

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call January 27, 2017**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on January 27, 2017, at 3:30 p.m. Eastern Standard Time.

1. **Members participating.** Clayton Graham, Chair, Nick Barry, George Brown, David Happe, David Hooper, Elizabeth Hurley, Keith Meier, and Jeff Sanford participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **December call minutes approved.** The Committee approved the minutes of the December 9, 2016 conference call.
4. **Probation revocation limitations waiver.** The Committee discussed a question asked by Court Services. A judge asked about the enforceability of a standard probation condition calling for a waiver of I.C. 35-38-2-3(a)(2)(B)'s 45 day limit on filing a probation revocation after State receives notice of a violation. Members thought that a waiver would probably be enforceable if it were bargained for, but there was a general agreement that a waiver without an agreement was inappropriate and probably not enforceable.
5. **Issues.** The Committee reviewed a number of issues for which material had been distributed for the call:

Sentencing dialogue - The Committee reviewed several items in its revised sentencing dialogue, Benchbook section 68.25.000.

- The Committee agreed that a reference should be added in the substantive section on credit restricted felons, 68.20.000, to the recent *Neal v. State* holding that no particular language is required to comply with the I.C. 35-38-1-7.8(c) requirement that “[u]pon determining that a defendant is a credit restricted felon, a court shall advise the defendant of the consequences of this determination.” *Neal* said that “[a]s long as the sentencing court’s advisement makes clear to the defendant that it is her status as a credit restricted felon that determines the calculation of her credit time, the court has satisfied the command of Section 7.8(c).”
- The Committee considered draft language adding to the 68.25.000 dialogue a suggested method to calculate and advise of earliest and maximum possible release dates. *Henriquez v. State*, 58 N.E.3d 942 (Ind. Ct. App. 2016), *transfer denied* 11-03-16, construed I.C. 35-38-1-1(b) 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.” Mike McMahon advised that Senate Bill 120 would repeal the release date language in 35-38-1-1(b) and noted that two days earlier, on January 25, the Senate Judiciary Committee had passed SB 120 with a provision that it would be effective on passage. Based on the likelihood of a repeal effective in two or three months and the fact that *Henriquez* and the other recent decisions on the statute have held that failure to comply with the advisement requirement was harmless error, the Committee decided that it would not address *Henriquez* or the release date calculations in the Benchbook.
- Mike McMahon reported that Senate Bill 120 had been amended when passed by Senate Judiciary to add language to I.C. 35-38-1-1(b) that for murder or Level 1 through Level 5 felonies “the court shall advise the person of the number of days of pretrial confinement the person served

while awaiting trial and sentencing on the felony charge and whether the days of confinement were in jail or in home detention.” Judge Happe, Judge Graham, and Magistrate Hooper said that giving this advice is already their practice; Judge Meier noted that he asks in court whether the defendant agrees that the specified number of days of confinement is accurate, and most members said they do the same. The Committee approved the draft language concerning this advisement as distributed for the call and agreed that language should be added to 68.25.000 asking the defendant whether he/she agrees with the court’s calculation of the days of confinement.

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. The drafts, which would add parenthetical advice to the judge that the firearms advisements should be given in domestic violence cases but are discretionary in all other cases, were approved by the Committee. It was agreed that the same advice should appear in the sentencing dialogue, too.

Recusal - Members approved a proposed new Judges chapter section 31.01.180 on the recent *Matthews v. State* holding that there is no “freestanding” right of a criminal defendant to move that the judge recuse based on the provisions of the Code of Judicial Conduct.

Probation violation sanctions – Members approved a draft adding a new sentence to the Probation chapter’s 74.61.625 noting the *Castillo v. State* recent decision that, while due process requires a court’s statement of reasons for revoking probation, due process does not require reasons from the court for why it chose the revocation sanction it imposes.

Post-conviction relief resentencing limits - The Committee approved addition of a sentence to 80.21.000 of a citation to *Linthicum v. State*’s holding that I.C. 35-50-1-5 and P-C.R. 1 § 10 do not conflict, as the statute allows imposition of a more severe sentence and the Rule “outlines the procedural conditions under which that may be done.”

Sixth Amendment Speedy Trial right inapplicable to sentencing delays – The Committee approved a new 43.70.300 on the *Betterman v. Montana* 2016 holding that the Speedy Trial Clause does not apply to delays in sentencing following conviction.

