

**CRIMINAL LAW POLICY COMMITTEE  
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES  
Conference Call January 8, 2016**

The Criminal Law Policy Committee of the Indiana Judicial Conference convened by conference call on January 8, 2016, at 3:00 p.m. Eastern Standard Time.

1. **Members participating.** Mark Spitzer, Chair, Kent Apsley, Blaine Akers, Denny Bridges, Tom Clem, Greg Coy, Kim Hall, Ryan King, and Nathan Verkamp participated in the call.
2. **Staff participating.** Mike McMahon and Jason Bennett provided the Committee with staff assistance.
3. **Minutes of January 30, 2015 conference call.** Members approved the proposed minute of the Committee's January 30, 2015 conference call.
4. **Asset forfeiture procedures.** Members discussed the potential impact on Indiana forfeiture activity of the cancellation of funding for the federal "Equitable Sharing" forfeiture program. Judge Apsley, who had substantial experience with the federal program as a prosecutor, said he expected that Indiana transfers of assets to the federal program are likely to stop due to the funding cancellation. Based on that expectation, Judge Apsley thought the draft amendments to Indiana statutes on transfer of assets to federal authorities, amendments the Committee considered in fall 2014, would not be needed. Judge Clem felt the amendments should still be pursued, given the potential problems demonstrated by the Clark County forfeiture decision in *State v. Downey*, 14 N.E.3d 812 (Ind. Ct. App. 2014), *transfer denied*. He noted the likelihood of the federal program's revival, given its popularity. The Committee then noted the 2016 Senate Bill 123, Senator Randolph's bill on Indiana's state asset forfeiture procedures. The Committee questioned whether the bill would preclude transfer of seized materials to federal authorities, given its prevention of state forfeiture until there was a conviction or guilty plea. After discussion it was agreed to monitor the impact of the federal program's cancellation, have Mike McMahon send out the amendments the Committee considered in 2014 and 2015 as well as the *Downey* case, and revisit the forfeiture issues later this year.
5. **Sentence modification issues.** Members reviewed the materials on retroactive application of the 2014 and 2015 changes in the sentence modification statute. Members agreed that there did not seem to be any problems given the clarifying cases and statute changes.
6. **Criminal justice issues.** Judge Spitzer briefly described his e-mail to Jane Seigel on needed criminal justice resources, for her use in testimony she will give to the House Courts and Criminal Code Committee on Jan. 6, 2016. He described his recommendations concerning the following topics: (a) lack of adequate treatment alternatives for individuals with substance use disorders; (b) adequacy of resources to deal with Level 6 felony offenders who will not be able to be sent to the DOC; and (c) limitations of tools available for accountability for drug offenders in the community. Members agreed with these concerns, noting that prohibitions on Level 6 DOC commitments will prevent Level 6 offenders from getting "therapeutic community" treatment. There was general concern about the probable inadequacy of funding for offender treatment in the community.
7. **I.C. 35-35-3-3(b) plea agreement provision.** The Committee discussed the statutory provision that no plea agreement, presentence report, or record of a hearing on an agreement shall be part of the "official record" of the case until the court accepts the agreement. State Court Administration attorneys had questioned whether the provision was a "green paper" confidentiality mandate. Judge Apsley noted that the provision was adopted prior to the adoption of the Evidence Rules, in particular Evidence Rule 410 which prevents use of withdrawn or

rejected plea agreements and factual basis statements as evidence. Members agreed to defer any recommendations, and Mike McMahon is to check with State Court Administration to see if there have been any further developments on the topic and report at the next Committee call.

