2014 Legislative Update - Felony Diversion, Sentence Modification, Credit time & Recidivism

David N. Powell, Executive Director
Indiana Prosecuting Attorneys Council

AGENDA

1. Felony Diversion
2. Modification of Sentence
3. Credit Time
4. Recidivism

1. Felony Diversion
1. HEA 1006 – Felony Diversion

- Council/Association did not ask for felony diversion – added by the House in HEA 1006
- I.C. 33-39-1-8(d) amended to add after the word misdemeanor, “a Level 6 felony, or a Level 5 felony”.
- 2012 Judiciary Data (Dispositions)
  - 51,664 D Felons (Level 5)
  - 9,239 C Felons (Level 6)
  - 167,126 misdemeanors
  - Represents 96% of all dispositions (237,951)

1. HEA 1006 – Diversion

- I.C. 33-39-8-5(6) (Function and Duties of IPAC)
  The council shall adopt guidelines for the expenditure of funds derived from a deferral program or a pretrial diversion program.
- Other than adding Level 6/5 felonies to misdemeanors, no other changes to I.C. 33-39-1-8.

1. HEA 1006 – Diversion Fees

- I.C. 33-37-4-1 governs court costs for actions involving felony/misdemeanor convictions and diversion.
  - (a) criminal costs is a fee of $120
  - (b) in addition to criminal costs, the clerk shall collect the following fees – 19 fees described
  - Number (10) is deferred prosecution fee (IC 33-37-5-17).
  - BUT subsection (c) provides: “Instead of the criminal cost fees prescribed by the section, the clerk shall collect a prettrial diversion fee if an agreement between the PA and the D entered into under IC 33-38-1-8 requires payment of those fees.
    - A prettrial diversion program fee as follows: initial user’s fee of $50 & a monthly user’s fee of $10
1. HEA 1006 - Diversion

- I.C. 33-39-1-8
  - Same restrictions apply (no diversion for driving offense involving a CDL, OVWI, Title 7 and operation of a motor vehicle, etc.)
  - Written agreement that includes all terms signed by PA & D and filed in court where charge filed.
  - PA transmits info to IPAC

1. HEA 1006 – Diversion Conditions

- I.C. 33-39-1-8 Conditions:
  - Pay fees specified in IC 33-37-4-1
  - Work, go to school, or pursue the same
  - Medical treatment/counseling (certified?)
  - Make restitution
  - Support dependents
  - Report to PA as reasonably required
  - Notify PA of change of address/employment

1. HEA 1006 – Diversion Conditions

- I.C. 33-39-1-8 Conditions:
  - Refrain from contact with victim/witness
  - Participate in dispute resolution or programs established by the PA
  - Any other provision reasonably related to rehab
  - PA will notify victim if diversion offered
  - All user fees collected shall be deposited in the appropriate fund under I.C. 33-37-8
1. HEA 1006 – Diversion Appropriations

- I.C. 33-37-8-6 Appropriations - county fund
  - Funds from Deferral/Deferral may be disbursed only by adoption of an appropriating ordinance for the following purposes:
    - Any normal personnel/supply/operating expense
    - Activity/Program by PA to reduce/prevent crime - substance & child abuse, DV, OVWI and delinquency
    - Any other purpose agreed upon by the PA and council
    - Funds only used per IPAC guidelines I.C. 33-39-8-5

2. HEA 1006 – Diversion & Court Services – Another Option?

- IC 12-23-14-5 allows a court to provide services under the certified alcohol & drug program for people referred by Prosecutor
- IC 33-23-15-23 as a condition of pretrial diversion a person is authorized to participate in a problem solving court program
- Additional program fees may be charged by these entities as well as community corrections

3. 1. HEA 1006 - Diversion Practice Tips

- So what does all of this mean?
  - No statutory restriction to diversion > 12 months
  - IPAC guidelines should permit additional activity/program treatment/rehab fees to reduce/prevent crimes
  - Prosecutors should be permitted to use the fees to fund treatment/rehab (Grants/vouchers?)
  - Some statutory cleanup needed to avoid SBA issues
  - Review your local ordinances for amendments
1. **HEA 1006 – Diversion**
   **Practice Tips**
   - So what does all of this mean?
   - Make sure you have in place written policies as to who can approve felony diversion
   - In large offices you may not want entry level DPAs signing off on felony diversion
   - You may want to establish a list of felonies that you will not permit a diversion (incest, etc.)
   - Be careful

2. **Modification of Sentence**

2. **HEA 1006 Sentence Modification**
   - Sentence Modification (I.C. 35-38-1-17)
     - Does not apply to credit restricted felons
     - Within first 365 days of sentence (current law)
     - After 365 days, as to open/discretionary portions of sentence in plea, or imposed after a trial
     - 2 petitions allowed
     - Cannot waive this right in a plea agreement
     - Victim notification only if petition set for hearing
     - Court is not required to set a hearing
2. HEA 1006 Practice Tips

