, 104 S. Ct. 1136, 1141 (1984) (where defendant did not have right to have attorney present at meeting with probation officer, defendant did not invoke his right against self-incrimination by asking to talk with his lawyer).

C. SWEEPS OF PROBATIONERS

Because a probation officer may visit a probationer at reasonable times at the probationer's home or elsewhere and a probationer may waive his Fourth Amendment rights as a condition of probation, a probationer should expect that his probation officer might stop by for a surprise visit to make sure that no illegal activity is occurring and to enforce the conditions of his probation. Bonner v. State, 776 N.E.2d 1244 (Ind. Ct. App. 2002). However, the probation officer cannot

search the home, person or vehicle of the probationer without reasonable suspicion that illegal activity is occurring. Purdy v. State, 708 N.E.2d 20 (Ind. Ct. App. 1999).

> Purdy v. State, 708 N.E.2d 20 (Ind. Ct. App. 1999) (where officers stopped by probationer's home on sweep of probationers and smelled marijuana when probationer's ex-wife opened door to home, subsequent search of home was reasonable).

But see:

> Fitzgerald v. State, 805 N.E.2d 857 (Ind. Ct. App. 2004) (disagreeing with Bonner and Purdy to extent those cases held that sweeps are a permissible means of monitoring whether probationers are engaged in prohibited activity; there must be reasonable suspicion that the conditions of probation are being violated in order for a probation search to be reasonable; in this regard, general or routine probation compliance checks will not suffice).

For more on consenting to search provisions and reasonable suspicion requirements, see *Section II.G.5, above.*

D. TRANSFER OF PROBATION

1. In state

a. Supervision

Supervision of a probationer may be transferred from the court that placed the person on probation to a court of another jurisdiction in Indiana, with the concurrence of both courts. Retransfers of supervision may occur in the same manner. This section does not apply to transfers under IC 11-13-4 [Out-of-State probationer] or IC 11-13-5 [Interstate Probation Hearings]. Ind. Code § 35-38-2-2.3(e).

b. Sanctioning authority – jurisdiction

The judge of a circuit, superior, city or town court, when transferring probation supervision to a court of another jurisdiction, may also transfer sanctioning authority for probation violations, including revocation of probation. If the original sentencing court transfers sanctioning authority, the consent of the judge in the receiving court is required. Ind. Criminal Rule 2.3(C).

c. Fee for transfer of probation supervision

An offender on probation who applies to have the probation supervision transferred to a court in another jurisdiction shall pay a transfer fee of seventy-five dollars ($75) to the receiving court. The receiving court may waive the transfer fee if it finds the offender is indigent. Ind. Criminal Rule 2.3(D).

2. Out of state

Pursuant to the Interstate Compact for Supervision of Parolees and Probationers, the State of Indiana is authorized to enter into a compact with other states dealing with the out-of-state supervision of probationers and parolees. Ind. Code § 11-13-4-1. However, this is just a transfer of supervision, not jurisdiction; thus, an Indiana probation officer retains authority to initiate revocation proceedings against a probationer upon his return to the jurisdiction.

Morgan v. State, 691 N.E.2d 466 (Ind. Ct. App. 1998).

Johnson v. State, 957 N.E.2d 660 (Ind. Ct. App. 2011) (trial court had jurisdiction to revoke defendant's probation even if he did not have a probable cause hearing in Michigan, the "receiving state," before extradition to Indiana).

King v. State, 642 N.E.2d 1389, 1389 n.1 (Ind. Ct. App. 1994) (interstate supervision of probationers does not require Indiana to apply law of other state when conducting revocation proceedings).

a. Requirements of probationer

Pursuant to Ind. Code § 11-13-4-1(1), the State is authorized to send a probationer to another state which is a party to the Compact if either:

(1) The probationer is in fact a resident of, or has his family residing within, the receiving state and can obtain employment there; or

(2) Although not a resident of the receiving state and not having his family residing there, the receiving state consents to probationer's being sent there.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted. Ind. Code § 11-13-4-1(1).

The trial court may impose additional conditions on its granting transfer.

King v. State, 642 N.E.2d 1389 (Ind. Ct. App. 1994) (fact that transfer of probation to another state pursuant to interstate probation compact was conditioned upon probationer's urinalysis drug testing on demand did not make probationer's consent to such testing involuntary; probationer petitioned for permission to move to other state and thereby submitted himself to condition, and form he signed indicated that he freely accepted condition).

b. Opportunity to investigate

Before granting permission to the probationer to reside in the receiving state, opportunity shall be granted to the receiving state to investigate the home and prospective employment of the probationer. Ind. Code § 11-13-4-1(1).

c. Supervision by receiving state

Each receiving state assumes the duties of visitation and supervision of probationers of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers. Ind. Code § 11-13-4-1(2).

Although a receiving state cannot modify the conditions of probation, the sending state may require certain conditions to be met before it transfers the defendant's probation. King v. State, 642 N.E.2d 1389, 1391 n.2 (Ind. Ct. App. 1994).

d. Sending state retaking probationer

Duly accredited officers of a sending state may enter a receiving state and there apprehend and retake any person on probation. Ind. Code § 11-13-4-1(3).

(1) No formalities

Unless otherwise required by law, no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived. Ind. Code § 11-13-4-1(3).

(2) Transportation of probation through other states

The duly accredited officers of sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference. Ind. Code § 11-13-4-1(4).

(3) Procedure for retaking

(a) Notification

Where supervision of a probationer is being administered under IC 11-13-4 or 4.5, the appropriate judicial or administrative authorities in this state shall notify the compact administrator of the sending state whenever, in their view, consideration should be given to retaking or re-incarceration for a probation violation. Ind. Code § 11-13-5-1.

(b) Hearing

Prior to the giving of notification, a hearing shall be held in accordance with this chapter within a reasonable time, unless the hearing is waived by the probationer. Ind. Code § 11-13-5-1.

A hearing may be before the administrator of the interstate compact for the supervision of probations, a deputy of the administrator, or any other person authorized pursuant to the laws of this state to hear cases of alleged probation violation, except that no hearing officer shall be the person making the allegation of violation. Ind. Code § 11-13-5-2.

Pursuant to Ind. Code § 11-13-5-3, with respect to the hearing, the probationer:

(1) shall have reasonable notice in writing of the nature and content of the allegations to be made, including notice that its purpose is to determine whether there is probable cause to believe that he has committed a violation that may lead to a revocation of probation;

(2) shall have the right to confront and examine any persons who have made allegations against him; and

(3) may admit, deny, or explain the violation alleged, call witnesses, and may present poof, including affidavits and other evidence, in support of his contentions.

This hearing may also be conducted by another state. Ind. Code § 11-13-5-4.

(c) Record and recommendations

The appropriate officer of this state shall as soon as practicable, following the termination of the hearing, report to the sending state, furnish a copy of the hearing record, and make recommendations regarding the disposition to be made of the probationer by the sending state. Ind. Code § 11-13-5-1.

If the hearing is conducted by another state, the record of the proceeding, held pursuant to a statute substantially similar to this state, shall have the same standing and effect as though the proceeding of which it is a record was had before the appropriate officer in Indiana, and any recommendations contained in or accompanying the record shall be fully considered by the appropriate officer in making disposition of the matter. Ind. Code § 11-13-5-4.

(d) Detention

Pending any proceeding pursuant to this section, the appropriate officer of this state may take custody of and detain the probationer involved for a period not to exceed fifteen days prior to the hearing and, if it appears to the hearing officer that retaking or re-incarceration is likely to follow, for such reasonable period after the hearing or waiver as may be necessary to arrange for the retaking or re-incarceration. Ind. Code § 11-13-5-1.

(4) Judicial review of retaking

The decision of the sending state to retake a probationer shall be conclusive upon and not reviewable within the receiving state. However, if at the time when a state seeks to retake a probationer, the probationer either faces charges in the receiving state or he is suspected of committing a crime within that state, the sending state cannot retake the probationer without the receiving state's consent until the probationer is discharged from prosecution or imprisonment in the receiving state. See Ind. Code § 11-13-4-1(3).

IV. MODIFICATION / TERMINATION OF PROBATION

A court may modify the conditions of probation (except a user's fee under IC 35-38-2-1(c)) or terminate the probation at any time. Ind. Code § 35-38-2-1(b); Clark v. State, 580 N.E.2d 708, 710 (Ind. Ct. App. 1991). After accepting a plea, the trial court is bound by the terms of that plea but can modify conditions of probation at any time. Malone v. State, 571 N.E.2d 329 (Ind. Ct. App. 1991). See also Subsection II.A., *Conditions of Probation, Trial Court's Discretion*, for a discussion on when a court can add a condition not specified in a plea agreement.

If the trial court enters into a probation modification agreement instead of revoking probation due to a violation, it cannot subsequently revoke the defendant's probation for the same conduct that instigated the modification.

Watson v. State, 833 N.E.2d 497 (Ind. Ct. App. 2005) (trial court improperly revoked defendant's probation, because State presented no evidence that defendant violated any of the conditions of his probation after he entered into a "Stipulation of Probation Modification Agreement" which was signed and approved by trial court).

A court may hold a new probation hearing and modify a probationer's conditions of probation at any time during the probationary period. No violation is required, but the court must notify the probationer of the hearing. Ind. Code § 35-38-2-1.8.

Collins v. State, 911 N.E.2d 700 (Ind. Ct. App. 2009) (declining to follow Ferrill v. State, 904 N.E.2d 323 (Ind. Ct. App. 2009) and holding that trial courts have statutory authority to add probation conditions after probation begins even though the probationer has not committed a violation; such authority does not violate due process or *ex post* facto protections).

Knight v. State, 155 N.E.3d 1242 (Ind. Ct. App. 2020) (while trial court complied with the procedural requirements of IC 35-38-2-1.8(c) when conducting a new probation hearing, the imposition of 600 hours of community service condition was beyond the trial court's discretion because that condition was not specified in the plea agreement and the agreement contained language that limited the court's discretion).

The trial court may not delegate authority to the probation department to add probation terms beyond what the trial court's probation order imposed. Lucas v. State, 501 N.E.2d 480 (Ind. Ct. App. 1986). See also Whitaker v. State, 87 N.E.3d 1139 (Ind. Ct. App. 2017). The trial court, not probation, has discretion to impose certain probation fees. Burnett v. State, 74 N.E.3d 1221 (Ind. Ct. App. 2017). See also De La Cruz v. State, 80 N.E.3d 210 (Ind. Ct. App. 2017); Polk v. State, 88 N.E.3d 226 (Ind. Ct. App. 2017); and Coleman v. State, 61 N.E.3d 390 (Ind. Ct. App. 2016).

If a court does not formally discharge a probationer from probation by court order, the probationary term ends by operation of law at the end of the maximum period for which the defendant could be placed on probation or at the end of the probationary period for which the probationer was placed.

Slayton v. State, 534 N.E.2d 1130 (Ind. Ct. App. 1989) (where court erroneously placed defendant on probation for period exceeding maximum period for which defendant could be placed on probation, probationary period ended by operation of law at the time it should have ended).

V. REVOCATION OF PROBATION1

A. AUTHORITY TO REVOKE PROBATION

Probation is a favor granted by the State, not a right to which the defendant is entitled; however, once the State grants that favor, it cannot simply revoke the privilege at its discretion. Parker v. State, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997). A necessary concomitant to the power to grant probation is the power to revoke probation. Ewing v. State, 160 Ind. App. 138, 310 N.E.2d 571, 575 (1974), *overruled on other grounds by* Hoffa v. State, 368 N.E.2d 250 (Ind. 1977).

Pursuant to Ind. Code § 35-38-2-3(a), the court may revoke a person's probation if:

1 For a discussion regarding revocation of placement in community corrections programs, see Chapter 5, *Sentencing Alternatives*, Subsection IV.F., *Direct Placement in Community Corrections; Violation of Terms of Placement*.

(1) the person has violated a condition of probation during the probationary period; and

(2) the petition to revoke probation is filed during the probationary period or before the earlier of the following:

(a) One (1) year after the termination of probation

(b) Forty-five (45) days after the state receives notice of the violation.

1. Timing of alleged violation

a. Prior to probationary period

The court has the authority to revoke probation for a violation even when the defendant has not yet commenced the probationary part of his sentence. Hardy v. State, 975 N.E.2d 833 (Ind. Ct. App. 2012). The defendant's probation begins immediately after sentencing. Childers v. State, 656 N.E.2d 514 (Ind. Ct. App. 1995), *opinion dissenting from denial of transfer*, 668 N.E.2d 1216; Johnson v. State, 606 N.E. 2d 881, 882 (Ind. Ct. App. 1993).

Thus, a defendant's probation may be revoked even before the defendant begins serving his sentence, regardless of whether such sentence constitutes an "executed sentence" rendering probation revocation prospective or a "suspended sentence" akin to probation. Gardner v. State, 678 N.E.2d 398 (Ind. Ct. App. 1997). Probation may also be violated while the defendant is serving his executed sentence. Baker v. State, 894 N.E.2d 594 (Ind. Ct. App. 2008).

Further, a defendant released on parole prior to completing his or her executed sentence, may have probation revoked based on conduct that occurred prior to the original date of initiation of probation. Ashba v. State, 570 N.E.2d 937 (Ind. Ct. App. 1991).

