

**CRIMINAL LAW POLICY COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call August 29, 2014**

The Criminal Law Policy Committee of the Indiana Judicial Conference convened by conference call on August 29, 2014 at 2:30 p.m. Eastern Daylight Savings Time.

1. **Members participating.** Mark Spitzer, Chair, Blaine Akers, George Brown, Tom Clem, Kim Hall, Larry Medlock, Richard Poynter, and Dean Sobecki participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **Expanding six person juries.** The Committee discussed Judge Terry Snow's suggestion that the use of six person juries be expanded to felony levels above D or Level 6. Richard Poynter said that he had been a prosecutor in Florida, where they have twelve person juries only for capital or sex molesting cases. He said there are disagreements in Florida about whether six person juries are appropriate. He suggested that consideration could be given to having less than twelve – e.g., nine or ten – as a compromise between too many and too little. Judge Spitzer observed expansion of the use of six person juries could reduce the costs of jury trials and make summoning and selecting jurors easier. Judge Poynter observed that C felonies make up about 15% of his docket, and said that in general about 90% of the Indiana criminal docket is made up of D or Level 6 felonies. Judge Sobecki said that the Committee might need to send out questionnaires asking about numbers of jury trials. It was agreed that Mike McMahon would find out whether the Division of State Court Administration can provide any statistics about numbers of jury trials for different levels of felonies. Judge Clem suggested that the Association of Prosecuting Attorneys and the Public Defender Council might be asked whether they would be receptive to proposals to expand use of six person juries.
4. **Fines in supplemental public defender fund.** Committee members discussed Judge Hamner's suggestion that legislation be sought to authorize a judge to order that a fine be put into the county supplemental public defender fund. Members discussed circumstances under which statute authorized retention of cash bail deposits. After discussion, members agreed it would be best to hear more from Judge Hamner about the specific circumstances in which he contemplated having a fine be put into the supplemental public defender fund. Mike McMahon will contact Judge Hamner to ask. In discussion, a \$200 reimbursement from people who become eligible for counsel at public expense was mentioned – Judge Spitzer said he would look to find the statute authorizing this.
5. **“Speedy trial” be changed to “early trial”.** Members discussed Senior Judge Carl Heldt's suggestion that the term “early trial” be used instead of “speedy trial.” Judge Heldt said offenders in his county use the term “speedy trial” derisively, based on a layperson's understanding of how rapidly “speedy” means a trial should occur. Judge Spitzer noted that “early trial” and “speedy trial” are used in Indiana to refer to two distinct rights: “early trial” is used in Criminal Rule 4(B) to refer to the right to demand trial within seventy (70) days, whereas the right to a “speedy trial” is conferred by the Sixth Amendment. Judge Spitzer thought it best not to make the change Judge Heldt suggested. Judge Clem pointed to the difficulty of advising a defendant of his “speedy trial” right without using the Sixth Amendment term to describe it. Judge Sobecki thought getting the legislature to make the change would not be worth the effort. Members agreed not to take the matter further.
6. **Notice of transfer of property for federal forfeiture.** The Committee discussed a proposal that measures be taken to insure that the Indiana law requirement was complied with to give notice of transfer of property to federal law enforcement authorities for federal forfeiture proceedings. Judge Clem pointed out the incentive for such

transfers, which result in law enforcement agencies acquiring as much as 80% of the property in a federal forfeiture. He noted a case in which money which had been decreed forfeited was to be returned – the only notice was in a single page ad in the Wall Street Journal. He said that Indiana procedures should be defined to have the court in which the Indiana criminal charge is pending be the one to receive notice of a proposed transfer to the federal authorities for forfeiture. He also felt that the court of prosecution should insure that notice was issued to the property owner prior to the transfer. Judge Poynter asked whether Indiana authorities are failing to give the mandated notice to owners prior to the transfer; Judge Clem thought the notice was not being given in all cases. Judge Clem observed that it would be better to take away any authority of police to seek the transfer to the federal authorities, so that prosecutors alone could seek it. Judge Sobocki said he had defended forfeiture actions in the federal system and observed that Indiana law enforcement authorities may file notice of transfers for forfeiture with courts other than the ones where charges are pending in order to avoid objections by the criminal defendant's counsel in the court where the charges are. Judge Poynter asked about cases in which the property is seized under a miscellaneous cause number, which resulted in discussion whether transfer to the federal authorities ought to be prohibited until state criminal charges had been filed. Judge Spitzer suggested that the Committee might want to defer action until the period had passed for a transfer petition in the *State v. Downey* opinion [14 N.E.3d 812] which prompted the Committee's discussion. Members agreed that the Indiana statutes should be modified to: (1) require that the court in which the prosecution is pending also be the court in which approval of property transfer to the federal forfeiture authorities be sought; (2) codify the Indiana caselaw requirement of notice of the federal transfer to the property owner; (3) have a statutory mandate for a period of time after the notice to the owner before the transfer can be made, and (4) limit authority to seek transfer to the prosecutor. Mike McMahon agreed to draft statutory language to accomplish these aims, and also to check whether transfer is going to be sought in *Downey*.

