



CRIMINAL CODE EVALUATION COMMISSION

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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
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Larry Landis
Chief Justice Brent Dickson

SA Staff:

Sue Vansickle, Staff Person for the Commission
C.C. Norwalk, Attorney for the Commission
Andrew Hedges, Attorney for the Commission
Mark Goodpaster, Fiscal Analyst for the Commission

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

MEETING MINUTES¹

Meeting Date: October 18, 2012
Meeting Time: 10:30 A.M.
Meeting Place: State House, 200 W. Washington St., Room 431
Meeting City: Indianapolis, Indiana
Meeting Number: 5

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

Members Absent: Rep. Linda Lawson; Sen. Randall Head; Professor Craig Bradley.

I. Funding of correctional programs and services

Chairperson Foley called the meeting to order at 10:38 a.m.

I. Revised Sentencing Grid

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.

After describing the composition and role of the Commission Workgroup, Deborah Daniels discussed the Commission Workgroup's revised sentencing grid. See Exhibit 1.

II. Rape and Criminal Deviate Conduct

Legislative Services Agency Senior Staff Attorney K.C. Norwalk discussed the rape and criminal deviate conduct issues in PD 3375.

III. Criminal Gang Activity

Ms. Daniels discussed revisions to the intent element of the Criminal Gang Activity statute (contained in PD 3378), noting that the Workgroup has suggested a person would commit the offense if the person knowingly or intentionally actively participated in an activity with the intent to benefit or promote the interests of the criminal gang or with the intent of increasing the person's own standing or position in the criminal gang.

Indiana Public Defender Council Executive Director Larry Landis suggested that this language was problematic because it would encompass completely legal activities that may have been done to impress gang members. Senator Richard Bray and Representative Matt Pierce agreed that this language was too broad, and Senator Lindel Hume expressed concern that the statute could lead to guilt by association.

IV. Educational Credit Time

The Commission discussed the educational credit time provision of PD 3375, which: (1) caps educational credit time at a maximum of two years; and (2) requires the Department of Correction (DOC) to approve only those educational programs which would meaningfully assist an offender with reintegrating into society.

In response to a question from Senator Greg Taylor concerning how DOC would approve educational programs, DOC representative Tim Brown testified that this would happen in consultation with a casework manager, who in turn would consult with the Department of Workforce Development to find programs most likely to lead to gainful employment. Sen. Taylor suggested that DOC implement a vocational school.

Mr. Landis testified that DOC should be provided with more objective standards, because trying to predict the job market is too speculative. In addition, numerous empirical studies suggest that education reduces recidivism regardless of the degree: anyone who receives a degree is less likely to commit a new offense. In addition, reducing the educational credit time cap from four years to two would have a significant fiscal impact.

Responding to Sen. Taylor, Indiana Prosecuting Attorneys Council Executive Director Dave Powell noted that a degree that would qualify a person to work with children would be inappropriate for a sex offender, who would be prohibited from associating with children, and thus DOC should direct that person to a different course of study.

Rep. Pierce objected to having DOC make individualized determinations for each offender, but had no objection to general standards that would apply to all offenders.

Sen. Hume stated that he wished to maintain educational programs because he believed that they were valuable in reducing recidivism.

Judge Lance Hamner suggested: (1) having offenders receive funding from student loans,

which must be repaid, instead of providing free education; and (2) that the offender should have a work plan in place when applying for credit. Mr. Brown noted that offenders now have to pay up front before registering for a course.

V. Habitual Offenders

Legislative Services Agency Senior Staff Attorney Andrew Hedges discussed a revised draft dealing with habitual offenders. See Exhibit 2.

Mr. Landis suggested the habitual offender statute should focus on prior offenses.

Judge Hamner testified that it would be simpler to take judicial notice of prior convictions rather than require a jury determination.

Chief Justice Dickson was concerned that a provision of the draft may violate Art. I, Sec. 19 of the Indiana Constitution by removing the jury's prerogative to determine the law and the facts.

Judge Marnocha testified that habitual offender proceedings are not difficult to administer, and the Commission should focus more on the policy behind the proceedings.

Sen. Taylor testified that the Commission needs to grant discretion to determine the danger that certain offenders present to society.

VI. Protective zones

Mr. Norwalk presented PD 3338, which reduces the protective zones used to enhance certain drug crimes from 1,000 feet to 200 feet, and requires that a child actually be present in order to charge a crime.

Chief Justice Dickson testified that prosecutors may have difficulty proving that a child was present within the protected zone, and Mr. Powell suggested considering this issue further.

Rep. Steuerwald testified that he was amenable to keeping the protective zone at 1,000 feet.

Sen. Taylor stated that the 200 foot zone makes sense, and noted that existing law causes people in rural areas to receive a lesser penalty in some cases than people in urban areas. He also stated that ensuring that a child was present was consistent with the intent of the protective zones.

