

ANNUAL REPORT

INDIANA

PUBLIC DEFENDER

COMMISSION

2007-2008



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**ANNUAL REPORT OF THE
INDIANA PUBLIC DEFENDER COMMISSION**

2007-2008

I. STATUTORY DUTIES

The Indiana Public Defender Commission was created by the General Assembly in 1989 by P.L. 284-1989. The Commission's primary purposes are to: (1) make recommendations concerning standards for indigent defense services provided for defendants against whom the State has sought the death sentence under I.C. 35-50-2-9; (2) adopt guidelines and salary and fee schedules pursuant to which Indiana counties are eligible for reimbursement under I.C. 33-40-6; and (3) review and approve requests from county auditors for state reimbursement from the public defense fund in capital cases.

In 1993, the General Assembly amended the Commission's statute in P.L. 283-1993 and authorized reimbursement from the public defense fund of 25% of a county's net expenditures in non-capital cases.

Effective July 1, 1997, the reimbursement level in non-capital cases was amended to provide 40% reimbursement of defense services in non-capital cases, except misdemeanors.

Under I.C. 33-40-5-4, the Commission is currently mandated to do the following:

- (1) Make recommendations to the Indiana Supreme Court concerning standards for indigent defense services provided for defendants against whom the State has sought the death sentence under IC 35-50-2-9, including the following subjects:
 - (A) Determining indigency and eligibility for legal representation.
 - (B) Selection and qualifications of attorneys to represent indigent defendants at public expense.
 - (C) Determining conflicts of interest.
 - (D) Investigative, clerical, and other support services necessary to provide adequate legal representation.
- (2) Adopt guidelines and standards for indigent defense services under which counties are eligible for reimbursement under IC 33-40-6, including the following:
 - (A) Determining indigency and the eligibility for legal representation.

- (B) The issuance and enforcement of orders requiring defendants to pay for the costs of court appointed legal representation under IC 33-40-3.
 - (C) The use and expenditure of funds in the county supplemental public defender services fund established by IC 33-40-3-1.
 - (D) Qualifications of attorneys to represent indigent defendants at public expense.
 - (F) Minimum and maximum caseloads of public defender offices and contract attorneys.
- (3) Make recommendations concerning the delivery of indigent defense services in Indiana.
 - (4) Make an annual report to the Governor, the General Assembly, and the Supreme Court on the operation of the public defense fund.

The report to the general assembly under subsection (4) must be in an electronic format under IC 5-14-6.

II. COMMISSION MEMBERS

Under its original enabling legislation, the commission had seven members: three appointed by the Governor; three appointed by the Chief Justice of the Indiana Supreme Court; and one appointed by the Board of Trustees of the Indiana Criminal Justice Institute. In P.L. 283-1993, the General Assembly added four legislators to the Commission. The following is a list of the Commission members as of the date of this report and their cities of residence:

Appointments by the Governor

<u>Name</u>	<u>City</u>
David J. Hensel	Indianapolis
Peter D. Nugent	Indianapolis
Mark W. Rutherford, Chairman	Indianapolis

Appointments by the Chief Justice

<u>Name</u>	<u>City</u>
Bettye Lou Jerrel	Evansville
Hon. Diane Ross Boswell	Crown Point
VACANT	

Appointment by the Indiana Criminal Justice Institute

<u>Name</u>	<u>City</u>
Susan Carpenter	Indianapolis

Appointments by the Speaker of the House

<u>Name</u>	<u>City</u>
Rep. Amos Thomas	Brazil
Rep. Phil Hoy	Evansville

Appointments by the Senate's Pro Tempore

<u>Name</u>	<u>City</u>
Sen. Joseph C. Zakas	Granger
Sen. Timothy Lanane	Anderson

In the spring of 2007, the membership of the Commission changed substantially when five current commissioners were replaced with five new members. Governor Mitch Daniels appointed three new members, David Hensel, Peter Nugent and Mark Rutherford, replacing Norman Lefstein, Monica Foster and Les Duvall. State Representatives Ralph Foley and Bob Kuzman resigned their positions, and Speaker of the House, B. Patrick Bauer, appointed Rep. Amos Thomas of Brazil, and Rep. Phil Hoy of Evansville to fill the vacancies.