Baldi v. State, 908 N.E.2d 639 (Ind. Ct. App. 2009) (defendant's probation can be revoked while he is still on parole for an unrelated conviction because probation can be revoked before defendant begins serving his sentence).

b. During probationary period

The court may revoke a person's probation if the person has violated a condition of probation during the probationary period. Ind. Code § 35-38-2-3(a).

The State must show the violation of the condition occurred after probation was imposed.

C.S. v. State, 817 N.E.2d 1279 (Ind. Ct. App. 2004) (Court reversed revocation of probation for juvenile who tested positive for cocaine metabolites, which appear in the urine for some time period after cocaine has been ingested, five days after he was placed on probation; because the State did not provide evidence of what that time period might be or that he was free of drugs prior to probation the trial court could only speculate about whether cocaine was used before or after probation was imposed).

Carpenter v. State, 999 N.E.2d 104 (Ind. Ct. App. 2013) (where State's expert testified that a person can test positive for phenobarbital up to three weeks after ingestion, the State failed to prove defendant ingested the drug during probation

when she was placed on probation just five days earlier).

c. After probationary period/during tolled period

Generally, a court cannot revoke probation based on conduct which occurred after the original probationary period has ended; however, the court may revoke probation based on the probationer's conduct after the original term has ended if the probationary period was tolled due to misconduct of the probationer.

When a petition is filed charging a violation of a condition of probation, the court may order a summons to be issued to the person to appear or order a warrant for the person's arrest if there is a risk of his fleeing the jurisdiction or causing harm to others. Ind. Code § 35-38-2-3(b).

The issuance of a summons or warrant tolls the period of probation until the final determination of the charge. Ind. Code § 35-38-2-3(c). See also Mumford v. State, 651 N.E.2d 1176, 1177 (Ind. Ct. App. 1995) and Hayes v. State, 590 N.E. 2d 1116, 1118 (Ind. Ct. App. 1992). But the trial court's failure to issue a warrant or summons after the filing of the petition to revoke probation has no effect on its ability to conduct a hearing on that petition. See, e.g., Murphy v. State, 113 N.E.3d 776 (Ind. Ct. App. 2018).

(1) Nature of summons

Phillips v. State, 611 N.E.2d 198 (Ind. Ct. App. 1993) (where defendant was served with document titled "Notice of Hearing," he was served with summons for purposes of tolling probation period because document set forth nature of offense, commanded defendant that he was to appear in court and was signed by clerk of court).

(2) Tolling beyond original probationary period

The period of probation is not tolled under Ind. Code § 35-38-2-3(c) for violations filed after the probationary period ends. And although the trial court loses jurisdiction over a defendant when the probation term expires, disposition may occur if the violation occurred during the probation term. The trial court has authority to hold a hearing and enter a revocation determination made in a petition timely-filed under Ind. Code § 35-38-2-3(a) (i.e., within 45 days of State receiving notice of the alleged violation). Murphy v. State, 113 N.E.3d 776 (Ind. Ct. App. 2018).

The purpose of tolling period of probation until final determination of charge of probation violation is to grant trial court power to revoke probation and order defendant returned to jail when it determines that defendant violated probation, even though disposition regarding that violation occurs after original term of probation had expired. Slinkard v. State, 625 N.E. 2d 1282, 1284 (Ind. Ct. App. 1993). Because the conditions of probation are not tolled along with the period of probation, a defendant may be revoked for a violation of a condition after the original period of probation has ended. However, the court may only revoke the defendant's probation based on a violation of those conditions during a tolled period of probation if:

(a) the original term of probation has not expired; or

Perry v. State, 642 N.E.2d 536 (Ind. Ct. App. 1994) (probation may be revoked for conduct occurring during the tolling period but when original term of

probation had not yet expired; here, defendant violated probation by drinking alcohol on day of probation revocation hearing for earlier alleged violation; at time, defendant's probationary period was tolled but original probation period had not ended).

(b) the original term of probation has expired but the defendant is found to be guilty of the reason for tolling the original period of probation, i.e., the first alleged violation, or the defendant's conduct, such as fleeing from the jurisdiction, results in the delay.

Mumford v. State, 651 N.E.2d 1176 (Ind. Ct. App. 1995) (although court found that defendant did not commit probation violations which tolled probation period, probation still could be revoked for violation which occurred after probation period because defendant's four-year disappearance caused delay in revocation).

Phillips v. State, 611 N.E.2d 198 (Ind. Ct. App. 1993) (petition to revoke probation based on violation, to which defendant admitted, tolled probation period; thus, second petition to revoke based on violation which occurred after original period of probation had ended was timely).

Thus, where the defendant is found not guilty of the alleged violation for which the probationary period was tolled, probation may not be revoked for conduct occurring outside the original probationary period but during the tolled period.

Slinkard v. State, 625 N.E.2d 1282, 1284 (Ind. Ct. App. 1993) (where no violations occur during the original term of probation, in absence of misconduct in hearing process or absconding from justice, court may not revoke probation for events occurring after original term of probation; because State failed to prove the alleged violation for which the probationary period was tolled, probation could not be revoked for violation which occurred outside original probationary period but during the tolled period).

Dawson v. State, 751 N.E.2d 812 (Ind. Ct. App. 2001) (defendant's probationary term was not tolled because State failed to present any evidence of, and court failed to make any findings concerning, probation violations alleged in original petition upon which to base tolling of probationary term; probation violation upon which defendant found guilty was allegedly committed after probationary period ended); see also Murphy v. State, 113 N.E.3d 776 (Ind. Ct. App. 2018) (trial court improperly revoked probation where the allegation was based on an offense alleged to have occurred after the expiration of defendant's probationary term).

d. Defendant agrees to extend probation

An agreement to modify or extend probation is akin to a plea agreement, and once accepted by trial court, it is binding upon both parties and trial court.

Hardy v. State, 975 N.E.2d 833 (Ind. Ct. App. 2012) (where defendant signed an agreement extending his probation to allow him additional time to complete his probation requirements; extension agreement was not the result of a revocation

proceeding and defendant did not show he had a right to counsel when entering into it).

Addington v. State, 869 N.E.2d 1222 (Ind. Ct. App. 2007) (probationary period was tolled by agreement, so defendant could not later complain that imposition of sentence following termination of participation in drug court was untimely).

2. Timing of petition to revoke probation filing

A petition to revoke based on conduct during the probation period may be filed during the probationary period or before the earlier of the following: (A) One year after the termination of probation; or (B) Forty-five days after the state receives notice of the violation. Ind. Code § 35-38-2-3(a).

a. Prior to probationary phase

The court has the authority to revoke probation for violation even when the defendant has not yet commenced the probationary phase of his sentence. Rosa v. State, 832 N.E.2d 1119 (Ind. Ct. App. 2005); Ashley v. State, 717 N.E.2d 927, 928-29 (Ind. Ct. App. 1999); Childers v. State, 656 N.E.2d 514 (Ind. Ct. App. 1995); Johnson v. State, 606 N.E.2d 881, 882 (Ind. Ct. App. 1993). The "probationary period," as used in IC 35-38-2-3, means the period beginning immediately after sentencing and ending at the conclusion of the probationary "phase" of a sentence. Ashley, *supra*.

This includes any time defendant is serving his executed sentence. Crump v. State, 740 N.E.2d 564 (Ind. Ct. App. 2000). Further, the trial court retains jurisdiction over the defendant to revoke probation even though appeal of the conviction for which he is serving probation is pending. Clark v. State, 727 N.E.2d 18 (Ind. Ct. App. 2000).

b. During probationary period

Where the petition to revoke probation is filed prior to the expiration of the suspended sentence, the court retains jurisdiction to revoke the probation although the suspended sentence had expired. State ex. rel. Wilson v. Lowdermilk, 245 Ind. 93, 195 N.E.2d 476 (1964).

Ind. Code § 38-5-2-3 does not limit the State's ability to file a petition to revoke probation during the probationary period, but rather permits the State to file a petition even after the probationary term has ended. Thus, the requirement that the State file the petition to revoke within forty-five days after receiving notice of the violation does not apply to petitions to revoke probation which are filed within defendant's probationary period. Sutton v. State, 689 N.E.2d 452, 455 (Ind. Ct. App. 1997).

PRACTICE POINTER: Where petition to revoke is filed during probationary period and is based on failure to complete counseling, community service, etc., the State may be unable to prove the violation if there was no time period specified within which the condition had to be completed. See Weatherly v. State, 564 N.E.2d 350 (Ind. Ct. App. 1990).

c. After probationary period

The court may revoke the defendant's probation if the petition is filed before the earlier

of one year after the termination of probation or forty-five (45) days after notice of the violation. Ind. Code § 35-38-2-3(a). This statute does not allow the State to file a motion to extend probation, instead of a petition to revoke, after the original probationary period has ended.

Gilreath v. State, 748 N.E.2d 919 (Ind. Ct. App. 2001) (where State filed motion to extend probation, instead of petition to revoke, one day after original probationary period ended, extension of probation contravened statute and violated defendant's right to due process).

(1) Required advisement

The court may revoke probation after probationary period expires only if defendant was advised of such possibility when placed on probation. Preston v. State, 591 N.E. 2d 597, 598 (Ind. Ct. App. 1992).

Taylor v. State, 675 N.E.2d 1128 (Ind. Ct. App. 1997) (revocation of defendant's probation after his initial probationary term had expired was error absent any indication that defendant was advised at time he was placed on probation of possibility of revocation after expiration of term).

Failure to inform defendant being placed on probation that his probation may be revoked after expiration of probationary period is harmless error where the court substantially complies with intent of notice statute or the petition for revocation is actually filed during the probationary period. Layne v. State, 691 N.E.2d 1305, 1307 (Ind. Ct. App. 1998).

(2) Notice

The 45-day deadline is only triggered in cases where the State received notice of the violation less than 45 days before the probationary term expired or after the term expired. The determination of when the State received notice of an alleged probation violation in order to begin the 45-day period is left to the discretion of the trial court, to be reviewed only for an abuse of such discretion. Louth v. State, 705 N.E.2d 1053, 1060 (Ind. Ct. App. 1999). Thus, where the State has notice of defendant's violations prior to the end of defendant's probation, it may not file for revocation more than 45 days after the end of the probationary period. Sharp v. State, 807 N.E.2d 765 (Ind. Ct. App. 2004).

Clark v. State, 958 N.E.2d 488 (Ind. Ct. App. 2011) (trial court erroneously denied defendant's motion to dismiss the notice of probation violation because the State did not file it within forty-five days of receiving notice of the violation).

Louth v. State, 705 N.E.2d 1053 (Ind. Ct. App. 1999) (fact that probationer called his probation officer and told her about his outstanding felony warrant did not constitute notice of probation violation in order to begin running of 45-day period in which to file petition to revoke because probation officer was uncertain how Michigan police were going to pursue matter until probationer was convicted on charge).

Sharp v. State, 807 N.E.2d 765 (Ind. Ct. App. 2004) (petition to revoke probation should have been dismissed as untimely because it was filed more than forty-five days after end of defendant's probationary period and State had notice of defendant's violations during his probation).

Murphy v. State, 113 N.E.3d 776 (Ind. Ct. App. 2018) (the State timely filed one of two probation revocation petitions within 45 days of the State receiving notice that defendant failed to complete all his probation requirements during his probationary period).

PRACTICE POINTER: Prior to July 1, 1990, where the petition to revoke probation was filed after the period of suspension had expired, the court was without jurisdiction to revoke suspension and impose a sentence. White v. State, 560 N.E.2d 45, 46 (Ind. 1990). See also Sandy v. State, 501 N.E.2d 486 (Ind. Ct. App. 1986).

d. Retroactive application

The 1990 version of the statute could be applied retroactively because of its remedial purpose. However, because courts could not anticipate legislative changes and could not have advised the defendants of the possibility of filing a petition to revoke after the probationary period, the amended version of the statute cannot apply to persons placed on probation prior to 1990. Louth v. State, 705 N.E.2d 1053 (Ind. Ct. App. 1999); Preston v. State, 591 N.E.2d 597 (Ind. Ct. App. 1992); see also *Required Advisement, supra*.

B. REVOCATION PROCEDURE

1. Who may initiate proceedings

a. Court

Court may initiate a hearing for revocation of probation on its own motion and in the exercise of its discretion, without requiring the filing of a verified petition for revocation of probation. Noethtich v. State, 676 N.E.2d 1078, 1081 (Ind. Ct. App. 1997) (*citing* State ex rel. Wilson v. Lowdermilk, 245 Ind. 93, 195 N.E.2d 476, 479 (1964)).

b. Prosecutor

Common practice is that the petition to revoke probation is filed by the probation officer or the prosecutor. See Isaac v. State, 605 N.E.2d 144, 146 (Ind. 1992) and Louth v. State, 705 N.E.2d 1053 (Ind. Ct. App. 1999).

c. Probation officer

A probation officer has the authority to initiate proceedings to revoke probation; such initiation of process does not violate defendant's right to a neutral and detached judge and does not constitute the unauthorized practice of law. Noethtich v. State, 676 N.E.2d 1078 (Ind. Ct. App. 1997).

Morgan v. State, 691 N.E.2d 466 (Ind. Ct. App. 1998) (although court granted defendant's petition to transfer probation to Georgia, probation officer had authority to initiate probation revocation proceedings where defendant ended up not moving to Georgia).

Noethtich v. State, 676 N.E.2d 1078 (Ind. Ct. App. 1997) (probation officer's designation of document filed with court as "Notice of Probation Violation" rather than as "Petition to Revoke Probation" did not invalidate probation revocation proceeding, as substance of document demonstrated that it was petitioned to revoke

probation).