Chairperson Foley adjourned the meeting at 12:21 p.m.

CCEC
Exhibit 1 (10/18/12 CCEC)

PROPOSED SENTENCING RANGES

Level	Range	Presumptive	Current Range	Current Presumptive
Murder	45-75 years	55 years	45-65 years	55 years
1	30-55 years	40 years	20-50 years	30 years
2	20-40 years	30 years	20-50 years	30 years
3	12-20 years	15 years	6-20 years	10 years
4	6-12 years	10 years	6-20 years	10 years
5	2-8 years	4 years	2-8 years	4 years
6	6 months to 3 years	1.5 years	6 months to 3 years	1.5 years

Specifies the procedures under which a person may be sentenced as a habitual offender, and provides that convictions for any felony may make a person eligible to be found a habitual offender (under current law, certain felony convictions are excepted.) Provides that the court shall sentence a habitual offender to additional fixed term that is equal to one to three times the sentence the court imposed on the person for commission of the underlying crime, to a maximum of thirty years. Provides that a habitual offender is a "credit restricted felon" and earns one day of credit time for every six days served.

1 SECTION 1. IC 35-50-2-8, AS AMENDED BY P.L.71-2005, SECTION 11, IS
2 AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2014]: Sec. 8. (a) Except as
3 otherwise provided in this section, the state may seek to have a person sentenced as a habitual
4 offender for any felony by alleging, on a page separate from the rest of the charging instrument,
5 that the person has accumulated two (2) prior unrelated felony convictions. **The state may allege**
6 **one (1) or more prior unrelated guilty but mentally ill felony convictions when seeking to**
7 **have a person sentenced as a habitual offender.**

8 (b) **Following a conviction on the underlying felony, the court shall conduct a split**
9 **trial, with the habitual offender portion of the trial following the guilt portion of the trial**
10 **and any separate enhancement portion of the trial. The state or defendant may not conduct**
11 **any additional interrogation or questioning of the jury during the habitual offender portion**
12 **of the trial. The trier of fact shall determine whether the state has presented evidence that**
13 **proves beyond a reasonable doubt that the:**

14 (1) **person has two (2) prior unrelated felony convictions; and**

15 (2) **commission of the:**

16 (A) **second prior unrelated felony was after the commission and**
17 **sentencing for the first prior unrelated felony; and**

18 (B) **current underlying felony offense was committed after the**
19 **commission and sentencing for the second prior unrelated felony**
20 **offense.**

21 **The role of the trier of fact is to determine whether the person has been twice convicted of**
22 **unrelated felonies in accordance with this section. A person who has been twice convicted**
23 **of unrelated felonies in accordance with this section is a habitual offender by operation of**
24 **law, and the trier of fact is not required to make a specific finding that the person is a**
25 **habitual offender.**

26 (c) **The court shall sentence a person found to be a habitual offender to an**
27 **additional fixed term that is equal to one (1) to three (3) times the sentence the court**
28 **imposed on the person for commission of the underlying crime, including any portion of**
29 **the sentence that was suspended. However, the additional sentence may not exceed thirty**
30 **(30) years. The court is not required to describe or set forth any aggravating or mitigating**
31 **circumstances explaining the particular habitual offender enhancement chosen.**

32 (d) **The court shall attach the habitual offender enhancement to the felony**
33 **conviction with the highest sentence imposed and specify which felony count is being**

1 enhanced. If the felony enhanced by the habitual offender determination is set aside or
2 vacated, then the court shall resentence the person and apply the habitual offender
3 enhancement to the felony conviction with the next highest sentence in the underlying
4 cause, if any.

5 (e) The court may impose multiple habitual offender enhancements and order them
6 served consecutively if the enhancements arise from separate and unrelated trials. The
7 state may allege the same unrelated prior felonies for the habitual offender enhancement in
8 each separate and unrelated trial.

9 (f) A prior unrelated felony conviction that has been set aside or pardoned may not
10 be used in habitual offender proceeding.

11 (g) A prior unrelated felony conviction may not be collaterally attacked during a
12 habitual offender proceeding.

13 (h) The procedural safeguards that apply to other criminal charges, including:

14 (1) the requirement that the charge be filed by information or indictment;

15 and

16 (2) the right to arraignment;

17 also apply to a habitual offender allegation.

18 (i) The determination that a person is a habitual offender under this section results
19 in the enhancement of the sentence for an underlying felony due to the person's status as a
20 habitual offender, and not in the imposition of a consecutive or concurrent sentence for a
21 separate crime.

