

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call March 18, 2016**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on March 18, 2016, at 3:30 p.m. Eastern Daylight Savings Time.

1. **Members participating.** Clayton Graham, Chair, George Brown, David Happe, and Jeff Sharp participated in the call.
2. **Staff participating.** Mike McMahon and Jason Bennett provided the Committee with staff assistance.
3. **December call minutes.** The Committee approved the minutes of the December 11, 2015 conference call.
4. **Index.** Members reviewed the March 14, 2016 draft of the Benchbook Index distributed for the call. A number of topics listed as subtopics under general headings were approved for individual listing as well. A number of new individual topics were suggested for indexing. Staff counsel will add these to the draft and alphabetize the topics for review in the next call.
5. **Individual issues.** The Committee reviewed a number of issues for which material was distributed for the call:

E-mail warrant application – A brief reference to the statutory authorization for e-mail warrant applications, added by a 2015 statute change, was approved. The Committee agreed that more materials on electronic, telephonic, and facsimile warrant applications ought to be considered.

Electronic abstract procedures – Members agreed that staff counsel should check with the JTAC abstract project manager Lisa Thompson about content to be added for the electronic abstract and about the electronic presentence report as announced in a JTAC e-mailing in December 2015. Members also agreed that an entry should be drafted, to add to the offender commitment portion of the Sentencing chapter, on the statutory limitations for commitments of Level 6 felons to the DOC.

Home detention prohibition for sex crimes – Members approved addition of a section modification which notes the statutory change allowing home detention for persons convicted of sex crimes under certain conditions (formerly statute denied all such home detention).

Discovery depositions and confrontation right – The Committee approved addition of a proposed section on recent cases holding that “discovery depositions” may be admissible without violating defendant’s confrontation rights.

Juror “Facebook” friends – Members approved a draft addition of a reference to a recent supreme court decision on impact of “Facebook” friends on juror voir dire answers about relationship with parties or witnesses.

Guilty plea once tendered cannot be withdrawn without permission – The Committee approved addition of a reference to a case holding that a guilty plea tendered and taken under advisement by the trial judge is considered to be “entered” under the statute requiring permission to withdraw a plea after its “entry.”

Magistrate authorized to sentence on guilty plea – Members approved addition in Guilty Pleas, Judges, and Sentencing chapters of citation to the statutory amendment authorizing magistrates to impose sentence after entry of a guilty plea.

Home detention credit time terminology changes – Changes were approved to the home detention

section to reflect the 2015 statutory changes in credit time terminology. Staff counsel is to check to see whether the statutory changes are to be used retroactively.

Suspicionless probationer home searches – Members approved a draft modification of the section on probationer home searches to state the new caselaw position from the supreme court that suspicionless searches of probationer homes are permitted if the probationers either consent or are clearly informed they are subject to searches without cause or suspicion. Staff counsel were asked to draft a dialogue to give a probationer the required clear advice that the probationer would be subject to searches without suspicion.

6. **Next conference call.** Members selected 3:30 p.m. Eastern Daylight Savings Time, Friday, April 22, 2016, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call April 22, 2016**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on April 22, 2016, at 3:30 p.m. Eastern Daylight Savings Time.

1. **Members participating.** Nick Barry, Leo Burns, David Happe, David Hooper, Stan Kroh and Keith Meier participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **March call minutes.** The Committee approved the minutes of the March 18, 2016 conference call.
4. **Index.** Members approved the March 29, 2016 draft of the Benchbook Index distributed for the call. Staff counsel will add the Index to the Benchbook and insert the needed hyperlinks to take the user from the Index to the desired text.
5. **Issues.** The Committee reviewed a number of issues for which material had been distributed for the call:

Limitations on Level 6 DOC commitments – Committee members approved changes to sections 68.55.010 and 68.55.011 to reflect the present limitations on commitments of Level 6 felons to the Department of Correction. Changes included addition of a note on the change, to be effective July 1, 2016, allowing commitment of a Level 6 felon who receives an habitual traffic violator sentence enhancement and has more than three-hundred sixty-five days from sentencing before his earliest possible release date. In discussing Level 6 commitments, Judge Happe noted that the Department had rejected a commitment of a Level 6 offender whose probation had been revoked based on a revocation showing of a preponderance that he had committed a new offense – the Department took the position that a conviction, not just a finding of commission, was required for the commitment. Judge Happe also said that the Department had additionally rejected a Level 6 commitment which was consecutive to a sentence for a Level 5 or higher felony, apparently because the Department interprets the “[a]t least two (2) Level 6 felonies that are ordered to be served consecutively” to apply only to multiple Level 6 felony convictions and not to Level 6 consecutive to a Level 5 or higher. Mike McMahon is to check whether the Department still adheres to these policies.