In February 2008, Judge Daniel Donohue's appointment to the Commission expired and Chief Justice Randall Shepard appointed Hon. Diane Ross Boswell, Lake County Superior Court Judge, to the Commission.

III. COMMISSION MEETINGS

During FY 2007-2008, the Commission met on September 26, 2007, December 12, 2007, March 26, 2008 and June 25, 2008.

IV. HISTORICAL SUMMARY OF COMMISSION ACTIVITIES

A. Capital Cases

The Commission held its first meeting on January 29, 1990. The Commission's primary focus during its first year was the preparation of a proposed new court rule concerning the appointment and compensation of counsel to represent defendants in capital cases. In November 1990, the Commission submitted to the Supreme Court a

proposed new court rule concerning these subjects. In June 1991, the Supreme Court issued a draft of a proposed amendment to Criminal Rule 24 regarding the appointment and compensation of counsel in capital cases, which incorporated many of the Commission's recommendations. Subsequently, the Commission submitted to the Supreme Court a written response to the Court's proposed draft rule. On October 25, 1991, the Supreme Court adopted amendments to Criminal Rule 24, effective January 1, 1992.

In 1991, the Commission adopted guidelines under which Indiana counties are eligible for reimbursement for indigent defense services in capital cases from the public defense fund under IC 33-9-14 (recodified as IC 33-40-6). These guidelines, effective January 1, 1992, require compliance with Criminal Rule 24. (The history of Criminal Rule 24 is recounted in Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and Its Implications for the Nation*, 29 Ind. L. Rev. 495 (1996).

In 1992, as a service to the trial courts and after consultation with Chief Justice Shepard, the Commission began maintaining a roster of attorneys who qualify for appointment in capital cases as either lead counsel, co-counsel, or appellate counsel based on their experience and their compliance with training requirements specified in Criminal Rule 24. The roster is intended to aid trial judges in seeking qualified counsel when a death penalty charge is filed against an indigent defendant, although trial judges may appoint attorneys who are not on the roster if they meet the qualifications specified in Criminal Rule 24. The roster was revised in the spring of 1998, with attorneys being requested to update their information. The revised roster was placed in a computer database for distribution to trial judges. In March 1999, the roster became available via the Internet, now located at <http://www.in.gov/judiciary/pdc/roster.html>. It was updated in 2008.

Also during FY 1998-1999, the Commission studied and reported to the Chief Justice regarding defense costs in several capital cases. The Commission offered to be involved, through staff, in assisting courts in budgeting for capital cases. At the request of trial court judges, the Commission also revised the form used by counties to submit claims for reimbursement in capital cases.

The Commission also amended the capital guidelines to provide for reimbursement in situations where standby counsel has been appointed for a defendant who has waived the right to counsel. The Commission requires such counsel to meet the requirements for lead counsel under Criminal Rule 24.

In FY 1999-2000, the Commission began studying the use of salaried public defenders as counsel in death penalty cases. The Marion County Public Defender Agency proposed using a full-time salaried public defender rather than an hourly paid attorney to handle death penalty cases. Subsequently, a full-time salaried public defender provision was added to Criminal Rule 24 by the Supreme Court effective January 1, 2001.

During FY 2000-2001, the Commission amended its Guidelines in capital cases to provide that requests for reimbursement be submitted within 120 days of the date the county paid the underlying invoice. This amendment resulted in timelier filing of claims and more accurate budgeting.

In FY 2004-2005, the compilation of current *Commission Guidelines Related to Capital Cases* was updated. Additionally, this publication was distributed to Indiana counties and placed on the Commission's website at <http://www.in.gov/judiciary/pdc/docs/standards/cap.pdf>. The latest Guideline was added in March 2008, approving a death penalty seminar as a qualifying training course in capital defense for Criminal Rule 24 eligibility.

B. Non-Capital Cases

Standards and Guidelines

This section recounts some of the more important developments concerning the Commission's history pertaining to non-capital indigent defense representation.

The Commission began its work on the adoption of standards for non-capital cases immediately after the enactment of P.L. 283-1993 (codified now as IC 33-40-5-4). Thus, on June 29, 1994, the Commission approved a draft of standards and authorized their distribution for comment to county auditors, commissioners, council members, judges, and public defenders. On September 1, 1994, the Commission reviewed the comments, made revisions, and adopted standards for non-capital cases, effective January 1, 1995.

On December 2, 1994, the Commission adopted a policy authorizing counties to phase in compliance with the non-capital standards on a court-by-court basis so long as the County committed itself to bringing all indigent defense services into full compliance with the standards within a reasonable period of time.

Effective July 1, 1997, the Legislature enacted P.L. 202-1997, which increased reimbursements in non-capital cases from 25% to 40% of a county's indigent defense expenses in all non-capital cases, except misdemeanors.

In February 1998, the Commission added a full time staff attorney through the Supreme Court's Division of State Court Administration. Since then at least one staff attorney has assisted the Commission in a pro-active approach to reimbursements in non-capital cases and has otherwise aided the Commission in the discharge of its duties.

On September 1, 1999, the Commission adopted a revision to Commission Standard E (4) regarding qualifications of counsel in juvenile delinquency matters. This revision gave consideration to juvenile court experience in qualifying counsel to handle juvenile delinquency matters. Previously, only adult felony experience was considered.

In FY 2003-2004, the Commission amended its Standards for Indigent Defense

Services in Non-Capital Cases, Standard J, providing new juvenile caseload standards. This was done to reflect more realistically the different demands in time and resources necessary to provide diligent representation in the various types of juvenile cases in which lawyers provide representation.

During FY 2005-2006, the compilation of the *Commission Guidelines Related to Non-Capital Cases* was updated, distributed to participating counties, and placed on the Commission's website at <http://www.in.gov/judiciary/pdc/docs/standards/non-cap.pdf>. The Commission also determined that it needed to improve its information gathering for reimbursement requests and to monitor attorney caseloads more effectively. Accordingly, standardized forms were developed for counties to use when requesting quarterly reimbursements and certifying caseload compliance. During the prior fiscal year, the Commission began a study to determine the extent of misdemeanor caseloads in counties with Chief Public Defenders. To effectuate these and other efforts, the Commission retained a second full-time staff attorney.

In addition, during FY 2005-2006, eliminating two categories on the Commission's caseload tracking form, "Non-Capital Murder and all felonies" and "Class D felonies and misdemeanors," amended Standard J. The category of "All Felonies (for use in CR24 compliance only)" was added. The purpose of this amendment was to provide a more accurate and uniform tracking system for new cases assigned to county indigent defense attorneys. The Commission's standards are available at <http://www.in.gov/judiciary/pdc/docs/standards/indigent-defense-non-cap.pdf>.

The Commission also adopted a guideline for the submission of non-capital claims pursuant to which financial penalties were established for claims that are filed late. The new guideline requires counties to submit non-capital claims not later than forty-five days after the end of the calendar quarter in which they were incurred. This change has provided a more orderly and predictable report schedule.

On July 13, 2006, the Commission approved a guideline that authorizes counties to explain and justify their accounting for non-reimbursable expenses in lieu of the Commission computing such expenses pursuant to a static mathematical formula. Non-reimbursable expenses include, for example, those incurred by a county for the appointment of a defense attorney for misdemeanor offenses and contempt charges in civil cases. Use of the prior formula penalized some counties by weighing more heavily their non-reimbursable cases than would be justified based upon examination of their actual non-reimbursable expenditures; and, conversely, the formula awarded some counties additional funds to which they would not be entitled if only *actual* non-reimbursable expenses were considered.

Finally, on April 11, 2007, a guideline for defining a 12-month period (referred to in Standard J) was adopted by the Commission. The 12-month period is not a calendar year, but a continuous, or rolling 12-month period for purposes of tracking compliance to Standard J's maximum caseloads being handled by public defense attorneys.

County Participation

The General Assembly approved an increase in the Commission's appropriation from \$2.4 million per year to \$6.0 million for fiscal year 2001-2002 and \$7.0 million for fiscal year 2002-2003. The General Assembly approved an increase in the Commission's appropriation to \$8 million for 2004-2005, \$9.0 million in 2005-2006, and \$10 million in 2006-2007. In the spring of 2007, the legislature approved increases to \$14.5 million for the Public Defense Fund in FY 07-08, and \$15.25 million in FY 08-09. These increased appropriations were essential in order to accommodate the growth in the number of counties participating in the non-capital reimbursement programs.

During fiscal year 2000-2001, eleven additional counties became eligible for reimbursements: Adams, Carroll, Jay, Kosciusko, Monroe, Noble, Rush, Steuben, Vanderburgh, Washington and White. At the close of the fiscal year, 48 counties were eligible to receive payments related to non-capital cases. Staff for the Commission continued to make presentations to counties regarding participation in the reimbursement program. Meetings were conducted throughout the year with officials of thirty counties, as interest in participating in the reimbursement program continued to grow. However, due to rapid growth in the number of participating counties, the total dollar amount of claims began to exceed the amount available in the Fund to pay them.

Nevertheless, in 2001-2002, two new counties, Pike and Perry, became eligible for reimbursements in non-capital cases. This raised the number of approved counties to fifty. That year also saw suspension of non-capital claims, as required by statute. In June 2002, the suspended claims were prorated and payments made, though about \$1.2 million in claims could not be paid because funding was insufficient to pay all claims in full. (During the year, Marion County achieved full compliance with Commission non-capital standards, by reducing the caseloads of its attorneys in its Class D felony courts.)

In FY 2003-04, three additional counties, Allen, Grant, and Tippecanoe, became eligible for reimbursements, bringing the total to fifty-three counties eligible for non-capital reimbursements. No additional counties became eligible for reimbursements during FY 2004-2005. In FY 2005-2006, Howard County submitted their Comprehensive Plan for defense services, and the Commission approved it. The following year, Wabash and St. Joseph Counties' Comprehensive Plans were approved. At the end of FY 2006-2007, fifty-seven counties were eligible for non-capital reimbursements.

In FY07-08, enforcement of Commission Standards to caseload maximums allowable in a 12-month period resulted in the termination of one county's eligibility for non-capital reimbursement from the public defense fund. Fifty-six counties remain eligible for non-capital reimbursements. (Appendix A contains a table showing all of the counties currently eligible for state reimbursements in non-capital cases.)

V. PUBLIC DEFENSE FUND (IC 33-40-6)

State reimbursement to the counties is paid from the public defense fund, which is a dedicated, non-reverting state fund created in 1989 pursuant to I.C. 33-9-14.

Originally, the public defense fund received an annual appropriation of \$650,000. In 1995, the General Assembly increased the annual appropriation from the state general fund to the public defense fund to \$1.25 million for FY 1995-97. Effective July 1, 1997 the annual appropriation was increased to a total of \$3 million for the biennium. For the biennium beginning July 1, 1999, the annual appropriation was set at \$2.4 million per year. For the fiscal year beginning July 1, 2001, the appropriation was increased to \$6 million, with the appropriation for the following fiscal year set at \$7 million. For the fiscal years beginning July 1, 2004 and July 1, 2005, the annual appropriation was increased to \$8 million and \$9 million, respectively. For FY 06-07, the annual fund appropriation was \$10 million dollars. The General Assembly increased the annual appropriation \$4.5 million dollars in FY 07-08, giving the Public Defense Fund \$14.5 million dollars to distribute to the counties for a portion of their public defense costs. (For the fund balance as of July 1, 2008, see "Fiscal Report," Appendix B.)

The state reimbursement to the counties from the Public Defense Fund is the only state assistance given to the counties for their expenditures in providing indigent defense services. In contrast, the state contributes approximately \$50.7 million for judges' salaries and \$23.8 million for prosecutors' salaries.