2. Preliminary Hearing

Due process requires a preliminary hearing to determine probable cause for the violation of a condition of probation. Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756 (1973). However, the requirement of a preliminary hearing is not applicable where the probationer is not detained because the purpose underlying the preliminary hearing is eliminated. Curtis v. State, 175 Ind. App. 76, 370 N.E.2d 385, 387 (1977).

a. Procedural rights

The probationer is entitled to a prompt preliminary hearing before an independent decision maker following arrest to determine whether there is probable cause to believe a violation has occurred. At that hearing he is entitled to: written notice of the alleged violations; opportunity to appear and present evidence; conditional right to confront adverse witnesses; independent decision maker; and written report of hearing. Gagnon v. Scarpelli, 411 U.S. 778, 786, 93 S. Ct. 1756, 1761 (1973).1

b. Must show prejudice

The failure to hold a preliminary hearing is not per se reversible error. The probationer bears the burden of showing prejudice. Wilson v. State, 403 N.E.2d 1104, 1105 (Ind. Ct. App. 1980).

3. Release pending final determination/Bail

a. Prior to filing of Petition

The court may detain, for a maximum period of fifteen (15) calendar days, a person charged with any offense who comes before it for a bail determination, if the person is on probation, parole, or other community supervision. During the fifteen (15)- day period, the prosecuting attorney shall notify the appropriate parole, probation, or other community supervision authority. If that authority fails to initiate probation or parole revocation proceedings during the fifteen (15) day period, the person shall be treated in accordance with the other sections of this chapter. Ind. Code § 35-33-8-6.

b. After filing of Petition

Pursuant to Ind. Code § 35-38-2-3(b), when a petition is filed charging a violation of a condition of probation, the court may:

(1) order a summons to be issued to the person to appear; or

(2) order a warrant for the person's arrest if there is a risk of the person's fleeing the jurisdiction or causing harm to others.

The court may admit the probationer to bail pending the final revocation hearing. A person who is not admitted to bail pending the hearing may not be held in jail for more than fifteen (15) days without a hearing on the alleged violation of probation. Ind. Code § 35-38-2-3(d). Although some courts have suggested that a court can hold a probationer without bond prior to the revocation hearing, argue that no bond holds on probationers

violates Article I, Section 17 of the Indiana Constitution. Moreover, Ind. Code § 35-38-2-3(b) suggests that unless there is a risk of the person fleeing or causing harm to others, the person should not be detained.

4. Final hearing/Revocation hearing

The court is required to conduct a hearing concerning the alleged violation of a condition of probation. Ind. Code § 35-38-2-3(d). Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756 (1973) (due process also requires a final revocation hearing). However, where a defendant admits to a probation violation, the trial court is not required to hold a hearing on whether the defendant violated the conditions before revoking probation. Cox v. State, 850 N.E.2d 485 (Ind. Ct. App. 2006) (defendant admitted to probation violation in letter to judge). See also Terrell v. State, 886 N.E.2d 98 (Ind. Ct. App. 2008).

When deciding whether to revoke probation, the court must first make a factual determination that the violation of the condition of probation actually occurred; if the violation is proven, then the court must determine if the violation warrants revocation of probation. Parker v. State, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997). Thus, the sole question at a probation revocation hearing is whether probationer should be allowed to remain conditionally free, given evidence of repeated antisocial behavior, or rather should be required to serve previously imposed sentence in prison. See Morgan v. State, 691 N.E.2d 466, 468 (Ind. Ct. App. 1998) and Bahr v. State, 634 N.E.2d 543, 545 (Ind. Ct. App. 1994).

a. Waiver of hearing

A person may admit to a violation of probation and waive the right to a probation violation hearing after being offered the opportunity to consult with an attorney. If the person admits to a violation and requests to waive the probation violation hearing, the probation officer shall advise the person that by waiving the right to a probation violation hearing the person forfeits the right to confrontation, cross-examination, representation by counsel, and a hearing in open court. Ind. Code § 35-38-2-3(e). The sanction administered must follow the schedule of progressive probation violation sanctions adopted by the judicial conference of Indiana under IC 11-13-1-8. Id.

b. Burden of proof

The State must prove the violation by a preponderance of the evidence. Ind. Code § 35-38-2-3(f). See also Isaac v. State, 605 N.E.2d 144, 147 (Ind. 1992). For a detailed summary of case law dealing with sufficiency of evidence for different types of violations, see each violation under Section V. C (below), *Grounds for Revocation*.

Heaton v. State, 984 N.E.2d 614 (Ind. 2013) (the correct legal standard in determining if a person on probation has committed a new offense is a preponderance of the evidence, as articulated in IC 35-38-2-3(e), not a probable cause standard).

c. Procedural rights

(1) 15-day incarceration limit without hearing

A person who is not admitted to bail pending a probation revocation hearing may be held in jail no more than fifteen days without a hearing on the alleged violation. Ind. Code § 35-38-2-3(d).

(2) Due process and statutory rights

The evidence shall be presented in open court. The person is entitled to confrontation, cross-examination, and representation by counsel. Ind. Code § 35-38-2-3(f).

Probation revocation implicates defendant's liberty interests which entitles him to some procedural due process; however, defendant is not entitled to full due process rights, as probation revocation does not deprive defendant of an absolute liberty, but only his conditional liberty. Parker v. State, 676 N.E.2d 1083, 1085 (Ind. Ct. App. 1997).

Pursuant to a line of cases discussing the issue [See Gagnon v. Scarpelli, 411 U.S. 778, 782, 93 S. Ct. 1756, 1760 (1973) (citing Morrissey v. Brewer, 408 U.S. 471, 482, 92 S. Ct. 2593 (1972)); Isaac v. State, 605 N.E.2d 144, 148 (Ind. 1992); Fields v. State, 676 N.E.2d 27, 31 (Ind. Ct. App. 1997); and Dalton v. State, 560 N.E.2d 558, 560 (Ind. Ct. App. 1990)], minimum requirements of due process require the following:

(1) Written notice of the claimed violations of probation.

The written notice must be sufficiently detailed to allow the probationer an adequate opportunity to prepare a defense. J.H. v. State, 857 N.E.2d 429 (Ind. Ct. App. 2006) (failure to provide written notice of claimed violation resulted in due process violation).

A defendant's probation may not be revoked based upon proof of an act that is merely similar in nature to violation charged in the written notice; failure to so include the accurate charge denies the defendant due process.

Long v. State, 717 N.E.2d 1238 (Ind. Ct. App. 1999) (where written notice charged defendant with tampering with ankle bracelet, but his probation was ultimately revoked because he attempted to fix his ankle bracelet, revocation violated due process; court drew distinction between "fix" and "tamper," both of which were conditions of his home detention agreement but different offenses).

(2) Disclosure to the probationer of evidence against him.

(3) Opportunity to be heard in person and to present witnesses and documentary evidence.

A hearing is not necessary if a defendant admits to a probation violation. Beeler v.

State, 959 N.E.2d 828 (Ind. Ct. App. 2011). However, a court may err in not conducting a hearing when combined with other possible due process violations.

Sparks v. State, 983 N.E.2d 221 (Ind. Ct. App. 2013) (suspect quality of defendant's admission to probation violation and trial court's comment that he was thinking of imposing a four-year sentence if defendant accepted responsibility for his actions constituted fundamental error).

A hearing is necessary, however, if a defendant merely pleads guilty to a separate offense in another case. Eckes v. State, 562 N.E.2d 443 (Ind. Ct. App. 1990). An admission to the conduct is not an admission that the defendant violated probation by engaging in that conduct. Trammell v. State, 45 N.E.3d 1212 (Ind. Ct. App. 2015).

Smith v. State, 929 N.E.2d 255 (Ind. Ct. App. 2010) (probation condition stating that any unfavorable polygraph test results would constitute probation violation deprived defendant of right to due process because it removed State's burden to prove a violation actually occurred).

A trial court may hold a probation revocation hearing in the absence of the defendant after a finding that the defendant knowingly and voluntarily waived her right to be present. Mathews v. State, 907 N.E.2d 1079 (Ind. Ct. App. 2009).

A court may, in the interest of judicial economy, hear evidence at a separate trial for a separate crime as evidence in probation revocation and then determine whether defendant violated terms of probation by committing the separate, substantive offense as long as jury is not informed of probation proceedings and defendant has the opportunity to confront and cross-examine witnesses, as well as be represented by counsel. See Strowmatt v. State, 686 N.E.2d 154 (Ind. Ct. App. 1997) and Fields v. State, 676 N.E.2d 27 (Ind. Ct. App. 1997).

An informal conversation between parties does not satisfy due process and statutory requirement to hold a hearing on the probation revocation. See Weatherly v. State, 564 N.E.2d 350 (Ind. Ct. App. 1990); Dalton v. State, 560 N.E.2d 558 (Ind. Ct. App. 1990); and Tillberry v. State, 895 N.E.2d 411 (Ind. Ct. App. 2009).

The right to a revocation hearing is present in juvenile cases as well.

M.T. v. State, 926 N.E.2d 266 (Ind. Ct. App. 2010) (even though statute requiring a hearing to modify juvenile dispositional decree does not specify what hearing must include, basic due process principles and fundamental fairness require an evidentiary hearing at which the State presents evidence supporting the allegations listed in the revocation petition).

(4) The right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).

Isaac v. State, 605 N.E.2d 144 (Ind. 1992), *cert. den*'d, 508 U.S. 922 (1993) (although prosecutor declined to present evidence and court called and questioned probation officer, due process and statutory requirements were satisfied where probation officer was under oath subject to cross-examination and defendant was given an opportunity to present evidence in his own defense).

(5) A "neutral and detached" hearing body; and

(6) A written statement by the fact finder as to the evidence relied on and reasons for revoking probation.

A probationer is entitled to a written statement by the fact finder as to the evidence relied upon and the reasons for the revocation. The placement into the record of a transcript that includes a clear statement of the court's reasons for revoking probation may satisfy requirement of written statement of reasons for revocation. Washington v. State, 758 N.E.2d 1014 (Ind. Ct. App. 2001). See also Wilson v. State, 708 N.E.2d 32 (Ind. Ct. App. 1999). A statement of reasons is not required when the defendant admits to violations of probation conditions. Terrell v. State, 886 N.E.2d 98 (Ind. Ct. App. 2008).

Terpstra v. State, 138 N.E.3d 278 (Ind. Ct. App. 2019) (although the Court does not encourage trial courts to conduct proceedings where rulings to objections are not provided, there was no due process violation in this case where, in an effort to expedite the proceedings, the trial court overruled all objections but stated it would ignore any inadmissible evidence in reaching its judgment).

A court must make some finding of a violation in order to extend a defendant's probation. Gilreath v. State, 748 N.E.2d 919 (Ind. Ct. App. 2001) (denial of due process to extend probation without finding violation).

(7) Probationer's competency

Although not required under Ind. Code § 35-36-3-1, the Due Process Clause of the United States Constitution requires that a defendant be competent when participating in a probation revocation hearing. Donald v. State, 930 N.E.2d 76 (Ind. Ct. App. 2010). However, it is not fundamental error to fail to conduct a competency evaluation before revoking a defendant's probation; trial court in best place to observe defendant's demeanor to find whether a competency analysis is necessary. Hutchison v. State, 82 N.E.3d 305 (Ind. Ct. App. 2017).

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).

PRACTICE POINTER: Some courts have expanded the use of Parker v. State, 676 N.E.2d 1083 (Ind. Ct. App. 1997), by having probationers admit to a violation as part of a plea agreement which the court later rejects. Based on the admission, the court then rules that probation was violated and no hearing is needed. When a probationer enters into a plea agreement, she is admitting the violation, which benefits the State, in order to receive a benefit herself, an agreed-upon sentence. The Defendant's statements violate the substantive rule disallowing statement made pursuant to a plea agreement introduction into evidence. Hensley v. State, 573 N.E.2d 913 (Ind. Ct. App. 1991) (the rule prohibiting evidence of a plea bargaining or statements made during plea bargaining is not just a rule of evidence, but also a rule of substantive law, and thus, applies in probation revocation proceedings). When the court uses this tactic, the probationer receives no benefit, and the State receives no disadvantage. It is a violation of the probationer's due process, and repeated use of this tactic would end the use of plea agreements in probation violations. Further, Greer v. State, 690 N.E.2d 1214 (Ind. Ct. App. 1998) holds that a probationer who chooses to admit rather than contest his probation violation places himself in a situation similar to that of a defendant who chooses to plead guilty to criminal charges. A decision to admit to a violation must be voluntary. A decision to admit to the violation when the probationer does not know how such an admission could be used against him is not a voluntary decision. See, e.g., Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495 (1971) and Epperson v. State, 530 N.E.2d 743 (Ind. Ct. App. 1988). Basically, a judge or prosecutor cannot mislead a probationer into admitting the violation. Sims v. State, 547 N.E.2d 895, 898 (Ind. Ct. App. 1989). This tactic also violates the defendant's substantial rights and crosses the boundary of fair play. Davenport v. State, 689 N.E.2d 1226 (Ind. 1997). Whether a defendant's admission to a probation violation has to be knowing and voluntary and whether such admission can be challenged on direct appeal are undecided issues in Indiana. See Sparks v. State, 983 N.E.2d 221 (Ind. Ct. App. 2013).