Indigent PCR petitioner assistance in obtaining trial transcript – The Committee approved an addition to 80.19.380 citing the *Hubbell v. State* holding that a PCR judge who will not judicially notice the trial transcript may abuse its discretion if it does not assist the petitioner in obtaining the trial transcript for use as evidence in the PCR hearing.

Future projects to revise competence to stand trial and bail chapters - Members agreed that the Committee should undertake a revision of the chapter on competence to stand trial and should also consider how to revise the bail chapter to make it consistent with the new Criminal Rule 26, which takes effect at the end of 2017.

6. **Next conference call.** Members selected 3:30 p.m. Eastern Standard Time, Friday, February 24, 2017, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call April 21, 2017**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on April 21, 2017, at 3:30 p.m. Eastern Daylight Savings Time.

1. **Members participating.** David Hooper, Elizabeth Hurley, Michael Kramer, Keith Meier, and Stan Kroh participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **January call minutes approved.** The Committee approved the minutes of the January 27, 2017 conference call.
4. **Issues considered during the call.** The Committee reviewed a number of issues for which material had been distributed for the call:

Probation revocation competence – Members reviewed a draft section 74.60.560 on the caselaw requirement that a probationer has a due process right to a competency evaluation prior to his revocation hearing, if it is warranted. The draft was approved, but Mike McMahon is to check with the Division of Mental Health to see whether the Division will accept revocation subjects for competence restoration services and amend the draft accordingly for Committee consideration at the next conference call.

Probationer’s request to make a statement at revocation – Members approved a draft section 74.61.610 on the trial court’s obligation to allow the probationer to make a statement at his revocation proceeding, if the probationer asks to make a statement.

Credit restricted felon determination section – Members approved a final draft of section 68.20.000 on credit restricted felon determination. The draft adds a footnote on the 2016 decision that no particular language is required from the trial court when it advises a defendant of the consequences of credit restricted felon status.

Sentencing dialogue - The Committee reviewed several items in its revised sentencing dialogue, Benchbook section 68.25.000:

- The Committee noted elimination of the statutory duty of the court to calculate and advise of earliest and maximum possible release dates. The language in I.C. 35-38-1-1(b) construed by *Henriquez v. State*, 58 N.E.3d 942 (Ind. Ct. App. 2016), *transfer denied*, as requiring actual release date calculations was repealed effective April 13, 2017 by 2017 Senate Enrolled Act 120.
- Also effective April 13, 2017 Senate Enrolled Act 120 added language to I.C. 35-38-1-1(b) that for murder or Level 1 through Level 5 felonies “the court shall advise the person of the number of days of pretrial confinement the person served while awaiting trial and sentencing on the felony charge and whether the days of confinement were in jail or in home detention.” The Committee approved draft language on this requirement for the affected felonies and then determined that it would be preferable to require the language to apply to all offenses, including Level 6 felonies and misdemeanors. Mike McMahon is to draft a final version for this “one size fits all” approach.
- The Committee gave final approval to the draft sentencing dialogue’s advice on limitations for firearm and ammunition possession. The approved dialogue language advises the judge that the

firearms advisements should be given in domestic violence cases but are discretionary in all other cases.

“Strict compliance” probation extensions - Members agreed that a draft section 74.61.560 should be posted as written to the online Benchbook but that the section should be considered again in the next conference call to see whether more content should be added.

Costs and fees – The Committee agreed to delete the extensive chart of costs and fees in criminal actions contained in the sentencing chapter’s section 68.12.030 and to have the section contain instead the Internet link to the Office of Court Services’s webpage which lists all the costs for criminal actions. This change will eliminate need for the Committee to duplicate the update work on costs and fees which the Office performs.

Abstract of conviction on Level 6 felony commitments - The Committee reviewed a draft of sentencing chapter section 68.55.070 on the abstract of conviction.

