

Members

Rep. Ralph Foley, Chairperson
Rep. Greg Steuerwald
Rep. Linda Lawson
Rep. Matt Pierce
Sen. Richard Bray
Sen. Randall Head
Sen. Greg Taylor
Sen. Lindel Hume
Judge John Marnocha
Judge Lance D. Hamner
Professor Craig Bradley
Attorney General Greg Zoeller
Commissioner Bruce Lemmon
David Powell
Larry Landis
Chief Justice Brent Dickson



CRIMINAL CODE EVALUATION COMMISSION

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Authority: P.L. 182-2009(ss)

MEETING MINUTES¹

Meeting Date: September 27, 2012
Meeting Time: 1:30 P.M.
Meeting Place: State House, 200 W. Washington
St., Room 431
Meeting City: Indianapolis, Indiana
Meeting Number: 3

Members Present: Rep. Ralph Foley, Chairperson; Rep. Matt Pierce; Sen. Richard Bray; Sen. Greg Taylor; Judge John Marnocha; Judge Lance D. Hamner; Attorney General Greg Zoeller; Commissioner Bruce Lemmon; David Powell; Larry Landis; Sen. Lindel Hume.

Members Absent: Rep. Greg Steuerwald; Rep. Linda Lawson; Professor Craig Bradley; Sen. Randall Head; Chief Justice Brent Dickson.

Chairperson Ralph Foley called the meeting to order at 1:30 p.m.

Deborah Daniels made a presentation containing the Criminal Code Evaluation Commission Workgroup's recommendations with respect to sentencing issues. (See Exhibit 1).

In response to a discussion between Larry Landis, David Powell, and Senator Greg Taylor concerning which offenses should be considered eligible for habitual offender

¹ These minutes, exhibits, and other materials referenced in the minutes can be viewed electronically at <http://www.in.gov/legislative>. Hard copies can be obtained in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for hard copies may be mailed to the Legislative Information Center, Legislative Services Agency, West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for hard copies.

enhancement, Judge Marnocha pointed out that looking only at an offender's most recent conviction could be misleading, noting that an offender convicted of Class D felony theft committing theft as the third and qualifying offense for habitual offender status may have a second offense of murder. Situations like this are problematic.

Mr. Landis noted that many states were moving away from broad recidivist sentencing schemes and were focusing instead specifically on recidivists who hurt people. The data show that by the time people commit their third felony, they are often "aging out" of crime, meaning that prison resources are being spent to incarcerate an individual whose criminal activity is declining anyway. This is not a good use of resources.

Mr. Powell stated that the Indiana Constitution is about reformation and rehabilitation, which is an explicitly offender-based approach. Prosecutors have an obligation to each offender to try and examine that individual to see what is necessary to reform and rehabilitate him or her. For repeat recidivists, obviously these cases are complicated.

Senator Taylor testified that the statute itself is based on the commission of specific crimes, and not on the character of the offender.

Representative Matt Pierce testified that his constituents are most concerned about the people who are a threat to society, and they want to see a 30 year enhancement because they feel you can't trust violent offenders in society.

Senator Lindel Hume expressed a concern that some educational programs offered in the prisons were not focused enough on assisting an offender in getting a job upon release from incarceration. The Commission needs to find some way to restrict the kinds of degree the offenders are allowed to those that will likely assist them in obtaining employment.

Senator Richard Bray and Chairperson Foley suggested that the Department of Correction (DOC) be granted the authority to approve courses of study for offenders that would be more likely to lead to a marketable skill. Representative Pierce suggested that it might be more useful to focus on vocational skills rather than degrees. Senator Taylor suggested that if DOC had an educational program for all offenders, recidivism would likely decline.

Tim Brown from DOC agreed that allowing DOC the flexibility to grant credit time for certain educational programs with better estimated outcomes would be a good approach. DOC works through MOU's with many state agencies and has one of the largest apprenticeship programs in the country as far as correctional institutions are concerned. The DOC attempts to insure that offenders are released into fields that will yield employment.

In response to several Commission members, Ms. Daniels stated that she would have the workgroup work with the Commission on how to proceed with credit limits and a cap on education.