(5) Right to confrontation/cross-examination

Probationers have a constitutional right to confrontation and cross-examination. See Ind. Code § 35-38-2-3(f) and Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756 (1973).

However, confrontation rights in the context of probation revocation are not as extensive as they are in criminal trials. Robinson v. State, 955 N.E.2d 228, 232 (Ind. Ct. App. 2011). The scope of the right to confrontation as explored in the seminal case of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), does not apply in probation revocation proceedings because they are not criminal trials. Reyes v. State, 868 N.E.2d 438, 440 n.1 (Ind. 2007). See also Smith v. State, 971 N.E.2d 86, 89 (2012) and Marsh v. State, 818 N.E.2d 143 (Ind. Ct. App. 2004).

Monroe v. State, 899 N.E.2d 688 (Ind. Ct. App. 2009) (proceedings involving community corrections placement revocations, like probation revocation proceedings, similarly are not criminal trials; accordingly, Crawford is not implicated in such cases).

Lightcap v. State, 863 N.E.2d 907 (Ind. Ct. App. 2007) (trial court may properly admit sworn testimony from a prior proceeding before the same court at a probation revocation hearing regardless of the unavailability of the witness).

C.S. v. State, 817 N.E.2d 1279 (Ind. Ct. App. 2004) (Court rejected defendant's claim that his confrontation rights to cross-examine his accuser were violated because the testing information was presented by a probation officer without knowledge of testing procedures employed).

(6) Right to counsel

Even though a probationer is not entitled to the full panoply of rights he enjoys prior to conviction, he is still entitled to due process protections such as representation by counsel. See Ind. Code § 35-38-2-3(e), which only permits a probationer to waive his right to hearing after being offered the opportunity to consult with an attorney.

When a defendant waives his right to counsel in a probation revocation proceeding, the record must show that the defendant was made aware of the nature, extent and importance of the right to counsel and to the necessary consequences of waiving such a right. Bumbalough v. State, 873 N.E.2d 1099 (Ind. Ct. App. 2007). Thus, a waiver of the right to counsel at a probation revocation hearing must be voluntary, knowing, and intelligent. Id. See also Eaton v. State, 894 N.E.2d 213 (Ind. Ct. App. 2008) and Allen v. State, 86 N.E.3d 391 (Ind. Ct. App. 2017). An unconstitutional denial of the right to counsel is not subject to harmless error analysis. If the record fails to establish that the probationer's waiver of the right to counsel was voluntary, knowing, and intelligent, then reversal is required even if the probationer, without the benefit of counsel, admitted the violations. Silvers v. State, 945 N.E.2d 1274 (Ind. Ct. App. 2011) (*quoting* Bumbalough v. State, 873 N.E.2d at 1102).

When a probationer unequivocally expresses a desire to proceed pro se and chooses to admit rather than challenge the alleged probation violation, a knowing, intelligent, and voluntary waiver of counsel may be established even if the record does not show that the probationer was warned of the pitfalls of self-representation. Cooper v. State, 900 N.E.2d 64 (Ind. Ct. App. 2009) (*quoting* Greer v. State, 690 N.E.2d 1214, 1217 (Ind. Ct. App. 1998)). See also Hammerlund v. State, 967 N.E.2d 525 (Ind. Ct. App. 2012).

Minimum due process of revocation hearing does not require appointment of stand-by counsel for a pro se defendant. Piper v. State, 770 N.E.2d 880 (Ind. Ct. App. 2002).

Ind. Crim. Rule 11 only applies to contested felony probation revocation proceedings; thus, there is no right to appellate pauper counsel when a defendant admits the probation violation. Gosha v. State, 873 N.E.2d 660 (Ind. Ct. App. 2007).

Because the revocation of probation or community corrections placement is civil, not criminal, in nature, Article 1, section 13 of the Indiana Constitution is inapplicable. Arrowood v. State, 152 N.E.3d 663 (Ind. Ct. App. 2020) (community corrections and probation revocation hearings are governed by principles of due process).

(7) Limited privilege against self-incrimination

A defendant may invoke the Fifth Amendment privilege concerning any questions whose answers could lead to subsequent criminal proceedings but may not invoke the privilege with regard to basic identifying information and any disclosures which are necessary to effectively monitor probation.

Bussberg v. State, 827 N.E.2d 37 (Ind. Ct. App. 2005) (granting of use immunity removed danger of future prosecution against probationer, thus trial court did not err in ordering probationer to answer whether he ingested methamphetamine

prior to giving urine sample).

McKnight v. State, 787 N.E.2d 888 (Ind. Ct. App. 2003) (defendant's Fifth Amendment right was not implicated by questions asked by State because questions did not elicit answers that could have implicated defendant in pending criminal matter, as questions concerned only prior arrest and conviction and defendant's probation violations).

Pitman v. State, 749 N.E.2d 557 (Ind. Ct. App. 2001) (requiring defendant to answer questions concerning whether there was probable cause determination concerning arrest did not violate defendant's Fifth Amendment right because answers did not reveal anything concerning guilt or innocence of new charge).

State v. Cass, 635 N.E.2d 225 (Ind. Ct. App. 1994) (probationer was not entitled to invoke Fifth Amendment rights against self-incrimination in refusing to answer question asked by State that merely served to identify probationer as perpetrator of crime, where probationer had already been convicted of that crime).

However, when a probation revocation is held prior to a criminal trial on the alleged crime which is the basis of the revocation, a defendant is placed in an untenable position of choosing between her due process right to be heard at a probation revocation hearing and her right to remain silent. If the defendant chooses to remain silent at the probation revocation hearing, the State will have a simple task of meeting the lower burden, preponderance of evidence, but on the other hand, if the defendant decides to take the stand, the defendant sacrifices her right to remain silent at the pending criminal trial and provides the prosecution with her trial strategy.

Although the Indiana Supreme Court in Hoffa v. State, 267 Ind. 133, 368 N.E.2d 250 (1977), held that a criminal conviction need not precede a probation revocation based on criminal conduct, the constitutional implications of a preceding revocation have never been addressed by the Indiana Supreme Court. Many other jurisdictions solved the problem by suggesting that the probation revocation be postponed until after the disposition of the criminal charges. However, if necessary, the probation revocation hearing can be held prior to the trial on the pending criminal charges as long as the defendant's testimony cannot be introduced in the subsequent trial. See State v. Begins, 514 A.2d 719 (Vt. 1986); People v. Jasper, 663 P.2d 206 (Cal. 1983); McCracken v. Corey, 612 P.2d 990 (Ala. 1980); and People v. Rocha, 272 N.W.2d 699 (Mich. Ct. App. 1978). In Indiana, there is no rule requiring a probation revocation hearing to be conducted after the relevant criminal trial.

Davis v. State, 743 N.E.2d 793 (Ind. Ct. App. 2001) (defendant's privilege against self-incrimination was not violated by requiring probation revocation hearing to be held prior to trial on new charge; further, court held only Indiana Supreme Court, and not Court of Appeals, has power to order new, prospective rule that probation violation hearing should be heard after criminal trial).

The ABA has suggested that the probation revocation hearing always be held after the disposition of the criminal charges because to do otherwise would divulge the defendant's theory to the State. McCracken v. Corey, 612 P.2d 990, 996 n.18 (Ala. 1980).

(8) Right to speedy trial

Indiana Criminal Rule 4 does not apply in proceedings to revoke a suspended sentence. However, where Criminal Rule 4 does not apply, Indiana courts apply the balancing test set forth in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182 (1972), in evaluating claims of violations of the right to a speedy trial. Wilburn v. State, 671 N.E.2d 143, 148 (Ind. Ct. App. 1996). Moreover, a person who is not admitted to bail pending a probation revocation hearing may be held in jail no more than fifteen (15) days without a hearing on the alleged violation. Ind. Code § 35-38-2-3(d).

Thus, courts look at the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. Wilburn v. State, 671 N.E.2d 143 (Ind. Ct. App. 1996) (where defendant could not establish prejudice, and most of the delay was attributable to the defendant, 14-month delay in revoking probation did not violate right to speedy trial).

> Alley v. State, 556 N.E.2d 15 (Ind. Ct. App. 1990) (State was not charged with period after it refused to extradite probationer from Texas because State had no duty to try probationer within one year for probation violation; fact that eight years passed between filing of petition to revoke, and disposition was caused by probationer's failures to appear and continuances).

(9) Right to allocution

Upon request, a defendant has the right to allocution, the opportunity to address the court during a probation revocation hearing, even though trial judge is not "pronouncing sentence" pursuant to Ind. Code § 35-38-1-5 (statutory right of allocution). Jones v. State, 71 N.E.3d 412 (Ind. Ct. App. 2017). See also Owens v. State, 69 N.E.3d 531 (Ind. Ct. App. 2017). A judge is not required to ask the defendant whether he wants to make a statement.

> Vicory v. State, 802 N.E.2d 426 (Ind. 2004) (trial court's denial of defendant's right to allocution did not affect his substantive rights as he was given opportunity to testify on his behalf during hearing).
>
> United States v. Core, 532 F.2d 40 (7th Cir. 1976) (noting that it would be good practice for courts to allow defendants to personally address courts, even at probation revocation hearings).

(10) Right to present witnesses

In a probation revocation hearing, a defendant has the due process right to present evidence. Cox v. State, 706 N.E.2d 547 (Ind. 1999). Even a defendant who admits his or her violation must be given an opportunity to offer mitigating evidence suggesting that the probation violation does not warrant revocation. Woods v. State, 892 N.E.2d 637, 640 (Ind. Ct. App. 2008). The denial of a defendant's due process right to present witnesses is an abuse of discretion. Brewer v. State, 816 N.E.2d 514 (Ind. Ct. App. 2004).

If a defendant is afforded the opportunity to present evidence at a hearing to determine if a violation of a condition of probation actually occurred, he does not

have a right to a second opportunity to present evidence at a hearing or otherwise to determine if the violation warrants revocation.

Vernon v. State, 903 N.E.2d 533 (Ind. Ct. App. 2009) (defendant was given the opportunity to present evidence suggesting that his probation violations did not warrant revocation where he testified at the evidentiary hearing admitting he committed some of the alleged probation violations but denying other violations). See also Beeler v. State, 959 N.E.2d 828 (Ind. Ct. App. 2011).

(11) Deprivation of due process is fundamental error

Before a trial court accepts a defendant's admission to a probation violation, they must be given advisements that by admitting the violation, the defendant would be surrendering his right to counsel, confrontation, and cross-examination, and that the State would carry the burden to prove its allegations by a preponderance of the evidence; failure to so advise is fundamental error. Hilligoss v. State, 45 N.E.3d 1228 (Ind. Ct. App. 2015).

Failure to hold an evidentiary hearing prior to revoking probation violates due process rights and constitutes fundamental error. Dalton v. State, 560 N.E.2d 558, 560 (Ind. Ct. App. 1990).

Tillberry v. State, 895 N.E.2d 411 (Ind. Ct. App. 2008) (although defendant did not object at revocation hearing to manner in which trial court conducted the hearing, informal conversation between judge and parties did not comport with due process and constituted fundamental error).

Sparks v. State, 983 N.E.2d 221 (Ind. Ct. App. 2013) (while an evidentiary hearing is not required if defendant admits to the probation violation, the lack of a hearing in this case in light of parties' informal conversation with trial court and suspect quality of defendant's admission constitutes fundamental error).

d. Evidentiary rules

Because probation revocation procedures are to be flexible, strict rules of evidence do not apply. Rather, in probation revocation hearings, judges may consider any relevant evidence bearing some substantial indicia of reliability. Judges are not, of course, bound to admit all evidence presented to the court. In fact, the absence of strict evidentiary rules places a particular importance on the fact-finding role of judges in assessing the weight, sufficiency and reliability of proffered evidence. Cox v. State, 706 N.E.2d 547 (Ind. 1999); Ind. R. Evid. 101(d)(2).

(1) Hearsay

The rule against hearsay and the definitions and exceptions with respect thereto do not apply in proceedings relating to sentencing, probation, or parole. Further, in probation revocation hearings, judges may consider any relevant evidence bearing some substantial indicia of reliability, which includes reliable hearsay. Cox v. State, 706 N.E.2d 547 (Ind. 1999) (disapproving of reasoning in Jones v. State, 689 N.E.2d 759 (Ind. Ct. App. 1997) and Greer v. State, 669 N.E.2d 751 (Ind. Ct. App. 1996) that hearsay is inadmissible under common law). See also Sutton v. State, 689

N.E.2d 452 (Ind. Ct. App. 1997).

Rather than require a trial court to make an explicit finding of good cause every time hearsay evidence is admitted during a probation revocation hearing, the trial court may instead evaluate the hearsay's "substantial trustworthiness." Ideally, the trial court should explain on the record why the hearsay is reliable and why that reliability is substantial enough to supply good cause for not producing live witnesses. Reyes v. State, 868 N.E.2d 438 (Ind. 2007). A court does not need to determine why the witness may be unavailable before admitting a hearsay statement, as long as the substantial trustworthiness test is otherwise met. Lightcap v. State, 863 N.E.2d 907 (Ind. Ct. App. 2007).

Carden v. State, 873 N.E.2d 160 (Ind. Ct. App. 2007) (introduction of mapping system without any evidence of name of manufacturer of system, how it works and whether it has been updated, was fundamental error in proving defendant was two blocks of daycare center).

Withers v. State, 15 N.E.3d 660 (Ind. Ct. App. 2014) (even if not electronically signed, attendance records constitute reliable hearsay evidence).