8. **Hilligoss on advice of rights at probation revocation.** Committee members discussed *Hilligoss v. State*, 34A02-1506-CR-529 (Ind. Ct. App., Nov. 18, 2015), which reversed a probation revocation on the basis that the trial judge had not advised the probationer of his statutory rights in a revocation. Members agreed the Criminal Benchbook Committee ought to deal with the decision. It was asked in discussion whether the advice of revocation rights ought to be repeated when the defendant admits the revocation allegations, if the court has already given the rights at the initial revocation hearing; it was agreed repeating the rights was the better practice.
9. **2016 legislation.** The Committee discussed particular bills:
- HB 1015, DNA samples from felony arrestees – members agreed there did not appear to be any need for the Committee to weigh in on this bill.
- SB 160, mandatory juvenile waiver, remand to juvenile court if convicted of different offense – Judges Apsley and Spitzer were concerned that this proposed change will reduce plea agreements.
- SB 155, mandatory pretrial release for misdemeanors and Level 6 felonies, with exceptions – members were concerned that this bill would reduce their discretion over bail.
- SB 216, requiring a bail hearing with 48 hours for persons with convictions for felonies, domestic violence offenses, or failure to appear – members expressed concern on the mandated hearing.
- HB 1129, requiring “automatic” forfeiture of bail upon failure to appear unless the court orders no forfeiture – members agreed this provision was undesirable.
- HB 1142, requiring mandatory 15 year enhancement if firearm used in commission of a felony and prohibiting plea agreements to avoid the enhancement – some concern was expressed about this bill.
10. **Expungement issue.** Judge Clem reported that the Bureau of Motor Vehicles says it is not obliged to expunge its records of arrests or prosecutions which do not result in any conviction, on the basis that the Bureau is not on the list of entities in the expungement statutes required to remove references to the arrest or prosecution upon a successful expungement proceeding. Judge Clem indicated that he has talked about this issue with Senator Lanane, who represents the Judge’s county, and that Senator Lanane is going to see if the statutes can be amended to add the BMV to the list of entities obliged to expunge their records.
11. **Next conference call.** Members agreed the only legislation which might require Committee action during this year’s session would be the bills affecting bail. Mike McMahon is to monitor those bills and report on any developments. Absent any need to meet on the bail legislation, members agreed a conference call or meeting should be scheduled in the summer, preferably after the General Assembly’s summer study committee agendas are established.

Respectfully submitted,

Mike McMahon  
Staff Counsel

**CRIMINAL LAW POLICY COMMITTEE  
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES  
Conference Call August 26, 2016**

The Criminal Law Policy Committee of the Indiana Judicial Conference convened by conference call on August 26, 2016, at 3:00 p.m. Eastern Daylight Savings Time.

1. **Members participating.** Mark Spitzer, Chair, Kent Apsley, Tom Clem, Kim Hall, Ryan King, Dean Sobecki, Wayne Trockman, and Nathan Verkamp participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **Minutes of January 8, 2016 conference call.** Members approved the proposed minutes of the Committee's January 8, 2016 conference call.
4. **Expungement issue.** Judge Clem had reported in January 2016 that he had talked with Senator Tim Lanane about the Bureau of Motor Vehicles' position that it is not obliged to expunge its records of arrests or prosecutions which do not result in any conviction, on the basis that the Bureau is not on the list of entities in I.C. 35-38-9-1 (the pertinent expungement statute) required to remove records concerning the arrest or prosecution upon a successful expungement proceeding. 2016 Senate Bill 267, which would have made a number of expungement amendments, had language added which would have required BMV to expunge its records in an IC 35-38-9-1 expungement proceeding. The Bill passed the Senate but was not given a hearing in the House. Mike McMahon is to check with Legislative Services to see if there was a particular reason the bill failed in the House.
5. **Plea agreement and "official record".** Members discussed I.C. 35-33-3-3(b), which provides that "[n]either the content of the plea agreement, the presentence report, nor the hearing shall be a part of the official record of the case unless the court approves the plea agreement." In the past year there have been questions, some raised at the 2015 Fall Judicial Conference, whether it was intended to make the specified items confidential and whether plea agreements tendered to the court for consideration must be filed on green paper. State Court Administration determined that green paper should not be used, but there may be some courts which consider plea agreements which are pending or rejecting to be confidential. All members participating in the call said they did not consider confidentiality to apply, conduct their hearings on tendered plea agreements in open court, and do not prohibit public access to the pending or rejected plea agreements. The Committee agreed repeal of this statutory provision should be sought. Mike McMahon is to check with David Powell to see if the Indiana Prosecuting Attorneys Council would support a repeal effort.
6. **Advice of earliest and maximum possible release dates.** Members discussed I.C. 35-38-1-1(b), which provides that "[w]hen the court pronounces the sentence, the court shall advise the person that the person is sentenced for not less than the earliest release date and for not more than the maximum possible release date." The Committee noted the recent *Henriquez v. State*, No. 20A04-1510-CR-1841, \_\_ N.E.3d \_\_ (Ind. Ct. App., Aug. 9, 2016), in which Judge Vaidik's majority opinion discussed how "it would be incredibly difficult, if not impossible, for a trial court to determine these dates with any certainty" and concluded "[w]e . . . encourage our legislature to reconsider Indiana Code section 35-38-1-1(b) and the unworkable obligation it places on our trial courts." The Committee determined it would be best to have the provision repealed. Mike McMahon is to check with both the Prosecuting Attorneys Council and the Public Defender Council to see if those agencies would support a repeal effort.
7. **Level 6 felon DOC commitment issues.** Members reviewed legislation presented to the Justice Reinvestment