- The draft removes language noting Level 6 felony commitment limitations used by the Department of Correction and substitutes the language added to I.C. 35-38-3-3 by House Enrolled Act 1010 effective March 29, 2017. The HEA 1010 language is intended to end the Department’s policies (1) requiring that a Level 6 offender committed on a probation revocation for a new offense have been convicted of the offense first rather than having been shown in the revocation hearing to have committed the offense, and (2) interpreting the authority to commit a Level 6 felony when it is consecutive to another sentence to apply only if the other sentence is for a Level 6 offense. During the call the Committee excised all the section’s “effective January 1, 2016” language. Members agreed the draft as modified should be posted online at once, due to the March 29 effective date, but the Committee will revisit the section in the next conference call to consider language making it clear that the HEA 1010 changes permit commitment of Level 6 probationers if revoked on the basis of proof by a preponderance in the revocation hearing of a new offense.
- The draft section makes it clear that the “earliest possible release date” of more than 365 days after sentencing in I.C. 35-38-3-3(d)(2) applies to all three subparts (A), (B), and (C). The Committee asked Mike McMahon to find out whether the Department of Correction interprets (d)(2)’s 365 days after sentencing to be “actual days.”

Racial bias verdict impeachment - Committee members agreed that the Trial chapter material on testimony by jurors about deliberations should have a draft section 59.75.940 added on the recent U.S. Supreme Court holding that the Sixth Amendment requires that courts allow juror testimony about a juror’s clear statement he or she relied in deliberations on racial stereotypes or animus to convict the defendant. Members agreed that this section about the *Pena-Rodriguez v. Colorado* decision should have a last sentence added noting that the Committee believes *Pena-Rodriguez* establishes a constitutional exception to Indiana Evidence Rule 606(b)’s limits on juror testimony about jury deliberations. Mike McMahon is to draft a last sentence for Committee consideration in the next conference call.

Probation conditions limiting contact with minors – The Committee reviewed a draft revision of Probation section 74.08.035 adding references to two cases reversing imposition of conditions limiting contact with children when the probationers’ sex offenses were not committed against children. Mike McMahon is to draft more general language stating a Committee recommendation that the court should be careful to tailor probation conditions to the particular offender.

Informant’s privilege – The Committee approved a new Discovery chapter section 40.10.100 on Chief Justice Rush’s recent *Beville v. State* decision on the informant’s privilege.

Draft revised chapter on competence to stand trial – The Committee did not have time to begin reviewing the draft Chapter 47.00.000 revisions on competence to stand trial. Judge Kramer noted that the initial section, 47.01.020, refers only to “court-appointed doctors” and should be expanded to refer to “psychiatrists, psychologists endorsed by the Indiana state board of examiners in psychology as health service providers in psychology, or physicians” all of whom “have expertise in determining competency”, with at least one being either a psychiatrist or a psychologist. Judge Meier also suggested that some parenthetical notations be added to the chapter draft to indicate where deleted material was transferred or why it was deleted. The Committee will take up the chapter revisions in the next call.

5. **Next conference call.** Members selected 3:30 p.m. Eastern Daylight Savings Time, Friday, June 2, 2017, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call June 2, 2017**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on June 2, 2017, at 3:30 p.m. Eastern Daylight Savings Time.

1. **Members participating.** George Brown, David Happe, Michael Kramer, and Stan Kroh participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **April call minutes approved.** The Committee approved the minutes of the April 21, 2017 conference call.
4. **Issues considered during the call.** The Committee reviewed a number of issues for which material had been distributed for the call:

Probation revocation competence – Members approved an addition to section 74.60.560, approved in the April 2017 call, on the caselaw requirement that a probationer has a due process right to a competency evaluation prior to his revocation hearing, if it is warranted. The addition notes that the Division of Mental Health will accept revocation subjects for competence restoration services. A new 74.85.100, “Order Determining Lack of Comprehension for Probation Revocation,” was also approved after the members substituted “Criminal Justice Programs Administrator” for “Matthew Stucky” (the current Administrator).

Sentencing dialogue - The Committee revised and approved a second draft of the sentencing dialogue, section 68.25.000, considered in the April call. The second draft consolidates credit time advice to comply with the 2017 amendment of I.C. 353-38-1-1. The approved advisement paragraph states:

The defendant has served ___ days of confinement awaiting trial and sentencing on the [name] charge, with ___ in jail and ___ days in home detention. For this presentencing confinement, the defendant shall receive ___ days of accrued credit and ___ days of good time credit on the [name] charge.]

“Strict compliance” probation extensions - Members approved the draft section 74.61.560 as considered in the April call without the addition of further content.