Generally speaking, without some finding of reliability, triple hearsay—hearsay within hearsay—is not reliable and it may be an abuse of discretion to admit.

Mateyko v. State, 901 N.E.2d 554 (Ind. Ct. App. 2009) (trial court did not explain why triple hearsay was reliable or why any reliability was substantial enough to support good cause for not producing a live witness; instead, State relied solely upon testimony of a witness who had no direct involvement with defendant or the events which State alleged constituted a violation of terms of probation).

A sufficiently reliable probable cause affidavit may, by itself, be sufficient to support a finding that a probationer has committed another crime in violation of his or her terms of probation. Whatley v. State, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006). However, a probable cause affidavit that was not prepared and signed by the officer who was listed as the affiant does not bear substantial indicia of reliability, and the trial court may err in admitting it into evidence at a revocation hearing. Robinson v. State, 955 N.E.2d 228 (Ind. Ct. App. 2011).

Baxter v. State, 774 N.E.2d 1037 (Ind. Ct. App. 2002) (uncertified, unverified "Law Enforcement Incident Report" had no substantial indicia of reliability and was erroneously admitted in probation revocation hearing; although evidence rules do not apply in revocation proceedings, it is nevertheless observed that investigative reports by police do not fall within public records exception to hearsay rule).

Whatley v. State, 847 N.E.2d 1007 (Ind. Ct. App. 2006) (distinguishing Baxter, court noted that probable cause affidavit was prepared and signed under oath by same officer who was listed as the affiant and contained relevant evidence concerning defendant's probation violation); see also Votra v. State, 121 N.E.3d 1108 (Ind. Ct. App. 2019).

Figures v. State, 920 N.E.2d 267 (Ind. Ct. App. 2010) (court declined to extend Whatley to case where probable cause affidavit was from a dismissed case; moreover, State presented no evidence at revocation hearing to corroborate allegations in affidavit).

Cooper v. State, 917 N.E.2d 667 (Ind. 2009) (trial court deprived defendant of due process when it revoked his probation based solely on probable cause affidavit, without conducting an evidentiary hearing).

Pitman v. State, 749 N.E.2d 557 (Ind. Ct. App. 2001) (admission of police report on new arrest claiming defendant made admission to drinking was admissible in probation revocation without testimony of police officer who created report).

Watters v. State, 22 N.E.3d 617 (Ind. Ct. App. 2014) (due process violation where documents purporting to show new conviction were not reliable, as they were not certified or supported by affidavit or live testimony).

Robinson v. State, 955 N.E.2d 228 (Ind. Ct. App. 2011) (trial court abused its discretion in admitting probable cause affidavit that contained multiple levels of hearsay).

Laboratory test results from a urinalysis conducted by an independent toxicology lab are generally admissible in a probation revocation hearing although they constitute hearsay. Cox v. State, 706 N.E.2d 547 (Ind. 1999). See also Holmes v. State, 923 N.E.2d 479 (Ind. Ct. App. 2010). An accompanying affidavit to establish the substantial trustworthiness of lab tests is not needed where other factors create a substantial guarantee of trustworthiness. Bass v. State, 974 N.E.2d 482 (Ind. Ct. App. 2012). Although such an affidavit may make the reports more trustworthy, if available. Smith v. State, 971 N.E.2d 86 (Ind. 2012).

Williams v. State, 937 N.E.2d 930 (Ind. Ct. App. 2010) (testimony of employee of company that housed defendant during home detention showed that documents regarding a failed marijuana test and defendant's failure to comply with electronic monitoring were substantially reliable).

(2) Expert testimony and scientific evidence

In probation revocation hearings, judges may consider any relevant evidence bearing some substantial indicia of reliability, including expert testimony and scientific evidence. Carter v. State, 706 N.E.2d 552 (Ind. 1999). The "general acceptance" test for scientific evidence in Frye is not required to find expert testimony reliable in revocation proceedings. Id. See also Mogg v. State, 918 N.E.2d 750 (Ind. Ct. App. 2009) (even assuming Secure Continuous Remote Alcohol Monitor (SCRAM) data has not gained general acceptance in the community, other facts supported trial court's finding that the SCRAM data was reliable and sufficient to support the revocation).

Black v. State, 794 N.E.2d 561 (Ind. Ct. App. 2003) (trial court erroneously excluded independent urinalysis from evidence in defendant's probation revocation hearing; under relaxed procedures of Ind. Evidence Rule 101(d)(2) at probation revocation hearing, State toxicology technician's testimony was a

sufficient foundation for admission of independent test results).

J.J.C. v. State, 792 N.E.2d 85 (Ind. Ct. App. 2003) (evidence was insufficient to support probation revocation where State did not adequately establish reliability of home detention monitoring system).

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

Peterson v. State, 909 N.E.2d 494 (Ind. Ct. App. 2009) (witness's comparison of transcript of questions and answers prepared by polygraph examiner to the video of the examination was sufficient to establish the reliability of the transcript for purposes of revocation hearing).

PRACTICE POINTER: Although the court must consider evidence of mental defect when determining whether the violation should result in revocation, the probationer is not entitled to the appointment of an independent psychiatrist to examine him and testify at the probation revocation hearing, even though he filed a notice of insanity defense in the underlying criminal proceeding. Patterson v. State, 659 N.E.2d 220 (Ind. Ct. App. 1995). However, due process does require that the Defendant be competent. Donald v. State, 930 N.E.2d 76 (Ind. Ct. App. 2010).

(3) Exclusionary Rule

Exclusionary rule does not apply to probation revocation hearings absent a showing of continued police harassment or particularly offensive violations of fundamental rights. Dulin v. State, 169 Ind. App. 211, 346 N.E.2d 746, 751 (1976); Plue v. State, 721 N.E.2d 308 (Ind. Ct. App. 1999). See also Pennsylvania Bd. of Probation and Parole v. Scott, 524 U.S. 357, 118 S. Ct. 2014 (1998). However, this is not an invitation to impose oppressive probation conditions, nor to conduct constant, meddling surveillance which unreasonably interferes with a probationer's privacy. Dulin, 346 N.E.2d at 753. But see Polk v. State, 739 N.E.2d 666 (Ind. Ct. App. 2000) (applying exclusionary rule to prohibit admission of illegally seized evidence into probation revocation).

Grubb v. State, 734 N.E.2d 589 (Ind. Ct. App. 2000) (although police obtained probationer's taped confession to two child molests in violation of Miranda, trial court properly admitted tape into evidence in probation revocation).

Plue v. State, 721 N.E.2d 308 (Ind. Ct. App. 1999) (lacking claim that defendant was harassed by police or that evidence was seized in an offensive manner, defendant's claim of unreasonable search and seizure need not be addressed as search was sufficiently supported for purpose of parole revocation).

PRACTICE POINTER: Argue that Article 1, Section 11 of the Indiana Constitution prohibits the State from using illegally seized evidence in probation revocation proceedings. A few states have applied the exclusionary rule to probation revocations under their state constitutions. See, e.g., State v. Marquart, 123 N.M. 809, 945 P.2d 1027 (1996); State v. Lampman, 724 P.2d 1092 (Wash. 1996); State v. Cross, 487 So.2d 1056 (Fla. 1986). The key issue in determining whether the Indiana Constitution mandates an exclusionary rule in probation revocations is "whether values other than deterrence might motivate suppression of evidence under an *Indiana* exclusionary rule." Indiana Dept. of Revenue v. Adams, 762 N.E.2d 728, 730 n.3 (Ind. 2002). Exclusion of illegally-seized evidence is "necessary to protect the privacy of all citizens from excessive intrusion by law enforcement. In other words, we accept the obstacle to the truth-seeking function in order to preserve a higher value." Membres v. State, 889 N.E.2d 265, 274 (Ind. 2008).

(4) Corpus delicti

The corpus delicti rule does not apply in probation revocation hearings; thus, probationer's admission alone may be competent evidence upon which to revoke his probation. Cain v. State, 30 N.E.3d 728 (Ind. Ct. App. 2015).

Shumaker v. State, 431 N.E.2d 862 (Ind. Ct. App. 1982) (where petition to revoke probation contained many documents indicating that warrants had been issued for probationer's arrest and statements to which probationer objected were relied upon to establish probable cause for arrest, probationer's statements to probation officer describing various crimes were admissible absent corpus delicti).

(5) Judicial notice

Trial courts may take judicial notice of probable cause affidavits from criminal proceedings filed against the defendant in the same court. Whatley v. State, 847 N.E.2d 1007 (Ind. Ct. App. 2006). Further, a trial court is allowed to take judicial notice of a new conviction entered in a different Indiana court. Christie v. State, 939 N.E.2d 691 (Ind. Ct. App. 2010). Finally, a court may also use a trial transcript as substantive evidence of a probation violation, assuming the defendant had the opportunity to cross examine any witnesses at the prior trial. Knecht v. State, 85 N.E.3d 829 (Ind. Ct. App. 2017).

A trial court may consolidate hearings on revocation of probation and sentencing on a subsequent crime and may use same evidence for both decisions.

Bane v. State, 579 N.E.2d 1339 (Ind. Ct. App. 1991) (court can take judicial notice of its own records when two hearings are consolidated, are chronologically adjoining phases, are attended by defendant, are presided over by same judge, and are argued by same counsel).

Moore v. State, 102 N.E.3d 304, 309-10 (Ind. Ct. App. 2018) (reaffirming that Indiana trial courts may properly take notice of a probationer's guilty plea in another action before the same court as a basis for revoking probation).

Patterson v. State, 659 N.E.2d 220 (Ind. Ct. App. 1995) (trial court did not err in failing to take judicial notice of file in criminal case which was basis of probation

revocation).

Sandy v. State, 501 N.E.2d 486 (Ind. Ct. App. 1986) (in revoking probation of defendant convicted of driving while intoxicated, trial court could not, through taking judicial notice of arrest for driving while intoxicated in another county in violation of probation conditions, revoke probation, where affiant was not arresting officer or associated with county judiciary).

C. GROUNDS FOR REVOCATION

Probation may be revoked only by reason of a violation of the specified conditions attached to probation or for commission of a criminal offense. State ex rel. Gash v. Morgan County Superior Court, 258 Ind. 485, 283 N.E.2d 349, 354 (1972), *overruled on other grounds*, 368 N.E.2d 250. Even where the State alleges more than one violation, a violation of a single condition of probation is sufficient to revoke probation. Hubbard v. State, 683 N.E.2d 618, 622 (Ind. Ct. App. 1997); Jones v. State, 689 N.E.2d 759, 761 (Ind. Ct. App. 1997). A probation revocation cannot be based on the violation of a void condition of probation. See, e.g., Foster v. State, 813 N.E.2d 1236, 1239 (Ind. Ct. App. 2004) (reversing probation revocation based on violation of term of probation void for vagueness); and Mosley v. State, 171 N.E.3d 1031 (Ind. Ct. App. 2021).

1. Sufficiency of evidence

a. Commission of Crime

If the person commits an additional crime, the court may revoke the probation. Ind. Code § 35-38-2-1(b). It is not necessary that a criminal conviction precede revocation of probation for unlawful conduct; it is only necessary that a trial judge find unlawful conduct to have occurred. Hoffa v. State, 267 Ind. 133, 368 N.E.2d 250 (Ind. 1977). The State must prove commission of a new criminal offense by the statutorily mandated preponderance of the evidence standard, not a probable cause standard. Heaton v. State, 984 N.E.2d 614 (Ind. 2013).

(1) No charges filed

A defendant's probation may be revoked even where the State has failed to obtain a conviction of the defendant of an additional crime by establishing his guilt beyond a reasonable doubt, or by entering the defendant's plea of guilty. It is only necessary that the trial court find by a preponderance of the evidence that the defendant committed an additional offense. Sims v. State, 549 N.E.2d 53, 55 (Ind. Ct. App. 1990). See also Boyd v. State, 481 N.E. 2d 1124, 1126 (Ind. Ct. App. 1985).

Harder v. State, 501 N.E.2d 1117 (Ind. Ct. App. 1986) (evidence was insufficient to support revocation of defendant's probation of driving while intoxicated because State failed to present evidence indicating that defendant's blood alcohol content was .10% when arrested and additionally failed to demonstrate that defendant violated probation by contributing to delinquency of minor where there was no evidence as to what fact of delinquency defendant encouraged, aided, induced, or caused and, additionally, only evidence as to age of two individuals who were with defendant was that police officer believed those individuals were sixteen years of age).

Goonen v. State, 705 N.E.2d 209 (Ind. Ct. App. 1999) (evidence was sufficient to prove defendant violated his probation by committing another crime, obstruction of justice, where defendant claimed Fifth Amendment protection against self-incrimination and failed to testify at another's trial; defendant did not have viable Fifth Amendment claim because earlier he agreed to testify as part of plea agreement in exchange for immunity).

All the elements of the crime must be proven by a preponderance of the evidence.

Ratliff v. State, 546 N.E.2d 309 (Ind. Ct. App. 1989) (defendant's failure to pay child support could not support revocation on grounds that it constituted a crime where court did not make findings of culpability necessary for criminal offense).

Just as conviction of a non-existent crime is fundamental error, so is a revocation of probation based on the ground that someone had committed a crime when in fact there was no crime. Gee v. State, 454 N.E.2d 1265 (Ind. Ct. App. 1983) (revocation of probation for possession of a controlled substance was fundamental error when pills were not a controlled substance).