22 (b) The state may not seek to have a person sentenced as a habitual offender for a felony
23 offense under this section if:

24 (1) the offense is a misdemeanor that is enhanced to a felony in the same
25 proceeding as the habitual offender proceeding solely because the person had a
26 prior unrelated conviction;

27 (2) the offense is an offense under IC 9-30-10-16 or IC 9-30-10-17; or

28 (3) all of the following apply:

29 (A) The offense is an offense under IC 16-42-19 or IC 35-48-4.

30 (B) The offense is not listed in section 2(b)(4) of this chapter.

31 (C) The total number of unrelated convictions that the person has for:

32 (i) dealing in or selling a legend drug under IC 16-42-19-27;

33 (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);

34 (iii) dealing in a schedule I, II, III controlled substance (IC
35 35-48-4-2);

36 (iv) dealing in a schedule IV controlled substance (IC
37 35-48-4-3); and

38 (v) dealing in a schedule V controlled substance (IC 35-48-4-4);

39 does not exceed one (1).

40 (c) A person has accumulated two (2) prior unrelated felony convictions for purposes of

1 this section only if:

2 (1) the second prior unrelated felony conviction was committed after sentencing
3 for the first prior unrelated felony conviction; and

4 (2) the offense for which the state seeks to have the person sentenced as a
5 habitual offender was committed after sentencing for the second prior unrelated
6 felony conviction.

7 (d) A conviction does not count for purposes of this section as a prior unrelated felony
8 conviction if:

9 (1) the conviction has been set aside;

10 (2) the conviction is one for which the person has been pardoned; or

11 (3) all of the following apply:

12 (A) The offense is an offense under IC 16-42-19 or IC 35-48-4;

13 (B) The offense is not listed in section 2(b)(4) of this chapter;

14 (C) The total number of unrelated convictions that the person has for:

15 (i) dealing in or selling a legend drug under IC 16-42-19-27;

16 (ii) dealing in cocaine or a narcotic drug (IC 35-48-4-1);

17 (iii) dealing in a schedule I, II, III controlled substance (IC
18 35-48-4-2);

19 (iv) dealing in a schedule IV controlled substance (IC
20 35-48-4-3); and

21 (v) dealing in a schedule V controlled substance (IC 35-48-4-4);

22 does not exceed one (1):

23 (e) The requirements in subsection (b) do not apply to a prior unrelated felony conviction
24 that is used to support a sentence as a habitual offender. A prior unrelated felony conviction may
25 be used under this section to support a sentence as a habitual offender even if the sentence for the
26 prior unrelated offense was enhanced for any reason, including an enhancement because the
27 person had been convicted of another offense. However, a prior unrelated felony conviction
28 under IC 9-30-10-16, IC 9-30-10-17, IC 9-12-3-1 (repealed), or IC 9-12-3-2 (repealed) may not
29 be used to support a sentence as a habitual offender.

30 (f) If the person was convicted of the felony in a jury trial, the jury shall reconvene for
31 the sentencing hearing. If the trial was to the court or the judgment was entered on a guilty plea,
32 the court alone shall conduct the sentencing hearing under IC 35-38-1-3.

33 (g) A person is a habitual offender if the jury (if the hearing is by jury) or the court (if
34 the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that
35 the person had accumulated two (2) prior unrelated felony convictions.

36 (h) The court shall sentence a person found to be a habitual offender to an additional
37 fixed term that is not less than the advisory sentence for the underlying offense nor more than
38 three (3) times the advisory sentence for the underlying offense. However, the additional
39 sentence may not exceed thirty (30) years.

40 SECTION 2. IC 35-31.5-2-72, AS ADDED BY P.L.114-2012, SECTION 67, IS

1 AMENDED TO READ AS FOLLOWS [EFFECTIVE JANUARY 1, 2014]: Sec. 72. "Credit
2 restricted felon" means a person who has been convicted of at least one (1) of the following
3 offenses:

4 (1) Child molesting involving sexual intercourse or deviate sexual conduct (IC
5 35-42-4-3(a)), if:

6 (A) the offense is committed by a person at least twenty-one (21) years
7 of age; and

8 (B) the victim is less than twelve (12) years of age.

9 (2) Child molesting (IC 35-42-4-3) resulting in serious bodily injury or death.

10 (3) Murder (IC 35-42-1-1), if:

11 (A) the person killed the victim while committing or attempting to
12 commit child molesting (IC 35-42-4-3);

13 (B) the victim was the victim of a sex crime under IC 35-42-4 for which
14 the person was convicted; or

15 (C) the victim of the murder was listed by the state or known by the
16 person to be a witness against the person in a prosecution for a sex crime
17 under IC 35-42-4 and the person committed the murder with the intent to
18 prevent the victim from testifying.

19 **(4) Any felony that has been enhanced due to the person's status as a**
20 **habitual offender under IC 35-50-2-8.**
21