Abstract of conviction on Level 6 felony commitments - The Committee approved the revised draft of sentencing chapter section 68.55.070 on the abstract of conviction after making the following changes in underlined font to the Level 6 felony commitment limitations:

A Level 6 felon cannot be committed to the Department of Correction (Indiana Code 35-38-3-3(d)) unless:

- the commitment is due to revocation of probation, parole, or community corrections when the revocation is due to a new criminal offense; or
- the Level 6 felony sentence

- is ordered to be served consecutively to the sentence for another felony and the offender's earliest possible release date is more than 365 actual days after the date of sentencing; or
- is enhanced by an additional fixed term under I.C. 35-50-2-8 through I.C. 35-50-2-16 and the offender's earliest possible release date is more than 365 actual days after the date of sentencing, or
- is enhanced for I.C. 9-30-1.5.-2 habitual vehicular offender status and the offender's earliest possible release date is more than 365 actual days after the date of sentencing.

Racial bias verdict impeachment - Committee members approved an addition to the new 59.75.940 added in the April call on the recent U.S. Supreme Court holding that the Sixth Amendment requires that courts allow juror testimony about a juror's clear statement he or she relied in deliberations on racial stereotypes or animus to convict the defendant. Members agreed to add a last sentence to the approved section, as shown below:

59.75.940 Racial bias exception to no-impeachment rule: “[W]here a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror’s statement and any resulting denial of the jury trial guarantee.” “For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror’s vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence. *Pena-Rodriguez v. Colorado*, No. 15-606, 580 U.S. ____ (Mar. 6, 2017). **The Criminal Benchbook Committee concludes that this Sixth Amendment holding amounts to a constitutionally-established exception to the restrictions on juror testimony in Indiana Rule of Evidence 606(b).**

Bail increase or revocation – new DNA evidence of new crimes – Members approved the addition of the following sentence at the end of sections 22.45.000 (increasing bail) and 22.50.000 (revoking bail) to reflect the change in I.C. 35-33-8-5(b) made by 2017 SEA 322:

If additional evidence presented by the state is DNA evidence tending to show the defendant committed additional crimes not considered when defendant was admitted to bail, the court may increase or revoke bail.

Probation conditions tailored to the offense and offender – The Committee approved a revision and relocation of the former section 74.08.035. The revised section, renumbered as 74.08.008, states that probation conditions “should be based on the specific nature of the offense and the rehabilitation needs of the offender” and provides that conditions “which have no reasonable relation to the offense and the offender may constitute an abuse of discretion,” citing the 2016 *Waters v. State* decision at 65 N.E.3d 613.

Zanders Indiana cellphone location decision – The Committee discussed the May 4, 2017 *Zanders v. State* opinion by Chief Justice Rush. The case applied the “third-party doctrine” to hold that there is no warrant-requiring Fourth Amendment protected privacy interest in “historical, active, network-based cell-

site location information (“CSLI”) and also held that obtaining “minimally intrusive historical CSLI from a service provider” without a warrant does not violate the Indiana Constitution Article I, Section 11 search provision. Chief Justice Rush noted that there are a number of other varieties of CSLI data but expressly left other types of data – “GPS, pinging, triangulation, passive, real-time, and so on” – “for another day.” It was agreed that Mike McMahon should draft a section listing the types of data mentioned in *Zanders* and noting that only the CSLI has been addressed to date.

Draft revised chapter on competence to stand trial – The Committee reviewed a few portions of the draft revision of the competence to stand trial chapter. The proposed removal of 47.35.100 was approved; members agreed it was extremely unlikely the same pattern of facts in the cited case would recur. Members also agreed to the deletion of the existing 47.95.000, which does no more than recite the *Strickland* factors for ineffective assistance of counsel; this deletion frees up 47.95.000 for use with the proposed new section on “Competence unlikely to ever be restored,” which the Committee did not begin to review. Finally, Mike McMahon reported that Kathy Gregory, Counsel for the Division of Mental Health and Addictions, advised him that Indiana uses an administrative procedure like that approved in the 1970’s by the District of Columbia Court of Appeals in a case called *Rennie v. Klein* to resolve challenges by committed subjects to involuntary medication. Ms. Gregory said that in her 33 year tenure with the DMHA there has not been a single appeal of the DMHA’s administrative resolution of objections to medication. Based on this information, Committee members agreed that the draft section on medication should be rewritten to describe the Indiana administrative procedure and to merely cite to, rather than detail the holding in, *Sell v. United States*, 539 U.S. 166 (2003), which generally assessed Due Process requirements for court-ordered psychiatric medication.