(2) Probationer arrested

When a probationer is accused of committing a criminal offense, an arrest alone does not warrant a probation revocation. Johnson v. State, 692 N.E.2d 485, 487 (Ind. Ct. App. 1998).

Tillberry v. State, 895 N.E.2d 411 (Ind. Ct. App. 2009) (State did not provide any evidence to support the revocation or circumstances leading to defendant's arrest for marijuana allegedly committed while on probation).

Johnson v. State, 692 N.E.2d 485 (Ind. Ct. App. 1998) (evidence was insufficient to prove probationer committed crime of public intoxication where only evidence of criminal conduct was probation officer's testimony that probationer had new arrest).

Jackson v. State, 6 N.E.3d 1040 (Ind. Ct. App. 2013) (mere fact defendant was charged with a sex offense in Kentucky was insufficient to revoke probation; State failed to carry its burden to prove by preponderance defendant actually committed the offense).

When a defendant commits a new criminal offense while on probation, the correct legal standard is the statutorily mandated preponderance of the evidence standard, not a probable cause standard. Heaton v. State, 984 N.E.2d 614 (Ind. 2013). To the extent prior cases may be read to permit proof only by probable cause when a new criminal charge is alleged as a probation violation, they are overruled. Id. at 617. A sufficiently reliable probable cause affidavit may, by itself, be sufficient to support a finding that a probationer has committed another crime in violation of his or her terms of probation. Whatley v. State, 847 N.E.2d 1007, 1010 (Ind. Ct. App. 2006). However, a probable cause affidavit that was not prepared and signed by the officer who was listed as the affiant does not bear substantial indicia of reliability, and the trial court may err in admitting it into evidence at a revocation hearing. Robinson v. State, 955 N.E.2d 228 (Ind. Ct. App. 2011). Thus, evidence that the probationer

committed another crime may be insufficient if the trial court does not explain on the record why it considered the affidavit substantially trustworthy, where the State does not present any evidence to corroborate the matters asserted therein, and where the charges pertaining to the offenses described in the affidavit had been dismissed.

Figures v. State, 920 N.E.2d 267 (Ind. Ct. App. 2010) (court declined to extend Whatley (above) to case where probable cause affidavit was from a dismissed case; moreover, State presented no evidence at revocation hearing to corroborate allegations in affidavit).

Baxter v. State, 774 N.E.2d 1037 (Ind. Ct. App. 2002) (uncertified, unverified "Law Enforcement Incident Report" had no substantial indicia of reliability and was erroneously admitted in probation revocation hearing; although evidence rules do not apply in revocation proceedings, it is nevertheless observed that investigative reports by police do not fall within public records exception to hearsay rule).

Davis v. State, 916 N.E.2d 736 (Ind. Ct. App. 2009) (defense counsel's admission that defendant had a new arrest and that he agreed to serve twelve years for the probation violation contingent on not beating the new arrest was insufficient to support revocation).

Martin v. State, 813 N.E.2d 388 (Ind. Ct. App. 2004) (trial court erred in revoking probation where defendant did not admit violation but only admitted that he was arrested for violation; record showed defendant to be confused and misinformed by trial court as to what constituted a violation of his probation).

Pitman v. State, 749 N.E.2d 557 (Ind. Ct. App. 2001) (evidence was sufficient to support revocation where State introduced into evidence certified copies of court docket with probable cause finding, police report and charging information without testimony of officer; police report claimed defendant admitted to drinking, which was also condition of probation).

(3) Probationer convicted

A conviction preceding the revocation hearing constitutes prima facie evidence at the probation revocation hearing and will alone support the revocation of the probation. Hoffa v. State, 56 Ind. App. 63, 358 N.E.2d 753 (1977), *rev'd on other grounds*, 368 N.E.2d 250. In fact, a criminal conviction established by proof beyond reasonable doubt may appropriately be used by State to collaterally estop the defendant from re-litigating precise issue in subsequent probation revocation proceeding. Sheron v. State, 682 N.E.2d 552, 553 (Ind. Ct. App. 1997). An abstract of judgment reflecting conviction while defendant is on probation is sufficient evidence to revoke probation. Mumford v. State, 651 N.E.2d 1176 (Ind. Ct. App. 1995). However, the documents purporting to show a new conviction must be reliable, such as certified or supported by affidavit or live testimony. Watters v. State, 22 N.E.3d 617 (Ind. Ct. App. 2014).

Bane v. State, 579 N.E.2d 1339 (Ind. Ct. App. 1991) (trial court properly sentenced defendant and, moments later, in same consolidated hearing with same parties, revoked defendant's probation on prior conviction without requiring additional proof that defendant violated his probation by committing crime for

which he was sentenced few moments earlier).

Henderson v. State, 544 N.E.2d 507 (Ind. 1989) (burglary conviction provided grounds supporting trial court's finding that defendant had violated his probation under prior forgery conviction and warranted revocation of probation).

The fact that defendant was convicted of a felony in another jurisdiction, where the offense is not a felony in Indiana, cannot support a finding of revocation without notifying defendant that conviction of a crime in another state would result in revocation. Gleason v. State, 634 N.E.2d 67 (Ind. Ct. App. 1994).

(4) Probationer acquitted of criminal charge based upon same facts

An acquittal of a criminal charge does not prohibit the trial court from revoking a defendant's probation for the commission of that crime. Jackson v. State, 420 N.E.2d 1239 (Ind. Ct. App. 1981). The appropriateness of revocation in each case must be decided on the basis of evidence presented at the revocation hearing, because in many instances of acquittal on the criminal charge, the State may not be able to meet its preponderance burden. Id.

Thornton v. State, 792 N.E.2d 94 (Ind. Ct. App. 2003) (State presented sufficient evidence to support revocation of defendant's probation by preponderance of evidence, based on defendant's commission of crime of resisting law enforcement for which he was acquitted). See also Dokes v. State, 971 N.E.2d 178 (Ind. Ct. App. 2012) and Knecht v. State, 85 N.E.3d 829 (Ind. Ct. App. 2017).

b. Failure to meet financial obligation

(1) Fees and costs

Failure to pay fines or costs (including fees) required as a condition of probation may not be the sole basis for commitment to the DOC. Ind. Code § 35-38-2-3(m). Failure to pay fees or costs assessed against a person under IC 33-40-3-6, IC 33-37-2-3(e), or IC 35-33-7-6 [payments into Public Defender Services Fund] is not grounds for revocation of probation. Ind. Code § 35-38-2-3(n). For a detailed analysis of indigency and failure to pay costs, fines and restitution, see IPDC Sentencing Manual, Chapter 6, *Cost, Fines, Restitution, and Other Punishments*.

(2) Willful failure to pay required

Probation may not be revoked for failure to comply with conditions of a sentence that imposes financial obligations on the person unless the person recklessly, knowingly, or intentionally fails to pay. Ind. Code § 35-38-2-3(g). The State bears the burden of proving that the defendant violated financial condition, and that the failure to pay was reckless, knowing or intentional. Baxter v. State, 774 N.E.2d 1037 (Ind. Ct. App. 2002). The defendant bears the burden of bringing forward facts relating to inability to pay and sufficient good faith efforts to pay. Runyon v. State, 939 N.E.2d 613 (Ind. 2010). See also Mauch v. State, 33 N.E.3d 387 (Ind. Ct. App. 2015) and Brandenburg v. State, 992 N.E.2d 951 (Ind. Ct. App. 2013). Once the defendant has produced evidence of his inability to pay, it is up to the State to rebut the evidence or

the trial court to make further inquiry before deciding on the issue. Bell v. State, 59 N.E.3d 959 (Ind. 2016).

In revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay. Bearden v. Georgia, 461 U.S. 660, 672, 103 S. Ct. 2064, 2073 (1983). If probationer has made all reasonable efforts to pay fine/restitution and yet cannot do so through no fault of his own, then it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing defendant are available. Id. at 672, 2073. Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet State's interest in punishment and deterrence may State imprison probationer who has made sufficient bona fide efforts to pay. Id. For a more detailed analysis, see IPDC Sentencing Manual, Chapter 6, *Costs, Fines, Restitution and Other Punishments*, Section VI, *Indigency*.

Examples of sufficient evidence of revocation for failure to pay a fine or restitution:

- Defendant had acquired $5,000 interest in real estate and had made no effort to make restitution payments. Bahr v. State, 634 N.E.2d 543 (Ind. Ct. App. 1994).
- Defendant made no attempt to contact court or prosecutor concerning ability to make restitution, made no payments towards obligation, left the state when State filed petition to revoke and did not return for several months, and was employed, although briefly. Sparkman v. State, 432 N.E.2d 437 (Ind. Ct. App. 1982).
- Defendant was employed since his release from the DOC, had set up child support for his child, and offered no evidence as to explain why he had not paid court costs and probation fees. Jenkins v. State, 956 N.E.2d 146 (Ind. Ct. App. 2011).
- Defendant knowingly failed to make payments as required by terms of his probation and made no explicit argument concerning inability to pay. Thus, he failed to carry his burden to show facts related to the inability to pay and indicating sufficient bona fide efforts to pay to persuade trial court that further imprisonment should not be ordered. Smith v. State, 963 N.E.2d 1110 (Ind. 2012).

c. Association with convicted felon or people with harmful character

In order to revoke a defendant's probation based on the defendant's association with a convicted felon, a defendant must know that the person with whom he is associating is a convicted felon. This can be inferred from a situation where the defendant should have reason to know that the person has the character proscribed by the probation condition.

Monroe v. State, 419 N.E.2d 831 (Ind. Ct. App. 1981) (there was insufficient evidence for reasonable trier of fact to have found that defendant knew that his companion had been convicted of a felony in 1975, although probationer had been acquainted with companion for about one and half years and they had once been arrested together for drinking) (Buchanan, C.J., dissenting).

d. Failure to adhere to good behavior

In proving that a probationer has violated the condition of "good behavior," State must prove by a preponderance of the evidence that the probationer has engaged in unlawful activity. Justice v. State, 550 N.E. 2d 809, 810 (Ind. Ct. App. 1990). This does not require a criminal conviction. See Section IV. C.1.a, of this document, *Sufficiency of Evidence, Commission of a Crime*.

e. Failure to attend counseling

Probation may be revoked if probationer does not regularly attend counseling sessions after being ordered to do so. Lind v. State, 550 N.E.2d 823 (Ind. Ct. App. 1990). However, it cannot be revoked based on the defendant's refusal to admit guilt as part of counseling where defendant has claimed his innocence through the proceedings. Gilfillen v. State, 582 N.E.2d 821, 824 (Ind. 1991); see also State v. Moore, 909 N.E.2d 1053 (Ind. Ct. App. 2010) (noting Gilfillen was grounded on the Fifth Amendment).

f. Violation of no contact order

Contact is the establishing of communication with someone. Communication occurs when a person makes something known or transmits information to another; it can be indirect or direct and is not limited by the means in which it is made known to another person. Wright v. State, 688 N.E.2d 224, 226 (Ind. Ct. App. 1997).

> Wright v. State, 688 N.E.2d 224 (Ind. Ct. App. 1997) (there was insufficient evidence that defendant violated no contact condition of probationer by filing lawsuit because court could not conclude that lawsuit was filed merely to harass victim absent determination that lawsuit was frivolous, unreasonable or groundless).
>
> Mosley v. State, 171 N.E.3d 1031 (Ind. Ct. App. 2021) (because a no-contact order cannot be issued to protect a dead person, trial court abused its discretion for revoking Defendant's probation based on violation of that void order).
>
> Alford v. State, 965 N.E.2d 133 (Ind. Ct. App. 2012) (defendant violated no-contact order by posting false negative review of his father's cleaning business on Angie's List; even though defendant's contact with father was indirect and not immediately known by father, it was still contact; defendant used Angie's List as intermediary through which to communicate with and harass his father).

"Contact" is not commonly understood to occur by mere presence alone.

> Hunter v. State, 883 N.E.2d 1161 (Ind. 2008) (defendant's presence on multiple occasions in his sister's mobile home when children came home from school was insufficient to prove he had contact with children when the evidence also showed the defendant immediately left the home and did not have face-to-face contact or interaction with the children).

g. Drug or alcohol use

Almost immediately upon being placed on probation, a defendant is usually required to submit to a drug screen, referred to as a baseline. A positive drug screen early on in

probation is not enough, standing alone, to support a revocation for drug use.

C.S. v. State, 817 N.E.2d 1279 (Ind. Ct. App. 2004) (five days into probation juvenile tested positive for cocaine, which can appear in urine for some time period after cocaine has been ingested; State produced no evidence of what time period the drug may show up, and no prior screen established C.S. was free of drugs prior to probation being implemented; thus, Court was "left to merely speculate" whether cocaine was used before or after probation was imposed, and revocation was improper).

Johnson v. State, 692 N.E.2d 485 (Ind. Ct. App. 1998) (evidence was insufficient to prove that probationer tested positive for cocaine use because State did not offer test results of drug, and probation officer did not specifically mention "cocaine"; only evidence was probation officer's testimony that probationer tested positive for cocaine).

Dean v. State, 948 So.2d 1042 (Fla. 2d DCA 2007) (State witnesses' testimony regarding defendant's alleged alcohol consumption emanated exclusively from their review of business records contained in probation file, the contents of which were garnered from information supplied by non-testifying sources; without any of these facts being introduced into evidence, there was no direct evidence of alcohol use).

h. Failure to complete community service or serve alternate sentence

Absent specification, it would not be unreasonable for a probationer to assume that he had until the end of his probationary period to comply with the conditions. Weatherly v. State, 564 N.E.2d 350, 352 (Ind. Ct. App. 1990).