Probationer home searches without warrant or suspicion – Committee members approved a change to the “Order Imposing Conditions of Probation,” 74.80.050, so that it would require the probationer to “permit your Probation Officer or anyone acting on behalf of the Probation Department to visit you at any time at your home or elsewhere and to search your home or any other place you are in without a search warrant and without any suspicion you have engaged in criminal activity or violated a condition of your probation.” There was discussion whether the phrase “for the purpose of insuring compliance with your Order of Probation” should be retained since it might suggest a limit on the scope of the authorized search. The Committee did approve deletion of the phrase that the probationer “shall waive your right against unreasonable searches by your Probation Officer, or anyone acting on behalf of the Probation Department.” Mike McMahon is to check for caselaw and other authority on the permissible extent of a probation search under a probation condition like the one approved above.

E-mail warrant application – In the March call, after approving addition of a brief reference to the statutory authorization for e-mail warrants in a new section 12.09.200, the Committee agreed to discuss whether more materials on electronic, telephonic, and facsimile warrant applications ought to be considered for the Benchbook. In discussion in April, the question was raised whether the judge who refuses to approve a warrant application can appropriately indicate to the applicant police agency what would have to be changed or added to make the application sufficient to support a warrant. Judge Meier suggested that Adrienne Meiring be contacted for advice on the extent to which a judge can suggest changes to police which the judge considers necessary to issue the warrant. Mike McMahon is to explore these issues and report for the next Committee call.

Home detention credit time terminology changes – The Committee discussed whether the 2015 statutory changes in credit time terminology are to apply retroactively. The legislation provides that the changes are “intended to be a clarification” and “do not affect any time accrued before July 1, 2015.” Members concluded it best not to address any retroactive effect in the revised credit time sections.

Indigency determination timing, costs and fines - At Mike McMahon’s suggestion, the Committee agreed to defer discussion of the recent *Meunier-Short* and its impact on the timing of the determination of ability to pay fines and costs when payment is a condition of probation.

Electronic sentencing abstract procedures – Members agreed that staff counsel should check with the JTAC abstract project manager Lisa Thompson about content to be added for the electronic abstract and about the electronic presentence report as announced in a JTAC e-mailing in December 2015. Members also agreed that an entry should be drafted, to add to the offender commitment portion of the Sentencing chapter, on the statutory limitations for commitments of Level 6 felons to the DOC.

Mandatory meth lab cleanup restitution - The Committee approved addition to 68.04.200 of a citation to the recent *Fisher v. State* decision addressing the I.C. 35-48-4-17’s mandate of restitution for the costs of an environmental cleanup incurred as a result of a methamphetamine manufacturing crime; *Fisher* held that the mandatory aspect of the restitution meant that it was implicitly included in a meth manufacturing plea agreement. As of 5-16-16, no petition for rehearing or transfer had been filed in the case.

Language identification guide - Members discussed whether the “I Speak” Language Identification Guide issued by State Court Administration should be placed in the Benchbook Interpreters chapter. It was noted in discussion that most if not all courts have copies of this Identification Guide. Members agreed that a reference to it in the Interpreters chapter, 35.00.000, would be sufficient.

Felony period of probation section - It was agreed that section 74.02.005 should be rewritten to eliminate its current reference to an unpublished memorandum decision. Members concluded that instead the section should note that there appears to be no published decision addressing whether the present version of the felony probation statute, I.C. 35-50-2-2.2, permits the period of sentence suspension to exceed the period of probation or whether instead probation must be ordered for the entire period of the suspended sentence.

Child sex offense former probation limit - The Committee agreed that section 74.02.020, which discusses the I.C. 35-50-2-2 ten-year probation cap on certain child victim sex crimes, should be deleted. I.C. 35-50-2-2 applies only to offenses committed prior to July 1, 2014, and current statutes eliminate the cap for crimes committed on or after July 1, 2014.

6. **Next conference call.** Members selected 3:30 p.m. Eastern Daylight Savings Time, Friday, May 20, 2016, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call May 20, 2016**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on May 20, 2016, at 3:30 p.m. Eastern Daylight Savings Time.