- Sentence Modification (I.C. 35-38-1-17)
  - Make sure waiver provisions are removed from your plea agreements – could result in a disciplinary complaint
  - Be alert to plea offers that agree to range, minimum and cap, defendant’s will later seek to modify to minimum under this statute
  - Look for more open pleas

3. Credit Time

3. Current Credit Time

- Credit time changes (Offenses before July 1, 2014)
  - 4 class system (35-50-6-3)
    - Class 1 - 1 day for 1 day (good time)
    - Class 2 - 1 day for 2 days
    - Class 3 – no credit
    - Class 4 – 1 day for 6 days (credit restricted felon)
3. HEA 1006 Credit Time Changes

- Credit time changes (Offenses after July 1, 2014)
  - New 4 class system (35-50-6.3.1)
    - Class A - 1 day for 1 day (Level 6 felons & Misdemeanors)
      - No change from current law.
    - Class B - 1 day for 3 days (Murder – Level 5 felons)
    - Class C – 1 day for 6 days (Credit restricted felon)
    - Class D - no credit

**Table: Current v. New Range of Penalties - Comparison**

<table>
<thead>
<tr>
<th>I.C. 35-50-2</th>
<th>Class</th>
<th>Current</th>
<th>% Credit</th>
<th>Level</th>
<th>New</th>
<th>% Credit</th>
</tr>
</thead>
<tbody>
<tr>
<td>35-50-2-3</td>
<td>Murder</td>
<td>25-35 years</td>
<td>50%</td>
<td>Murder</td>
<td>20-30 years</td>
<td>50%</td>
</tr>
<tr>
<td>35-50-2-4</td>
<td>A</td>
<td>10-20 years</td>
<td>50%</td>
<td>20-40 years</td>
<td>25-35 years</td>
<td></td>
</tr>
<tr>
<td>35-50-2-4.5</td>
<td>2</td>
<td>10-30 years</td>
<td>50%</td>
<td>20-30 years</td>
<td>25-35 years</td>
<td></td>
</tr>
<tr>
<td>35-50-2-5</td>
<td>B</td>
<td>15-30 years</td>
<td>50%</td>
<td>20-30 years</td>
<td>25-35 years</td>
<td></td>
</tr>
<tr>
<td>35-50-2-5.5</td>
<td>4</td>
<td>20-40 years</td>
<td>50%</td>
<td>20-30 years</td>
<td>25-35 years</td>
<td></td>
</tr>
<tr>
<td>35-50-2-6</td>
<td>C</td>
<td>20-40 years</td>
<td>50%</td>
<td>20-40 years</td>
<td>25-35 years</td>
<td></td>
</tr>
<tr>
<td>35-50-2-7</td>
<td>D</td>
<td>0.125 years</td>
<td>50%</td>
<td>0.25 years</td>
<td>0.125 years</td>
<td></td>
</tr>
</tbody>
</table>

**Table: Comparison – Current v. New Range of Advisory Penalties**

<table>
<thead>
<tr>
<th>I.C. 35-50-2</th>
<th>Class</th>
<th>Current</th>
<th>% Credit</th>
<th>Level</th>
<th>New Advisory</th>
<th>% Credit</th>
</tr>
</thead>
<tbody>
<tr>
<td>35-50-2-3</td>
<td>Murder</td>
<td>25-35 years</td>
<td>50%</td>
<td>Murder</td>
<td>20-30 years</td>
<td>50%</td>
</tr>
<tr>
<td>35-50-2-4</td>
<td>A</td>
<td>10-20 years</td>
<td>50%</td>
<td>20-40 years</td>
<td>25-35 years</td>
<td></td>
</tr>
<tr>
<td>35-50-2-4.5</td>
<td>2</td>
<td>10-30 years</td>
<td>50%</td>
<td>20-30 years</td>
<td>25-35 years</td>
<td></td>
</tr>
<tr>
<td>35-50-2-5</td>
<td>B</td>
<td>15-30 years</td>
<td>50%</td>
<td>20-30 years</td>
<td>25-35 years</td>
<td></td>
</tr>
<tr>
<td>35-50-2-5.5</td>
<td>4</td>
<td>20-40 years</td>
<td>50%</td>
<td>20-30 years</td>
<td>25-35 years</td>
<td></td>
</tr>
<tr>
<td>35-50-2-6</td>
<td>C</td>
<td>20-40 years</td>
<td>50%</td>
<td>20-40 years</td>
<td>25-35 years</td>
<td></td>
</tr>
<tr>
<td>35-50-2-7</td>
<td>D</td>
<td>0.125 years</td>
<td>50%</td>
<td>0.25 years</td>
<td>0.125 years</td>
<td></td>
</tr>
</tbody>
</table>
### 3. HEA 1006 Education Credit