Chairperson Foley recommended that the Commission consider the sentencing grid (as presented in Exhibit 1) in conjunction with Indiana's current felony penalties and consider which penalty levels might be appropriate.

Chairperson Foley adjourned the meeting at 4:20 p.m.

**Report of the Criminal Code
Evaluation Workgroup:
Sentencing Issues**

Submitted by Deborah J. Daniels
Krieg DeVault LLP
September 27, 2012

**Suspension of Sentence; Limitations
(IC 35-50-2-2)**

**Suspension of Sentence; Limitations
(IC 35-50-2-2)**
Page 328

- **Current provisions:**
 - **Basic rule:** Court may suspend any part of a sentence for a felony
 - **Exceptions:** Must serve at least the minimum sentence
 - Prior conviction for Class A or Class B felony
 - Prior conviction for Class C felony (< 7 years since discharge)
 - Prior conviction for Class D felony (< 3 years since discharge)
 - Specified crimes (see list, "Current Statute", p. 332-334)

**Suspension of Sentence; Limitations
(cont'd.)**

- **Recommendations:**
 1. **Sentence for a Class 1-4 felony** should remain non-suspendible as currently with prior conviction
 - a. Only the amount above the minimum may be suspended
 - b. **Exception:** Where the only prior felony conviction(s) are for Class D or Level 6 felonies
 2. **Sentence for a Level 5 felony:**
 - a. Remain non-suspendible if Level 1-5 prior felony (< 7 years since discharge) - as in current law
 - b. **Recommend:** Fully suspendible at Court's discretion if only prior(s) = Class D or Level 6

**Suspension of Sentence; Limitations
(cont'd.)**

- **Recommendations (cont'd.)**
 3. **Level 6 felony conviction:** Recommend fully suspendible at discretion of Court
 4. **Specified offenses:** non-suspendible based on offense
 - a. **ADD to specified non-suspendible category:**
 - Attempted Murder
 - Conspiracy to Commit Murder
 - Voluntary Manslaughter
 - Neglect of a Dependent as a Level 1 felony (death of a person under age 14)

**Suspension of Sentence; Limitations
(cont'd.)**

- **Recommendations (cont'd.)**
 4. **Specified offenses:** non-suspendible (cont'd.)
 1. **DELETE from specified non-suspendible category:**
 - **Battery with a Deadly Weapon**
 - **Rationale:** Can be charged as aggravated battery (listed as non-suspendible) if SBI occurs.
 - **Sexual Battery with a Deadly Weapon**
 - **Rationale:** If the act involves rape or CDC, it will be non-suspendible under this section. If not rape or CDC, recommend that Court have discretion to suspend if appropriate.

Suspension of Sentence; Limitations (cont'd.)

- **Recommendations (cont'd.)**
- 4. **Specified offenses: non-suspendible (cont'd.)**
 - a. **DELETE (cont'd.)**
 - **Drug dealing offenses** currently listed (dealing in controlled substances while possessing a firearm, dealing to < 18, or in protected zone)
 - **Note:** Recommended in connection with other proposed amendments to drug statutes, as reported 9/20/12
 - **Child Molesting as Level 4 felony** (fondling)
 - but keep Level 3 Intercourse (CDC) non-suspendible

Suspension of Sentence; Limitations (cont'd.)

- **Recommendations (cont'd.)**
- 4. **Specified offenses: non-suspendible (cont'd.)**
 - b. **DELETE (cont'd.):**
 - Dangerous Control of a Firearm (IC 35-47-10-6) - knowing/intentional
 - Dangerous Control of a Child (IC 35-47-10-7) - knowing/intentional
 - Possession of Cocaine or Narcotic Drug with a Firearm (IC 35-48-4-6(b)(1)(B))
 - Possession of Methamphetamine with a Firearm (IC 35-48-4-6 (b)(1)(B))

Suspension of Sentence; Limitations (cont'd.)