1. **Members participating.** Clayton Graham, Chair, George Brown, David Hooper, and Keith Meier participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **April call minutes.** The Committee approved the minutes of the April 22, 2016 conference call.
4. **Issues.** The Committee reviewed a number of issues for which material had been distributed for the call:

Limitations on Level 6 DOC commitments – Members discussed reports that the Justice Reinvestment Advisory Council will seek amendments to IC 35-38-3-3 to require the DOC to accept Level 6 felons both when their probation is revoked based only on proof of commission, but not conviction, of a new offense and when a Level 6 sentence is consecutive to another sentence for any Level of felony, not just another Level 6. The Committee concluded that the Benchbook Sentencing chapter should note these DOC positions on commitment of Level 6 felons to Department and that it appears that legislative changes in the commitment statute will be sought.

Advice to police on rejecting warrant application – The Committee discussed the extent to which a judge who rejects a warrant application should indicate to law enforcement officers the reasons for the rejection. Members reviewed advice on the issue from Adrienne Meiring, Counsel to the Commission on Judicial Qualifications. It was agreed that the issue is one of general interest for judges, but a question was raised as to whether, if the only guidance is ethical in nature, the Benchbook should address the matter. Members did not reach a conclusion as to whether it would be better to not discuss the issue at all in the Benchbook or to instead put in a Committee opinion as to the desirable practice. Mike McMahon is to draft a policy statement for discussion in the next conference call.

Language Identification Guide – A draft statement about the Language Identification Guide to appear in the Interpreters chapter was approved.

Simons decision on advice of earliest and maximum release dates – Members reviewed the May 13, 2016 *Simons v. State* decision, which found harmless error in failing to advise pursuant to I.C. 35-3-81-1(b) of the defendant's earliest and maximum possible release dates. The statute and the *Simons* decision itself do not establish clearly whether the trial court is to make an estimate of the actual possible release dates. The current language in the Benchbook does not require such an estimate and instead merely repeats the language in the statute. It was agreed to keep the Benchbook entry as it is and to endorse repeal of the provision.

Electronic sentencing abstracts update – A draft incorporating the Dec. '15 e-mail from State Court Administration on policies and procedures for electronic abstracts was approved.

Fines and costs - time to determine ability to pay – Members agreed that Mike McMahon should draft a Benchbook proposal on the April 14, 2016 *Meunier-Short* holding on the time for determination of a probationer’s ability to comply with probation conditions to pay fines and costs.

Good time credit for pretrial home detention - Members approved a draft of separate sections for the former caselaw rule on discretion to award pretrial credit for time served and for the legislation effective July 1, 2016 providing for “Class P” good time credit for pretrial home detention, at the rate of a day’s credit for four days of pretrial home detention.

Probationer home searches without warrant or suspicion – It was agreed to defer discussion of the recent cases on probationer home searches until the next call. Mike McMahon is to prepare a table comparing the appellate decisions for Committee review and discussion.

Ramirez rule on resolving juror “taint” issues – Members agreed to take up the 2014 *Ramirez* “jury taint” opinion in the next call. Mike McMahon is to draft a discussion proposal.

5. **Next conference call.** Members selected 3:30 p.m. Eastern Daylight Savings Time, Friday, July 22, 2016, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call August 19, 2016**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on August 19, 2016, at 3:30 p.m. Eastern Daylight Savings Time.

1. **Members participating.** Clayton Graham, Chair, Nick Barry, George Brown, and David Hooper participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **April call minutes.** The Committee approved the minutes of the May 20, 2016 conference call.
4. **Issues.** The Committee reviewed a number of issues for which material had been distributed for the call:

Electronic sentencing abstracts update – Members approved a draft revision of Section 68.55.070 on the electronic abstract of judgment modified to include notes about the DOC positions that IC 35-38-3-3 does not require the DOC to accept Level 6 felons both when their probation is revoked based only on proof of commission, but not conviction, of a new offense and when a Level 6 sentence is consecutive to another sentence for any Level of felony other Level 6. The approved revision notes that legislative changes will be sought to authorize Level 6 commitments for revocations based on evidence by a preponderance of a new offense and when the Level 6 is consecutive to a felony of any Level.

Advice to police on rejecting warrant application – The Committee reviewed and approved draft revisions to the Chapter 12 Search sections on telephonic, facsimile, and electronic warrant applications. The revised Sections 12.08.200, 12.08.500, and 12.09.000 contain bullet lists of the statutory steps, in the statute’s language, for processing each of these types of warrant applications. The Committee revised the draft Section 12.09.200 on denying one of these warrant applications, as follows:

12.09.200 DENYING TELEPHONIC, FAX, OR E-MAIL WARRANT APPLICATIONS – A warrant application may be summarily denied, without giving reasons for the denial, but the ~~better practice is to~~ **court in its discretion may** make a general reference to the basis for the denial without identifying specific shortcomings. Examples of appropriate references for denial:

- Denied, inadequate description of property to be searched/items seized
- Denied, unclear about the reliability of the hearsay declarant
- Denied, stale information.