- **Additional credit time changes**
  - Earned/Education credit changes (35-50-6-3.3)
    - Associates/Bachelors degrees must be earned (vs. received) during period of incarceration
    - Not more than 1 year for Associates
    - Not more than 2 years for Bachelors
    - Vocational increased from ½ year to 1 year
    - Credit time earned must be proportional to time served & earned while incarcerated

### 3. HEA 1006 Education Credit

- **Credit time changes**
  - Earned/Education credit changes (35-50-6-3.3)
    - Maximum E. credit time one can earn is the lessor of:
      - 2 years
      - 2/3 of executed sentence
      - Current law allows 4 years for educational credit
      - Educational credit deducted from the release date after subtracting all other credit time (net v. gross sentence)

### 3. HEA 1006 Pretrial credit

- **Credit time changes – I.C. 35-50-6-4**
  - A person awaiting trial is assigned to a credit class on the most serious offense charged. However, credit time is adjusted to the lower offense if the person is convicted of an offense that permits increased credit time.
  - Example, Charged with a level 5 and convicted of a Level 6. Given credit at 50% vs. 25% for pretrial detention despite charged with level 5.
3. **HEA 1006 Home Detention Credit**

- Credit Time for Home Detention (Probation v. Community Corrections Commitment)
- I.C. 35-38-2.5-5 provides that credit time is day for day (no good time allowed)
- Some courts were allowing good time and treating credit time differently for Home Detention as a condition of probation vs. Home Detention community corrections placement.

3. **HEA 1006 Level 6 Doc Restriction**

- I.C. 35-38-3-3 (Level 6 DOC restriction)
  - After 6.30.14 and before 7.1.15 court may not commit a Level 6 felon to DOC if earliest release date is less than 91 days from date of sentencing, unless commitment is due to violation of probation, parole or community corrections.
  - 366 days after 6.30.15
  - Sheriff gets per diem & medical expenses

4. **Recidivism**
4. Recidivism

- First some numbers
  - DOC
  - PROBATION
  - JAIL
  - HEA 1268 – Community Corrections funding
  - SEA 235 – Marion County pilot
  - SEA 171 – Collaborative plan by 2017
  - HEA 1006 (2014) – seed money

4. DOC Admission/Releases 2013

- 2013 DOC Offender Population Report:
  - Table 4 – Yearly Admissions & Release of Adult Offenders
    - 18,533 admissions, 18,921 releases
    - 51% of the males had a prior commitment to DOC
    - 38% of the females had a prior commitment to DOC

4. Drug Offense Numbers

- 2013 DOC Offender Population Report:
  - Table 11 – Admissions by Most Serious Offense:
    - Drug Offenses:
      - 1. A Felonies 266 (Level 2 cap) 5.9%
      - 2. B Felonies 1,782 (Level 3 & 4) 39.7%
      - 3. C Felonies 420 (Level 5) 9.3%
      - 4. D Felonies 2,013 (Level 6) 47.5%
  - Total: 4,481 or 24% of admissions (18,533)
4. DOC Recidivism

- DOC data shows that 39% of the males sent to them recidivate
- This number has been constant for years
- 84% of the recidivists are offenders serving less than 2 years – the C and D felons
- Under new code how many will go to DOC?

4. Probationers – 2012 Data

- 61% - no H.S. diploma
- 57% - no job & possess a criminal attitude
- 73% - poor – indigent
- 88% - use drugs
- 42% - regular use of alcohol since 17
- 63% - report friends with criminal records
- 67% - have unstructured time

*Data provided by Don Travis, President, Indiana Probation Officers in his 2011 report to the Criminal Code Evaluation Commission

4. Drug Offenses - Probation

- 2012 Indiana Probation Report p. 16:
  - 128,189 people on probation
  - 61,494 felons/66,695 misdemeanants
  - 42% of felons on probation for a substance abuse offense (25,828)
  - 39% of misdemeanants on probation for a substance abuse offense (26,011)
4. Risk Assessments - Probation

- 2012 Indiana Probation Report p. 15
  - Felony Probation Supervision (74,442)
    - High risk 14,594 or 20%
    - Medium risk 18,982 or 26%
    - Low risk 22,045 or 36%
    - No assessment 13,821 or 18%
- Misdemeanor Probation Supervision (44,010)
  - High risk 5,305 or 12%
  - Medium risk 7,390 or 18%
  - Low risk 19,856 or 45%
  - No assessment 11,459 or 26%

Should the folks in Red be on probation at all?