A request from a county for state reimbursement is initiated by a written request from the county auditor to the Commission for reimbursement for the certified expenditures paid by the county for indigent defense services in capital and non-capital cases. Upon determination by the Commission that the county auditor's request is in compliance with Commission guidelines, the state court administrator certifies to the state auditor that the county should receive 50% of its approved expenditures for indigent defense services in the capital case. The state auditor then issues a warrant to the state treasurer for payment from the Public Defense Fund to the county for the amount certified. This same procedure is used for reimbursing counties up to 40% of their expenditures in non-capital cases.

In FY 06-07, the Commission was able to reimburse the program counties 40% of their non-capital requests for reimbursement for the first and third quarter public defense expenses, and 25.3% for the second quarter of 2006. The fourth quarter of 2006 saw the largest prorating of the non-capital reimbursement requests in the history of the Commission; the reimbursement was only 18.3% of the program counties' requests. The average reimbursement for this fiscal year was 30.9% of the reimbursement requests submitted by the qualified counties.

In FY 07-08, The Commission reimbursed program counties 40% of the amount requested for non-capital expenses in two of the four quarters. The other two quarters had to be prorated at 39.8% and 33.85%. Considering all four quarters of FY07-08, counties' that requested and qualified for reimbursement received an average 38.41% return on public defense expenses. Requests for reimbursement of public defense

expenses in capital cases are the first to be considered for payment, and are always reimbursed by the Public Defense Fund at 50% of a county's capital claims.

To assist the counties with state funds to help cover the costs of death penalty cases, the Commission approved reimbursements totaling \$755,126.85 for public defense expenditures in capital cases. (Appendix C shows reimbursements to counties in capital cases, FY07-08.)

Also in FY 07-08, the Commission returned \$13,586,669.15 to the counties in the public defense program for expenditures in non-capital cases. (Appendix D shows reimbursements to counties in non-capital cases.)

APPENDIX A

County Eligibility Status for Reimbursement in Non-capital Cases as of June 30, 2008:

County	Ordinance Adopted	P.D. Board Established	Comprehensive Plan Adopted	Plan Approved By Commission
1 ADAMS	X	X	X	X
2 ALLEN	X	X	X	X
3 BENTON	*	*	X	X
4 BLACKFORD	X	X	X	X
5 CARROLL	X	X	X	X
6 CLARK	X	X	X	X
7 CRAWFORD	*	*	X	X
8 DECATUR	X	X	X	X
9 FAYETTE	X	X	X	X
10 FLOYD	X	X	X	X
11 FOUNTAIN	X	X	X	X
12 FULTON	X	X	X	X
13 GRANT	X	X	X	X
14 GREENE	X	X	X	X
15 HANCOCK	X	X	X	X
16 HENRY	X	X	X	X
17 HOWARD	X	X	X	X
18 JASPER	X	X	X	X
19 JAY	X	X	X	X
20 JENNINGS	X	X	X	X
21 KNOX	X	X	X	X
22 KOSCIUSKO	X	X	X	X
23 LAKE	X	X	X	X
24 LaPORTE	X	X	X	X
25 MADISON	X	X	X	X
26 MARION	X	X	X	X
27 MARTIN	*	*	X	X
28 MIAMI	X	X	X	X
29 MONROE	X	X	X	X
30 MONTGOMERY	X	X	X	X
31 NEWTON	X	X	X	X
32 NOBLE	X	X	X	X
33 OHIO	*	*	X	X
34 ORANGE	X	X	X	X
35 PARKE	X	X	X	X
36 PERRY	X	X	X	X
37 PIKE	X	X	X	X
38 PULASKI	X	X	X	X
39 RUSH	X	X	X	X
40 ST. JOSEPH	X	X	X	X
41 SCOTT	X	X	X	X
42 SHELBY	X	X	X	X
43 SPENCER	X	X	X	X
44 STEUBEN	X	X	X	X
45 SULLIVAN	X	X	X	X
46 SWITZERLAND	*	*	X	X
47 TIPPECANOE	X	X	X	X

48 UNION	*	*	X	X
49 VANDERBURGH	X	X	X	X
50 VERMILLION	X	X	X	X
51 VIGO	X	X	X	X
52 WABASH	X	X	X	X
53 WARREN	*	*	X	X
54 WASHINGTON	X	X	X	X
55 WELLS	X			
56 WHITE	X	X	X	X

* Board not required for counties with populations fewer than 12,000.

APPENDIX B

PUBLIC DEFENSE FUND Fiscal Report FY 2006-2007

Category	Allotted	Expended	Balance
1 Personal Services	159,842.00	136,535.11	23,306.89
2 Services other than personal	1,600.00	1,407.96	192.04
3 Services by Contract	1,500.00	652.58	847.42
4 Materials and Supplies	200.00	1,932.49	(1,732.49)
5 Equipment	0.00	0.00	0.00
6 Land and Structures	0.00	0.00	0.00
7 Grants, subsidies, refunds	14,329,358.00	14,341,796.00	(12,438.00)
8 In-state Travel	7,500.00	2,237.00	5,363.00
9 Out-of-state Travel	0.00	2,055.98	(2,055.98)
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TOTALS	<u>14,500,000.00</u>	<u>14,486,617.12</u>	<u>13,382.88</u>
			13,382.88
Beginning Balance		45,104.23	
Allotment	14,486,617.12		
Unused Appropriation	<u>13,382.88</u>		
Total Appropriation		14,500,000.00	
Less Expenditures		<u>(14,486,718.12)</u>	
Fund Balance 6/30/08		58,487.11	

APPENDIX C

Reimbursements in Capital Cases

2007-2008

County	Defendant		
Allen	Rios		\$84,059.73
Clark	Melcher		\$708.95
Fulton	Baker		\$35,121.26
Lake	Aki-Khaum		\$104,213.23
	Azania		\$7,767.56
Madison	Baer		\$1,396.14
Marion	Adams		\$1,370.64
	Allen		\$62,3990.92
	Turner		\$115,733.99
	Voss		\$10,137.25
Parke	Cottrell		\$39,142.14
Pike	Harbison		\$10,897.16
Spencer	Ward		\$117,633.24
Vanderburgh	Wilkes		\$150,794.68
Vigo	Walker		\$13,759.96
TOTAL			\$755,126.85

APPENDIX D

NON-CAPITAL REMBURSEMENTS 2007-08

COUNTY	NONCAPITAL REIMBURSEMENT PAID 2007-2008
ADAMS	\$70,332.17
ALLEN	\$977,416.47
BENTON	\$13,542.96
BLACKFORD	\$35,497.99
CLARK	\$150,173.43
DECATUR	\$35,870.04
FAYETTE	\$104,187.62
FLOYD	\$158,948.69
FOUNTAIN	\$30,806.56
FULTON	\$49,415.90
GRANT	\$299,214.65
GREENE	\$101,237.94
HANCOCK	\$101,761.03
HENRY	\$117,460.14
HOWARD	\$471,597.01
JASPER	\$48,353.70
JAY	\$59,202.14
JENNINGS	\$43,879.04
KNOX	\$149,630.51
KOSCIUSKO	\$116,092.47
LAKE	\$1,347,087.82
LaPORTE	\$156,355.44
MADISON	\$539,291.63
MARION	\$5,025,568.07
MARTIN	\$17,329.29
MONROE	\$345,288.91
MONTGOMERY	\$75,577.22
NOBLE	\$100,536.00
OHIO	\$15,104.54
ORANGE	\$70,737.41
PARKE	\$33,664.31
PERRY	\$73,896.88
PIKE	\$72,491.70
PULASKI	\$72,155.99
RUSH	\$45,147.02
ST. JOSEPH	\$328,755.13
SCOTT	\$69,729.86
SHELBY	\$109,343.29
SPENCER	\$24,454.88
STEUBEN	\$73,964.90

SULLIVAN	\$22,001.99
SWITZERLAND	\$54,905.23
TIPPECANOE	\$345,663.72
VANDEBURGH	\$701,028.03
VERMILLION	\$26,422.73
VIGO	\$463,346.43
WABASH	\$37,693.52
WARREN	\$6,172.84
WASHINGTON	\$143,240.97
WHITLEY	\$55,092.94
TOTAL	\$ 13,586,669.15