Fines and costs - time to determine ability to pay – The Committee reviewed draft sections for the Sentencing Chapter 68 addressing the *Meunier-Short* holding, at 52 N.E.3d 927 (Ind. Ct. App. 2016 on the time for determination of a probationer’s ability to comply with probation conditions to pay fines and costs. It was agreed that Mike McMahon would check for the U.S. Supreme Court and Indiana decisions on revoking probation when the probationer willfully refuses to acquire the resources to pay financial conditions to see whether citation to them in these draft sections would be appropriate.

Probationer home searches without warrant or suspicion – The Committee discussed a chart comparing the supreme court’s *Vanderkolk* decision on warrantless probationer home searches without warrants and two recent Court of Appeals cases on such searches. The Committee agreed to adopt the March ’16 proposal to modify Section 74.35.000 by simply quoting the *Vanderkolk* “holding” on “warrantless and suspicionless” probationer searches. As *Vanderkolk* requires that probationers be “clearly informed that the conditions of their probation or community corrections program unambiguously authorize warrantless and suspicionless searches,” Mike McMahon is to check to see whether the Benchbook contains a form list of conditions which can be modified to comply with this *Vanderkolk* directive.

Ramirez rule on resolving juror “taint” issues – Members approved the draft of Section 59.50.100, which recites in bulleted format the language directly from *Ramirez v. State*, 7 N.E.3d 933 (Ind. 2014) listing the required steps for dealing with “jury taint.” The proposed deletion of present Sections 59.50.110 through 59.50.130 was also approved. Members agreed it would be useful to repeat the *Ramirez* directions in the Mistrial Chapter 58 and Mike McMahon is to draft a revised 58.60.100 to do this.

Firearms information from Ruth Reichard - The Committee agreed to defer consideration of the information on legal prohibitions of firearms possession by felons and persons convicted of domestic violence misdemeanors.

Utah v. Strieff U.S. Supreme Court decision – Members agreed that Mike McMahon should draft a section for the Search chapter addressing the 2016 *Utah v. Strieff* holding that the discovery of an outstanding warrant “attenuate[s] the connection between” an initial unlawful stop and any evidence seized from the person after arrest based on the outstanding warrant. The draft should include a statement that the *Strieff* scenario’s resolution under the Indiana Constitution has yet to be addressed.

Zanders v. State August 4, 2016 decision – Members briefly discussed the *Zanders* holding that a cell phone possessor has “a reasonable expectation of privacy in the historical location data generated by his cell phone but collected by [his cell phone service] Provider.” It was agreed that the Committee would wait to see if transfer is sought in this case before discussing how it might be included in the Benchbook.

5. **Next conference call.** Members selected 3:30 p.m. Eastern Daylight Savings Time, Friday, October 21, 2016, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call October 21, 2016**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on October 21, 2016, at 3:30 p.m. Eastern Daylight Savings Time.

1. **Members participating.** Clayton Graham, Chair, George Brown, David Hooper, Elizabeth Hurley, Stan Kroh, and Keith Meier participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **August call minutes.** The Committee approved the minutes of the August 19, 2016 conference call.
4. **Issues.** The Committee reviewed a number of issues for which material had been distributed for the call:

***Utah v. Strieff* U.S. Supreme Court decision** – Members approved a draft section for the Search chapter on the 2016 *Utah v. Strieff* holding that the discovery of an outstanding warrant “attenuate[s] the connection between” an initial unlawful stop and any evidence seized from the person after arrest based on the outstanding warrant. Mike McMahon is to add a final sentence to the draft noting that the *Strieff* scenario’s resolution under the Indiana Constitution has yet to be addressed.