5. **Next conference call.** Members selected 3:30 p.m. Eastern Daylight Savings Time, Friday, August 4, 2017, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel

**CRIMINAL BENCHBOOK COMMITTEE
INDIANA JUDICIAL CONFERENCE**

**PROPOSED MINUTES
Conference Call August 4, 2017**

The Criminal Benchbook Committee of the Indiana Judicial Conference convened by conference call on August 4, 2017, at 3:30 p.m. Eastern Daylight Savings Time.

1. **Members participating.** Clayton Graham, Chair, George Brown, David Happe, David Hooper, Elizabeth Hurley, and Stan Kroh participated in the call.
2. **Staff participating.** Mike McMahon provided the Committee with staff assistance.
3. **June call minutes approved.** The Committee approved the minutes of the June 2, 2017 conference call.
4. **Issues considered during the call.** The Committee reviewed a number of issues for which material had been distributed for the call:

Involuntary medication section for competence to stand trial chapter - The Committee approved a draft Section 47.55.125, "Involuntary medication to attain competence," which notes the use of an administrative process by the Division of Mental Health and Addiction when a person committed to have competency restored objects to being medicated.

Zanders Cell-site Location Information decision – The Committee approved a draft section for the Search and Arrest chapter listing the varieties of cell-site location information (CSLI) noted in the recent *Zanders v. State*, 73 N.E.3d 178 (Ind. 2017) and describing the *Zanders* holding. Members agreed that Mike McMahon should check to see whether the Search and Arrest chapter has a section on thermal imaging, draft a section including a recent decision if there is no thermal imaging section, and move the thermal imaging section and other technology-based search sections next to the *Zanders* section.

Partial cash deposit bail forfeiture - Members discussed the impact of the July 1, 2017 amendment to I.C. 35-33-8-7(a)(2) requiring that partial cash bond deposits be declared forfeited not more than three hundred sixty-five (365) days after the defendant's failure to appear.

- The Committee reviewed two Marion Superior Criminal Division 14 forms, "Personal Appearance Bond With Ten Percent Cash Deposit" and "Order of Cash Bond Forfeiture"; both of these forms were obtained from the Odyssey system. It was noted that Odyssey personnel should be advised that the "Personal Appearance" form needs to be modified to indicate that the deposit forfeiture would be entered no earlier than 120 days and no later than 365 days after a failure to appear.
- It was agreed that Mike McMahon should draft a revision to Benchbook Section 22.95.075, "Personal Appearance Bond with Ten Percent Cash Deposit", to reflect the I.C. 35-33-8-7(a)(2) forfeiture time frame.
- It was agreed that a Benchbook notice of failure to appear form should be drafted to be sent to the defendant and to any person who posted the deposit on defendant's behalf, advising that the deposit and the entire amount of the bond could be forfeited if the defendant does not appear after 120 days and will be forfeited if defendant does not appear within 365 days.

- Members suggested that the notice of failure to appear form should be provided to Odyssey with a request that an Odyssey “event code” be employed with the notice to set the 120 to 365 day clock running from the date of the notice.
- Members suggested that the Criminal Law Policy Committee be advised that certain fees or expenses which could be imposed or incurred by the court prior to a defendant’s failure to appear (e.g., the I.C. 35-33-7-6 \$100 fee for partially indigent felony defendants requesting pauper counsel) might not be collectable from the cash bail deposit once it is forfeited.

Insanity chapter - The Committee agreed that a chapter on the insanity defense should be drafted. The chapter should have a general brief description of insanity defense procedures, a form order of appointment of and directions to the court mental health experts who are to give opinions on insanity, and form orders required by I.C. 35-36-2-4 for commitment of defendants acquitted on grounds of insanity. Elizabeth Hurley and David Hooper agreed to check for forms used in their counties and to send any they find to Mike McMahon.

5. **Next conference call.** Members selected 3:30 p.m. Eastern Daylight Savings Time, Friday, September 29, 2017, for the next Committee conference call.

Respectfully submitted,

Mike McMahon
Staff Counsel