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

LSA Staff:

Sue Vansickle, Staff Person for the Commission
K.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)

CRIMINAL CODE EVALUATION COMMISSION

Legislative Services Agency
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MEETING MINUTES[1]

Meeting Date:	**October 26, 2012**
Meeting Time:	**10:30 A.M.**
Meeting Place:	**State House, 200 W. Washington St., Room 431**
Meeting City:	**Indianapolis, Indiana**
Meeting Number:	**6**

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

Members Absent: **Rep. Linda Lawson; Rep. Matt Pierce; Sen. Randall Head; Sen. Greg Taylor; Judge John Marnocha; Professor Craig Bradley.**

Representative Ralph Foley, Chairperson called the meeting to order at 10:37 a.m.

I. Discussion of PD 3425

Chairperson Foley introduced the members of the Commission and asked Legislative Services Agency attorneys K.C. Norwalk and Andrew Hedges to discuss portions of PD 3425 concerning: (1) Criminal Gang Activity; (2) Credit Time; (3) Battery; (4) Habitual

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[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.

Offender Proceedings; (5) Rape; (6) Protected Zones; and (7) Manufacturing Marijuana.

Senator Lindel Hume noted that PD 3425 would reduce the penalty for certain thefts from a felony to a misdemeanor, but that the felony theft convictions of people convicted under the earlier version of the law would still be counted in the future as a prior unrelated felony for habitual offender enhancement purposes. It would be better if these crimes could not be used for habitual offender enhancement purposes, since they are no longer considered to be felonies.

In response to Judge Lance Hamner's concern that "extreme and protracted pain" (as used in the revised definition of "serious bodily injury") could be difficult to prove, Chairperson Foley directed the Commission Workgroup to discuss this issue.

Indiana Public Defender Council (IPDC) Executive Director Larry Landis testified that the provision in the draft habitual offender language that a person was a habitual offender as a matter of law if the jury found that the person had committed certain prior felonies, and that the jury did not need to make a specific determination that a person was a habitual offender, seemed to violate Art. I, Sec. 19, of the Indiana Constitution ("In all criminal cases whatever, the jury shall have the right to determine the law and the facts."). Chief Justice Brent Dickson agreed that the proposed language was problematic.

Chairperson Foley noted that the original draft reduced protective zones from 1,000 feet to 200 feet, but after discussions with the Indiana Prosecuting Attorneys Council, the protective zones would be set at 500 feet.

Deborah Daniels, facilitator of the Commission Workgroup, testified that provisions in PD 3425 dealing with computer crimes had been largely rewritten with input from the Indiana State Police, who recommended using Florida law as a model.

II. Presentation by the Indiana Prosecuting Attorneys Council

Steve Johnson, former Executive Director of the Indiana Prosecuting Attorneys Council (IPAC), testified concerning the history of criminal code revisions in Indiana. See Exhibit 1.

Grant County Prosecuting Attorney Jim Luttrell, chairperson of IPAC's Legislative Committee, testified concerning IPAC's sentencing recommendations. See Exhibit 2.

III. Presentation by the Indiana Public Defender Council

Mr. Landis testified concerning the factors the legislature should consider in determining appropriate sentences. See Exhibit 3.

Chairperson Foley adjourned the meeting at 12:46 p.m.

Exhibit 1

HISTORY OF COMPREHENSIVE CRIMINAL CODE RE-WRITE IN INDIANA

- 1905 – Comprehensive Indiana Criminal Code adopted
- 1973 – Executive Order of Gov. Bowen reorganizes Indiana Criminal Law Study Commission
- 1973 – Commission begins work on re-write of Criminal Code
- Oct. 1974 – Proposed Final Draft of Indiana Penal Code; Effective Date – Jan. 1, 1976
- Oct. 1977 – New Penal Code took effect
- 2003 – P.L. 140-2003 – Sentencing Policy Study Committee directed to look at existing sentencing classifications
- 2009 – Criminal Code Evaluation Commission enacted