Weatherly v. State, 564 N.E.2d 350 (Ind. Ct. App. 1990) (probation officer's statement that probationer had completed five days of ten-day alternative sentence did not support revocation where nothing indicated that probationer was directed to fulfill alternative sentence by particular date).

But see:

Buck v. State, 580 N.E.2d 730 (Ind. Ct. App. 1991) (probation revocation was justified where defendant moved from Indiana to Florida without consent from court, without advising community service supervisor or court of his address, and after performing only fifty of required one hundred and sixty hours of community service; it could be inferred that defendant did not intend to complete his agreed upon community service within one year).

i. Failure to observe requirements while in treatment

Failure of an individual placed on probation and under the treatment supervision of the division to observe the requirements set down by the division constitutes a violation of a condition of probation. A failure shall be reported by the division to the probation officer in charge of the individual and treated in accordance with IC 35-38-2-3. Ind. Code § 12-23-8-11.

j. Failure to obtain/maintain employment

Jones v. State, 689 N.E.2d 759 (Ind. Ct. App. 1997), *overruled on other grounds*, 721 N.E.2d 220 (Ind. 1999) (there was sufficient evidence of probation violation where defendant admitted that he had only worked four of past twenty months and that he did not inform probation officer of his status).

k. Possession of dangerous weapon

Kuhfahl v. State, 710 N.E.2d 200 (Ind. Ct. App. 1999), *overruled on other grounds*, 721 N.E.2d 220 (Ind. 1999) (although probationer claimed he used knife as part of his employment as maintenance worker and forgot to take it out prior to coming to court for hearing, fact that he possessed knife with blade four inches long was sufficient to revoke probation).

l. Violation of school attendance requirement

M.J.H. v. State, 783 N.E.2d 376 (Ind. Ct. App. 2003) (State presented insufficient evidence in effort to prove defendant's violation of school attendance requirement of his probation; evidence consisted solely of computer printout entitled "Student Absence Information;" attached to printout was affidavit for probable cause in which assistant principal at junior high school stated he had access to official records of school attendance indicating defendant was absent from school without excuse and then referred to attached printout that designated certain days with abbreviated notations, but there was no "AU" (unexcused absence) notation on days in question).

m. Refusal to testify

Where defendant agrees to testify as part of a plea agreement, but later refuses to testify, a probation revocation is justified. Goonen v. State, 705 N.E.2d 209 (Ind. Ct. App. 1999). A failure to testify breaching a plea agreement does not void the agreement; defendant cannot break his own plea agreement by purposely violating one of its provisions and consequently benefiting himself. Downs v. State, 827 N.E.2d 646 (Ind. Ct. App. 2005).

PRACTICE POINTER: Argue that a condition requiring a clean-up statement is not related to the rehabilitation of the probationer and, thus, is illegal. Carroll v. State, 740 N.E.2d 1225 (Ind. Ct. App. 2000).

2. Duress, insanity and other defenses

The duress defense may be asserted by probationers who violate terms of probation; however, if probationer is threatened with harm which is so imminent as to qualify as duress, he must contact the probation department and report such occurrence.

Hensley v. State, 583 N.E.2d 758 (Ind. Ct. App. 1991) (trial court properly revoked defendant's probation based on his moving out of state and failing to ever contact his probation officer because if defendant was under duress, he could have told probation officer about problem).

Although the Court did not determine whether the insanity defense is available in probation

revocation proceedings, evidence of a defendant's mental state must be considered. Patterson v. State, 659 N.E.2d 220, 222-23 (Ind. Ct. App. 1995) (disagreeing with Mitchell v. State, 619 N.E.2d 961 (Ind. Ct. App. 1993)).

Hill v. State, 28 N.E.3d 348 (Ind. Ct. App. 2015) (trial court did not abuse its discretion by revoking defendant's placement in home detention program for unexcused absences despite sister's testimony that he had a mental defect).

Even in the face of a probation violation, the trial court may nonetheless exercise its discretion in deciding whether to revoke probation; lack of volition is a factor for the trial court to consider when deciding whether to revoke probation.

May v. State, 58 N.E.3d 204 (Ind. Ct. App. 2016) (it was reasonable for defendant not to report to probation where he was mistakenly released on parole and was otherwise in compliance with parole conditions).

D. CONSEQUENCES OF VIOLATION

1. Court's options

After final judgment, the court retains only such continuing jurisdiction as is permitted by judgment itself or as is given to court by statute or rule. Thus, court is limited to the options set forth in IC 35-38-2-3(h). King v. State, 720 N.E.2d 1232 (Ind. Ct. App. 1999). Pursuant to Ind. Code § 35-38-2-3, trial courts have the authority to sentence offenders using any one of or any combination of the enumerated options, which in turn serves the public interest by giving judges the ability to order sentences they deem to be most effective and appropriate for individual defendants who violate probation. Prewitt v. State, 878 N.E.2d 84 (Ind. 2007) (implicitly overruling Sharp v. State, 817 N.E.2d 644 (Ind. Ct. App. 2004)).

A trial court is not allowed to elevate a misdemeanor conviction to a felony conviction as punishment for a probation violation. King v. State, 720 N.E.2d 1232 (Ind. Ct. App. 1999).

A trial court is not required to explain the sanction it imposes following a finding of revocation. Castillo v. State, 67 N.E.3d 661 (Ind. Ct. App. 2017).

PRACTICE POINTER: However, IC 35-50-2-7 gives court authority to sentence the defendant to a Class D felony and after successful completion of probation, reduce judgment to a Class A misdemeanor.

a. Continue probation

If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may continue the person on probation, with or without modifying or enlarging the conditions. Ind. Code § 35-38-2-3(h)(1).

A plea agreement between the State and the defendant on a probation violation cannot contain a "zero-tolerance" clause requiring the defendant to strictly comply or face entire sanction automatically. This type of provision is constitutionally suspect. Sullivan v. State, 56 N.E.3d 1157, 1162 (Ind. Ct. App. 2016) (*citing* Woods v. State, 892 N.E.2d 188, 637 (Ind. 2008)). Thus, a defendant must still be given the opportunity to present his defense, and the trial court is not precluded from imposing sentences other than what

is contained in the agreement. Hampton v. State, 71 N.E.3d 1165 (Ind. Ct. App. 2017).

b. Reinstate probation

If the court finds that the person has violated a condition during any time before the termination of the period, and the petition is filed under IC 35-38-2-3(a) after the probationary period has expired, the court may reinstate the person's probationary period, with or without enlarging the conditions, if the sum of the length of the original probationary period and the reinstated probationary period does not exceed the length of the maximum sentence allowable for the offense that is the basis of the probation. Ind. Code § 35-38-2-3(j).

c. Extend probationary period

If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period, the court may extend the person's probationary period for not more than one year beyond the original probationary period. Ind. Code § 35-38-2-3(h)(2). A court can extend probation one year even if extension results in a sentence beyond the maximum. Bailey v. State, 731 N.E.2d 447 (Ind. Ct. App. 2000).

> Watson v. State, 833 N.E.2d 497 (Ind. Ct. App. 2005) (trial court was without power to revoke defendant's probation because it was a party to Stipulation of Probation Modification, which is akin to plea agreement, and alleged violations occurred before date of Stipulation, for which defendant had already been punished).

However, to extend an individual's probation, the State still must file a petition to revoke the probation within the proper time period, the court must hold a hearing, and the court must find that the defendant violated probation.

> Gilreath v. State, 748 N.E.2d 919 (Ind. Ct. App. 2001) (trial court improperly extended defendant's probation when State filed a motion to extend probation, rather than petition to revoke, day after original probationary period ended; further, trial court erred by failing to hold hearing prior to extending probation).

Note: If the court extends probation one year beyond the maximum sentence and the Defendant is revoked, the court cannot order an executed sentence in excess of the maximum sentence.

d. Order time served

Notwithstanding fixed sentence set forth in plea agreement, trial courts should have flexibility in sentencing when revoking probation. 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 trial court retains the power to decide consequences of probation violation, then it has authority to sentence defendant to time served for technical violations, even if sanction is less than the sentence originally suspended.

> State v. Rivera, 20 N.E.3d 857 (Ind. Ct. App. 2014) (when revoking placement in community corrections for technical violation, trial court had discretion to sentence defendant to time served, which was less than the length of sentence originally

suspended but not less than the statutory minimum for the offense; time-served sanction was not an illegal sentence modification, but a consequence of violation of his initial sentence).

e. Order execution of sentence

If the court finds that the person has violated a condition at any time before termination of the period, and the petition to revoke is filed within the probationary period or under IC 35-38-2-3(a) after the probationary period has expired, the court may order execution of all or part of the sentence that was suspended at the time of initial sentencing. Ind. Code § 35-38-2-3(h) and (j).

So long as the proper procedures have been followed in conducting a probation revocation hearing pursuant to Ind. Code § 35-38-2-3, a trial court may order the execution of the suspended sentence upon a finding of violation by a preponderance of the evidence. Goonen v. State, 705 N.E.2d 209, 212 (Ind. Ct. App. 1999); Monday v. State, 671 N.E.2d 467, 468 (Ind. Ct. App. 1996). The trial court is not required to consider alternatives to incarceration before revoking defendant's probation and ordering incarceration. Monday v. State, 671 N.E.2d 467, 468-69 (Ind. 1996). But see, Section IV. C.1.b above, *Failure to meet financial obligation, supra*. The court is also not required to order a new presentence report. Boyd v. State, 481 N.E.2d 1124, 1127 (Ind. Ct. App. 1985).

When a trial court revokes a defendant's probation, it may order less than the entire amount of the sentence originally suspended, so long as, when combined with executed time previously ordered, the total sentence is not less than the statutory minimum. Stephens v. State, 818 N.E.2d 936 (Ind. 2004). Stephens has not been construed to mean that the trial court is *required* to impose the entire suspended sentence or that the rule must be so rigidly applied in every probation revocation. See Podlusky v. State, 839 N.E.2d 198, 201 (Ind. Ct. App. 2005) (emphasis in original). "[J]udges must be afforded the flexibility to use and terminate probation when appropriate and to order a sentence that they deem proper in the particular circumstances." Id. at 202. There must be times when revocation of less than the minimum sentence would be appropriate, such as minor or technical violations.

Probation may be revoked on evidence of violation of a single condition, and the selection of an appropriate sanction will depend upon the severity of the defendant's probation violation. Heaton v. State, 984 N.E.2d 614, 618 (Ind. 2013). There are situations where ordering the execution of a suspended sentence or revoking probation may be an abuse of discretion.

Woods v. State, 892 N.E.2d 637, 641 (Ind. 2008) (giving as example a probationer not reporting to his probation officer because he was in a coma or failing a drug screen due to medicine prescribed by a physician).

Brown v. State, 162 N.E.3d 1179 (Ind. Ct. App. 2021) (trial court abused its discretion in ordering defendant to serve more than 16 years of his previously suspended 20-year sentence when the evidence before the court showed only that defendant had missed an undetermined number of meetings with his probation officer).

Ripps v. State, 968 N.E.2d 323 (Ind. Ct. App. 2012) (trial court abused its discretion by revoking 69-year-old terminally ill probationer and ordering him to serve the entire suspended portion of his sentence for moving to an assisted living facility 980 feet away from a public library in violation of his residency restrictions).

Further, a trial court may not rely on improper sentencing factors, such as the leniency of the defendant's original plea, when revoking the defendant's entire suspended sentence. Puckett v. State, 956 N.E.2d 1182 (Ind. Ct. App. 2011).

Johnson v. State, 62 N.E.3d 1224 (Ind. Ct. App. 2016) (considering nature of the probation violation and the severity of sentence, trial court abused its discretion in ordering defendant to serve the entire remainder of his executed sentence in the DOC where he had limited mental functioning, scant financial resources, and previous successful placements on work release).

In Abernathy v. State, 852 N.E.2d 1016 (Ind. Ct. App. 2006), the court of appeals addressed the issue of whether the trial court violated the terms of defendant's plea agreement when, following the revocation of defendant's probation, the court imposed a sentence that exceeded the cap included in the plea agreement. The court held that "[t]he mere fact that Abernathy had a plea agreement which controlled at the time of initial sentencing in no way modified the trial court's statutory authority under IC 35-38-2-3(g)(3) to order execution of a suspended sentence following a probation violation." Id. at 1021. But See Ind. Code § 35-35-3-3(e) (requiring a trial court which has accepted a plea agreement to be bound by its terms, such as a cap on defendant's executed sentence); Brewer v. State, 830 N.E.2d 115, 116 (Ind. Ct. App. 2005); and Berry v. State, 10 N.E.3d 1243 (Ind. 2014) (trial court exceeded its authority in ordering work release as a condition of probation in excess of executed-time cap in plea agreement).

A trial court's acceptance of a plea agreement at a revocation hearing does not affect the original, suspended sentence or the trial court's authority to order execution of sentence at a second probation revocation hearing. Menifee v. State, 600 N.E.2d 967 (Ind. Ct. App. 1992), *clarified on denial of rehearing*, 605 N.E.2d 1207 (defendant's second violation constituted breach of contract, and consequence was reinstatement of original sentence).