Probation condition for home searches without warrant or suspicion – The Committee discussed the draft of Section 74.35.000 on the *Vanderkolk v. State* “holding” on “warrantless and suspicionless” probationer searches. It was agreed that Mike McMahon should add a citation, with parenthetical summaries, for *State v. Terrell*, 40 N.E.3d 501 (Ind. Ct. App. 2015) and *Hodges v. State*, 54 N.E.3d 1055 (Ind. Ct. App. 2016), which both applied *Vanderkolk* and were summarized on the “May ’16 Comparison of Probation Home Search Cases” sent to members for the August 19, 2016 Committee conference call. It was also agreed that the draft *Vanderkolk* probation condition, item 9 on the probation conditions form, Benchbook § 74.80.050, should have a caveat added about *Vanderkolk*’s requirement of a clear probation condition informing the probationer of the court’s home search condition with a statement that the language of the condition imposed will determine the times and circumstances under which a home search can be made without a warrant or suspicion.

Failure to pay fines and costs as basis for revoking probation– The Committee approved modified sections 74.61.100 and 74.61.105 addressing the statutory restrictions on DOC commitments and on revocations for failure to pay fines or costs. Members also approved modification of § 74.61.010 and a consolidation of present §§ 74.61.020 and 74.61.025, with a caveat to be added to the consolidated sections about the *Sparkman v. State* decision’s having preceded the *Bearden v. Georgia* Supreme Court decision on willful failure to acquire resources to pay restitution and of the *Runyon v. State* Indiana decision on proof burdens under Indiana’s I.C. 35-38-2-3(g) provision that probation can be revoked only for a knowing, intentional, or reckless failure to comply with a financial probation condition. Members also agreed that the Criminal Law Policy Committee should be asked to consider whether to seek repeal of the “recklessly” term in the statute, so that the limitation on revocation for nonpayment of financial conditions would be limited to “knowingly or intentionally” failing to pay.

Zanders v. State August 4, 2016 decision – It was noted that as of October 4, 2016, the transfer application was completed for the *Zanders* Court of Appeals holding that a cell phone possessor has “a reasonable expectation of privacy in the historical location data generated by his cell phone but collected by [his cell phone service] Provider.”

Ramirez rule on resolving juror “taint” issues – Members approved the draft of a Mistrial Chapter Section 58.60.100, which recites in bulleted form the language directly from *Ramirez v. State*, 7 N.E.3d 933 (Ind. 2014) listing the required steps for dealing with “jury taint” and mistrials based on such taint. Members agreed that the paragraphs concerning the *Wahl v. State* decision on jury taint discovered after discharge of the jury should be retained in the section with a note that they concern a post-trial situation in which a mistrial is no longer an option..

Firearms information from Ruth Reichard - The Committee agreed that initial hearing and sentencing material should be drafted for informing the defendant of the effect of criminal charges and conviction on the defendant’s right to possess firearms or ammunition. The material should contain information on the domestic violence determination form which I.C. 35-38-1-7.7 requires the trial judge to complete when a defendant is convicted of any “crime of domestic violence.” Judge Graham also noted that the Committee may want to consider a reference to *Hitch v. State*, 51 N.E.3d 216 (Ind. 2016), which held that the defendant does not have a right to have a jury make the statutory domestic violence determination.

Benchbook updates notification – Judge Meier noted that it is not possible to tell how recently Benchbook sections have been updated, so that the user must always assume that the material is dated to a greater or lesser degree. Mike McMahon said he would report to the Committee about update notification possibilities.

5. **Next conference call.** Members selected 3:30 p.m. Eastern Standard Time, Friday, November 18, 2016, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call December 9, 2016**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on December 9, 2016, at 3:30 p.m. Eastern Daylight Savings Time.

1. **Members participating.** Clayton Graham, Chair, George Brown, David Hooper, Mike Kramer, Stan Kroh, and Jeff Sanford participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **October call minutes approved.** The Committee approved the minutes of the October 21, 2016 conference call.
4. **Issues.** The Committee reviewed a number of issues for which material had been distributed for the call:

***Utah v. Strieff* U.S. Supreme Court decision** – Members approved a final draft section for the Search chapter on the 2016 *Utah v. Strieff* holding that the discovery of an outstanding warrant “attenuate[s] the connection between” an initial unlawful stop and any evidence seized from the person after arrest based on the outstanding warrant. Members approved a final sentence added to the draft noting that the *Strieff* scenario’s resolution under the Indiana Constitution has yet to be addressed.