In drafting the new Penal Code, the Commission referred to:

- Existing Indiana law – statutes and case law
  - (it was said the changes were "not radical changes")
- Model Penal Code (1962)
- Study Draft of Federal Criminal Code
- Recent revisions of other states

Major change was certainly in sentencing

- Indeterminate to determinate sentencing
- General penalty classifications instead of a separate penalty for each offense

Initial proposal for sentences in 1974

- Class felonies
  - (1) Capital Murder
  - (2) Class A felonies
  - (3) Class B felonies
  - (4) Class C felonies
  - (5) Class D felonies

- Sentence
  - Death
  - Life Imprisonment
  - 1-30 years
  - 1-20 years
  - 1-10 years

- Class misdemeanors
  - (1) Class A misdemeanors
  - (2) Class B misdemeanors

- Sentence
  - Up to 1 year
  - Up to 60 months

- Habitual Offender was changed from life imprisonment to a 30 year additional sentence
  - No eligibility for parole
- Anyone convicted of Capital Murder, Class A felony
  - No eligibility for parole
- Good time was 50% - but no earned credit time
- Any prior felony conviction meant present sentence was non-suspendible

- After the 1977 Penal Code was adopted there have been amendments almost every year.
- Certainly, there have been new crimes and penalty enhancements over the years
- However, there have been many broad-based sentencing reductions over the years, including:
  - Changing the sentencing range of a Class C felony from 3-8 years with a 5 year presumptive to 2-8 year sentence with a 4 year presumptive (advisory)
  - Changing 2-4 year sentence for a Class D felony, with 2 years presumptive to 6 months – 3 years with 1 ½ year presumptive (advisory)

- Original 1977 version of habitual offender provided for an additional 30 year sentence regardless of what the present felony conviction is
- Present law has been amended many times to reduce penalties. It is now basically 1-3 times the penalty for the underlying offense with a maximum 30 year sentence even for higher felonies.
- 2001 amendments made statute virtually incomprehensible, particularly with regard to drug dealers.

- Original 1977 Penal Code prohibited suspension of any sentence for a felony if defendant had a prior unrelated felony conviction of any kind
- Changed several times over the years to limit non-suspendability. Now prior convictions lead to non-suspendability if prior conviction is a Class A or B felony, Class C felony was within 7 years and a Class D felony within 3 years.

- Original 1977 Penal Code allowed a trial court to impose consecutive sentences for multiple crimes.
- Changed to limit the sentence if multiple offenses arose from an "episode of criminal conduct." Exception for "crimes of violence."

- Original 1977 Penal Code provided for "good time" credit – including 50% off the sentence for good behavior
- Beginning in 1993, the legislature began allowing for "earned" credit time for a variety of programs – up to a maximum of 4 years off a sentence

P. Robinson and M. Cahill, "Can a Model Penal Code Second Save the States from Themselves?" 1 Ohio State Journal of Criminal Law 169 (2003)

- Even among states that re-codified their criminal codes they are often "degraded" over the years by "ad hoc" amendments
- Sources of "degrading"
  - "designer offenses" – most of which are unnecessary – leads to duplication and overlap
  - "crime du jour" – reacting to news stories
    - Carjacking and robbery

- Indiana certainly has had its share of ad hoc amendments over the years, though many of the new offenses have arisen because of changes in society
  - Electronic crimes – identity theft, etc.
  - Sex crimes – perverted acts we never contemplated people committing
  - Terrorism

Problems created by this amendment process:

- New statutes drafted as if existing statutes didn't exist
- Style and format may be inconsistent with that of general offenses
- Many offenses, even serious offenses, are defined outside the criminal code
- Use undefined terms or create new definitions that conflict with pre-existing language or definitions
- Undermines clarity and predictability of previously existing general offenses

Distorts Grading Judgments

"Indeed, the entire process of amendment by piecemeal legislation generally encourages changes without regard for their impact on the overall consistency or rationality of the code."