- **Recommendations (cont'd.)**
- 5. **MAINTAIN** as non-suspendible:
 - All sentence enhancements in IC 35-50-2
 - Examples:
 - Habitual Offender (IC 35-50-2-8)
 - Additional penalty for use of a firearm in certain offenses (IC 35-50-2-11)
 - Use of firearm in (dealing) controlled substance offense (IC 35-50-2-13)

Suspension of Sentence; Limitations (cont'd.)

- **Workgroup Position:**
 - Reservation expressed by a representative of IPAC about proposed deletion of Battery with a Deadly Weapon and Sexual Battery with a Deadly Weapon
 - See Slide #5 for majority's rationale:
 - **Battery with a Deadly Weapon**
 - **Rationale:** Can be charged as aggravated battery (listed as non-suspendible) if SBI occurs
 - **Sexual Battery with a Deadly Weapon**
 - **Rationale:** If the act involves rape or CDC, it will be non-suspendible under this section. If not rape or CDC, recommend that Court have discretion to suspend if appropriate

Suspension of Sentence; Limitations (cont'd.)

- **Workgroup Position: (cont'd.)**
 - Reservation expressed by a representative of IPAC about proposal for judicial discretion to suspend Level 6 sentence for prior felony conviction
 - Similar reservation by IPAC representative regarding proposal for judicial discretion to suspend higher level penalties where only prior conviction is for a Level 6 or Class D felony

Suspension of Sentence; Limitations (cont'd.)

- **Workgroup Position: (cont'd.)**
 - **Basis** of reservations: repeat felony behavior, even at a low level, should require at least minimum sentence to be served in DOC
 - **Rationale of Workgroup:** Judges should have flexibility to choose community supervision at the lowest level of felony conviction/felony prior conviction, depending on nature of offense of conviction/facts

CONSECUTIVE/CONCURRENT SENTENCING
(IC 35-50-1-2)

Consecutive/Concurrent Sentencing
(IC 35-50-1-2)
(Not Reflected in Report No Recommendation)

- Current statute:
 - **Mandatory** consecutive sentencing:
 - Defendant commits new crime after arrest for another crime and before discharge from supervision (including pre-trial and post-trial period)
 - Defendant convicted of using a firearm under IC 35-50-2-11; must run consecutively to underlying offense
 - **All other cases:** discretionary with Court

Consecutive/Concurrent Sentencing
(cont'd.)

- Current statute (cont'd.)
 - **Limitation:** Except for (listed) crimes of violence, total of consecutive terms for convictions arising out of an "episode of criminal conduct" shall not exceed advisory sentence for next higher offense level

Consecutive/Concurrent Sentencing
(cont'd.)

- Discussion:
 - IPDC expressed concern about vague definition of "episode of criminal conduct"
 - Fear that a single fight might lead to multiple convictions not deemed a "single episode"
 - Case law did not seem to bear this out
- Workgroup Position
 - After significant discussion and research, **no recommendation** for change

HABITUAL OFFENDER
(IC 35-50-2-8)
HABITUAL SUBSTANCE OFFENDERS
(IC 35-50-2-10)
LIFE WITHOUT PAROLE IMPRISONMENT
(IC 35-50-2-8.5)

Habitual Offender
(IC 35-50-2-8)
Current statute, page 338

- Current statute:
 - Upon the third unrelated felony conviction (each new crime committed after sentencing for last crime), additional fixed term is added to sentence
 - Additional fixed term is to be:
 - Not less than advisory sentence for offense of conviction
 - Not more than 3x the advisory sentence
 - Not to exceed total of 30 years

Habitual Offender (cont'd.)

- Current statute: (cont'd)
 - Certain restrictions on use of Habitual statute:
 - **Habitual N/A if offense of conviction is:**
 - A Class A misdemeanor only enhanced to a D felony based on prior felony convictions
 - Operating a Vehicle as a HTV or after Lifetime Suspension
 - Delivery of Anabolic Steroids (under IC 16-42-19) under certain circumstances
 - Any drug offense under IC 35-48-4 (controlled substance offenses) under certain circumstances (see pp. 338-339)

Habitual Offender (cont'd.)