Pursuant to Ind. Code § 35-50-1-2(e), if a person commits another crime while on probation, the terms of imprisonment for the crimes shall be served consecutively, regardless of the order in which the crimes are tried, and sentences are imposed. Harris v. State, 598 N.E.2d 639 (Ind. Ct. App. 1992). This includes federal crimes and sentences as well as state crimes and sentences.

Jiggets v. State, 978 N.E.2d 29 (Ind. Ct. App. 2012) (trial court properly ordered defendant's sentence for his probation violation to run consecutively to his federal sentence for bank robbery which occurred while he was serving probation; statutory language makes no distinction between a federal and state conviction, and there is no logical reason to do so).

A trial court is not required to advise a person about their release date. Ind. Code § 35-38-1-1 only requires such an advisement upon initial sentencing, not upon revocation of probation. Jones v. State, 71 N.E.3d 412 (Ind. Ct. App. 2017).

PRACTICE POINTER: Before entering a guilty plea to a partially suspended sentence, be certain that the defendant understands the consequences of a probation violation. This involves the understanding of the difference between a split sentence (partially executed and partially suspended) and a straight executed sentence. If the defendant does not understand this, the defendant may not have entered into the agreement voluntarily and intelligently. However, it may not be the court's duty to advise the defendant of the consequences of a suspended sentence. See Page v. State, 706 N.E.2d 230 (Ind. Ct. App. 1999) (Brook, J., dissenting).

2. Defendant's opportunity to present evidence

Due process requires that a defendant, even one who admits the violation, be given the opportunity to offer mitigating evidence suggesting that the probation violation does not warrant revocation. Woods v. State, 892 N.E.2d 637 (Ind. 2008). A plea agreement between the State and the defendant cannot deprive the trial court discretion as to the appropriate sanction for a probation violation. Holsapple v. State, 148 N.E.3d 1035 (Ind. Ct. App. 2020); see also Sullivan v. State, 56 N.E.3d 1157 (Ind. Ct. App. 2016) ("zero-tolerance" clause in plea agreement requiring the defendant to strictly comply or face entire sanction automatically is constitutionally suspect). Thus, a defendant must still be given the opportunity to present his defense, and the trial court is not precluded from imposing sentences other than what is contained in the agreement. Hampton v. State, 71 N.E.3d 1165 (Ind. Ct. App. 2017).

3. Double jeopardy implications

A violation of a condition of probation does not constitute an "offense" within the purview of double jeopardy analysis. Culley v. State, 179 Ind. App. 345, 385 N.E.2d 486, 488 (1979). However, the doctrine of *res judicata* may bar a probation revocation if the issues presented have already been litigated. Shumate v. State, 718 N.E.2d 1133 (Ind. Ct. App. 1999).

> Childers v. State, 656 N.E.2d 514 (Ind. Ct. App. 1995) (court setting aside first revocation of probation which was based on guilty plea to escape and holding second revocation hearing resulting again in revocation based on escape did not violate prohibition against double jeopardy).
>
> Montgomery v. State, 58 N.E.3d 279 (Ind. Ct. App. 2016) (*res judicata* does not bar trial court from revoking probation after previously revoking placement in a community transition program).

A defendant who has been acquitted of a criminal charged may still have their probation revoked based upon the same facts. Whether the State can meet the preponderance burden of probation revocation after acquittal is decided on a case-by-case basis. Thornton v. State, 792 N.E.2d 94 (Ind. Ct. App. 2003).

> Jackson v. State, 420 N.E.2d 1239 (Ind. Ct. App. 1981) (revocation of defendant's probation for commission of crime after defendant had been acquitted of that very offense in jury trial did not violate principles of collateral estoppel and double jeopardy where evidence presented at defendant's criminal trial was reexamined, additional testimony was taken, and limited rights afforded an alleged probation violator were fully protected). See also Justice v. State, 550 N.E.2d 809 (Ind. Ct. App. 1990).

Although double jeopardy does not bar a second probation revocation after a reversal of a

first probation revocation, res judicata bars the second probation revocation after the first probation revocation is reversed due to insufficiency of the evidence. Shumate v. State, 718 N.E.2d 1133 (Ind. Ct. App. 1999).

Revocation of both parole and probation for the same offense does not violate double jeopardy. Ashba v. State, 570 N.E.2d 937 (Ind. Ct. App. 1991). Further, use of trial transcript for a subsequent offense as evidence to support a probation revocation does not violate double jeopardy. Knecht v. State, 85 N.E.3d 829 (Ind. Ct. App. 2017).

However, double jeopardy requires the trial court to credit the probationer for time served on probation when the underlying conviction is set aside, and the defendant is re-sentenced for the same offense. Kincaid v. State, 778 N.E.2d 789 (Ind. 2002).

However, double jeopardy requires the trial court to credit the probationer for time served on probation when the underlying conviction is set aside, and the defendant is re- sentenced for the same offense. Kincaid v. State, 778 N.E.2d 789 (Ind. 2002).

4. Credit time

a. Pre-trial and sentence

Under IC 35-50-6-3 or IC 35-50-6-3.1, an individual incarcerated awaiting trial and sentencing earns good time credit. Thus, an individual sentenced to probation is entitled to pre-sentence good time credit towards his probation sentence. See Williams v. State, 759 N.E.2d 661 (Ind. Ct. App. 2001) and Albright v. State, 708 N.E.2d 15 (Ind. Ct. App. 1999).

b. Time served for probation revocation

Double jeopardy requires the trial court to credit the probationer for time served on probation when the underlying conviction is set aside, and the defendant is re-sentenced for the same offense.

> Kincaid v. State, 778 N.E.2d 789 (Ind. 2002), *cert. denied*, 124 S. Ct. 84 (2003) (even though defendant's sentence was erroneous, he was not entitled to make that determination unilaterally and disregard terms of his probation, so trial court's order to serve remainder of sentence affirmed).

c. While on probation

A person does not earn good time credit while on probation. Ind. Code § 35-50-6-6(a). In addition, being placed on probation does not constitute serving time, and thus, a defendant placed on probation does not get any credit towards his executed sentence for the number of days spent on probation.

> Oswalt v. State, 749 N.E.2d 612 (Ind. Ct. App. 2001) (defendant was not entitled to credit for time spent in drug rehabilitation facility that was ordered as part of his probation when he violated probation).

d. Exceptions

(1) Home detention

A person confined on home detention as a condition of probation receives one day of accrued credit for each day the person is confined on home detention. Ind. Code § 35-38-2.5-5(e) and (f). See also Ind. Code § 35-38-2-3(i) and (k) and Peterink v. State, 971 N.E.2d 735 (Ind. Ct. App. 2012), *summarily aff'd*, 982 N.E.2d 1009 (Ind. 2013).

(2) Work release

Courts have not specifically addressed whether probation on work release is entitled to two for one credit time. See Senn v. State, 766 N.E.2d 1190 (Ind. Ct. App. 2002). But the logic of Peterink and the statutes above should apply. Because the legislature could not have intended to credit those on home detention with more time than those on work release, an individual on work release as a condition of probation should be entitled to two for one credit.

> Senn v. State, 766 N.E.2d 1190, 1203 (Ind. Ct. App. 2002) (a defendant on work release is entitled to at least the same credit as a person on home detention as "he is subject to a restriction of liberty equivalent or even greater than that of a defendant on home detention." Moreover, it is a violation of equal protection to discriminate between those on work release as a condition of probation and those on work release as an executed sentence. In addition, because incarceration is a greater restraint on an individual's liberty than home detention, the legislature could not have intended to treat those placed on work release as a condition of probation worse than those placed on home detention as a condition of probation).

E. APPEAL OF REVOCATION

1. Final Appealable Order

A judgment revoking probation is a final appealable order. Ind. Code § 35-38-2-3(l). The appeal of a probation condition is similar to an appeal of a sentence; appellate courts may review without insisting that the claim first be presented to the trial judge. Meunier-Short v. State, 52 N.E.3d 927 (Ind. Ct. App. 2016).

2. Cannot appeal from guilty pleas

A defendant cannot challenge a guilty plea to a probation violation by direct appeal, but rather must seek post-conviction relief. See Huffman v. State, 822 N.E.2d 656 (Ind. Ct. App. 2005) and Ind. P-C.R. 1(1)(b). However, if the judge retained discretion over the sentence, an appeal may be the appropriate method of challenging only the sentence. Collins v. State, 817 N.E.2d 230 (Ind. 2004).

3. Belated appeal not available

Belated appeals from orders revoking probation are not presently available pursuant to Indiana Post-Conviction Rule 2. Dawson v. State, 943 N.E.2d 1281 (Ind. 2011). However,

you can file a motion and cite In re adoption of O.R., 16 N.E.3d 965 (Ind. 2014), where the Indiana Supreme Court held that "[t]he untimely filing of a Notice of Appeal is not a jurisdictional defect depriving the appellate courts of the ability to entertain an appeal." Id., at 971, and argue that under the extraordinary compelling reasons of your case the Court should permit a late filing of a Notice of Appeal. See IPDC Motions Manual for sample motion.

4. Standard of review

a. Sufficiency of evidence

Standard of review as to sufficiency of evidence to support revocation of probation is the same as for any other sufficiency question. Richeson v. State, 648 N.E.2d 384, 389 (Ind. 1995); Hensley v. State, 583 N.E.2d 758, 759 (Ind. Ct. App. 1991). When sufficiency of factual basis for probation revocation is challenged, Court of Appeals neither weighs evidence nor judges credibility of witnesses; rather, court looks to evidence most favorable to the State. Mumford v. State, 651 N.E.2d 1176, 1179 (Ind. 1995); King v. State, 642 N.E.2d 1389, 1393 (Ind. Ct. App. 1994); Menifee v. State, 600 N.E.2d 967, 970 (Ind. Ct. App. 1992), *reh'g den'd, clarified* 605 N.E.2d 1207.

If there is substantial evidence of probative value to support the trial court's decision that probationer is guilty of any violation, revocation of probation is appropriate. Morgan v. State, 691 N.E.2d 466, 468 (Ind.Ct.App. 1998); Braxton v. State, 651 N.E.2d 268, 270 (Ind.Ct.App. 1995).

b. Harmless error

When challenging an error in a probation revocation hearing, because federal due process concerns are raised, the correct test to apply is the federal harmless error analysis. The federal harmless error analysis provides that the State has the burden of proving beyond a reasonable doubt that the error complained of did not contribute to the verdict or judgment. Black v. State, 794 N.E.2d 561 (Ind. Ct. App. 2003) (trial court's exclusion of independent test results was not harmless error).

PRACTICE POINTER: Black specifically left open for argument in later cases the question of which harmless error standard should apply to probation hearings- the federal or Indiana standard. Black v. State, 794 N.E.2d 561, 566 (Ind. Ct. App. 2003). However, defendants should cite Black as support for application of the federal standard, which puts the burden on the State to prove beyond a reasonable doubt that the error was harmless. The Indiana standard for review of state evidentiary or procedural law, in contrast, merely requires a determination by the court as to whether the probable impact of the error, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties. Id. at 565 (*citing* Fleener v. State, 656 N.E.2d 1140, 1141 (Ind. 1995).

c. Grant of probation and conditions

Only where the trial court has abused discretion in granting probation and setting out terms thereof can it be set aside on appeal. State ex rel. Sufana v. Superior Court of Lake County, 269 Ind. 466, 381 N.E.2d 475, 478 (1978).

However, a defendant may waive an objection to the granting of probation or conditions if the defendant does not object at the time the conditions are set or at the revocation

hearing based on a violation of the conditions.

Robinette v. State, 641 N.E.2d 1286 (Ind. Ct. App. 1994) (defendant, who was convicted of battering his wife and placed on probation, waived argument on appeal of revocation of his probation that special condition of his probation was invalid where defendant failed to object to condition at time it was imposed or at his hearing for probation violations).

d. Review of sentence – abuse of discretion

Indiana Appellate Rule 7(B), which requires an appellate court to determine whether a sentence is inappropriate, does not apply to the imposition of a suspended sentence in a probation revocation proceeding. The trial court has discretion in deciding which option is appropriate under the circumstances of each case. As such, the Court of Appeals will only review the trial court's decision for an abuse of discretion. Prewitt v. State, 878 N.E.2d 184 (Ind. 2007). See also Johnson v. State, 692 N.E.2d 485, 488 (Ind. Ct. App. 1998).

Jones v. State, 838 N.E.2d 1146 (Ind. Ct. App. 2005) (trial court did not abuse its discretion by ordering defendant to serve thirty years of his previously forty-year suspended sentence instead of ordering continued probation).

Porter v. State, 117 N.E.3d 673 (Ind. Ct. App. 2018) (IC 35-38-2-3 imposes no requirement to balance aggravating and mitigating circumstances and issue a sentencing statement when imposing a sanction for violation of probation); Cf. Puckett v. State, 956 N.E.2d 1182 (Ind. Ct. App. 2011) (a trial court may not rely on improper sentencing factors, such as the leniency of the defendant's original plea, when revoking the defendant's entire suspended sentence).

See V.D.1, above, for examples of situations where ordering the execution of an entire suspended sentence or revoking probation may be an abuse of discretion.

5. Res Judicata

Although double jeopardy does not bar a second probation revocation after a reversal of a first probation revocation, res judicata bars the second probation revocation after the first probation revocation is reversed due to insufficiency of the evidence. Shumate v. State, 718 N.E.2d 1133 (Ind. Ct. App. 1999).