"What is needed for rational grading is to step back, to decide how many grading categories one wants, then to sort all offenses into those offense grades, taking seriously the obligation to grade each in relation to the relative seriousness of all other offenses. All offenses can't be worse than the worst."

The Criminal Code Evaluation Commission is doing exactly that – taking a step back and looking at the entire penal code – though the article says that prosecutors, defense attorneys, judges and legislators are extremely reluctant to do so.

Step 1:
HOW MANY GRADING CATEGORIES?

Recommendation is to increase the number of grading categories.

Original Model Penal Code said that subdivision into 3 felony grades was the "absolute minimum" and that classifications in the range of 3-6 degrees of felony would fall well within the Code's recommendations.

New Model Penal Code: Sentencing §6.01

Comment (adopted in 2011)

"(c) Degrees of felonies. Relatively few states today follow the 1962 code's black-letter suggestion that felonies be classified into only three degrees. Contemporary codes with comprehensive grading schemes have typically chosen a more fine-grained approach, and include varying numbers of felony gradations, from three to ten."

"The revised code signals even greater latitude than the original codes through its use of bracketed alternatives in subsection (1). Depending on the legislative preference in a particular jurisdiction, any number of felony grades from three to ten would be reasonable according to current state practice. Indeed, no firm principle supports a stopping point precisely at ten. What the original and revised code both seek to foreclose is the proliferation of sentencing levels to the point where no sensible comparative ordering of offenses and penalty ranges is likely."

Step 2:
PROPORTIONALITY

Final Report of Indiana Sentencing Policy Study Committee (November 2004) were tasked by H.B. 1145, P.L. 140-2003 to accomplish the following:

"Evaluate the existing classification of criminal offenses into felony and misdemeanor categories. In determining the proper category for each felony and misdemeanor, the committee shall consider , to the extent that they have relevance the following:

- The nature and degree of harm likely to be caused by the offense, whether it involves property, a person, a number of persons, or a breach of the public trust
- The deterrent effect a particular classification may have on the commission of the defense;
- The current incidence of the offense in Indiana;
- The rights of the victim."

(2) Recommend structures to be used by the sentencing court in determining the most appropriate sentence to be imposed on a criminal case, including any combination of imprisonment, probation, restitution, community service, or house arrest. The committee shall also consider the:

- Nature and characteristics of the offense;
- Severity of the offense in relation to other offenses;
- Characteristics of the defendant that mitigate or aggravate the seriousness of the criminal conduct and the punishment deserved for that conduct;
- Defendant's number of prior convictions;
- Available resources and capacity of the Department of Corrections, local confinement facilities, and community based sanctions; and
- Rights of the victim."

Recommend that:

- Perhaps a general purpose clause that indicates that any future amendments to the penal code must weigh these issues
- Continuation of CCEC
- Proposed penal code changes be reviewed by CCEC or, absent special circumstances, changes to Penal Code could not be enacted.

Exhibit 2

Sentencing Grid

Class	Prosecutors	Credit
Murder	45 – 65	85%
1	20 – 50	85%
2	10 – 35	50%
3	5 – 20	50%
4	2.5 – 10	50%
5	1.5 – 5	50%
6	.5 – 2.5	50%

Class	Current	Prosecutors	Credit	CCEC
Murder	45 – 65	45 – 65	85%	45 – 75
1	20 – 50	20 – 50	85%	30 – 55
2	20 – 50	10 – 35	50%	20 – 40
3	6 – 20	5 – 20	50%	12 – 20
4	6 – 20	2.5 – 10	50%	6 – 12
5	2 – 8	1.5 – 5	50%	2 – 8
6	.5 – 3	.5 – 2.5	50%	.5 – 3