- Current statute: (cont'd)
 - Prior felony does not count toward Habitual if:
 - Set aside/defendant pardoned
 - Driving as HTV or after lifetime suspension under certain circumstances
 - Delivery of Anabolic Steroids (under IC 16-42-19) under certain circumstances
 - Any drug offense under IC 35-48-4 (controlled substance offenses) under certain circumstances (see pp. 338-339)

Habitual Substance Offenders (IC 35-50-2-10)

Current statute, page 340

- Current statute:
 - Offense of conviction and priors are substance offense convictions (includes alcohol and controlled substances, Class A misdemeanors as well as felonies)
 - Fixed additional term of 2-8 years
 - Additional term may be reduced to 1 year under certain circumstances (see pp. 340-341)

Life Without Parole Imprisonment (Certain Felonies)

IC 35-50-2-8.5 – Current statute, page 5

- Current statute:
 - Life without parole if:
 - Offense of conviction and both priors are among those crimes specified as non-suspendible under IC 35-50-2-2
 - Sex offense against a child with one prior Class A felony that is a sex offense against a child

Habitual Offender Habitual Substance Offenders Life Without Parole (cont'd.)

- Recommendations:
 1. **Habitual Offender:**
 - a. Maintain basic underpinnings (3rd offense, penalty enhancement of up to 3x advisory, not exceeding 30 years)
 - b. Exclude:
 - Level 6 offenses as offense of conviction eligible for Habitual
 - Drug possession offenses as offense of conviction eligible for Habitual
 - c. Include:
 - Drug dealing offenses as offense of conviction
 - Drug possession offenses as prior convictions for eligibility purposes
 - All D felony prior convictions for eligibility purposes

Habitual Offender Habitual Substance Offenders Life Without Parole (cont'd.)

- Recommendations (cont'd.)
 1. **Habitual Offender (cont'd.)**
 - a. Level 5 offense: Require 3 prior convictions if all priors are Level 5/Class C or Level 6/Class D felonies
 - b. Level 5 offense: Require only 2 prior convictions – as in current law – if at least one prior is Level 4/Class B felony or higher
 - c. Clearly state that the fixed additional term is non-suspendible

Habitual Offender
Habitual Substance Offenders
Life Without Parole *(cont'd.)*

- **Recommendations** *(cont'd.)*
 2. **Life Without Parole** Habitual Offender statute (IC 35-50-2-8.5) should be **REPEALED**
 3. **Habitual Substance Offender** statute should be **REPEALED**
 - Drug offenses should be reincorporated into original Habitual Offender statute (IC 35-50-2-8)

Habitual Offender
Habitual Substance Offenders
Life Without Parole *(cont'd.)*

- **Rationale:**
 - Basic underpinnings of Habitual statute are appropriate and proportional; should preserve for more serious felony offenders (including drug dealers)
 - In line with other proposals (e.g., D felony with prior conviction no longer non-suspendible), Level 6; Class D felonies and drug possession cases should not be eligible for Habitual enhancement
 - Similarly, if all priors are lower-level (Level 5 or 6; Class C or D), one extra prior conviction should be required
 - Based on relative severity of the current and prior offenses
 - Habitual term should be clearly non-suspendible

Habitual Offender
Habitual Substance Offenders
Life Without Parole *(cont'd.)*

- **Rationale:** *(cont'd.)*
 - **Life Without Parole** statute is unnecessary and disproportional
 - Applies only to high-level offenses (Level 1 or 2/Class A felony with prior at same level)
 - Offender will receive a lengthy sentence including 30 years additional for Habitual

Habitual Offender
Habitual Substance Offenders
Life Without Parole *(cont'd.)*

- **Rationale:** *(cont'd.)*
 - **Habitual Substance Offender (HSO)** statute
 - This statute and the changes in original Habitual statute when passed have led to wholesale confusion
 - Escalating drug penalties proposed in Level 1-6 sentencing grid (e.g., prior drug dealing conviction raises the sentencing range by one level) should preclude need for separate HSO statute
 - Removal of low-level offenders including all drug possessors from operation of Habitual should address concerns of legislators when passing HSO