4. Probation

- CONCLUSIONS 2012 PROBATION REPORT:
  - LOCAL PROBATION UNABLE TO FUND OR CONTINUE EVIDENCE BASED PROGRAMS
  - TOO FEW PROBLEM SOLVING COURTS
  - ¾ OF OFFENDERS UNABLE TO PARTICIPATE WITHOUT WAIVER OF FEES – REAL COST?
  - 1,362 PROBATION OFFICERS
  - NO FORMULA FOR STAFFING OR WORKLOADS

4. Jail Numbers

- 2012 JAIL SURVEY (85 of 92 counties reporting)
  - Average year of construction 1987 (25YRS)
  - 17,581 capacity
  - $195,119,052 budgeted
  - Medical appropriated $27,843,347.00 (14%)
  - 40% NA or AA
  - 28% “thinking for a change” & religion
  - 17% substance abuse assistance
4. HEA 1268
Community Corrections

- I.C. 11-12-1-2.5 – Community Corrections
  - “Shall use evidence based services, programs, and practices that reduce the risk for recidivism among persons who participate in the community corrections programs”
  - May include: list of 11 programs

4. HEA 1268 Mental Health and Addiction Forensic Treatment

- I.C. 11-12-3.8 (New chapter)
  - Mental Health and Addiction Forensic Treatment Services
  - (1) Provide evidence based treatment/recovery wrap around services for treatment, vocations, housing, community support, care coordination and transportation
  - (2) Eligible if poor, a resident, 18, entering criminal justice system as a felon or with prior felony

4. HEA 1268 Mental Health and Addiction Forensic Treatment

- I.C. 11-12-3.8 (New chapter)
  - (3) Provider must be certified by Division of Mental Health and Addiction
  - (4) Creates a forensic treatment account
    - Provides grants/vouchers
    - Appropriations from general assembly, grants, gifts & bequests – does not revert to state if not spent
4. HEA 1268 Mental Health and Addiction Forensic Treatment

- I.C. 11-12-3.8 (New chapter)
  - (5) DOC commissioner may award financial assistance – but must coordinate with judicial center and division of mental health/addictions to avoid duplication of services
  - Division of mental health/addiction may provide grants

4. HEA 1268 Judicial Center

I.C. 11-13-2-1 – Judicial Center
- Allows local grants from Judicial Center
- Permits judicial center to deduct a 3% admin. fee from appropriations and prohibits use for any purpose other than local grants.
I.C. 11-13-2-2 Funds the development of local programs, evidence based practices to reduce recidivism. Must establish a coordinated system of community supervision.

4. HEA 1268 Judicial Center

I.C. 11-13-2-3 – Judicial Center
- Shall develop a grant process for local courts
- Shall base awards upon local coordination & EBP
- Shall consult with DOC and Division of Mental Health/Addiction to avoid duplication of services
- Certified provider required in every case
4. SEA 235 Augments HEA 1268

- Marion County Recidivism Reduction Pilot
  - I.C. 11-12-3.8-5(e) permits DOC to award money to Marion County for project – ends 6.30.2017
  - I.C. 11-12-3.8-6 (defines pilot)
    - Marion Superior Court may create 3 year pilot to provide mental health & addiction services as an alternative to DOC commitment
    - Authorized programs included: diversion, probation, community corrections, home detention, anything that works

4. SEA 235 Augments HEA 1268

- Marion County Recidivism Reduction Pilot
  - I.C. 11-12-3.8-6 (defines pilot)
    - Sex and violent offenders not eligible
    - Certified provider (diversion program certification)
    - Report to legislature each year before Oct 1
    - Report shall provide recidivism rate, cost, savings, any other info requested by the legislative council

4. SEA 171 Community Corrections

- I.C. 11-12-2-4 (Community Corrections)
  - New (8) requires a plan of collaboration between the probation department and community corrections filed with DOC and Judicial Center – deadline July 1, 2017
  - Plan must include: description of EBP, ways to reduce duplication, sanctions, eligibility criteria, fees/aid, evidence of compliance
  - DOC funding priority to those who comply
4. Seed Money

- Dr. Roger Jarjoura, in his assessment of the local fiscal impact of HEA 1006 (2013), estimated that an additional 10.5 million dollars would be needed annually at the local level. (page 6/169 January 2014 report)
- HEA 1006 (2014) – I.C. 11-12-2-1
  - Before March 1, 2015 DOC shall estimate operation cost savings of HEA 1006-2014

4. Seed Money

- HEA 1006 (2014) – I.C. 11-12-2-1
  - DOC shall certify savings to budget/auditor
  - Shall transfer/grant to judicial conference an amount that may not exceed the lessor of the operational savings certified or 11 million dollars
  - Subsection expires on June 30, 2015
  - What then?

QUESTIONS?

- David N. Powell, Executive Director
- Indiana Prosecuting Attorneys Council
  - 302 W. Washington Street
  - Indianapolis, Indiana 46204
  - dpowell@ipac.in.gov
  - 317-232-1836