Drug Offenses

Dealing in Cocaine, Meth, Narcotics and Schedule I – III Controlled Substance

	Current	Prosecutors	CCEC
Core Offense	B Felony 6 – 20 years	Class 4 2.5 – 10 years	Level 5 2 – 8 years
Enhancement by weight	**3+ grams or more:** A Felony 20 – 50 years	**3 – 10 grams:** Class 3 5 – 20 years **10+ grams:** Class 2 10 - 35 years	**3 – 10 grams:** Level 4 6 – 12 years **10 – 28 grams:** Level 3 12 – 20 years **28+ grams:** Level 2 20 – 40 years

Dealing in Cocaine, Meth, Narcotics and Schedule I – III Controlled Substance

	Current	Prosecutors	CCEC
Other Enhancements	**A Felony: (20-50 yrs)** -Delivered to a child -1,000 ft.	**Class 3: (5-20 yrs)** -Prior dealing conviction -1,000 ft. -Firearm -Presence of a child or an endangered adult -Body armor -Mfg. Meth 1000 ft. of residence **Class 2: (10-35 yrs)** -Delivered to a child -Mfg. controlled substance serious bodily injury -3 grams AND Level 3 enhancers **Class 1: (20-50 yrs)** -Mfg. controlled substance resulting in death	**Level 4: (6-12 yrs)** -Prior dealing conviction -1,000 ft. -Firearm **Level 3: (12-20 yrs)** -3+ grams AND Level 4 enhancers OR -Delivered to a child **Level 2: (20-40 yrs)** -10-28 grams AND Level 3 enhancers **Level 1: (30-55 yrs)** -Mfg. controlled substance serious bodily injury or property damage over $10,000

Possession of Cocaine, Meth, Narcotics and Schedule I – III Controlled Substance

	Current	Prosecutors	CCEC
Core Offense	D Felony .5 – 3 years	Class 6 .5 – 2.5 years	Level 6 .5 – 3 years
Enhancement by weight	**3+ grams or more:** C Felony 2 – 8 years	**3 – 10 grams:** Class 5 1.5 – 5 years **10+ grams:** Class 4 2.5 – 10 years	**3 – 10 grams:** Level 5 2 – 8 years **10 – 28 grams:** Level 4 6 – 12 years **28+ grams:** Level 3 12 – 20 years

Possession of Cocaine, Meth, Narcotics and Schedule I – III Controlled Substance

	Current	Prosecutors	CCEC
Other Enhancements	**A felony:** **(20-50 yrs)** -3 grams AND -1,000 ft. **B felony:** **(6-20 yrs)** -1,000 ft. **C felony:** **(2-8 yrs)** -Firearm	**Class 5: (1.5-5 yrs)** -Prior dealing conviction -1,000 ft. -Firearm -Presence of a child or endangered adult -Body armor	**Level 5: (2-8 yrs)** -Prior drug offense -1,000 ft. -Firearm **Level 4: (6-12 yrs)** -3-10 grams AND -Prior drug offense; 1,000 ft. OR firearm **Level 3: (12-20 yrs)** -10-28 grams AND Level 4 enhancers

Habitual Offender Proposals

Class	Current 1-3 times advisory	Prosecutors 1-3 times underlying sentence	Credit	CCEC 1-3 times presumptive
Murder	75 – 95	75 – 95	85%	75 – 105
1	50 – 80	40 – 80	85%	60 – 85
2	50 – 80	20 – 65	85%	50 – 70
3	16 – 50	10 – 50	85%	27 – 50
4	16 – 50	5 – 30	85%	16 – 42
5	14 – 20	3 – 15	85%	3.5 – 12.5
6	2 – 7.5	1 – 7.5	85%	2 – 7.5

Exhibit 3

IPDC POSITIONS

Larry A. Landis
Executive Director
Indiana Public Defender Council

Presented to the Criminal Code Evaluation Commission
10-26-2012

CCEC Workgroup

Proportionality

Article 1, Section 16: "... All penalties shall be proportioned to the nature of the offense."

Article 1, Section 18: "The penal code shall be founded on the principles of reformation, not vindictive justice."