7. **Revised sentence modification statute's application to Pre-July 1 crimes.** The Committee discussed whether the revised version of I.C. 35-38-1-17, the sentence modification statute as amended effective July 1, could be used to seek modification of sentences for crimes committed prior to July 1. Judge Spitzer noted that the panel of judges who had presented Judicial Conference education programs on the revised penal code thought the revised modification statute can apply only to crimes committed on or after July 1. Judge Brown asked what was intended in the revised statute's provision limiting modification petitions to "a maximum of two (2) times during any consecutive period of incarceration." Judge Spitzer said the education panel thought it was meant to prevent bootstrapping modifications. Judge Brown said he had raised the question with Senator Glick. The Committee decided it would take no action on the revision application issue.
8. **Next conference call.** The Committee requested that Judge Spitzer and Mike McMahon poll the members by e-mail to determine whether Friday October 17 or October 31 would be the best date for the next conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL LAW POLICY COMMITTEE
INDIANA JUDICIAL CONFERENCE**

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

The Criminal Law Policy Committee of the Indiana Judicial Conference convened by conference call on October 17, 2014 at 2:30 p.m. Eastern Daylight Savings Time.

1. **Members participating.** Mark Spitzer, Chair, Tom Clem, Greg Coy, Kurt Eisgruber, Kim Hall, Les Meade, and Dean Sobecki participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **Waivers of initial hearing.** The Committee discussed the question whether a trial court should permit waivers of initial hearings at defendant's request. Mark Spitzer said that in his county waivers were allowed when sought by counsel with counsel's assurance to consult with the defendant about the matters statute requires to be covered in an initial hearing. Judge Meade said he thinks that waivers are workable for Level 6 felonies, but would not want to use waivers for higher felony levels. He said he had relied on misdemeanor waivers. Judge Coy asked whether the defendants waiving were out of jail, and Judge Meade said he assumed they were out and observed that waivers should not be used for defendants in jail. Judge Sobecki said he allows misdemeanants represented by counsel to waive the initial, but does not allow felony waivers. He observed that having a defendant present for an initial helps assure that defendant knows of the trial date. Judge Clem suggested that the Benchbook Committee consider what the best practice is with initial hearing waivers. Judge Meade asked whether it would be best practice to have counsel for a misdemeanor submit an advice of rights form signed by the defendant in conjunction with the request to waive the initial. Judge Spitzer said that having counsel discuss the rights with the defendant gives better assurance than the defendant's viewing a video rights advisement that the defendant has been given the rights, so he thought a waiver accompanied with a written signed advice of rights form could be used, even for lower level felonies. Judge Meade observed that a standard form to be used by counsel would be useful. Judge Sobecki noted that we have no appellate decisions yet approving waivers, and that if waivers are used the court is trusting the lawyers to give the requisite advice; he also said that he was not sure waivers with advice of rights forms ought to be required. He recommended that the Committee not recommend any legislative changes and that the current situation be maintained. After discussion, members agreed the Committee should adhere to Judge Sobecki's position and not recommend any statutory or rule changes addressing initial hearing waivers.
4. **ICE seizures of defendants in courthouses.** The Committee discussed the information received about ICE having taken a defendant for deportation from the Carroll County courthouse while he was waiting in the hall to appear for a hearing. Judge Sobecki said that he has not had any bad experiences with ICE agents, who have been polite and have waited to deport serious felons until Indiana proceedings were completed. Judge Spitzer noted that at a Judicial Center program with ICE agents a couple of years ago it became apparent from the comments the agents themselves made that policies change when administrations change, so that today's undesirable practice may well go away in a few years. The Committee agreed not to recommend any action on the topic.
5. **Judge Poynter's proposal to study Florida pretrial processes.** The participants agreed to defer discussion of Judge Poynter's proposal to a call or meeting which he could attend or participate in.
6. **Expanding use of six-person juries.** Members discussed Judge Snow's request that expansion of six person juries to levels above Level 6 be considered. Mike McMahon discussed the jury trial statistics he obtained from State Court Administration's 2012 judicial service report and the numbers from 2013 to appear soon in the report