Probation condition for home searches without warrant or suspicion – The Committee approved a revised draft of Section 74.35.000 on the *Vanderkolk v. State* “holding” on “warrantless and suspicionless” probationer searches. The draft added citations, with parenthetical summaries, for *State v. Terrell*, 40 N.E.3d 501 (Ind. Ct. App. 2015) and *Hodges v. State*, 54 N.E.3d 1055 (Ind. Ct. App. 2016), which both applied *Vanderkolk* and were summarized on the “May ’16 Comparison of Probation Home Search Cases” sent to members for the August 19, 2016 Committee conference call. Members also discussed a draft *Vanderkolk* probation condition, item 9 on the probation conditions form, Benchbook § 74.80.050, which added a caveat about *Vanderkolk*’s requirement of a clear probation condition informing the probationer of the court’s home search condition with a statement that the language of the condition imposed will determine the times and circumstances under which a home search can be made without a warrant or suspicion. After discussion, the Committee decided not to rewrite the draft so as to allow searches which are not made on behalf of the probation authorities. The draft as distributed for the call was then approved.

Failure to pay fines and costs as basis for revoking probation– The Committee approved drafts for sections 74.61.100 and 74.61.105 to have them address only the statutory restriction on DOC commitments for failure to pay fines and costs and prohibiting revocations based solely upon failure to pay public defender fees. Members also approved a caveat in the consolidated §§ 74.61.020 and 74.61.025 about the *Sparkman v. State* decision’s having preceded the *Bearden v. Georgia* Supreme Court decision on willful failure to acquire resources to pay restitution and of the *Runyon v. State* Indiana decision on proof burdens under Indiana’s I.C. 35-38-2-3(g) provision that probation can be revoked only for a knowing, intentional, or reckless failure to comply with a financial probation condition.

Ramirez rule on resolving juror “taint” issues – Members approved some modifications to substitute gender-neutral language for usages of “he” in the draft of a Mistrial Chapter Section 58.60.100, which

recites in bulleted form the language directly from *Ramirez v. State*, 7 N.E.3d 933 (Ind. 2014) listing the required steps for dealing with “jury taint” and mistrials based on such taint. Members approved an added note pointing out that the paragraphs concerning the *Wahl v. State* decision on jury taint discovered after discharge of the jury concern a post-trial situation in which a mistrial is no longer an option. The draft section was then approved, as modified.

Firearms advisements - The Committee reviewed drafts which would add advice on limitations for firearm and ammunition possession to the initial hearing and guilty plea dialogues. After discussion whether such advice on firearms “collateral consequences” should be given at all, members agreed Mike McMahon should revise the drafts to add parenthetical advice to the judge that the firearms advisements should be given in domestic violence cases but are discretionary in all other cases.

Determining domestic violence – The Committee approved a draft substantive section on making the determination at sentencing whether the crime was one of domestic violence and on advising the defendant of the consequences of the finding on the defendant’s right to possess firearms or ammunition. The approved draft also notes that the judicial officer must record the domestic violence determination on the Office of Court Services form required by I.C. 35-38-1-7.7.

Credit restricted felon criteria – After discussion, members decided not to add a reference in 68.20.000 (the credit restricted felon determination) to an unpublished Indiana memorandum decision which held that a defendant does not have a Sixth Amendment jury trial right on the credit restricted status. It was agreed, however, to change the present footnote 1’s first sentence to say that “Indiana has no **published** case on the question whether credit restricted status has to be determined by a jury.” Members also agreed to transfer the dialogue advising the defendant of the consequences of being a credit restricted felon from 68.20.000 to the 68.25.000 sentencing dialogue.

Sentencing dialogue changes - Members reviewed the draft of a revised sentencing dialogue, 68.25.00. The Committee approved the draft’s added findings and advice on a domestic violence determination and credit restricted felon consequences with updated sentence credit terminology. Language changes were approved to the last two sentences of the credit restricted dialogue to make them gender neutral. The Committee also approved the draft’s expansion of the findings on sentence credit to include separate findings and advice on accrued, good time, and educational credits. The Committee agreed that Mike McMahon would draft revised material on the statutory mandate for determining the earliest and maximum possible release dates. The material would note that the recent *Henriquez v. State*, 58 N.E.3d 942 (Ind. Ct. App. 2016), *transfer denied* 11-03-16, construes the statute as requiring actual release date calculations while noting that the calculations can be no more than an estimate, are “incredibly difficult if not impossible,” and amount to “an unworkable obligation.” The draft is to include the *Henriquez* recitation of the factors which must be included in the calculation as well as a caution for the judge to check for new legislation repealing I.C. 35-38-1-(b)’s requirement of the calculation. It was noted that Senator Koch has prepared a draft repeal at the Judicial Conference’s request and that the Senator will act as author of the repeal bill in the 2017 General Assembly session.

5. **Next conference call.** Members selected 3:30 p.m. Eastern Standard Time, Friday, January 27, 2017, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel