

INDIGENCE FINDINGS IN INDIANA



***PRESENTATION BY THE IN PUBLIC
DEFENDER COMMISSION TO THE
GENERAL ASSEMBLY'S INTERIM
STUDY COMMITTEE ON
CORRECTIONS & CRIMINAL CODE
8-27-19***

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Right to a lawyer under U.S. & IN Constitution

- **Death Penalty**
- **Criminal**
- **Juvenile Delinquency**
- **Appeals**

Right to a lawyer under IN Law

- **Parents in CHINS cases**
- **Parents in Termination of Parental Rights cases**
- **Civil commitments**
- **Child support contempt**
- **Paternity**
- **Probation revocation**

INDIGENCE DETERMINATION

Province of Judge

- Decision to appoint pauper counsel lies within **exclusive province of trial court**. Poe v. State, 445 N.E.2d 94, 96 (Ind. 1983). The court's duty to appoint counsel arises at any stage of the proceedings when defendant's indigency causes him to be without assistance of counsel. **Although there is no specific financial guideline for determination of indigency, the determination must be made based on as thorough an examination of defendant's total financial picture as is practical.** Shively v. State, 912 N.E.2d 427 (Ind. Ct. App. 2009).
- Moore v. State, 273 Ind. 3, 401 N.E.2d 676, 679 (1980) (trial court must appoint counsel if defendant **legitimately lacks financial resources** to employ an attorney without imposing substantial hardship on self or family).

SHOWING REQUIRED

What Must be in the Record

- **Record must show** adequate determination of factual question of defendant's ability to afford counsel. Moore v. State, 401 N.E.2d 676, 678-79 (Ind. 1980); Mitchell v. State, 417 N.E.2d 364, 368 (Ind. Ct. App. 1981); Reese v. State, 953 N.E.2d 1207 (Ind. Ct. App. 2011).
 - (a) Determination must be based on **as thorough examination of defendant's total financial picture as is practical**.
 - (b) Record must show a balancing of assets against liabilities and a consideration of the amount of defendant's **disposable income or other resources reasonably available to him after payment of fixed obligations**.
- Graves v. State, 503 N.E.2d 1258 (Ind. Ct. App. 1987) (**defendant's ability to post bond is not determinative of non-indigency** but only a factor to be considered in deciding whether he can afford a lawyer).

FACTORS FOR JUDGE TO CONSIDER

When Appointing Counsel – IC 33-40-3-7

- (a) if a defendant or a child alleged to be a delinquent child is receiving publicly paid representation, the court shall consider:
 - (1) the person's independently held **assets and assets available** to the spouse of the person or the person's parent if the person is non-emancipated;
 - (2) the person's **income**;
 - (3) the person's **liabilities**; and
 - (4) the extent of the **burden that payment** of costs assessed under section 6 of this chapter would impose **on the person and the dependents of the person**.

WHEN SHOULD DEFENDANT BE REQUIRED TO PAY?

Examples from Indiana Cases

- Under Ind. Code § 33-40-3-6(a), **at any stage of a prosecution for a felony or a misdemeanor the court may make a finding of ability to pay the costs of representation.**
 - Parish v. State, 989 N.E.2d 831 (Ind. Ct. App. 2013) (defendant should have been required to **use the equity in his \$130,000 home** before being appointed counsel at public expense).
 - Reese v. State, 953 N.E.2d 1207 (Ind. Ct. App. 2011) (trial court erred in denying defendant's request for court-appointed counsel where it was **apparent from the record that defendant lacked the resources to employ an attorney**).
 - Shively v. State, 912 N.E.2d 427 (Ind. Ct. App. 2009) (trial court erroneously **failed to carefully consider defendant's financial situation** in either of the pre-trial hearings in which it denied appointment of counsel).
 - Gilmore v. State, 953 N.E.2d 583 (Ind. Ct. App. 2011) (**defendant's obstreperous conduct is not a proper consideration** in determining whether defendant is indigent).

IF DEFENDANT IS REQUIRED TO PAY

- **Collection of Funds (IC 33-40-3-6(b)):** Costs collected shall be deposited into the supplemental public defender services fund.
- **Costs Required to be Paid**
 - (a)(1) **Reasonable attorney's fees**, if an attorney has been appointed for the person by the court.
 - (a) (2) **Costs incurred by the county** as a result of court appointed legal services rendered to the person.

NOTE: IC 33-40-5-4 authorizes the Indiana Public Defender Commission to adopt **guidelines and standards** about the issuance and enforcement of orders requiring defendant to pay for the costs of court appointed legal representation.

FEE FOR REPRESENTATION *

At the initial hearing stage, the trial court shall order an indigent defendant to pay a **\$100 fee for a felony action**, or a **\$50 fee for a misdemeanor action**, when the trial court finds that the defendant is able to pay for part of the representation by assigned counsel.*

Without a **finding** that the defendant is not indigent, the trial court cannot exceed the statutory cap of \$100 [or \$50] for the fee under IC 35-33-7-6. **

*IC 33-40-3-6

** Turner v. State, 755 N.E.2d 194, 200 (Ind. Ct. App. 2001)

CONFLICT BETWEEN COURT RULINGS AND STATUTE?

An indigent person cannot be imprisoned for failure to pay

Statute requires indigence hearings both as to the imposition of fines, IC 35-38-1-18(a), and costs, IC 33-37-2-3(a). While indigent defendant cannot be imprisoned for failure to pay fines or costs, court *overruled* previous holdings that sentencing orders must expressly state this prohibition; **a defendant's financial resources to pay fines or costs are best determined not at initial sentencing but at the conclusion of incarceration.****

*However, IC 35-38-1-18(a) and & IC 33-37-2-3(a) clearly mandate a hearing at the time of sentencing.****

*Petty v. State, 532 N.E.2d 610, 612 (Ind. 1989)

**Whedon v. State, 765 N.E.2d 1276, 1279¹⁰ (Ind. 2002)

***Briscoe v. State, 783 N.E.2d 790 (Ind. Ct. App. 2003)

CONFLICT BETWEEN COURT RULINGS AND STATUTE?

HOWEVER, an indigent defendant may be required to pay fines and fees.*

SEE Handout: "INDIANA TRIAL COURT FEE MANUAL" for a list of potential fines and fees.

USE OF CASH BONDS POSTED BY DEFENDANT

- Cash bonds may not be used for the cost of an appeal* but may be applied to the fees set forth in statute,** less the cost of representation***.

*Hendrix v. State, 615 N.E.2d 483 (Ind. Ct. App. 1993)

**IC 35-33-8-3.1(a) (2)

***IC 35-33-8-1.5

NEW COMMUNITY SERVICE OPTION

HOUSE ENROLLED ACT 1087 (2019)

See Handout of *Indiana Lawyer* Article: “New law Allows judges to permit defendants to complete **community service or volunteer work as an offset** to court costs.”

FAILURE TO PAY COSTS

Average court costs are approximately \$185.

Costs of incarceration in county jail is approximately \$30 per day.

-Serious collateral consequences occur upon incarceration, including loss of employment, potential DCS actions regarding dependent children, etc.

Without a **finding** that the defendant is not indigent, the trial court cannot exceed the statutory cap of \$100 [or \$50] for the fee under IC 35-33-7-6. **

*IC 33-40-3-6

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ISSUES TO CONSIDER....

- Are the failure to pay fines and fees leading to probation and parole **technical rule violations** when those fees could have or should have been waived?
- Should there be a **prohibition of** turning unpaid costs into **civil judgments** without a hearing with a non-indigence finding?
- Should there be a statutory requirement that **fines and fees be re-assessed post incarceration?**



Thank you!

For further information, please contact:

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