Habitual Offender
Habitual Substance Offenders
Life Without Parole *(cont'd.)*

- **Workgroup Position:**
 - Reservation expressed by a representative of IPAC about proposed changes as they relate to a person charged with OWI at Level 5: would require one additional prior conviction for OWI than currently required in order to merit Habitual
 - Similar reservation expressed by same representative of IPAC: current charge of Involuntary Manslaughter with one prior Domestic Battery and one prior Strangulation would not merit Habitual (none exceeds Level 5)

CREDIT TIME

Credit Time (IC 35-50-6) Page 342

- **Background:**
 1. **“Good Time” Credit**
 - In 1977, 3 classes of “good time” credit created, all based on behavior of offender in prison
 - Class I: day for day
 - Class II: two days served for one day credit
 - Class III: No good time credit
 - Recently: Class IV added (credit-restricted felons)
 - Based not on behavior, but on offense of conviction
 - Motivation: increasing sentences for most serious offenders

Credit Time (cont'd.)

- **Background: (cont'd.)**
 2. **Educational and Programmatic Credits**
 - Various additional credits have been added
 - **Motivation:**
 - Provide incentive to obtain education, treatment
 - Provide education, treatment options to reduce recidivism after release
 - **Effect** on length of stay
 - Sentences reduced beyond that permitted by Class I credit time
 - Reduced certainty for victims in terms of length of stay

Credit Time (cont'd.)

- **Background: (cont'd.)**
 - Some prior legislative revisions have addressed unintended consequences
 - Example: Limitation on amount of educational credit
 - Some perverse outcomes still occur (see page 342-343 of Report)
 - **Current caps:**
 - By program (up to 6 months for literacy training or substance abuse treatment)
 - Overall cap: lesser of 4 years or 1/3 of sentence

Credit Time (cont'd.)

- **Background: (cont'd.)**
 - 1999: legislation amended to deduct programmatic credit from “period of incarceration” after good time credit deducted
 - This tends to shorten sentences further
 - See Paragraph 5, page 343 of Report

Credit Time (cont'd.)

- **Recommendations:**
 1. **Credit time classification:**
 - **Question:** How much time should be deducted for good behavior?
 - **No recommendation made**
 - Suggestion: certainty and proportionally appropriate sentences should be focus
 - If actual time served is sufficient and proportional to offense, actual % served should not be relevant factor

Credit Time (cont'd.)

- **Recommendations: (cont'd.)**
 2. **Credit Restricted Felon (CRF):**
 - Recommend REPEAL.
 - **Rationale:**
 - CRF was passed in order to increase time served by very serious offenders
 - In order to achieve proportional sentencing, should provide for sentences at higher end of range for the most serious offenses
 - Workgroup has attempted to accomplish that using 6-level sentencing grid and placing the most serious offenses in top range (Level 1)

Credit Time (cont'd.)

- **Recommendations: (cont'd.)**
 3. **Post-Conviction Supervision:**
 - Recommend that *every inmate* be required to serve some time on post-conviction supervision
 - No one should "max out" and be released without supervision
 - **Rationale:** Reducing recidivism
 4. **Programmatic Credit Time:**
 - Recommend *reversal* of 1999 change affecting computation of educational/programmatic credit time
 - **Rationale:** Arbitrarily shortens sentence
 - **Limit** total education-related credits available to any individual inmate

Credit Time (cont'd.)

- **Recommendations: (cont'd.)**
 4. **Programmatic Credit Time: (cont'd.)**
 - See current statutory limitations (bottom of p. 344)
 - Possible to obtain as much as 4 years in total educational credits under current statute, whether or not the inmate benefits by the additional education in terms of job-readiness
 - **Recommend cap** of two years' educational credit
 - **Recommend limitation** on amount of total credit available for credits earned prior to incarceration (see p. 345)

Credit Time (cont'd.)

- **Recommendations: (cont'd.)**
 4. **Programmatic Credit Time: (cont'd.)**
 - **Rationale:** Inmates, in particular those who are already educated, should not be able to manipulate the system in order to obtain early release
 - At the same time, some incentive should be offered for self-improvement in appropriate cases

DISCUSSION OF 6-LEVEL SENTENCING GRID

THANK YOU!

Questions?