More Work on Proportionality

- Aiding, inducing, or causing
- Resisting law enforcement in a vehicle
- Felony-murder
- Domestic Battery - in presence of minor
- Gangs

Sentencing Issues

- Habitual offender
- Suspension of sentences
- Enhancements of numerous misd. to felonies

Theories of Punishment

Retribution
Rehabilitation
Deterrence
Incapacitation
Restoration

Article 1, Section 18: "The penal code shall be founded on the principles of reformation, not vindictive justice."

1970's Criminal Code Reform

- 1976 Penal Code
  - Abandoned rehabilitation & embraced retribution ("just deserts") and incapacitation
  - Indeterminate to Determinate
- Intent was to transfer the authority for determining release date from parole board to the sentencing judge.

How Has It Worked?

Who has more sentencing authority now, judges or prosecutors?

Prosecutors Have More, If They Want It

- All crimes charged by information.
- No preliminary hearing procedure.
- Prosecution can proceed w/o probable cause
- Binding plea agreements.
- No GP to lesser offense w/o pros. consent.
- Non-suspendible sentences.
- Sentence modification after 365 days of sentencing requires consent of prosecutor.

Where to From Here?

- 2-3 year process
- What is the future role of CCEC?
- What are the takeaways for the "PEW" Study and the Justice Reinvestment Project?
- Are we willing to admit that we are addicted to incarceration?
- Do we want to break our addiction and try to do things that work?

What is the purpose of the proposed sanction?

- Retribution
- Rehabilitation
- Deterrence
- Incapacitation
- Restoration

What Works

- re-entry
- treatment
- education
- increase arrests
- improve crime clearance rates

Thank You

Larry A. Landis
Executive Director
Indiana Public Defender Council

Analysis of Impact of Proposed Changes to the Habitual Offender Sentence

		Additional Sentence for H.O.			*Time Served*		
		Currrent	CCEC	IPAC	Currrent	CCEC	IPAC
3rd Felony	**Sent. Imposed**	**1 to 3 x advisory sentence**	**1 to 3 x advisory sentence**	**1 to 3 x sentence imposed**	**50% credit time**	**50% credit time**	**15% credit time**
D	1.5	1.5 - 4.5	1.5 - 4.5	1.5 - 4.5	.75 - 2.25	.75 - 2.25	1.3 - 3.8
D	3	1.5 - 4.5	1.5 - 4.5	3 - 9	.75 - 2.25	.75 - 2.25	2.5 - 7.7
C	4	4 - 12	4 - 12	4 - 12	2 - 6	2 - 6	3.4 - 10.2
C	8	4 - 12	4 - 12	8 - 24	2 - 6	2 - 6	6.8 - 20.4
B	10	10 - 30	10 - 30	10 - 30	5 - 15	5 - 15	8.5 - 25.5
B	15	10 - 30	10 - 30	15 - 30	5 - 15	5 - 15	12.75 - 25.5
B	20	10 - 30	10 - 30	20 - 30	5 - 15	5 - 15	17 - 25.5
A	30	30 - 30	30 - 30	30 - 30	15 - 15	15 - 15	25.5 - 25.5
A	40	30 - 30	30 - 30	30 - 30	15 - 15	15 - 15	25.5 - 25.5
A	50	30 - 30	30 - 30	30 - 30	15 - 15	15 - 15	25.5 - 25.5
Murder	55	30 - 30	30 - 30	30 - 30	15 - 15	15 - 15	25.5 - 25.5
Murder	65	30 - 30	30 - 30	30 - 30	15 - 15	15 - 15	25.5 - 25.5

CCEC Recommendations

- all Level 6 offenses (D felonies) & all drug possession offenses ineligible as 3rd or triggering offense
- all drug dealing offenses eligible as 3rd triggering offenses
- all drug possession felonies eligible as prior offenses
- Level 5 offense requires 3 or more priors if all are Level 5 or 6 offenses
- Level 5 offense requires 2 priors if one or more is a Level 4 or above.

IPAC Recommendations

- HO sentence must be served in DOC at 85%