Advisory Council (JRAC) to address two Department of Corrections interpretations of I.C. 35-38-3-3's limitations on commitments of Level 6 felons to the Department. The DOC interprets the statute's provision on commitment of Level 6 felons whose probation is revoked based on the commission of a new crime to require a conviction, as opposed to proof of commission by a preponderance at a revocation. The DOC also limits the provision for commitment of a Level 6 felon "convicted of at least two (2) Level 6 felonies" to be served consecutively to not include persons convicted of a Level 6 when they have a Level 1 to Level 5 felony sentence to be served consecutively. The Committee agreed it would endorse the draft legislation presented to JTAC to require the DOC to accept Level 6 felons based on either revocation with proof by a preponderance, not a conviction, of a new offense or on the Level 6 felony's being consecutive with a Level 1 to Level 5 felony sentence. The Committee did think that the draft legislation to authorize commitment based on revocation proof by a preponderance rather than a conviction could be made clearer. Mike McMahon is to check with Jane Seigel to see how the draft might be altered to achieve this result.

In discussion, Judge Clem proposed and the Committee agreed that it would be best not to seek at this time amendments of I.C. 35-38-3-3 to authorize DOC commitment for Level 6 offenders who have failed to complete multiple substance abuse treatment programs, had multiple probation or community corrections or drug court placements revoked, or otherwise repeatedly failed to take advantage of rehabilitative alternatives to incarceration. The Committee may take up the topic again for the 2018 legislation session.

8. **Forfeiture legislation proposals.** Due to the apparent resumption of the federal "Equitable Sharing" program, the Committee resumed its consideration of prior proposals to amend Indiana statutes to explicitly require notice and other protections prior to the transfer of seized property to federal authorities for federal forfeiture proceedings. The Committee briefly noted the Marion Superior Court pending litigation claiming unconstitutionality of the state statute allowing for law enforcement reimbursement from funds forfeited under state procedures. It was noted that the Prosecuting Attorneys Council received an opinion from the Attorney General that funds generated under the state's criminal forfeiture statutes must go to the Common School Fund but funds generated under the civil forfeiture statutes are not required to go to the School Fund. Members agreed that however this lawsuit pans out there will still be the notice issues about transfer of funds from state officials to federal authorities for federal forfeiture. A number of judges said they felt Indiana's pre-transfer procedures should be changed to require notice and provide more protections for those with interests in seized property. It was noted that for the Committee to seek changes approval must first be obtained from the Judicial Conference Board of Directors and that passage of any changes in the General Assembly will be very difficult without the concurrence of law enforcement groups. It was agreed that Judge Spitzer would informally talk about the issues with Prosecuting Attorneys Council Executive Director David Powell at the Justice Reinvestment Advisory Council meeting September 21. Based on any conversation Judge Spitzer and Director Powell have, the Committee will decide what sort of follow-up should be sought. It was agreed that Judge Sobecki, who will succeed Judge Spitzer as Chair in mid-September, would be a good Committee representative in further discussions with Mr. Powell, who was prosecutor for many years in a county adjoining Judge Sobecki's.

Respectfully submitted,

Mike McMahon  
Staff Counsel