

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call January 17, 2014**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on January 17, 2014, at 3:30 p.m. Eastern Standard Time.

1. **Members participating.** Jon Cleary, Chair, Nick Barry, George Brown, Leo Burns, Kelli Fink, Clayton Graham, Jim Heimann, Liz Hurley, Mike Kramer, Stan Kroh, and Bill Nelson.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **November call minutes.** The Committee approved the minutes of the November 14, 2013 conference call.
4. **Speedy trial calculation sheet.** The Committee reviewed a Criminal Rule 4 calculation sheet for use in determining periods of delay of trial attributable to a defendant. Members agreed the sheet was useful for its list of factors which can be considered delays. It was suggested that weather emergencies and acts of God be added to the list of factors.
5. **Speedy trial priority.** The Committee reviewed revised material on factors to consider in assigning Criminal Rule 4 priorities among cases. The material had been expanded and placed in a separate section of the speedy trial chapter draft. Mike McMahon explained that the initial supreme court decision on priorities remains the basic authority and that there has been little subsequent consideration of prioritization. In discussion members observed that the factors they applied in making priority decisions corresponded to those listed in the draft section.
6. **Criminal Rule 4 congestion.** Mike McMahon explained the expanded material in the speedy trial draft on the identical congested calendar provisions in each of the three Criminal Rule 4 time limit sections. He noted that the portion of the material addressing the procedure to challenge a court's finding of congestion summarizes the analysis in each of four opinions and explained that the analysis appears to be very case-specific. Members discussed their methods for priority assignment. Jim Heimann said he resolves speedy trial congestion issues by having the reporter go through the calendar to report on available dates and then determining which dates could be used for the case. Kelli Fink and Liz Hurley said they each "stack up" cases triable on a given date and determine the day before by written order which case or cases in the "stack" will be tried the next day. They both noted that their prosecutors generally do not file written congestion notices (as required by C.R. 4), so that the procedure they normally utilize is judge-initiated. It was agreed that a generally-applicable congestion factor analysis would be preferable to the case summaries in the draft discussed in the call. Mike McMahon will draft such a general factor analysis for the next call.
7. **Apprendi-Blakely jury issue for facts determining credit time earning class.** The Committee continued its discussion as to whether the Sixth Amendment requires a jury resolution of factors, not contained in the guilty verdict itself, which determine whether the defendant will earn credit time at a reduced rate. This discussion is pertinent to Indiana due to the statutory requirement that defendant must be sentenced as a "credit restricted felon" if the victim was under twelve years of age at the time of the offense. The caselaw from other jurisdictions found by Mike McMahon establishes a majority position that credit time eligibility is not an *Apprendi-Blakely* issue because it has no effect on the maximum sentence the defendant may be given. It was agreed that Mr. McMahon will draft a note to the "credit restricted" material approved in November '13 addressing the issue and the caselaw and citing the Alaska case citing the majority position cases while taking a minority position.

7. **Speedy trial chapter section numbering.** Mike McMahon noted that he had reduced the use of Benchbook section numbers in the speedy trial chapter draft. After discussion, the Committee decided it would be preferable for the draft to continue the more thorough section-numbering approach in the other chapters. Mr. McMahon will revise the draft accordingly.
8. **Identifying Benchbook sections affected by penal code reform act.** Mike Kramer suggested that the Committee begin reviewing the Benchbook to determine what changes will be required by the penal code reform, which Mike McMahon said will probably go into effect July 1, 2014 as provided in last year's legislation. It was agreed that Mike McMahon will make an initial assessment of sections which may need changing and that the Committee will consider establishing work groups to review and draft the needed changes.
9. **Next conference call.** Members selected 3:30 p.m. Eastern Daylight Savings time, Friday, February 21, 2014, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call February 21, 2014**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on February 21, 2014, at 3:30 p.m. Eastern Standard Time.