for that year. McMahon said that the total numbers of C felony jury trials averaged out to about 1.5 to 2 jury trials a year per county, and observed that the savings to be obtained just from jury fees, based on the figures, would not be significant. Judge Coy said that he did not think there should be an emphasis on cost savings in making a decision to expand six person jury usage. Judge Spitzer asked what the Committee's role would be with an expansion proposal – would Committee members have to make a case for the expansion in the legislature, and was that consistent with the judiciary's role in policy-making? In discussion, members observed that there if any expansion of six person juries were to be sought it should not go beyond Level 5 felonies. It was observed that there appears to be no accepted evidence or agreement about advantages or disadvantages in achieving just results between 6 person juries and 12 person juries, so that there was little basis for the Committee to make any expansion recommendation based on the judicial process itself. Cost savings, if any, were agreed to be matters left to the legislature to consider. The Committee concluded it would not make any recommendation on expansion of 6 person juries.

7. **Fines in supplemental public defender fund.** Committee members resumed discussion of Judge Hamner's suggestion that legislation be sought to authorize a judge to order that a fine be put into the county supplemental public defender fund. Judge Meade said he was concerned that the proposed legislation would, it appeared, contravene the Indiana Constitution command that fines go to the Common School Fund. It was noted that statutes do allow some funds, such as cash bail deposits, to be taken to defray judicial process expenses such as the provision of pauper counsel. Judge Meade observed that those statutes did not concern funds for which a specific constitutional usage applies. Judges Clem and Coy said they did not think it would be appropriate to require a fee to be paid by defendants who did not receive publicly-paid legal assistance. Judge Sobecki noted that *Ratliff v. State*, 596 N.E.2d 241 (Ind. Ct. App. 1992) had affirmed a court order for charitable donations to be made as called for in the defendant's plea agreement, but Judge Sobecki said he thought the better policy was not to allow such donations and not to allow a defendant to elect, via a plea bargain, to make them
8. **Procedures for transferring seized property to federal government.** In the August 2014 call, members had agreed that the Indiana statutes should be modified to: (1) require that the court in which the prosecution is pending also be the court in which approval of property transfer to the federal forfeiture authorities be sought; (2) codify the Indiana caselaw requirement of notice of the federal transfer to the property owner; (3) have a statutory mandate for a period of time after the notice to the owner before the transfer can be made, and (4) limit authority to seek transfer to the prosecutor. Mike McMahon and Judge Clem each presented drafts of statutory language to make these changes to I.C. 35-33-5-5. Judge Clem's draft would give the Indiana trial court "having jurisdiction over the case" authority (with "may set" or "shall set" being alternatives) to set a hearing on a motion to transfer property, with notice to all parties with an interest in the property. Judge Clem's draft also provided that, if the court finds by a preponderance of the evidence that the property was lawfully seized and subject to seizure under I.C. 34-34-1, it "shall" order the property transferred to the federal authority. Mike McMahon's draft would require the prosecutor to give notice to anyone interested in the property of a motion to transfer the property, and would prevent a transfer order until at least thirty days passed after the notice. McMahon's draft would give the right to the owner to move, within thirty days of the notice, for a hearing to contest the transfer on the basis it was seized unconstitutionally or that the property was not subject to seizure under I.C. 34-34-1-1, and would require the state to prove at the hearing by a preponderance (or, as an alternative, by clear and convincing evidence) that the property was taken legally and was subject to seizure under statute. McMahon's draft would also afford the property owner or person with an interest a right to appeal a denial of the motion to contest transfer.

Judge Spitzer liked the time frames and clarity about appeals in McMahon's draft. Judge Sobecki noted resistance to any of this legislation would come from law enforcement agencies desiring the cash which comes to them through the federal procedure. He liked the proposal for allowing an appeal, but was not sure whether the use "shall" or "may" for ordering transfer of the property. McMahon observed that a court ought to be able to stay a transfer order under present law. Members discussed whether it was better to have the transfer procedures addressed through a benchbook "best practices" approach rather than through statutes. It was observed that either

statutes or a combination of statute and best practices ought to be employed. Judge Spitzer suggested the Committee pick a proposal to send to the Prosecuting Attorneys Council, the Public Defender Council, and the Criminal Benchbook Committee for comments. It was agreed that Mike McMahon would draft a version utilizing Judge Clem's 2nd draft with an appeal right added to present to the Committee, which could after Committee modifications be sent to the prosecutors and public defenders.

9. Adjournment.

Respectfully submitted,

Mike McMahon
Staff Counsel