1. **Members participating.** Nick Barry, George Brown, Clayton Graham, Tom Hakes, David Hooper, and Mike Kramer participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **January call minutes.** The Committee approved the minutes of the January 17, 2014 conference call.
4. **Speedy Trial chapter.** The Committee reviewed a revised draft of the proposed Speedy Trial chapter changes. Members approved the renumbering in the revision. In the initial "Summary of section contents" section, 43.10.000, it was agreed that hyperlinks should be inserted to take the reader from the summarized subdivisions of the chapter to the full text for each subdivision. In section 43.50.950, on challenges to a congestion finding, members approved the reorganization of the case citations and agreed that the bullet-pointed subparts should be highlighted with capital letters and bold font.
5. **Jury trial on credit-restricted felon status.** The Committee reviewed a 2nd draft of material on credit restricted felon determination. A change in the first sentence of the first footnote was made. Members discussed whether to include more material on how to conduct a jury trial on the issue if a judge concludes one is required. Judge Kramer suggested that special interrogatories or a bifurcated proceeding would be required. A majority of the members decided that more material on the issue should not be added.
6. **Changes required by H.E.A. 1006, criminal reform legislation.** Members discussed a list of benchbook section changes required by the criminal reform legislation which will take effect July 1, 2014. Mike McMahon asked members about addressing the legislative changes in Benchbook sentence range tables and similar materials. The members agreed that it would generally be easier to use separate tables and charts, one for the law as in effect prior to July 1, 2014 and another for the legislative changes effective July 1, 2014.
7. **Next conference call.** Members selected 3:30 p.m. Eastern Daylight Savings time, Friday, March 28, 2014, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call March 28, 2014**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on March 28, 2014, at 3:30 p.m. Eastern Standard Time.

1. **Members participating.** Jon Cleary, chair; Kelli Fink, Jim Heimann, David Hooper, Mike Kramer, and Stan Kroh participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **February call minutes.** The Committee approved the minutes of the February 21, 2014 conference call.
4. **Credit-restricted felon status.** The Committee gave final approval to material on credit restricted felon determinations.
5. **Speedy Trial materials.** The Committee approved a final draft of the proposed new Speedy Trial chapter and a new form for calculation of Criminal Rule 4 periods.
6. **Sentencing ranges adopted in criminal reform legislation.** Members reviewed a draft of the felony sentencing parameters charts in section 68.02.040. An erroneous reference to “months” instead of “years” was corrected in the new sentence range table, and it was agreed that a header row should be inserted in the felony sentencing enhancements chart. The latter chart also should have a row added for the new “habitual vehicular substance offender” enhancement added to the statutes effective January 1, 2015 by this year’s S.E.A. 1279.
7. **Future projects.** Mike McMahon suggested two projects the Committee might consider after the work is completed for the criminal code reform legislation. The two projects suggested were (1) a revision of the index and (2) a section on life without parole prosecutions.
8. **Next conference call.** Members selected 3:30 p.m. Eastern Daylight Savings time, Friday, May 16, 2014, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call May 16, 2014**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on May 16, 2014, at 3:30 p.m. Eastern Standard Time.

1. **Members participating.** Jon Cleary, Chair, George Brown, Kelli Fink, Clayton Graham, Tom Hakes, David Hooper, Elizabeth Hurley, Mike Kramer, and Stan Kroh.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **March call minutes.** The Committee approved the minutes of the March 28, 2014 conference call.
4. **Updates for criminal reform legislation.** The Committee reviewed proposed changes in Chapters 19 (Initial Hearing), 50 (Guilty Pleas), and 68 (Sentencing) to incorporate the criminal reform legislation which will take effect July 1, 2104.

New “Standard Sentencing Ranges” charts for all three chapters were approved.

It was agreed that separate “Felony Sentencing Enhancement” charts for the “old” laws in effect prior to July 1, 2014 and for the “new” laws in effect July 1 should be used in each of the three chapters .

It was agreed to insert in the enhancement charts the 30 year cap on habitual offender enhancements under the “old” law

It was agreed to have separate “old” and “new” charts for the Chapter 50 “Calculation – Maximum and Minimum Felony Sentence”

The “old” “Suspendibility of Felony Sentence” sections, 50.70.200 and 68.16.030, should have their “steps” noted as totalling “seven,” not the inaccurate “five” in the present version.

The D felony written advisement, 50.70.450, should have the maximum sentence be three years, not 2.5.

The 50.70.460 Level 6 felony written advisement and waiver form should contain a note on 2014’s 91 day and 2015’s 356 day “earliest possible release” thresholds for DOC commitment.

Paragraph 11 in the 50.70.450 and 50.70.460 sections should refer to the caselaw requirement that the dealing or possession offense triggering the license suspension requirement has to have been committed within the vehicle.

Chapter 68 changes approved:

68.01.010 (presentence report – Level numbers added);

68.02.036 (amelioration doctrine does not apply to “new” code);

68.02.150 (changed to reflect statutory prohibition on use of statements made for plea bargains later rejected);

68.03.000 (note on “new” legislation’s provision that a sentencing statement is not required if advisory is imposed);

68.10.065 and 68.10.066 (credit time earning classes “old” and “new”);

68.10.085 (credit time and credit for time served for probation home detention);

68.10.087 (credit time and credit for time served for community corrections home detention);

68.10.200 (consecutive sentences summary);

68.10.205 (consecutive sentences statutory cap).

The Committee agreed to resume its Chapter 68 review in July at section 68.16.000.

5. **Posting of Revised Chapters 19, 50, and 68 Dialogues and Forms.** Due to the interest of all judges in having the Committee's revised initial hearing, guilty plea, and sentencing dialogues before July 1, 2014 when the new code revisions take effect, it was agreed that Mike McMahon could make the approved changes in the sentencing parameters, sentencing enhancement, and maximum-minimum calculation sections and post them in the online Benchbook before July 1, with a notice to all judicial officers of the updated sections' posting.
6. **Next conference call.** Members selected 3:30 p.m. Eastern Daylight Savings time, Friday, July 11, 2014, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call July 11, 2014**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on July 11, 2014, at 3:30 p.m. Eastern Standard Time.

1. **Members participating.** Jon Cleary, Chair, Kelli Fink, Jim Heimann, Elizabeth Hurley, Mike Kramer, and Stan Kroh.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **May call minutes.** The Committee approved the minutes of the May 16, 2014 conference call.
4. **No cap on age of prior for suspension statute.** Judge Kramer noted that there appears to be no age limit on prior unrelated felony convictions which prevent suspension of the minimum sentence for Level 2 and 3 felonies. The pertinent statute, IC 35-50-2-2.2, contains no limit:
35-50-2-2.2. Suspension; probation
 - (a) Except as provided in subsection (b) or (c), the court may suspend any part of a sentence for a felony.
 - (b) If a person is convicted of a Level 2 felony or a Level 3 felony, except a Level 2 felony or a Level 3 felony concerning a controlled substance under IC 35-48-4, and has any prior unrelated felony conviction, the court may suspend only that part of a sentence that is in excess of the minimum sentence for the:
 - (1) Level 2 felony; or
 - (2) Level 3 felony.
 - (c) The court may suspend only that part of a sentence for murder or a Level 1 felony conviction that is in excess of the minimum sentence for murder or the Level 1 felony conviction.
5. **Is an habitual criminal offender enhancement eligible for community corrections.** The Committee asked whether an habitual criminal offender enhancement prevents direct commitment to community corrections. Mike McMahon will research.
6. **Completed review of sentencing chapter, Chapter 68.** The Committee completed its review of Chapter 68, on sentencing, beginning at section 68.16.000 where it had stopped during the May conference call. Changes included:
 - 68.16.012 correcting prior conviction limit on suspension of sentence to strike out Level 4 felony, so that limit refers correctly only to Level 2 and Level 3 felonies with prior convictions. (Correction made in online Benchbook – M. McMahon.)
 - 68.16.025 and 68.16.026 on suspendability of habitual offender and habitual substance offender enhancements – question raised whether such enhancements prevent home detention as direct commitment to community corrections or as condition of probation. McMahon to research.
 - 68.02.050, 68.02.055, 68.02.060, 68.02.065, 68.02.070, 68.02.075, and 68.02.080 showing prior penalty levels for murder through D felonies and habitual enhancement all to be modified to show the levels which ended June 30, 2014.
7. **Review of probation chapter, Chapter 74, and post-trial proceedings chapter, Chapter 77.** The Committee reviewed Chapters 74 and 77. Changes included:

- 74.02.005, on felony period of probation for pre-July 1, 2014 crimes, was approved.
- 74.02.010, on felony period of probation for crimes on or after July 1, 2014, was corrected to show that the prior conviction limits on felony suspension apply to Levels 2 and 3, not Levels 3 and 4, felonies.
- Deletion of 74.02.070, on probation for a “non-suspended period,” as it appears to have involved an outlier sentence.
- Deletion of 74.02.085, as it appears to have been superseded by the misdemeanor term of probation decision in *Jennings v. State*, 982 N.E.2d 1003 (Ind. 2013), which was described in the preceding section 74.02.050.
- 74.50.000 was modified to reflect addition of offenses for which placement in community corrections is prohibited by statute effective July 1, 2014.
- 77.02.000 was modified to reflect the question whether the more liberal sentence modification policy in the July 1, 2104 version of I.C. 35-38-1-7 may be applied to crimes committed before July 1, 2014.
- 77.02.010 and 77.02.015 were approved; these sections list the contents of the pre-July 1, 2014 and post-June 30, 2014 versions of I.C 35-38-1-7, the sentence modification statute.
- Deletion of 77.02.050 was approved; the case summarized in the section was vacated on transfer and no equivalent decision was found.
- 77.02.225, on notice of sentence modification to the victim, is to be revised by having all current contents deleted (current contents are incorrect); M.McMahon to draft a corrected version reflecting present statute’s requirement that court give notice to prosecutor of setting of a hearing on a modification petition and that prosecutor then give notice of the hearing to the victim.
- Deletion of 77.02.255 (denial of modification petition without findings) and 77.02.315 (hearing waiver by petitioner if prosecutor agrees to modification), as these factors are already covered in 77.02.010 and 77.02.015.

8. **Setting trial date at initial hearing.** Mike McMahon advised the Committee that Justice David had asked if the Committee would consider addressing the desirability of setting a trial date at the initial hearing. Justice David said that his request was based on a case under consideration by the Supreme Court in which a date had not been set, with consequent complications. Stan Kroh said that Judge Carlisle of Marion Superior sets a date at the initial hearing for more serious felonies heard in her court, but that dates were generally not set at the initial hearings in Marion Superior for misdemeanors and D (or Level 6) felonies. Kelli Fink said that trial dates were not set at the initial hearing in Vanderburgh County, the practice not being feasible with the system there. Jon Cleary said he does set a trial date at the initial in all cases, to help encourage more prompt case resolution and reduce jail population. Members did not reach any final decision whether to recommend or encourage the practice in the Benchbook initial hearing sections. It was noted that 19.50.000, the Initial Hearing Procedural Checklist, contains in subpart 11 on setting omnibus dates a note that the misdemeanor omnibus date to be set is also the trial date, as provided in I.C. 35-38-8-1(c).

9. **Next conference call.** Members selected 3:30 p.m. Eastern Daylight Savings time, Friday, August 22, 2014, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

CRIMINAL BENCHBOOK COMMITTEE INDIANA JUDICIAL CONFERENCE

PROPOSED MINUTES Conference Call October 24, 2014

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on October 24, 2014, at 3:30 p.m. Eastern Standard Time.

1. **Members participating.** Jon Cleary, Chair, Nick Barry, George Brown, Kelli Fink, Clayton Graham, Tom Hakes, and David Hooper participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **July 11 call minutes.** The Committee approved the minutes of the July 11, 2014 conference call.
4. **Victim notice of sentence modification.** The Committee approved a change to section 77.02.225, to reflect the 2014 legislation removing the obligation of the court to give notice to a victim of a hearing on a sentence modification hearing. The new law requires the court to give notice to the prosecuting attorney, who in turn must give notice to the victim of the hearing.
5. **Direct placement of defendant with an habitual offender sentence.** The Committee discussed an assessment of the availability of a direct commitment to community corrections for a defendant who receives an habitual criminal offender sentence. Mike McMahon is to draft a section on the issue for consideration in the next Committee call.
6. **Recidivist chapter.** Committee members discussed a new proposed outline to reorganize Chapter 69 on recidivist proceedings. The outline received favorable comments. It was agreed to reconsider it in the next call, after members have had more time to study it.
7. **New traffic and driving privileges laws.** The Committee briefly discussed the legislation to go into effect January 1, 2015 on license suspensions and related matters. Members agreed that the subject of the new laws is not appropriate for the Benchbook. It was suggested that the Judicial Center consider establishing a special group or task force to assess the legislation.
8. **Chapter specialist proposal.** The Committee discussed a proposal to have each member select several Benchbook chapters for oversight. The member would have the responsibility of monitoring caselaw and legislation for developments affecting his or her assigned chapters. Mike McMahon is to break the chapters into groups, based on size, and send out the groups for volunteers to select.
9. **Index.** Mike McMahon suggested that the Index for the Benchbook be revised, to a simpler format, with index-to-subject hyperlinks. He agreed to draft an example of an Index revision with these characteristics.
10. **Setting trial date at initial hearing.** The Committee discussed Justice David's suggestion that material be drafted to encourage the setting of a trial date at the initial hearing. Justice David said that his request was based on a case under consideration by the Supreme Court in which a date had not been set, with consequent complications. A "best practice" note was mentioned as a possible addition to the Initial Hearing chapter.
9. **Next conference call.** Members selected 3:30 p.m. Eastern Standard time, Friday, December 5, 2014, for

the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call December 5, 2014**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on December 5, 2014, at 3:30 p.m. Eastern Standard Time.

1. **Members participating.** George Brown, Leo Burns, Clayton Graham, Jim Heimann, David Hooper, Mike Kramer, Stan Kroh, and Keith Meier participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **October call minutes.** The Committee approved the minutes of the October 24, 2014 conference call.
4. **Habitual offender direct commitment to community corrections.** Mike McMahon noted that he had been asked to draft a proposal for a section on whether an habitual offender sentence is eligible for direct placement in community corrections. When he began work on a draft, he said that he had difficulty finding a circumstance in which there could be an habitual eligible for direct placement. Judge Meier also said that he could not think of a situation in which the issue would come up. The Committee agreed not to have a section on the matter.
5. **Recidivist Chapter 62 outline.** The Committee asked discussed a draft outline for a reorganization of Chapter 62 on recidivist penalties and procedures. The outline was approved. Mike McMahon will put together a draft chapter based on the outline for Committee consideration.
6. **Traffic law legislative changes in 2014.** Mike McMahon reported on activities of a work group studying needed corrections for 2014 House Bill 1279, which makes numerous changes in license suspension statutes. The Committee agreed that traffic items should not be in the Criminal Benchbook. Members did agree that it would be helpful to have the materials for the Judicial Center’s December 12 Winter Conference on HB 1279 be placed online, with notice to judges. Members also agreed that charts detailing the new provisions on suspensions and “specialized driving privileges” would be useful, and suggested that perhaps former BMV counsel Scott DeVries might be retained to draft such charts.
7. **Chapter monitoring.** The Committee discussed a proposal to have individual members volunteer to “monitor” areas covered by a group of chapters in the Benchbook. “Monitors” would not be required to keep their chapter group up-to-date, but rather would, in their normal day-to-day reading of cases and work with statutes, keep an eye out for developments which the Committee may want to consider treating in the Benchbook. It was agreed that this was a project worth trying. The following members agreed to “monitor” the following chapters:

Group 1:	Search and Arrest, Ch. 10 Confessions, Ch. 13 Motion to Suppress, Ch. 53	Mike Kramer
Group 2	Extradition and Detainers, Ch. 16 Initial Hearing, Ch. 19 Bail, Ch. 22	George Brown
Group 3	Grand Jury, Ch. 25 Informations, Ch. 28	Keith Meier

Group 4	Judges, Prosecutors, Venue, Ch. 31 Defense Counsel, Ch. 34 Interpreters, Ch. 35	Volunteer needed
Group 5	Discovery, Ch. 40 Speedy Trial, Ch. 43 Competence to Stand Trial, Ch. 47	Clayton Graham
Group 6	Guilty Pleas, Ch. 50	Leo Burns
Group 7	Jury Right and Demand, Ch. 39 Jury Lists, Ch. 56 Voir Dire, Ch. 57 Trial, Ch. 59 Mistrials, Ch. 58	Volunteer needed
Group 8	Penalty Enhancements, Ch. 62 Sentencing, Ch. 68	Volunteer needed
Group 9	Appeals and Retrials, Ch. 71 Post-Trial, Ch. 77 Post-Conviction Relief, Ch. 80	Volunteer needed
Group 10	Probation, Ch. 74	JUDGE HAKES Volunteer needed
Group 11	Capital Cases, Ch. 83	Volunteer needed

8. **Index.** The Committee discussed a proposal from Mike McMahon to change to a simpler index which would use “hyperlinks” to take the user to the pertinent portion of a specific chapter’s table of contents, which itself would have “hyperlinks” to the pertinent sections or forms. Where appropriate, the index link could go directly to the pertinent sections or forms in a chapter, instead of the chapter table of contents. Members agreed it would be useful to take the proposal a step further, and it was agreed that Mr. McMahon would draft index links for an actual chapter in the Benchbook for the Committee to evaluate.
9. **Setting trial date at initial hearing.** Members resumed consideration of Justice David’s suggestion that there be a Benchbook recommendation that a trial date be set at the initial hearing, in order to avoid the situation in which a trial date is inadvertently never set within the one-year period required by Criminal Rule 4(C). After discussion, it was agreed that the Initial Hearing Checklist form in the Initial Hearing Chapter 19 and a new specific section in that chapter be amended to contain the Committee’s encouragement that the trial judge consider the following suggestion in *Logan v. State*, 16 N.E.3d 953, 965 (Ind. 2014) (the case which prompted Judge David’s suggestion):
“To prevent the potential for any subsequent violation of a defendant's constitutional right to a speedy trial due to protracted court congestion, we encourage trial courts to consider setting the defendant's trial date at his or her first initial hearing and to remain diligent in monitoring the age of these cases.
10. **Next conference call.** Members selected 3:30 p.m. Eastern Standard Time, Friday, January 30, 2015, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel