

CHAPTER SIX

COURT COSTS, FINES, RESTITUTION AND OTHER PUNISHMENTS

I. COSTS

A. IN GENERAL

1. What costs may be imposed

A defendant is liable for court costs upon conviction when there is specific authorization by the legislature to impose the costs. Ind. Code § 33-37-4-1, Ind. Code § 33-37-4-2, or Ind. Code § 33-37-4-3. Ind. Code § 33-37-2-2 makes clear court costs are not part of a criminal sentence. Therefore, a defendant's belated attempt to challenge court costs through a *pro se* motion to correct erroneous sentence is not proper. Godby v. State, 976 N.E.2d 1235 (Ind. Ct. App. 2012).

Only the specifically enumerated costs may be assessed upon a defendant, absent other statutes authorizing payment of such costs.

Cranor v. State, 699 N.E.2d 284, 287 (Ind. Ct. App. 1998) (no authorization for "jury costs").

Creekmore v. State, 858 N.E.2d 230 (Ind. Ct. App. 2006) (no authorization for a "general prosecutor's collection fee"); See also Gooch v. State, 685 N.E.2d 152, 155 (Ind. Ct. App. 1997).

However, a fee may be authorized under the Indiana Home Rule - which grants, pursuant to Ind. Code § 36-1-3-2, units of government the powers they need for the effective operation of government as to local affairs - and a valid county ordinance, even when such fee is not otherwise authorized. Creekmore v. State, 858 N.E.2d 230 (Ind. Ct. App. 2006).

2. When costs may not be imposed

Defendant is not liable for costs if acquitted or if charge(s) are dismissed by order of court. Ind. Code § 33-37-2-2(b). Although this includes reversals by appellate courts, certain fees may not be refundable upon a reversal.

Brantley v. State, 769 N.E.2d 676 (Ind. Ct. App. 2002) (court refused to refund community corrections fees totaling \$2,415, since defendant received benefit of placement in lieu of incarceration, which was a privilege and not a right).

Nelson v. Colorado, 137 S. Ct. 1249 (2017) (when a criminal conviction is invalidated by appellate court and no retrial will occur, State is obligated to refund fees, court costs, and restitution exacted from defendant as a consequence of conviction).

Defendant is not liable for any ordinance violation costs fee in an action in which he/she was charged with ordinance violation subject to IC 33-36; defendant denied violation under IC

33-36-3; proceedings in court against defendant were initiated under IC 34-28-5 (or IC 34-4-32 before its repeal), and defendant was tried, and court entered judgment for defendant for violation. Ind. Code § 33-37-4-2(d).

If the defendant is convicted of two or more offenses - which are joined for trial - the court may waive the defendant's liability for costs for all but one of the offenses. Ind. Code § 33-37-2-2(a).

If a defendant committed the offense while an inmate at a correctional facility and the trial occurs in the county in which the correctional facility is located, the costs of the trial are to be paid by the State, including court fees and expenses incurred by the county in returning the defendant to the court and keeping the defendant in custody pending trial. Ind. Code § 33-37-2-4.

Also, costs may not be imposed upon an indigent defendant (see section V on page 6-36) and they may be suspended until a defendant completes his sentence (see section I.C.1.b on page 6-12).

3. Improper delegation of authority to impose costs and fees

The statutes pertaining to imposition of court costs and fees give the trial court, not the probation department, the discretionary authority to impose probation fees. Thus, it is an abuse of discretion for trial court to direct the probation department to assess the fees. Whitaker v. State, 87 N.E.3d 1139 (Ind. Ct. App. 2017). If the probation department later wants to alter the fees imposed by trial court, it must petition the trial court to increase the probation fees and demonstrate that there was a change in financial ability of the probationer while on probation. Ind. Code § 35-38-2-1.7(b). See also Burnett v. State, 74 N.E.3d 1221 (Ind. Ct. App. 2017).

Further, the practice of a probation department submitting a memo to the trial court post-sentencing and without notice to the defendant requesting imposition of probation fees impedes the interest of criminal defendants in the transparency of judicial proceedings. Ross v. State, 150 N.E.3d 233 (Ind. Ct. App. 2020).

Coleman v. State, 61 N.E.3d 390 (Ind. Ct. App. 2016) (vacating probation fees imposed by probation department where the sentencing order did not list any such fees, and the probation order included "ordered amount" sections that were either blacked out or blank).

De La Cruz v. State, 80 N.E.3d 210, 215 (Ind. Ct. App. 2017) (local rule does not operate as an order for probation fees).

Amick v. State, 126 N.E.3d 909 (Ind. Ct. App. 2019) (I.C. 35-38-2.5-6(7) clearly indicates that the trial court is to determine home detention fees, not community corrections; thus, Court remanded to trial court for an opportunity to approve or clarify its intent regarding Community Corrections assessment of sliding scale fee schedule of \$3,680 for home detention fees and costs).

B. AMOUNT

1. Criminal costs fee

a. Felonies and misdemeanors

If the defendant is convicted of a felony pursuant to Ind. Code § 35-50-2, or a misdemeanor pursuant to Ind. Code § 35-50-3, the criminal costs fee is \$120. Ind. Code § 33-37-4-1(a).

If the defendant enters into a pretrial diversion agreement pursuant to Ind. Code § 33-39-1-8, and the agreement requires a payment of fees by the defendant, the clerk shall collect a pretrial diversion program fee instead of the criminal costs fee under IC 33-37-4-1(a). Ind. Code § 33-37-4-1(c).

The pretrial diversion program fee is: (1) an initial user's fee of fifty dollars (\$50) for a misdemeanor offense; (2) seventy-five (\$75) for a felony offense; (3) a monthly user's fee of twenty dollars (\$20) for each month that the person remains in the pretrial diversion program; and (4) any additional program fee or cost that is reasonably related to the person's rehabilitation and approved by the court. A monthly user fee may not be collected beyond the maximum length of the possible sentence. Id.

b. Infractions or ordinance violations

For each action that results in a judgment for a violation constituting an infraction or a municipal ordinance (as defined in IC 36-1-2-10), the defendant is required to pay a court costs fee of \$70. Ind. Code § 33-37-4-2(a).

If the defendant enters into a deferral program agreement pursuant to Ind. Code § 34-28-5-1 (or IC 34-4-32-1 before its repeal), and the agreement provides for payment of fees, the clerk shall collect a deferral program fee. Ind. Code § 33-37-4-2(e). The deferral program fee is: (1) an initial user's fee not to exceed \$52; and (2) a monthly user's fee not to exceed \$10 for each month the person remains in the deferral program. Id.

c. Juvenile adjudications/CHINS and paternity

For each action filed under IC 31-34 (CHINS), IC 31-37 (delinquency), or IC 31-14 (paternity), the juvenile costs fee is \$120. Ind. Code § 33-37-4-3(a).

2. Additional fees

In addition to the court costs fee above, additional fees shall be applied from a list of statutorily enumerated fees. There is a total of 22 different additional fees, but whether or not one of the additional fees applies depends upon whether the action is criminal under IC 33-37-4-1, an infraction or ordinance violation under IC 33-37-4-2, or a juvenile matter under IC 33-37-4-3. All of these additional fees are contained in Ind. Code § 33-37-5. The chart below contains a list of the different fees, along with a reference to where the fee is discussed in this manual, and the different types of proceedings on which they can be imposed.

| Additional Fees Under Ind. Code § 33-37-5 | | |
|---|---|---------------------|
| § | Fee | When Applicable |
| f | Alcohol & Drug Countermeasures Fee (Ind. Code § 33-37-5-10) | Crim, Infr/Ord, Juv |
| c | Alcohol & Drug Services Program Fee (Ind. Code § 33-37-5-8(b)) | Crim, Infr/Ord, Juv |
| l | Automated Record Keeping Fee (Ind. Code § 33-37-5-21) | Crim, Infr/Ord, Juv |
| g | Child Abuse Prevention Fee (Ind. Code § 33-37-5-12) | Crim |
| r | Court Administration Fee (Ind. Code § 33-37-5-27) | Crim, Infr/Ord, Juv |
| j | Deferred Prosecution Fee (Ind. Code § 33-37-5-17) | Crim, Infr/Ord, Juv |
| s | DNA Sample Processing Fee (Ind. Code § 33-37-5-26.2) | Crim, Infr/Ord, Juv |
| a | Document Fee (Ind. Code § 33-37-5-1, § 33-37-5-3, or § 33-37-5-4) | Crim, Infr/Ord, Juv |
| k | Document Storage Fee (Ind. Code § 33-37-5-20) | Crim, Infr/Ord, Juv |
| h | Domestic Violence Prevention & Treatment Fee (Ind. Code § 33-37-5-13) | Crim |
| e | Drug Abuse, Prosecution, Interdiction & Correction Fee (Ind. Code § 33-37-5-9) | Crim |
| i | Highway Worksite Zone Fee (Ind. Code § 33-37-5-14) | Crim, Infr/Ord |
| p | Judicial Insurance Adjustment Fee (Ind. Code § 33-37-5-25) | Crim, Infr/Ord, Juv |
| q | Judicial Salaries Fee (Ind. Code § 33-37-5-26(c)) | Crim, Infr/Ord, Juv |
| t | Jury Fee (Ind. Code § 33-37-5-19) | Crim, Infr/Ord |
| m | Late Payment Fee (Ind. Code § 33-37-5-22) | Crim, Infr/Ord, Juv |
| d | Law Enforcement Continuing Education Fee (Ind. Code § 33-37-5-8(c)) | Crim, Infr/Ord, Juv |
| b | Marijuana Eradication Program Fee (Ind. Code § 33-37-5-7) | Crim, Juv |
| o | Public Defense Administration Fee (Ind. Code § 33-37-5-21.2) | Crim, Infr/Ord, Juv |
| u | Safe Schools Fee (Ind. Code § 33-37-5-18) | Crim |
| n | Sexual Assault Victims Assistance Fee (Ind. Code § 33-37-5-23) | Crim |

a. Document fees

The court shall collect a document fee of one dollar per page, or less if a municipal ordinance says otherwise, for preparing a transcript or copy of any record. Ind. Code § 33-37-5-1.

The court shall also collect a document fee of three dollars (\$3) for each certificate under seal attached in authentication of a copy of any record, paper, or transcript. Ind. Code § 33-37-5-3.

The court shall also collect a document fee of \$3 for preparing or recording a transcript of a judgment to become a lien on real estate. Ind. Code § 33-37-5-4.

b. Marijuana eradication program fee

A fee not exceeding \$300 shall be assessed if a defendant has been convicted of a controlled substance offense under IC 35-48-4 and if a weed control board has been established in the county. Ind. Code § 33-37-5-7.

c. Alcohol and drug services program fee

Subject to Ind. Code § 12-23-14-16(d), a fee shall be assessed against defendants convicted of a criminal offense, infraction, or ordinance violation for alcohol and drug services program in counties which have established such a program under IC 12-23-14-16. Ind. Code § 33-37-5-8(b).

d. Law enforcement continuing education program fee

A fee of four (4) dollars shall be collected as a Law Enforcement Continuing Education program fee in any action against defendants convicted of a criminal offense, infraction, or an ordinance violation. Ind. Code § 33-37-5-8(c).

e. Drug abuse, prosecution, interdiction and correction fee

A fee of at least \$200 and not more than \$1,000 shall be assessed against a person convicted of a controlled substance offense under IC 35-48-4. Ind. Code § 33-37-5-9(b). See also Creekmore v. State, 853 N.E.2d 523 (Ind. Ct. App. 2003). In assessing the fee, a court shall consider the person's ability to pay the fee. Ind. Code 33-37-5-9(c). See also Everroad v. State, 730 N.E.2d 222 (Ind. Ct. App. 2000).

The minimum fee of \$200 is mandatory, and a court is not required to assess a defendant's ability to pay if they only impose the minimum fee. Taylor v. State, 786 N.E.2d 285, 287-88 (Ind. Ct. App. 2003).

The maximum fee of \$1,000 is per person, regardless of the number of applicable offenses of which he is convicted in anyone proceeding. Goffinet v. State, 775 N.E.2d 1227, 1235 (Ind. Ct. App. 2002).

f. Alcohol and drug countermeasures fee

A fee of \$200 shall be collected as an Alcohol and Drug Countermeasures fee in any action against persons found to have committed a criminal offense relating to operating a vehicle while intoxicated under Ind. Code § 9-30-5, violated a statute defining an infraction under IC 9-30-5, or adjudicated a delinquent for operating a vehicle while intoxicated under IC 9-30-5 and the person's driving privileges are suspended by the court as a result of the finding. Ind. Code § 33-37-5-10(a).

However, if a person is charged with operating a vehicle while intoxicated under IC 9-30-5, enters into a plea agreement for a lesser charge of reckless driving or public intoxication, and agrees to pay the Alcohol and Drug Countermeasures fee, the court shall collect a fee of \$200. Ind. Code § 33-37-5-10(b).

g. Child abuse prevention fee

Pursuant to Ind. Code § 33-37-5-12, A fee of \$100 shall be collected as a Child Abuse Prevention Fee in each criminal action in which a person is found to have committed the following offenses involving a victim under the age of 18:

- (a) Murder (Ind. Code § 35-42-1-1);
- (b) Causing Suicide (Ind. Code § 35-42-1-2);
- (c) Voluntary Manslaughter (Ind. Code § 35-42-1-3);
- (d) Reckless Homicide (Ind. Code § 35-42-1-5);
- (e) Battery (Ind. Code § 35-42-2-1);
- (f) Strangulation (Ind. Code § 35-42-2-9);
- (g) Domestic Battery (Ind. Code § 35-42-2-1.3);
- (h) Aggravated Battery (Ind. Code § 35-42-2-1.5);
- (i) Rape (Ind. Code § 35-42-4-1);
- (j) Criminal Deviate Conduct (Ind. Code § 35-42-4-2) - (repealed);
- (k) Child Molesting (Ind. Code § 35-42-4-3);
- (l) Child Exploitation (Ind. Code § 35-42-4-4);
- (m) Vicarious Sexual Gratification (Ind. Code § 35-42-4-5);
- (n) Child Solicitation (Ind. Code § 35-42-4-6);
- (o) Incest (Ind. Code § 35-46-1-3);
- (p) Neglect of a dependent (Ind. Code § 35-46-1-4);
- (q) Child Selling (Ind. Code § 35-46-1-4); or
- (r) Child Seduction (Ind. Code § 35-42-4-7).

h. Domestic violence prevention and treatment fee

Pursuant to Ind. Code § 33-37-5-13, a fee of \$50 shall be collected as a Domestic Violence Prevention and Treatment Fee in each criminal action in which a person is found to have committed the following offenses involving a victim who is a spouse or former spouse of the person who committed the offense, or in the case of domestic battery, is or was living as if a spouse or has a child in common with the person who committed the offense:

- (a) Murder (Ind. Code § 35-42-1-1);
- (b) Causing Suicide (Ind. Code § 35-42-1-2);
- (c) Voluntary Manslaughter (Ind. Code § 35-42-1-3);
- (d) Reckless Homicide (Ind. Code § 35-42-1-5);
- (e) Battery (Ind. Code § 35-42-2-1);
- (f) Domestic Battery (Ind. Code § 35-42-2-1.3);
- (g) Strangulation (Ind. Code § 35-42-2-9); or

(h) Rape (Ind. Code § 35-42-4-1).

i. Highway work zone fee

The clerk shall collect a highway worksite zone fee of fifty cents if a person is found to have committed a criminal, infraction, or ordinance violation that is a traffic offense under IC 9-13-2-183. Ind. Code § 33-37-5-14.

However, the clerk shall collect a fee of twenty-five dollars and fifty cents if the violation is exceeding a worksite speed limit (IC 9-21-5-2 and authorized by IC 9-21-5-3) or failure to merge (IC 9-21-8-7.5) and the judge orders the clerk to collect the fee for exceeding a worksite speed limit or failure to merge. Ind. Code § 33-37-5-14.

j. Deferred prosecution fees

If the court defers prosecution under IC 33-39-1-8, the clerk shall collect from the defendant a fee of \$120 for court costs and any applicable user or program fees described under IC 33-39-1-8(f) or (h). Ind. Code § 33-37-5-17.

k. Document storage fee

In all civil, criminal, infraction, and ordinance violations, the clerk shall collect a document storage fee of five dollars (\$5) after June 30, 2015. Ind. Code § 33-37-5-20.

l. Automated record keeping fee

In all civil, criminal, infraction, and ordinance violations, the clerk shall collect an automated record keeping fee of twenty dollars after June 30, 2017. Ind. Code § 33-37-5-21(b)(1).

However, the fee is only five dollars if the accused enters into a pretrial diversion program agreement under IC 33-39-1-8 or a deferral program agreement under IC 34-28-5-1. Ind. Code § 33-37-5-21(b)(2).

m. Late payment fee

In all criminal, infraction, ordinance, or juvenile actions, the clerk shall assess a Late Payment fee of \$25 if a person is required to pay court costs, fees, fines, or a civil penalty, that person is not determined to be indigent, and fails to pay the court costs, fees, fines, or civil penalties by the end of business day on which the court enters the judgment or conviction or the end of the period specified in a payment schedule. Ind. Code § 33-37-5-22(a).

A late fee only applies if a court adopts a local rule to impose a late penalty upon defendants that meet the criteria of IC 33-37-5-22(a). Ind. Code § 33-37-5-22(c).

Notwithstanding Ind. Code § 33-37-2-2, a court may suspend a late payment fee if the court finds that the defendant has demonstrated good cause for failure to make a timely payment of court costs, a fine, or a civil penalty. Ind. Code § 33-37-5-22(d).

n. Sexual Assault Victims Assistance fee

Pursuant to Ind. Code § 33-37-5-23(b), the court shall assess a Sexual Assault Victims Assistance fee of between \$500 and \$5,000 against an individual convicted in Indiana of any of the following offenses:

- (1) Rape (IC 35-42-4-1);
- (2) Criminal deviate conduct (IC 35-42-4-2) (before its repeal);
- (3) Child molesting (IC 35-42-4-3);
- (4) Child exploitation (IC 35-42-4-4(b));
- (5) Vicarious sexual gratification (IC 35-42-4-5);
- (6) Child solicitation (IC 35-42-4-6);
- (7) Child seduction (IC 35-42-4-7);
- (8) Sexual battery (IC 35-42-4-8);
- (9) Sexual misconduct with a minor as a Class A or B felony or a Level 1 or 4 felony (IC 35-42-4-9);
- (10) Incest (IC 35-46-1-3)
- (11) Promotion of human labor trafficking (IC 35-42-3.5-1);
- (12) Promotion of human sexual trafficking (IC 35-42-3.5-1.1);
- (13) Promotion of child sexual trafficking (IC 35-42-3.5-1.2(a));
- (14) Promotion of sexual trafficking of a younger child (IC 35-42-3.5-1.2(c));
- (15) Child sexual trafficking (IC 35-42-3.5-1.3);
- (16) Human trafficking (IC 35-42-3.5-1.4).

o. Public defense administration fee

The clerk shall collect a public defense administration fee of five dollars in each action in which a person is convicted of an offense, required to pay a pretrial diversion fee, or found to have committed an infraction or an ordinance. Ind. Code § 33-37-5-21.2.

NOTE: A public defense administration fee is separate and distinct from the Public Defender Reimbursement fees covered in Section II beginning on page 6-14.

p. Judicial insurance adjustment fee

The clerk shall collect a judicial insurance adjustment fee of one dollar (\$1) in each action in which a person is convicted of an offense, required to pay a pretrial diversion fee, or found to have committed an infraction or an ordinance. The clerk shall deposit the amount collected in the state general fund. Ind. Code § 33-37-5-25(b).

q. Judicial salaries fee

In each action in which a person is convicted of an offense, required to pay a pretrial diversion fee, or found to have violated an infraction or an ordinance, the clerk shall

collect a judicial salaries fee in the amount specified in the schedule in IC 33-37-5-26(d), which start at \$15 with annual increases up to \$20. Ind. Code § 33-37-5-26(c).

r. Court administration fee

In each action in which a person is convicted of an offense, required to pay a pretrial diversion fee, or found to have violated an infraction or an ordinance, the clerk shall collect a court administration fee of five dollars (\$5). Ind. Code § 33-37-5-27.

s. DNA sample processing fee

In each action in which a person is convicted of an offense, required to pay a pretrial diversion fee, or found to have violated an infraction or an ordinance, the clerk shall collect a DNA sample processing fee of three dollars (\$3). Ind. Code § 33-37-5-26.2.

t. Jury Fee

In each action in which a defendant is found to have committed a crime, violated a statute defining an infraction, or violated an ordinance of a municipal corporation, the clerk shall collect a jury fee of two dollars (\$2). Ind. Code § 33-37-5-19. A trial court is not allowed to exceed this two-dollar (\$2) fee. Jones v. State, 938 N.E.2d 1248 (Ind. Ct. App. 2010).

u. Safe schools fee

In any criminal action in which a person is convicted of an offense where possession or use of a firearm is an element of the offense, the court shall assess a fee of not less than \$200 and not more than \$1,000. Ind. Code § 33-37-5-18(a). The court must first consider the defendant's ability to pay. Ind. Code § 33-37-5-18(b).

3. Costs of extradition

Each county has an extradition fund intended to provide funding to offset the costs of extraditing criminal defendants, among other things. See Ind. Code § 35-33-14. Extradition expenses are reimbursement costs that a court may order a defendant to pay at sentencing, subject to an indigency hearing. Vestal v. State, 745 N.E.2d 249 (Ind. Ct. App. 2001), *sum. aff'd and vacated in part on other grounds*, 773 N.E.2d 805 (Ind. 2002).

The court may take this reimbursement from the bond deposit after a defendant is convicted. Maroney v. State, 849 N.E.2d 745 (Ind. Ct. App. 2006). However, if the charges are dismissed or a defendant is otherwise not convicted, a court may only order a defendant's bond deposit forfeited if the defendant fails to appear and the extradition costs are directly related to the purpose of the bond statute, which is to ensure the defendant's appearance at trial. Zanders v. State, 800 N.E.2d 942 (Ind. Ct. App. 2003).

4. Costs of incarceration

A person sentenced for a felony or misdemeanor in a county which adopted an ordinance under IC 36-2-13-15 may be required to reimburse the county for the cost of incarceration in the county jail. Ind. Code § 35-50-5-4(a). However, if the county does not pass the ordinance allowing the costs of incarceration to be passed to the defendant, the county and

the State have the sole obligation to pay for the costs of the prisoner's confinement. Everroad v. State, 730 N.E.2d 222 (Ind. Ct. App. 2000).

Thus, a person sentenced for a felony or a misdemeanor, not a juvenile subject to the jurisdiction of the juvenile court, is subject to incarceration in a county jail for a period of more than seventy-two (72) hours and is determined not to be indigent shall reimburse the county for the costs of incarceration. Ind. Code § 36-2-13-15(c).

A reimbursement order is not discharged by the completion of a sentence imposed for a felony or a misdemeanor, or by the liquidation of a person's estate by a receiver under IC 32-30-5. Ind. Code § 35-50-5-4(e).

a. Amount due

The amount a person may be ordered to reimburse under this statute for each day incarcerated is either the lesser of (1) \$30; or (2) a per diem fixed by the county's fiscal body in an amount that is reasonably related to the average daily cost of housing a person in the county jail. Ind. Code § 36-2-13-15. Only the days that a person is lawfully detained in a county jail for more than six hours is counted and multiplied by the preceding amounts. Ind. Code § 36-2-13-15(d)(1).

In addition to the cost of incarceration, a defendant may also be ordered to pay the direct cost of investigating whether he is indigent and the cost of collecting the amount for which the person is liable under this statute. Ind. Code § 26-2-13-15(d).

If the county transfers the person to another county or the department of correction under IC 35-33-11-3 (overcrowding), the per diem is equal to the per diem charged to the county under IC 35-33-11-5. Ind. Code § 36-2-13-15(e). Either way, the per diem amount cannot exceed \$30 per day pursuant to Ind. Code § 36-2-13-15(d)(1).

b. Limitations on amount due

Pursuant to Ind. Code § 35-50-5-4(c), the court shall fix an amount of reimbursement that:

- (1) may not exceed an amount the person can or will be able to pay;
- (2) does not harm the person's ability to reasonably be self-supporting or to reasonably support any dependent of the person; and
- (3) takes into consideration and gives priority to any other restitution, reparation, repayment, costs, fines, or child support obligations the person is required to pay.

The trial court is not required to make a finding regarding the defendant's ability to pay if the order to pay is in the form of a money judgment, and not attached as a condition of probation. Miller v. State, 884 N.E.2d 922 (Ind. Ct. App. 2008), *reh'g granted on other grounds*, 891 N.E.2d 58. The distinction is that a defendant may be imprisoned for failing to comply with conditions of probation, including payment of fees, but only if the court first finds that the defendant can pay the fees in the first place. Id.

PRACTICE POINTER: There are many possible constitutional problems with IC 35-50-5-4. It may violate the Double Jeopardy, Equal Protection and Due Process clauses of the Indiana and United States Constitutions. In addition, it may violate Article 1, Section 30 of the Indiana Constitution which reads “[n]o conviction shall work corruption of blood, or forfeiture of estate.” For a discussion on constitutional challenges to state reimbursement statutes, see George L. Blum, Annotation, Validity, Construction, and Application of State Statute Requiring Inmate to Reimburse Government for Expense of Incarceration, 13 A.L.R.5th 872 (1993). Further, Baker v. State, 768 N.E.2d 477 (Ind. Ct. App. 2002), supports the argument that incarceration costs cannot be ordered when only court costs are specified in a plea agreement.

5. Public defender reimbursement

Formerly covered in this section, public defender reimbursement is now addressed in a separate section (See Section II, *Public defender reimbursement*, below). In Baker v. State, 768 N.E.2d 477, 482 (Ind. Ct. App. 2002), the Court of Appeals held that IC 33-9-11.5-6 [now IC 33-40-3-6] “place[s] the fee for public defender representation in a category of ‘costs’ separate and distinct from other ‘court costs.’” Therefore, a defendant cannot be ordered to pay public defender fees where an initial plea agreement provides only for payment of court costs.

C. TIME AND MANNER FOR PAYMENT

1. Timing of payment

A court may impose costs at the time the sentence is carried out or it may suspend the costs until after a defendant’s sentence has been completed. Ind. Code § 33-37-2-3.

a. Costs imposed at time of sentence

When the court imposes costs, it shall conduct a hearing to determine whether the convicted person is indigent. Ind. Code § 33-37-2-3(a). If the person is not indigent, the court shall order that the person pay either: (1) the entire amount of costs imposed at the time sentence is pronounced; (2) the entire amount at some later date; (3) specified parts at designated intervals; or (4) the entire amount of the costs at some later date, less any amount credited for the performance of allowable community service work ordered by the court as part of the person’s sentence or as part of the person’s probation; or uncompensated volunteer work approved by the court at a nonprofit or municipal corporation that benefits the community, even if the volunteer work is not ordered by the court. Id.

b. Costs suspended until after sentence

Court costs are not part of the sentence and may be suspended only until the convicted person has completed all or part of their sentence. Ind. Code § 33-37-2-3(b). If the court suspends payment of the costs, it shall conduct a hearing at the time the costs are due to determine whether the convicted person is indigent. Id. If the court suspends payment of costs, it retains jurisdiction over the convicted person until the convicted person has paid the entire amount of the costs. Ind. Code § 33-37-2-3(c).

If the convicted person is not indigent, the court shall order the convicted person to pay the costs: (1) at the time the costs are due; (2) the entire amount at some later date; or (3) specified parts at designated intervals. Ind. Code § 33-37-2-3(b).

2. Deduction from cash deposit

When a defendant executes a bail bond by depositing cash or securities in an amount not less than ten percent (10%) of the bail and the defendant is convicted, the court may retain all or a part of the cash or securities to pay fines, costs, fees, restitution and public defender reimbursement if ordered by the court. The lesser of \$50 or ten percent of the monetary value of the deposit may be retained as an administrative fee. Ind. Code § 35-33-8-3.2(a)(2).

When a bail bond agreement is in effect, a court is not required to hold an indigency hearing before retaining the bond and using it to pay fees. Wright v. State, 949 N.E.2d 411 (Ind. Ct. App. 2011). Further, extradition costs are “costs” that can properly be taken from the cash bond deposit after a defendant is convicted. Maroney v. State, 849 N.E.2d 745 (Ind. Ct. App. 2006).

The bond can also be used to pay for the costs of representation. A bond-release agreement can allow withholding from a cash bond, and an individual posting bail, particularly a third party, must be notified of the bond forfeiture agreement when posting bond. These rules do not apply to real estate bonds.

Moreover, the trial court may not hold a portion of a criminal defendant's bond money in trust to be used toward public defender fees not yet incurred.

Sandovol v. State, 70 N.E.3d 889 (Ind. Ct. App. 2017) (trial court erred in holding the balance of defendant's bond in trust toward possible future appellate public defender fees).

a. To pay publicly paid costs of representation

Within thirty (30) days after disposition of the charges, the court that admitted the defendant to bail shall order the clerk to remit the amount of the deposit remaining under IC 35-33-8-3.2(a)(2) to the defendant. However, the clerk shall retain publicly paid costs of representation, which are the portion of attorney fees incurred by the county which are directly attributed to the defendant's defense. Obregon v. State, 703 N.E.2d 695 (Ind. Ct. App. 1998). The portion of the deposit that is not remitted to the defendant shall be deposited by the clerk in the supplemental public defender services fund established under IC 33-40-3. Ind. Code § 35-33-8-3.2(b).

Obregon v. State, 703 N.E.2d 695 (Ind. Ct. App. 1998) (although IC 35-33-7-6 limits public defender fee to \$100 for those who are not found to have ability to pay for representation, Ind. Code § 35-33-8-3.2 permits forfeiture of bond in excess of \$100).

For more on what a court can impose in regard to the cost of representation, see section II on page 6-8.

b. Bond-release agreement can allow withholding from cash bond

If the court requires the defendant to deposit cash or cash and another form of security as bail, the court may require the defendant and each person who makes the deposit on behalf of the defendant to execute an agreement that allows the court to retain all or part of the cash to pay publicly paid costs of representation and fines, costs, fees, and restitution that the court may order the defendant to pay if the defendant is convicted. Ind. Code § 35-33-8-3.2(a). The defendant must also pay the five-dollar (\$5) fee noted in IC 35-33-8-3.2(d).

c. Notification

The individual posting bail for the defendant or the defendant admitted to bail must be notified by the sheriff, court, or clerk that the defendant's deposit may be forfeited by defendant's failure to appear or retained to pay fines, costs, fees and restitution. Ind. Code § 35-33-8-3.2(a)(2). Further, a defendant has standing to object to forfeiture of a bond, regardless of whether he or a third party posted it. Cody v. State, 702 N.E.2d 364, 367 (Ind. Ct. App. 1998).

d. Exception: real estate bond

In the event of the posting of a real estate bond, the bond shall be used only to ensure the presence of the defendant at any stage of the legal proceedings but shall not be foreclosed for the payment of fines, costs, fees, or restitution. Ind. Code § 35-33-8-3.2(a)(2).

3. Alternatives to cash payments

Effective July 1, 2019, Ind. Code § 33-37-2-3(g) allows trial courts to reduce some or all of the court costs owed by a person who performs community service or approved uncompensated volunteer work under certain conditions. The amended statute specifies how the reduction is determined. Ind. Code § 33-37-2-3(i). If the defendant is sentenced pursuant to a plea agreement that requires the person to perform a specific number of hours of community service work, the court may consider only those hours of community service work that exceed the minimum requirements of the plea agreement. Ind. Code § 33-37-2-3(h).

D. DEFAULTS

If a defendant fails to fulfill his payment obligation and defaults on the payment of costs, the following options can be pursued to enforce the judgments: (a) an attorney representing the county may bring a civil action for payment of the fees; (b) the court may order detention of that person, if found not to be indigent, and be credited at a rate of \$20 per day the person is incarcerated in the county jail, until the total amount credited equals the entire amount due; or (c) the court may initiate contempt proceedings to enforce the court's order for payment of the costs. Ind. Code § 33-37-2-3(d).

II. PUBLIC DEFENDER REIMBURSEMENT

The fee for public defender representation under IC 33-40-3-6 is in a category of costs that are separate and distinct from other court costs contained within IC 33-37-5. Baker v. State, 768 N.E.2d

477 (Ind. Ct. App. 2002). The public defender reimbursement is not the same as the \$5 maximum Public Defense Administration fee under IC 33-37-5-21.2.

An indigent defendant may be subject to payment of a fee of up to \$100 if the court determines at an indigency hearing that he/she is able to pay for part of the cost of representation. Ind. Code § 35-33-7-6(c). However, if at any time during the proceedings, the court determines that a defendant is able to pay for the costs of representation, he/she may be ordered to pay for the total reasonable attorney's fees or costs incurred by the county pertaining to representation. Ind. Code § 33-40-3-6(a). A court may order reimbursement of fees under any of these two statutes, or a combination thereof. Jackson v. State, 968 N.E.2d 328, 333 (Ind. Ct. App. 2012).

However, the total fee under these two statutes, in addition to any fee imposed under IC 33-37-5-21.2 (see § I.B.2.O) cannot exceed the total cost of defense services rendered on behalf of the defendant. See Ind. Code § 33-37-2-3(e) and Ind. Code § 33-40-3-6(d).

PRACTICE POINTER: If a plea agreement only accounts for payment of "costs" or "court costs," the courts have held that these refer to the general costs under IC 33-37-4-1 and IC 33-37-4-2. Thus, if a court orders a defendant to pay for public defender reimbursement and their plea agreement only allows for payment of "costs" or "court costs," object and argue that the court may not impose such fees. See Baker v. State, 768 N.E.2d 477 (Ind. Ct. App. 2002).

A. PARTIAL FEES

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. If the court orders the defendant to pay these fees, it shall inquire at sentencing whether the defendant has paid the required amount. Ind. Code § 35-33-7-6(c). 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. Turner v. State, 755 N.E.2d 194, 200 (Ind. Ct. App. 2001).

Langdon v. State, 71 N.E.3d 1162 (Ind. Ct. App. 2018) (after imposing \$50 public defender fee at defendant's initial hearing where he was found indigent, trial court lacked statutory authority to impose a second \$50 supplemental public defender fee at sentencing hearing; trial court did not find that defendant had the ability to pay costs of representation pursuant to I.C. 33-40-3-6 or I.C. 33-37-2-3); see also Neal v. State, 131 N.E.3d 654 (Ind. Ct. App. 2019) and Holder v. State, 119 N.E.3d 621 (Ind. Ct. App. 2019).

B. TOTAL COST OF REPRESENTATION

Pursuant to Ind. Code § 33-40-3-6, if at any stage of a prosecution for a felony or a misdemeanor, the court makes a finding of ability to pay the costs of representation under IC 33-40-3-7, the court shall require payment by the person - or the person's parent, if the person is a child alleged to be a delinquent child - of (1) reasonable attorney's fees if an attorney has been appointed for the person by the court; and (2) costs incurred by the country as a result of court appointed legal services rendered to the person.

A court must make a finding related to the actual cost of defense services before the trial court may impose a fee under this statute.

Stanley v. State, 755 N.E.2d 708 (Ind. Ct. App. 2001) (trial court abused discretion in

ordering defendant to reimburse county where record contained no findings regarding actual cost of defense services rendered).

C. DETERMINATION OF ABILITY TO PAY

Pursuant to Ind. Code § 33-40-3-7, 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 unemancipated;
- (2) the person's income;
- (3) the person's liabilities;
- (4) the extent of the burden that payment of costs assessed under IC 33-40-3-6 would impose on the person and the dependents of the person.

If, after considering the factors described in IC 33-40-3-7(a), the court determines that the person is able to pay the costs of representation, the court shall enter a finding that the person is able to pay those additional costs. Ind. Code § 33-40-3-7(b).

The trial court may not enter an order to pay costs of representation under these statutes unless it makes a finding of a person's ability to pay or conducts a hearing to determine whether the defendant is indigent. May v. State, 810 N.E.2d 741 (Ind. Ct. App. 2004). In making this determination, the court must take into account both the amount of the proposed fee and the defendant's assets, income, and necessary expenses when determining whether or not the defendant is able to pay. See Ind. Code § 35-33-7-6.5(a) (2020). The court may consider that a person's eligibility for federal need-based public assistance programs constitutes sufficient evidence to establish that a person is indigent. Ind. Code § 35-33-7-6.5(b). If the court finds that the person is able to pay some of the fines, fees, and court costs, the court may prorate the person's fine, fee, and court costs, and require the person to pay an amount that the person can reasonably afford. Ind. Code § 35-33-7-6.5(b).

Jones v. State, 938 N.E.2d 1248 (Ind. Ct. App. 2010) (trial court improperly ordered defendant to pay a pauper counsel fee of \$4,527 without finding whether he was able to pay; remanded for indigency hearing).

Mathis v. State, 776 N.E.2d 1283 (Ind. Ct. App. 2002) (because defendant was indigent, and no finding had been made regarding his ability to pay, trial court only had authority to impose public defender fees in amount of \$100).

Baker v. State, 768 N.E.2d 477 (Ind. Ct. App. 2002) (trial court erred in ordering defendant to pay \$250 for public defender costs as part of plea agreement pursuant to Ind. Code 33-9-11.5-6; no showing that defendant had ability to pay for representation).

Banks v. State, 847 N.E.2d 1050 (Ind. Ct. App. 2006) (noting the confusing nature of conflicting statutes on imposing public defender fees and suggesting that a thorough legislative consideration would be helpful).

If the court finds that a defendant is indigent, it may not order he/she to pay for the costs of representation.

Hall v. State, 826 N.E.2d 99 (Ind. Ct. App. 2005) (trial court abused its discretion in finding that indigent defendant was partially able to pay costs associated with prosecuting his appeal).

LaMonte v. State, 839 N.E.2d 172 (Ind. Ct. App. 2005) (nothing in record indicated defendant's financial status changed between the time of his initial hearing, where he was determined indigent for trial purposes, to the post trial hearing where he was erroneously ordered to pay \$400 toward his appeal costs); see also Turner v. State, 755 N.E.2d 194 (Ind. Ct. App. 2001).

The court does not have the authority to order a presently indigent defendant to pay these fees based on possible future or other speculative prospective wealth. Davis v. State, 843 N.E.2d 65 (Ind. Ct. App. 2006).

Further, a court is not allowed to base a decision of ability to pay based on the financial situations of an adult defendant's parents.

Hendryx v. State, 130 Ind. 265, 29 N.E. 1131 (1892) (if parents decide they do not want to pay legal fees to defend their adult son, they are not obligated to do so).

D. TIMING OF ABILITY TO PAY DETERMINATION

Even if a defendant is ordered to pay a fee as part of a condition of probation or otherwise, but the payment is not due until after a defendant has completed his executed sentence, the trial court is not required to conduct an ability to pay determination until the payment becomes due. There is no specific requirement regarding the timing of the indigency hearing for probation costs. Meunier-Short v. State, 52 N.E.3d 927 (Ind. Ct. App. 2016).

Bex v. State, 952 N.E.2d 347 (Ind. Ct. App. 2011) (trial court did not abuse its discretion when it imposed public defender fee as a condition of probation without holding a hearing on defendant's ability to pay because fee was not due until defendant completed her executed sentence, which was four days). See also Owens v. State, 947 N.E.2d 482 (Ind. Ct. App. 2011).

Owens v. State, 947 N.E.2d 482 (Ind. Ct. App. 2011) (during sentencing, trial court does not have to determine defendant's ability to reimburse the public defender fund; issue of indigency not yet ripe for appellate review where defendant has not yet completed his executed sentence. Defendant's financial resources are more appropriately determined at the conclusion of his incarceration).

But see:

Berry v. State, 950 N.E.2d 798 (Ind. Ct. App. 2011) (issue is ripe for appellate review; trial court was required to make a finding regarding whether defendant had the ability to pay the \$100 public defender fee, remanded to trial court to do so. Court also noted that Owens appeared to consider two separate statutes and implicitly applied IC 33-37-2-3; here, because the public defender fee was imposed pursuant to Ind. Code § 35-33-7-6, trial court was required to make a finding of ability to pay).

III. FINES

A. AMOUNT OF FINE

1. Murder and other felonies

The court may fine a defendant up to \$10,000 following a conviction for murder or any felony. Ind. Code § 35-50-2-3 through 7.

2. Misdemeanors

The court may fine a defendant convicted of a misdemeanor as follows:

Class A Misdemeanor - up to \$5,000. Ind. Code § 35-50-3-2.

Class B Misdemeanor - up to \$1,000. Ind. Code § 35-50-3-3.

Class C Misdemeanor - up to \$500. Ind. Code § 35-50-3-4.

3. Alternative fine

In the alternative to the provisions concerning fines in IC 35-50, a person may be fined a sum equal to twice his pecuniary gain, or twice the pecuniary loss suffered by the victims of the offense he committed. Ind. Code § 35-50-5-2.

4. Confiscation as alternative to fine improper under Ind. Code § 35-50-2 and § 35-50-3.

Absent a statutory authorization specifically granting law enforcement the power of confiscation for an offense, a court may not order confiscation of a defendant's property in lieu of fines under IC 35-50.

Vitaniemi v. State, 440 N.E.2d 5 (Ind. Ct. App. 1982) (confiscation of defendants' firearms and digging tools was improper despite their relation to convictions for possessing loaded firearms in a state park and unlawful cutting and removal of ginseng roots in a state park; \$500 fine was only penalty permitted unless specific statutory forfeiture provision exists).

5. Role of jury in determining fine

Any fact that increased the maximum punishment authorized for a particular crime must be proved to a jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466 (2000). It is the role of the jury, not the trial judge, to determine the amount of a fine in a criminal case. Southern Union Company v. United States, 132 S. Ct. 2344 (2012).

B. SEPARATE FROM COSTS AND MUST NOT CONTRAVENE PLEA AGREEMENT

Any fine or penalty is in addition to costs. Ind. Code § 33-37-2-5. Costs are separate from fines and cannot be imposed if a plea agreement only allows for payment of costs.

Gipperich v. State, 658 N.E.2d 946 (Ind. Ct. App. 1995) (because plea agreement only allowed for payment of counseling fees for victims and payment of costs, trial court was precluded from imposing \$10,000 in fines for each felony to which defendant plead guilty).

C. SUSPENSION OF FINE

A trial court may suspend a fine and impose any reasonable condition it deems appropriate. Campbell v. State, 551 N.E.2d 1164 (Ind. Ct. App. 1990).

The trial court has discretion to give a defendant the option of payment of a fine or to make a charitable contribution. Ratliff v. State, 596 N.E.2d 241 (Ind. Ct. App. 1992). Generally, where a defendant enters into a plea in which he agrees to pay a charitable contribution in lieu of fine and the defendant chooses the recipient of the contribution, the imposition of charitable contributions will be upheld. Id. However, defendants cannot be ordered to pay fines into county funds in lieu of the fine, nor may they make charitable contributions in lieu of fines in specific offense cases, such as violations of the Sherman Act. Id.

Fordyce v. State, 569 N.E.2d 357 (Ind. Ct. App. 1991) (order providing for option of charitable contribution instead of fine was not fundamental error).

Campbell v. State, 551 N.E.2d 1164 (Ind. Ct. App. 1990) (trial court sentencing defendant for theft of university funds could require as condition for suspending fine imposed that defendant be precluded from taking charitable deduction on federal income tax return for alternative contribution made to university).

D. TIME AND MANNER OF PAYMENT

Before 2002, the Indiana Supreme Court applied the general rule that when fines or costs are imposed upon an individual, the trial court must expressly state that the defendant shall not be imprisoned for failing to pay the fine. However, Whedon v. State, 765 N.E.2d 1276, 1279 (Ind. 2002), rejected the idea that trial courts must necessarily recite an express prohibition upon imprisonment for failure to pay fines or costs because remanding every case where such a warning is not included in the sentencing order “does not substantially serve defendants or the just and efficient administration of justice.” Rather, a defendant’s financial resources are more appropriately determined at the conclusion of incarceration.

A court may then either impose a fine at sentencing, pursuant to Ind. Code § 35-38-1-18(a), suspend a fine until the end of the sentence pursuant to Ind. Code § 35-38-1-18(b), or deduct the fine from the cash bond pursuant to Ind. Code § 35-33-8-3.2.

1. Imposed fine at sentencing

Pursuant to Ind. Code § 35-38-1-18(a), except as provided in IC 35-38-1-18(b), whenever a court imposes a fine, it shall conduct a hearing to determine whether the convicted person is indigent. If the court imposes a fine and the defendant is not indigent, the court shall order: (1) the person to pay the entire amount at the time the sentence is pronounced; (2) the person to pay the entire amount at some later date; (3) the person to pay specified parts at designated intervals; or (4) at a person’s request, commitment of the person to the county jail for a period of time set by the court in lieu of a fine. Id.

If the court orders a person committed to jail under this subdivision, the person’s total confinement for the crime that resulted in the conviction must not exceed the maximum term of imprisonment prescribed for the crime under IC 35-50-2 (felonies) or IC 35-50-3 (misdemeanors). Ind. Code § 35-38-1-18(a)(4).

2. Suspended fine until end of sentence

Pursuant to Ind. Code § 35-38-1-18(b), if the court suspends payment of the fine, the court shall conduct a hearing at the time the fine is due to determine whether the convicted person is indigent. If the convicted person is not indigent, the court shall order the convicted person to pay the fine: (1) at the time the fine is due; (2) at some later date; (3) in specified parts at designated intervals; or (4) at a person's request, commitment of the person to the county jail for a period of time set by the court in lieu of a fine. Id.

If the court orders a person committed to jail under this subdivision, the person's total confinement for the crime that resulted in the conviction must not exceed the maximum term of imprisonment prescribed for the crime under IC 35-50-2 (felonies) or IC 35-50-3 (misdemeanors). Ind. Code § 35-38-1-18(a)(4).

3. Deduction from cash deposit

As of July 1, 1998, Ind. Code § 35-33-8-3.2 was added to authorize a court to retain all or a part of the cash or securities to pay fines, costs, fees, and restitution, if the defendant is convicted. See Section I., Subsection C.2, *Costs; Time and manner of payment, supra* for a more detailed discussion.

E. DEFAULT

Pursuant to Ind. Code § 35-38-1-18(d), upon any default in the payment of the fine: (1) the county attorney may bring an action on a debt for the unpaid amount; (2) the court may direct that person, if he is not indigent, be committed to the county jail and credited toward payment at the rate of \$20 for each twenty-four-hour period he is confined, until the amount paid plus the amount credited equals the entire amount due; or (3) the court may institute contempt proceedings or order the convicted person's wages, salary, and other income garnished in accordance with IC 24-4.5-5-105 to enforce the court's order for payment of the fine.

F. INAPPROPRIATE/EXCESSIVE FINE

The Excessive Fines Clause is enforceable against the States through the 14th Amendment. Timbs v. Indiana, 139 S. Ct. 682 (2019). To stay within the bounds of the Excessive Fines Clause, a use-based fine must meet two requirements: (1) the property must be the actual means by which an underlying offense was committed; and (2) the harshness of the forfeiture penalty must not be grossly disproportional to the gravity of the offense and the claimant's culpability for the property's misuse. State v. Timbs, 134 N.E.3d 12 (Ind. 2019),

State v. Timbs, 169 N.E.3d 361 (Ind. 2021) (although defendant was very blameworthy for his Land Rover's misuse, the *in rem* fine was overly harsh, significantly more punitive than remedial and the dealing in heroin crime was of lesser severity; in affirming trial court's order to return the seized \$40,000 Land Rover to Timbs, the Court declined the State's invitation to reconsider the proportionality test developed in Timbs, supra, for examining forfeitures under the Excessive Fines Clause).

Moreover, a fine can be inappropriate under Indiana Appellate Rule 7(B). Thus, an appellate court can review and reverse a fine if it is inappropriate and no reasonable person could find such fine appropriate to the particular offense and offender for which the fine was imposed. Austin v. State, 528 N.E.2d 792, 795 (Ind. Ct. App. 1988).

Cooper v. State, 831 N.E.2d 1247 (Ind. Ct. App. 2005) (\$2,500 fine in battery case was inappropriate where there was no evidence that defendant could ever pay the fine due to a loss of job because of conviction and was unable to even make home or car payments).

Johnson v. State, 845 N.E.2d 147 (Ind. Ct. App. 2006) (holding that when sentencing a defendant to the presumptive sentence, a middle-of-the-road fine of \$5,000, when compared to the \$10,000 maximum, is not inappropriate despite the fact that defendant is indigent and will not be released from prison until he is past retirement age).

Like v. State, 760 N.E.2d 1188 (Ind. Ct. App. 2002) (imposition of maximum fine of \$10,000 for class B felony was clearly, plainly, and obviously unreasonable because defendant had no other convictions and had only sold .32 grams of meth to a confidential informant); see also Beno v. State, 581 N.E.2d 922, 923 (Ind. 1991).

IV. RESTITUTION

Restitution order is entered with respect to a particular conviction in order to impress upon a criminal defendant the magnitude of loss he has caused as a result of his crime and his responsibility to make good that loss as completely as possible. Wilson v. State, 688 N.E.2d 1293, 1295-96 (Ind. Ct. App. 1997).

A. AUTHORITY AND IMPOSITION OF RESTITUTION ORDER

Order of restitution is a matter within the trial court's discretion, and Court of Appeals will only reverse when abuse of that discretion occurs. Green v. State, 811 N.E.2d 874 (Ind. Ct. App. 2004). A trial court can order restitution as a condition of probation or as part of a sentence. It may also order restitution in juvenile cases, pursuant to special rules.

While the trial court has discretion to set an amount of restitution, it is constrained by the principles of equal protection and fundamental fairness to set an amount within the person's ability to pay when restitution is made as a condition of probation. S.S. v. State, 68 N.E.3d 594 (Ind. Ct. App. 2017); M.L. v. State, 838 N.E.2d 525 (Ind. Ct. App. 2005). Further, a court is not constrained by the statute of limitations to bring civil suits when determining a criminal restitution order, which is separate and distinct from its civil counterparts.

McKenney v. State, 848 N.E.2d 1127 (Ind. Ct. App. 2006) (restitution for failure to pay child support is not prevented despite fact that order is outside statute of limitations to bring a civil suit).

1. As part of sentence

In addition to any sentence imposed under IC 35-50 for a felony or misdemeanor, the court may, as a condition of probation or without placing the person on probation, order the person to make restitution to the victim of the crime, the victim's estate, or the family of a victim who is deceased. Ind. Code § 35-50-5-3(a); Reinbold v. State, 555 N.E.2d 463, 469 (Ind. 1990). The restitution order must be imposed at sentencing. The trial court lacks jurisdiction to enhance a sentence by entering a restitution order after the sentence has already been pronounced. Wilson v. State, 688 N.E.2d 1293 (Ind. Ct. App. 1997).

2. As a condition of probation

The court may require, as a condition of probation, that the defendant make restitution or reparation to the victim of the crime for damage or injury that was sustained by the victim. When restitution is ordered as a condition of probation, the court shall fix the amount, which may not exceed an amount the person can or will be able to pay and shall fix the manner of performance. Ind. Code § 35-38-2-2.3(a)(6); Ind. Code § 35-50-5-3(a).

When a defendant is given a suspended sentence that exceeds the probationary period, a defendant is on a “quasi-probation” for as long as the suspended sentence can be revoked, and thus when a case involves a suspended sentence, but not necessarily probation, restitution can still be ordered as a condition of that suspended sentence. Smith v. State, 471 N.E.2d 1245, 1248 (Ind. Ct. App. 1984).

3. Effect of plea agreements

Generally, if the trial court accepts a plea agreement which does not include or specify that restitution will be made, the court may not impose it later at sentencing. Sinn v. State, 693 N.E.2d 78 (Ind. Ct. App. 1998). See also Disney v. State, 441 N.E.2d 489 (Ind. Ct. App. 1982) and Chapter 1, *Sentencing Authority*, Subsection I.A., *Plea agreements*. However, a trial court may award restitutions in open plea agreements. Morris v. State, 2 N.E.3d 7 (Ind. Ct. App. 2013).

A.H. v. State, 10 N.E.3d 327 (Ind. Ct. App. 2014) (rule announced in Morris also applies to juvenile cases).

Fisher v. State, 52 N.E.3d 871 (Ind. Ct. App. 2016) (statutory requirement to pay restitution for meth lab cleanup applies even if plea agreement does not call for it).

4. Effect of appellate reversal of restitution order

When the State fails to present sufficient evidence to justify the trial court’s restitution order, appellate courts should normally remand for a new hearing where the State can present new evidence. Iltzsch v. State, 981 N.E.2d 55 (Ind. 2013). Effect of reversal and remand of conviction to which restitution order is attached

Following a remand, double jeopardy does not prohibit the trial court from imposing restitution again as a condition of probation if it follows the appropriate procedures, and the order is supported by sufficient evidence. Winter v. State, 587 N.E.2d 691 (Ind. Ct. App. 1992). However, if the offense to which a restitution order attached is vacated on appeal, the trial court does not have authority on remand to add a restitution order to any remaining offenses.

Wilson v. State, 688 N.E.2d 1293 (Ind. Ct. App. 1997) (trial court is precluded from moving restitution order from one felony conviction to another where original conviction to which it was attached was subsequently vacated).

Nelson v. Colorado, 137 S.Ct. 1249 (2017) (when a criminal conviction is invalidated by appellate court and no retrial will occur, State is obligated to refund restitution, fees and court costs exacted from defendant as a consequence of conviction).

5. Mandatory restitution for meth lab cleanup

In addition to any other penalty imposed for conviction of an offense under IC 35-48-4 involving the manufacture or intent to manufacture methamphetamine, a court shall order restitution pursuant to Ind. Code § 35-50-5-3 to cover the costs of an environmental cleanup incurred by a law enforcement agency or other person as a result of the offense. Ind. Code § 35-48-4-17(a). This restitution is not discretionary, but required, and must be imposed regardless of whether the defendant's plea agreement calls for it. Fisher v. State, 52 N.E.3d 871 (Ind. Ct. App. 2016).

Bulthuis v. State, 17 N.E.3d 378 (Ind. Ct. App. 2014) (in dealing in methamphetamine prosecution, trial court properly ordered defendant to pay \$2,443 incurred by the State in removing items found in the garage that had been used to manufacture meth).

The amount collected under IC 35-48-4-17(a) shall be used to reimburse the law enforcement agency that assumed the costs associated with the environmental cleanup. Ind. Code § 35-48-4-17(b).

6. Juvenile cases

A juvenile court may order a child to pay restitution if the victim provides reasonable evidence of the victim's loss, which the child may challenge at the dispositional hearing. Ind. Code § 31-37-19-5(b)(4). The parent's ability to pay is not relevant to the restitution order.

J.H. v. State, 950 N.E.3d 731, 735 (Ind. Ct. App. 2011). Unlike criminal cases, there is no statutory requirement that the trial court inquire into whether the juvenile has the ability to pay restitution, but equal protection and fundamental fairness dictate that such an inquiry be made when restitution is a condition of probation. T.C. v. State, 839 N.E.2d 1222, 1224 (Ind. Ct. App. 2005); but see P.J. v. State, 955 N.E.2d 234, 235 (Ind. Ct. App. 2011) (no inquiry into ability to pay required if restitution is set as part of a plea agreement).

J.L.T. v. State, 712 N.E.2d 7 (Ind. Ct. App. 1999) (juvenile argued that maximum amount of restitution could not exceed \$2,500.00, which was maximum amount of pecuniary loss for Class D felony mischief; however, because victim testified that cost of repair or replacement of headstone which juvenile damaged was approximately \$14,000.00 and evidence revealed that juvenile caused more damage than his cohorts, court properly ordered juvenile to pay two-thirds of total damages, \$9,333.00 in restitution).

A.H. v. State, 10 N.E.3d 37 (Ind. Ct. App. 2014) (same rule as announced in Morris v. State, 2 N.E. 3d 7 (Ind. Ct. App. 2013) that trial court may award restitution in open plea agreement, should also apply in juvenile cases).

W.L. v. State, 707 N.E.2d 812, 814 (Ind. Ct. App. 1999) (where State failed to request a restitution order at disposition and the court discharged the child, trial court erred in granting the State's motion to reopen for restitution due to lack of jurisdiction and failure to reacquire jurisdiction through any manner authorized by statute).

B. AMOUNT OF RESTITUTION

1. Considerations

Pursuant to Ind. Code § 35-50-5-3(a), the court shall base its restitution order upon a consideration of:

- a. property damages of the victim as a result of the crime, based on the actual cost of repair (or replacement, if repair is inappropriate);
- b. medical and hospital costs incurred by the victim (before the date of the sentencing) as a result of the crime;
- c. the cost of medical laboratory tests to determine if the crime has caused the victim to contract a disease or other medical condition;
- d. earnings lost by the victim (before the date of sentencing) as a result of the crime including earnings lost while the victim was hospitalized or participating in the investigation or trial of the crime;
- e. funeral, burial, or cremation costs incurred by the family or estate of a homicide victim as a result of the crime.

There are also specific restitution facts that a court must take consideration of if a person is convicted of certain offenses.

A court that orders a person convicted of an offense under IC 35-43-9 (conversion or misappropriation of title insurance escrow funds) to make restitution to the victim of the crime shall base its restitution order upon consideration of the amount of money that the convicted person converted, misappropriated or received, or for which the convicted person conspired. Ind. Code § 35-50-5-3(i).

A court that orders a person convicted of an offense under IC 35-43-5-3.5 (identity deception) to make restitution to the victim of the crime, the victim's estate, or the family of a victim who is deceased upon consideration of amount of fraud or harm caused by the convicted person and any reasonable expenses (including lost wages) incurred by the victim in correcting the victim's credit report and addressing any other issues caused by the commission of the offense. Ind. Code § 35-50-5-3(j).

The court shall order a person convicted of an offense under IC 35-42-3.5 (human and sexual trafficking) to make restitution to the victim of the crime in an amount equal to the greater of the following:

- (1) The gross income or value to the person of the victim's labor or services
- (2) The value of the victim's labor as guaranteed under the minimum wage and overtime provisions of:
 - (i) the federal Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201-209); or
 - (ii) Ind. Code 22-2-2 (Minimum Wage);whichever is greater. Ind. Code § 35-50-5-3(k).

Hearsay evidence is admissible at sentencing to determine the amount of restitution. Kotsopoulos v. State, 654 N.E.2d 44, 46 (Ind. Ct. App. 1995).

The level of the offense has no bearing on the amount of restitution the court may impose. J.L.T. v. State, 712 N.E.2d 7 (Ind. Ct. App. 1999).

2. Limitations on amount

Restitution must reflect the actual loss by a victim attributable to the defendant which is a factual matter and must be established by the presentation of competent evidence.

Kotsopoulos v. State, 654 N.E.2d 44, 47 (Ind. Ct. App. 1995); Batarseh v. State, 622 N.E.2d 192, 196 (Ind. Ct. App. 1993). When restitution is ordered as a condition of probation, the court must inquire into the defendant's ability to pay. Ind. Code § 35-38-2-2.3(a)(6).

a. Must have victim

One who suffers injury, harm or loss as a direct and immediate result of the criminal acts of a defendant, even if not the party directly against whom the crime was committed, may appropriately be considered a "victim" for purposes of restitution. Reinbold v. State, 555 N.E.2d 463, 470 (Ind. 1990), *overruled on other grounds by* Wright v. State, 658 N.E.2d 563 (Ind. 1995). This includes survivors of murder victims, such as dependent children. Id.

(1) Examples of victims for restitution purposes:

- Custodial parent (mother), when non-custodial parent failed to support his dependent children. Sickels v. State, 982 N.E.2d 1010 (Ind. 2013).
- Family of deceased victim to cover funeral and related costs, despite fact that defendant acted in self-defense, was not convicted of a homicide offense and IC 35-50-5-3(a)(5) allows funeral expenses for homicide victims. Martin v. State, 784 N.E.2d 997, 1014-15 (Ind. Ct. App. 2003).
- Children of homicide victim, and loss of child support payments up until date of sentencing count as lost earnings. Creager v. State, 737 N.E.2d 771, 781 (Ind. Ct. App. 2000).
- Medical facility that treated victim, regardless of whether victim already paid the medical expenses. Mata v. State, 866 N.E.2d 346 (Ind. Ct. App. 2007).
- Insurance companies can be victims for purposes of restitution, but their investigative expenses are not compensable. Henderson v. State, 848 N.E.2d 341 (Ind. Ct. App. 2006); Little v. State, 848 N.E.2d 341 (Ind. Ct. App. 2006) (medical insurance).
- The State, for medical expenses covered by Medicaid. Ault v. State, 705 N.E.2d 1078 (Ind. Ct. App. 1999).
- State highway department, for damages to traffic signals. Kingston v. State, 479 N.E.2d 1356 (Ind. Ct. App. 1985).
- Police and fire departments. Judge v. State, 659 N.E.2d 608, 613 (Ind. Ct. App. 1995).
- Rescue organization that incurs costs for care of animals injured as a result of a defendant's cruelty or neglect. Bickford v. State, 25 N.E.3d 1275 (Ind. Ct. App. 2015).

(2) State entities

The State cannot be a victim for restitution purposes for the costs of conducting routine investigations following a crime, since these are voluntary acts of the State in order to obtain criminal evidence and prosecute a defendant. Green v. State, 811 N.E.2d 874 (Ind. Ct. App. 2004). This does not include the general costs of investigating drug cases.

Hendrickson v. State, 690 N.E.2d 765 (Ind. Ct. App. 1998) (because a state entity may be considered a victim under restitution statute, trial court properly ordered defendant to pay restitution to drug task force for amount of money used to conduct drug purchase during sting operation).

Ladd v. State, 710 N.E.2d 188 (Ind. Ct. App. 1999) (affidavit of deputy prosecuting attorney alleging costs of law enforcement and litigation to which defense counsel did not object was sufficient evidence to support restitution order of \$4,270.00 payable to South Central Narcotics Strike Force).

But see:

Edsal v. State, 983 N.E.2d 200 (Ind. Ct. App. 2013) (State was not a “victim” for restitution purposes where restitution was ordered for money spent by drug task force during undercover investigation of defendant, including purchase of pills and to pay for law enforcement wages and other expenses; but allowing defendant to retain funds used for controlled buy would be an unjust enrichment).

Green v. State, 811 N.E.2d 874 (Ind. Ct. App. 2004) (distinguishing Hendrickson, Court held that trial court erred in ordering restitution for cost of forensic sexual assault examination because State was not a “victim” but rather elected to spend money to obtain criminal evidence).

Kopas v. State, 699 N.E.2d 1193 (Ind. Ct. App. 1998) (trial court could not order defendant to pay \$1,000 to county prosecuting attorney council as restitution when there was no evidence that council was damaged in any way as required by statute or that council was victim).

Lang v. State, 911 N.E.2d 131 (Ind. Ct. App. 2009) (expenses incurred by Conservancy District when investigating its financial records was not an appropriate basis for a criminal restitution award).

(3) Victimless crimes

There are some crimes that may be considered victimless, and absent evidence to the contrary, restitution orders would be improper.

Brock v. State, 558 N.E.2d 827, 878 (Ind. Ct. App. 1990) (possession of marijuana is a victimless crime, restitution order for payment to weed eradication fund is therefore improper). See also Rumble v. State, 529 N.E.2d 861 (Ind. Ct. App. 1988).

b. Property Damage

(1) Must have sufficient proof of actual loss

Restitution should reflect only the actual cost of repair (or replacement if repair is inappropriate). The State must sufficiently allege and prove the actual loss--mere speculative guesses on costs of repair, or the value of damaged property are not sufficient.

J.H. v. State, 950 N.E.2d 731 (Ind. Ct. App. 2011) (“estimate” which amounted to a piece of paper with a dollar amount written on it is mere speculation or conjecture; court recognized a preference for paper from a legitimate business, such as letterhead, with cost of labor and parts).

Ladd v. State, 710 N.E.2d 188 (Ind. Ct. App. 1999) (affidavit alleging costs of law enforcement and litigation exceeded \$4,270, to which defense counsel did not object, was sufficient evidence to support restitution order for that amount).

Gil v. State, 988 N.E.2d 1231 (Ind. Ct. App. 2013) (trial court erred in imposing \$20,000 in restitution when record was devoid of any evidence establishing the value of the missing jewelry or other damages caused by defendant’s burglary).

(2) Replacement of property

Cases involving replacement upgrades may be improper if the defendant can prove that the replacement was unnecessary. Judge v. State, 659 N.E.2d 608, 613 (Ind. Ct. App. 1995). A victim is entitled only to the actual replacement cost, i.e., value, of the destroyed item.

S.G. v. State, 956 N.E.2d 668 (Ind. Ct. App. 2011) (restitution is not a means by which the victim may obtain better or more current equipment; restitution amount for a new iPhone 4G when victim suffered loss of iPhone 3G, restitution was inappropriate).

Rich v. State, 890 N.E.2d 44 (Ind. Ct. App. 2008) (installation of a security system in an attempt to alleviate angst suffered as a result of a burglary is improper since the statute only authorizes the actual cost of repair or replacement).

Baker v. State, 59 N.E.3d 959 (Ind. Ct. App. 2017) (restitution for a totaled car is determined by the actual value of the car, not the difference between the cost of a new car, and insurance proceeds paid to victim).

(3) Stolen property

A defendant may be properly ordered to pay restitution for damage or reduction in value that occurred to stolen property while that property was in the defendant’s possession or control, regardless of whether the State proves that the defendant actually did the damage.

Archer v. State, 81 N.E.3d 212 (Ind. 2012) (where stolen vehicle was spray painted while in defendant's possession and control, restitution was proper; no need to prove that defendant actually spray painted the car).

T.C. v. State, 839 N.E.2d 1222 (Ind. Ct. App. 2005) (depending on evidence presented at restitution hearing, trial court may award restitution based upon retail value of unsalable stolen merchandise; however, retail value is not necessarily the appropriate measure of damages in every case).

Wittl v. State, 876 N.E.2d 1136 (Ind. Ct. App. 2007) (in auto theft prosecution, trial court did not abuse its discretion when it ordered defendant to pay restitution to rental car company for fair rental value in amount of \$4,919; damages for deprivation of use of property may be measured by fair rental value for period of conversion).

Hill v. State, 25 N.E.3d 1280 (Ind. Ct. App. 2015) (State failed to show department store suffered actual loss from theft because defendant was detained before she left store with stolen items).

Garcia v. State, 47 N.E.3d 1249 (Ind. Ct. App. 2015) (only support for insufficient restitution order came from probable cause affidavit, which is not a valid basis for upholding the order); C.f. Lisk v. State, 145 N.E.3d 838 (Ind. Ct. App. 2020) (distinguishing Garcia, Court upheld \$400 restitution order which was based probable cause affidavit in PSI report entered into evidence without objection and defendant did not contest amount).

Balls v. State, 725 N.E.2d 450 (Ind. Ct. App. 2000) (although actual loss to State for stolen food stamps is the cost of printing new food stamps, restitution was properly based on face value of food stamps, since they share properties with bearer paper).

Martin v. State, 127 N.E.3d 1235 (Ind. Ct. App. 2019) (\$2,000 restitution award was within the range of the evidence presented as to the vehicle's pre-theft value).

(4) Consider property's value at time of sentencing

When a restitution order is put in place, the value of the property at the time of sentencing is the appropriate value of the restitution order but may be reduced by the value of the property on the date it is returned if the property is returned to the victim.

Robers v. United States, 134 S. Ct. 1854 (2014) (defendant was convicted of the federal crime of submitting fraudulent loan applications to two banks; held, the sentencing court must reduce restitution by the amount of money the bank actually received when it sold the house, not the value of the house when the bank received it).

c. No recovery for intangible damages

The statute allows restitution of the value of the property taken or harmed, including direct and out-of-pocket expenses, but not less tangible damages such as pain and

suffering, wrongful death, or emotional distress. Person v. State, 93 N.E.3d 1126 (Ind. Ct. App. 2018).

d. Lost Earnings

Lost earnings include wages, salary, or income that a person could have earned if he or she had not lost a job, suffered a disabling injury, or died, but does not include money that is expended. Henderson v. State, 848 N.E.2d 341, 346 (Ind. Ct. App. 2006). While a crime victim's lost earnings may more than often take the form of lost wages, it is not expressly limited to wages only. Wittl v. State, 876 N.E.2d 1136 (Ind. Ct. App. 2007). Ind. Code § 35-50-5-3(a)(4) requires a direct and immediate causal connection between a crime and loss of earnings to authorize restitution for lost wages.

Wolff v. State, 914 N.E.2d 299 (Ind. Ct. App. 2009) (trial court abused its discretion in awarding restitution of \$12,789 to victim for lost wages, even though defendant's criminal recklessness set in motion a chain of events that eventually led to termination of victim's job and subsequent loss of earnings; the connection was too indirect to allow restitution).

Cooper v. State, 831 N.E.2d 1247 (Ind. Ct. App. 2005) (trial court abused its discretion in ordering defendant to pay \$330.80 in restitution to victim's father and stepmother for their claimed lost wages, where evidence did not reflect a legal necessity for their attendance at trial; moreover, restitution claim was unsigned, no documentation was attached, and there was no testimony about what occasioned lost wages).

Huddleston v. State, 764 N.E.2d 655 (Ind. Ct. App. 2002) (letter from victim's employer indicating days of missed work without pay because of various pre-trial dates, trial dates, counseling appointments and other proceedings relating to criminal case is sufficient evidence to demonstrate that the victim suffered injury, harm, or loss).

Gonzalez v. State, 3 N.E.3d (Ind. Ct. App. 2014) (lost wages and medical expenses does not include victim's permanent partial impairment (PPI) compensation, which is for a victim's permanent loss of physical function rather than for inability to work).

e. Medical Costs

Some evidence of specific medical expenses that provide evidence of the extent and cause of a victim's injuries must be introduced into evidence; a prosecutor's unsworn statement regarding the amount of bills is not sufficient. Smith v. State, 471 N.E.2d 1245, 1248 (Ind. Ct. App. 1984). It is sufficient to show that the defendant's actions resulted in the injuries complained of, not necessarily that the defendant's actions caused the specific injury.

Postiglione v. State, 84 N.E.3d 659 (Ind. Ct. App. 2017) (even though defendant did not cause the victim's injuries, restitution order totaling \$18,451.33 was proper because she initiated the fracas that resulted in the victim's injuries).

f. Funeral and Related Costs

While funeral and related costs are not limited to homicide cases, the injury, harm, or loss must be a direct and immediate result of the criminal acts of the defendant.

Utley v. State, 699 N.E.2d 723 (Ind. Ct. App. 1998) (defendant convicted of failing to stop at the scene of an accident but acquitted of reckless homicide was erroneously required to pay for the funeral expenses because no such costs were incurred by victim's estate due to defendant's failure to stop; however, restitution may be proper where leaving the scene of an accident is causally connected to the victim's death).

Martin v. State, 784 N.E.2d 997, 1014-15 (Ind. Ct. App. 2003) (defendant was acquitted of homicide offense but convicted of battery; because victim's family suffered financial loss as direct and immediate result of defendant's criminal act, trial court did not abuse its discretion in ordering defendant to pay victim's funeral expenses).

g. Does not include all expenses incurred by victim

Restitution does not include money which a victim has expended, but only money that the victim has lost. Nor does it include amortized costs of equipment depreciation--only replacement costs or repair costs of such equipment is allowed. Bockler v. State, 908 N.E.2d 342 (Ind. Ct. App. 2009).

Henderson v. State, 848 N.E.2d 341, 346 (Ind. Ct. App. 2006) (insurance company's investigative expenses could not be included in restitution order).

Lagos v. United States, 138 S. Ct. 1684 (2018) (federal Mandatory Restitution Act does not require reimbursement of victim's expenses incurred through its own investigation and related civil proceedings).

h. Generally, does not include loss incurred after sentencing

In general, the trial court may only consider those expenses incurred by the victim prior to the date of sentencing when determining a restitution amount.

Carswell v. State, 721 N.E.2d 1255 (Ind. Ct. App. 1999) (defendant can only be ordered to pay restitution for counseling fees of molest victim incurred prior to sentencing); see also Johnson v. State, 845 N.E.2d 147 (Ind. Ct. App. 2006).

Ware v. State, 816 N.E.2d 1167 (Ind. Ct. App. 2004) (although defendant waived issue by failing to object during sentencing hearing, trial court committed fundamental error in ordering defendant to pay for all of victim's counseling expenses; statute authorizes restitution for expenses incurred before date of sentencing); see also Bennett v. State, 862 N.E.2d 1281 (Ind. Ct. App. 2007).

Kotsopoulos v. State, 654 N.E.2d 44 (Ind. Ct. App. 1995) (only those medical expenses incurred by victim before date of sentencing may be included in restitution). See also Creager v. State, 737 N.E.2d 771 (Ind. Ct. App. 2000).

Creager v. State, 737 N.E.2d 771 (Ind. Ct. App. 2000) (lost child support payments only up to the date of sentencing; cannot allocate for future lost child support payments).

Akehurst v. State, 115 N.E.3d 515 (Ind. Ct. App. 2018) (restitution does not include lost wages for time victim took off work to attend and testify at sentencing hearing).

Note: There is a limited exception to this rule when it comes to funeral-related expenses. Roach v. State, 695 N.E.2d 934 (Ind. 1998); Markland v. State, 865 N.E.2d 639 (Ind. Ct. App. 2007). A court has continuing jurisdiction over a person convicted of an offense under IC 35-43-5-3.5 (identity fraud) for five (5) years after the date of sentencing. See Ind. Code § 35-50-5-3(j). Thus, these crimes may be an exception where expenses incurred after sentencing can be included in restitution.

PRACTICE POINTER: Counsel can be found ineffective for failure to determine the proper amount of restitution. Kellett v. State, 716 N.E.2d 975 (Ind. Ct. App. 1999) (ineffective assistance of counsel found for failure to review and object to admission of ledger upon which restitution order was based).

3. Apportionment

Trial courts are not required to apportion the amount of restitution among co-defendants in relation to each person's contribution to the victim's loss. Gill v. State, 988 N.E.2d 1231 (Ind. Ct. App. 2013). However, apportioning restitution based on relative liability is an argument worthy of consideration. Id. at 1236. Under Art. 1, Section 16 of the Indiana Constitution, penalties shall be proportioned to the nature of the offense. Thus, courts should consider whether imposing joint and several liability for the full amount of the restitution ordered is constitutionally proportionate to the nature of the offense committed by a defendant who has caused only a portion of the damages and in relation to the sentences entered against other co-defendants for the same criminal conduct. Id. at 1237. The Court noted that it would be particularly advisable to apportion liability among defendants under certain situations, such as when there are varying levels of involvement by the criminal participants. Id.

Paroline v. United States, 134 S. Ct. 1710 (2014) (under 18 U.S.C. § 2259, restitution was proper only to the extent defendant's offense proximately caused the victim's losses).

4. No duplicated recovery

The amount of restitution must reflect only actual costs incurred by the victim and may not include recovery for duplicated medical charges. Kotsopolous v. State, 654 N.E.2d 44 (Ind. Ct. App. 1995). To avoid double recovery any restitution amount must be offset by the amount paid to the victim through any related civil judgments. Myers v. State, 848 N.E.2d 1108 (Ind. Ct. App. 2006). A court can avoid duplicated recovery by ordering the defendant to pay certain amounts to the insurance company, as opposed to the person who had been injured by the defendant's acts. Little v. State, 839 N.E.2d 807, 810 n.10 (Ind. Ct. App. 2005).

Little v. State, 839 N.E.2d 807 (Ind. Ct. App. 2005) (in prosecution for operating a vehicle while intoxicated causing serious bodily injury, trial court erred when it ordered

defendant to pay \$199,582 to victim of crime; an order to pay restitution greater than \$24,458 for victim's out of pocket expenses constituted double recovery because remainder of his medical expenses were covered by insurance).

Kelley v. State, 11 N.E.3d 973 (Ind. Ct. App. 2014) (while trial court was free to disregard the civil settlement, it was within its discretion to credit the amount of the civil settlement toward the amount owed toward restitution in the criminal drunk driving case).

Lang v. State, 911 N.E.2d 131 (Ind. Ct. App. 2009) (because financial losses suffered by Conservancy District were far in excess of restitution award, defendant failed to demonstrate that the restitution award constituted a double recovery in light of the insurance proceeds which had been paid to the district).

5. Ability to pay

a. Restitution as condition of probation

Under IC 35-38-2-2.3(a)(6), a trial court may order restitution as a condition of probation, even if the defendant has been found indigent for other purposes. However, the trial court must fully assess a defendant's ability to pay when ordering restitution to prevent indigent defendants from being imprisoned for probation violation due to failure to pay restitution.

Bell v. State, 59 N.E.3d 959 (Ind. 2016) (defendant presented evidence supporting her claimed inability to pay \$932 in restitution for her criminal mischief conviction, but State did not rebut her testimony and trial court made no further inquiry; thus, trial court abused its discretion in ordering restitution and its order must be vacated without remand for new restitution order).

Archer v. State, 81 N.E.3d 212 (Ind. 2017) (distinguishing Bell, Court held that because defendant agreed to pay restitution and she testified she is able to work and hopes to secure employment in the future, trial court did not abuse its discretion in finding she had the ability to pay \$25 per month restitution).

Savage v. State, 655 N.E.2d 1223 (Ind. 1995) (fact that amount ordered in restitution was in excess of defendant's current assets and in excess of what his lifetime discretionary income would be given his income level prior to incarceration did not make restitution unreasonable because court considered evidence of defendant's financial situation; however, court erred in failing to incorporate in its restitution order periodic payment amount that defendant could afford). See also Smith v. State, 655 N.E.2d 133 (Ind. Ct. App. 1995).

Kays v. State, 963 N.E.2d 507 (Ind. 2012) (federal law does not prohibit trial court from considering social security disability income in determining whether defendant is able to pay restitution).

A.H. v. State, 10 N.E.3d 37 (Ind. Ct. App. 2014) (juvenile court had no duty to inquire into ability to pay restitution as a condition of probation where restitution could be paid by completing community service).

Although the juvenile restitution statute (IC 31-37-19-5) is silent as to a defendant's ability to pay, equal protection and fundamental fairness concerns require that a juvenile court must inquire into a juvenile's ability to pay before the court can order restitution as a condition of probation, unless restitution is set as part of a plea agreement. P.J. v. State, 955 N.E.2d 234, 235 (Ind. Ct. App. 2011); M.L. v. State, 838 N.E.2d 525 (Ind. Ct. App. 2005).

P.J. v. State, 955 N.E.2d 234 (Ind. Ct. App. 2011) (where a restitution amount is determined pursuant to a plea agreement, once the trial court accepts the agreement, it is not required to conduct an ability to pay determination, as defendant waived his or her right to have this inquiry by agreeing to the amount in the plea).

Because IC 35-38-2-2.3 is not specific as to form trial court must follow in determining defendant's financial status, the presentence report, as part of the court's record, may be an adequate review of defendant's ability to pay. Mitchell v. State, 559 N.E.2d 313, 315 (Ind. Ct. App. 1990).

Antcliff v. State, 688 N.E.2d 166, 170-71 (Ind. Ct. App. 1997) (trial court adequately inquired into defendant's ability to pay before ordering defendant to pay restitution; defendant stipulated to amount ordered and to his willingness to pay it, and trial court reviewed presentence report documenting defendant's employment history and his financial status, including information regarding money judgments held by defendant and his monthly accounts receivable). See also Champlain v. State, 717 N.E.2d 567, 570-71 (Ind. 1999); Polen v. State, 578 N.E.2d 755 (Ind. Ct. App. 1991).

But see:

Clausen v. State, 612 N.E.2d 147 (Ind. Ct. App. 1993), *rev'd on other grounds*, 622 N.E.2d 925 (where trial court, in ordering defendant convicted of child molesting to pay cost of child's counseling sessions, failed to inquire into, or hear any evidence of, cost of such counseling but did review defendant's presentence report, remand was required in order to hold hearing to determine amount of restitution).

Remand for resentencing is not required where defendant is not harmed by the trial court's failure to inquire into ability to pay or the defendant waives such inquiry.

Mellott v. State, 496 N.E.2d 396 (Ind. 1986) (because defendant was given ten years to pay victim and nine years to pay county, defendant was not prejudiced by court's failure to determine defendant's ability to pay restitution and remand was not necessary).

Judge v. State, 659 N.E.2d 608, 613 (Ind. Ct. App. 1995) (defendant's refusal to supply trial court with requested financial information precluded them from arguing on appeal that trial court failed to fulfill its duty to inquire into their individual abilities to pay restitution).

b. Restitution as part of executed sentence

When restitution is ordered as part of an executed sentence and, therefore, is not a condition of probation or a suspended sentence, an inquiry into the defendant's ability to pay is not required. In such a situation, restitution is merely a money judgment and a

defendant cannot be imprisoned for his failure to pay the restitution. Shaffer v. State, 674 N.E.2d 1, 9 (Ind. Ct. App. 1996); Miller v. State, 648 N.E.2d 1208, 1212 (Ind. Ct. App. 1995). Thus, when restitution is not made as part of a condition of probation, the trial court is not required to inquire into the defendant's ability to pay. Ladd v. State, 710 N.E.2d 188, 192 (Ind. Ct. App. 1999). See also Collins v. State, 676 N.E.2d 741 (Ind. Ct. App. 1996) (\$700,000 restitution order upheld).

Bitner v. State, 546 N.E.2d 117 (Ind. Ct. App. 1989) (because restitution imposed as part of executed sentence is merely a judgment lien against defendant under IC 35-50-5-3(b), he or she cannot be subject to imprisonment for failure to pay money judgment).

6. Must be convicted or be a part of the plea agreement

a. No obligation to pay restitution for crimes to which defendant did not plead guilty

Restitution orders covering crimes to which the defendant did not plead guilty and of which he was not convicted or did not agree to repay as restitution are contrary to law. And absent an agreement by the defendant, a trial court may not order restitution in an amount greater than the sums involved in those crimes to which defendant actually pleaded guilty. Polen v. State, 578 N.E.2d 755, 756-57 (Ind. Ct. App. 1991); Hipskind v. State, 519 N.E.2d 572 (Ind. Ct. App. 1988).

Hill v. State, 25 N.E.3d 1280 (Ind. Ct. App. 2015) (restitution order that included value of items allegedly stolen, for which defendant was never charged, was an abuse of discretion).

Kinthead v. State, 791 N.E.2d 243 (Ind. Ct. App. 2003) (a plea agreement which leaves the issue of restitution open, to be subsequently determined at the time of sentencing, is not an agreement to pay a greater amount or admission of damages in an amount greater than that resulting from the crime to which a person pleads guilty; here, record revealed that defendant agreed to pay restitution in an amount greater than sums involved in two (2) counts to which he pled guilty).

Nurseryland v. State, 749 N.E.2d 1240 (Ind. Ct. App. 2001) (restitution order requiring defendant to pay victims who were not named in charge to which defendant pled guilty was invalid; defendant made no admissions concerning guilt with regard to other injured victims).

M.C. v. State, 817 N.E.2d 606 (Ind. Ct. App. 2004) (\$7,005.60 restitution order exceeded terms of plea agreement because offenses defendant pled guilty to did not include an admission of fault for accident or damages for injuries to victims or their vehicles).

Linville v. State, 120 N.E.3d 648 (Ind. Ct. App. 2019) (although defendant agreed to pay restitution in an amount to "be determined by the court following a restitution hearing," he did not agree to pay restitution for all 17 theft counts that were charged; thus, he could only be ordered to pay restitution for amounts stemming from the six crimes to which he pleaded guilty; held, remanded to modify the restitution order from \$ 98,310.30 to \$ 35,729.00).

J.P.B. v. State, 705 N.E.2d 1075 (Ind. Ct. App. 1999) (although juvenile pled guilty to leaving scene of accident where physical injury occurred, defendant could be ordered to pay restitution to victim in other car for property damage because being in accident with other car and leaving scene was part of factual basis of defendant's plea).

b. Restitution may be added by court as part of open plea agreement

Restitution may be added by court as part of open plea agreement, even if the plea agreement is silent as to restitution, but the plea should be carefully drafted to ensure sufficient factual basis to procure redress. Morris v. State, 2 N.E.3d 7 (Ind. Ct. App. 2013). See also A.H. v. State, 10 N.E.3d 37 (Ind. Ct. App. 2014) (Morris rule applies in juvenile cases as well).

PRACTICE POINTER: Although victims of dismissed charges cannot generally receive restitution, the State can use additional terms or conditions in the plea agreement to include payment of restitution to other parties or other damages not covered by the agreement. Nurseryland v. State, 749 N.E.2d 1240 (Ind. Ct. App. 2001). For example, the State can request that a party admit liability such that other parties allegedly harmed in the commission or as a consequence of the defendant's actions could receive restitution. Id. The State may include additional language in the guilty plea that would create a factual basis sufficient to warrant an order of restitution with respect to other victims. See J.P.B. v. State, 705 N.E.2d 1075 (Ind. Ct. App. 1999).

7. Trial court's continuing jurisdiction over restitution

The law is unclear over what happens when restitution is left open at the time the notice of the appeal is filed. In Alexander v. State, 4 N.E.3d 1169 (Ind. 2014), the defendant filed his notice of appeal before the issue of restitution was resolved because the trial court set a restitution hearing more than thirty (30) days past sentencing. After the appellant's brief was filed, the State moved to dismiss on grounds the appeal was premature because it was not a final judgment and therefore the Court of Appeals lacked jurisdiction to decide the appeal. The Court of Appeals dismissed the appeal as premature. On transfer, the Indiana Supreme Court found that because the trial court had specifically advised Alexander that the Notice of Appeal must be filed in thirty (30) days, there may have been some confusion and Alexander was entitled to have his appeal decided on its merits. The Supreme Court specifically noted a future order of restitution once jurisdiction returns to the trial court is not precluded.

However, in Denning v. State, 991 N.E.2d 160, 163 n. 4 (Ind. Ct. App. 2013), *trans. not sought*, the Court suggested that the trial court might not have authority to order restitution after the appeal of the conviction had been decided, because there was no continuing jurisdiction permitted by the judgment itself, or by rule or statute, and a trial court does not have inherent authority to modify a sentence. The better practice for trial courts is to enter restitution at the time of sentencing. Denning is distinguishable from Haste v. State, 967 N.E.2d 576 (Ind. Ct. App. 2012), where Haste's appeal was dismissed because the trial court specifically stated at sentencing that it was taking the issue of restitution under advisement. Thus, Haste filed the Notice of Appeal before there was a final appealable order. Id.

The United States Supreme Court addressed the issue of when restitution must/may be ordered in Dolan v. United States, 130 S. Ct. 2533 (2010), where a federal law allowed for the sentencing court to set a restitution hearing up to ninety (90) days after sentencing. However, the sentencing court set the restitution hearing out about six months after

sentencing. The 5-4 majority held statutory language, context and purpose of the statute meant the sentencing court retained jurisdiction past the deadline when the sentencing court made clear it would order restitution, leaving only the dollar amount in question, before the deadline passed. The dissent found restitution must be ordered at sentencing unless the statute explicitly permits otherwise, even if this means victims may suffer as the result of missed deadlines which are a consequence of having a system of rules.

C. MANNER OF PAYMENT

1. Court's discretion

When restitution or reparation is a condition of probation, the court shall fix the manner of performance. Ind. Code § 35-38-2-2.3(a)(6). Thus, it is improper for a trial court to order restitution to be made without either specifying a payment plan or some other method of ensuring compliance, as allowed under the ability to pay inquiry. Further, it is the trial court's duty--not the probation department's duty--to determine the time and manner of payment. McGuire v. State, 625 N.E.2d 1281 (Ind. Ct. App. 1993). A court may wait and provide the terms of restitution at the time of the commencement of the defendant's probation. Bailey v. State, 717 N.E.2d 1 (Ind. 1999). This method of fixing terms of restitution is preferred. Shepard v. State, 839 N.E.2d 1268 (Ind. Ct. 2005).

Savage v. State, 655 N.E.2d 1223 (Ind. 1995) (trial court's failure to specify payment plan for \$164,998.59 restitution order was abuse of discretion; case remanded to identify appropriate restitution payment plan).

Jaramillo v. State, 803 N.E.2d 243, 251 (Ind. Ct. App. 2004), *sum. aff'd* 823 N.E.2d 1187 (Ind. 2005) (court remanded case for more specific recitation of manner of performance, where trial court's order of probation required defendant to make full payment of \$34,707.40 within six months after release on probation; defendant is a non-English speaking laborer and there was no indication of ability to pay).

Garrett v. State, 680 N.E.2d 1 (Ind. Ct. App. 1997) (probation order requiring defendant to make good faith effort to pay restitution in certain amount as determined by probation department was so unreasonably vague that it was unenforceable, as probation order did not fix manner of payment as required by statute).

Bailey v. State, 717 N.E.2d 1 (Ind. 1999) (sentencing order which provided for terms of restitution to be set at commencement of defendant's probation did not require probation department to set restitution terms).

Shepard v. State, 839 N.E.2d 1268 (Ind. Ct. App. 2005) (Baker, J., concurring, believes that better rule is that trial court may wait to determine a defendant's ability to pay restitution and to fix manner of performance until the commencement of probation).

2. Deduction from cash deposit bond

Ind. Code § 35-33-8-3.2 was added in 1998 to authorize a court to retain all or a part of the cash or securities to pay fines, costs, fees, and restitution, if the defendant is convicted. For a more detailed analysis, see Section I.C.2, *Costs; Time and manner of payment*.

D. EFFECTS OF RESTITUTION ORDER

1. Not discharged until paid

Regardless of whether restitution is required as a condition of probation or other sentence, the restitution order is not discharged by the completion of any probationary period or other sentence imposed for a felony or misdemeanor. Ind. Code § 35-50-5-3(f). See also M.M. v. State, 31 N.E.3d 516 (Ind. Ct. App. 2015).

2. Not dischargeable in bankruptcy

Restitution orders are not dischargeable in bankruptcy. Kelly v. Robinson, 479 U.S. 36, 107 S. Ct. 353 (1986); Ind. Code § 35-50-5-3(g). Even if the defendant had the civil obligation discharged in bankruptcy immediately prior to the restitution order, the trial court may still order restitution to be paid. Miller v. State, 502 N.E.2d 92 (Ind. 1986).

3. Civil liability

Pursuant to Ind. Code § 35-50-5-3(e), an order of restitution does not bar a civil action for: (a) damages that the court did not require the person to pay to the victim under the restitution order but arise from an injury or property damage that is the basis of restitution ordered by the court; and (b) other damages suffered by the victim.

Settlements in civil cases can have no effect on sentences meted out in criminal cases, and partial civil settlement is not a substitute for restitution in criminal proceedings. Dupin v. State, 524 N.E.2d 329 (Ind. Ct. App. 1988). The trial court is allowed to take note of such agreements, but these agreements in no way preclude a criminal court from ordering restitution when appropriate under IC § 35-50-5-3. Haltom v. State, 832 N.E.2d 969 (Ind. 2005).

However, a restitution order must be offset by any amount paid to a victim through a civil judgment in order to avoid double recovery. Myers v. State, 848 N.E.2d 1108 (Ind. Ct. App. 2006); see also Kelley v. State, 11 N.E.3d 973 (Ind. Ct. App. 2014).

4. Judgment lien

A restitution order is a judgment lien that: (1) attaches to the property or the person subject to the order; (2) may be perfected; (3) may be enforced to satisfy any payment that is delinquent under the restitution order by the person in whose favor the order is issued or the person's assignee; and (4) expires in the same manner as a judgment lien created in a civil proceeding. Ind. Code § 35-50-5-3(b).

V. INDIGENCY

A. COURT COSTS AND FINES

A hearing is required to determine whether the convicted person is indigent prior to the imposition of both fines (IC 35-38-1-18(a)) and court costs (IC 33-37-2-3(a)). See Cranor v. State, 699 N.E.2d 284, 287 (Ind. Ct. App. 1998); Brock v. State, 558 N.E.2d 872, 878 (Ind. Ct. App. 1990). This hearing can occur at the time of sentencing or at the time the payment of the fines or costs are due. See Ind. Code § 35-38-1-18 and Ind. Code § 33-37-2-3. In making this

determination, the court must take into account both the amount of the proposed fee and the defendant's assets, income, and necessary expenses when determining whether or not the defendant is able to pay. See Ind. Code § 35-33-7-6.5(a) (2020). The court may consider that a person's eligibility for federal need-based public assistance programs constitutes sufficient evidence to establish that a person is indigent. Ind. Code § 35-33-7-6.5(b). If the court finds that the person is able to pay some of the fines, fees, and court costs, the court may prorate the person's fine, fee, and court costs, and require the person to pay an amount that the person can reasonably afford. Ind. Code § 35-33-7-6.5(b).

1. Hearing Requirement

It is an error to impose discretionary fines and costs upon a criminal defendant without first deciding whether or not he/she is indigent. Bitner v. State, 546 N.E.2d 117 (Ind. 1989). See also Like v. State, 760 N.E.2d 1188 (Ind. Ct. App. 2002), *aff'd in part on reh'g*, 766 N.E.2d 416 and Everroad v. State, 730 N.E.2d 222 (Ind. Ct. App. 2000). However, some fees are mandatory, and an indigency determination is not required unless the court exceeds the mandatory portion of the relevant fee. Taylor v. State, 786 N.E.2d 285 (Ind. Ct. App. 2003).

The fact that a court fails to conduct an indigency hearing does not necessarily mean that the defendant does not owe the fine, since nothing in IC 35-38-1-18 prevents a court from collecting the fine altogether through a civil judgment. Cf. J.B. v. State, 5 N.E.3d 831 (Ind. Ct. App. 2017) (juvenile court may not reduce restitution order to a civil judgment). But a defendant may not be incarcerated or otherwise punished for failure to pay the fine without first determining he/she has the ability to pay. Newton v. State, 460 N.E.2d 1266 (Ind. Ct. App. 1984).

2. Effect of prior indigency finding on ability to pay

The Court of Appeals has issued contradictory holdings as to whether a separate hearing is required when the defendant has already been found indigent for the purpose of appointing trial counsel or appellate counsel.

a. Separate indigency hearing required

Vestal v. State, 745 N.E.2d 249, 253 *summarily aff'd and vacated in part on other grounds*, 773 N.E.2d 805 (Ind. 2002) (finding of indigency for appointing appellate counsel is not conclusive as to defendant's ability to pay \$1,250.00 for public defender representation).

McRoy v. State, 794 N.E.2d 539 (Ind. Ct. App. 2003) (hearing is required as to indigency for purpose of assessing fines and costs, as a defendant may not be able to afford an attorney but still be able to pay fines or costs).

Bitner v. State, 546 N.E.2d 117 (Ind. Ct. App. 1989) (because finding of indigency for purposes of appointing counsel was not conclusive as to defendant's ability to pay, court erred by imposing fines without first deciding whether defendant was indigent for purposes of payment). See also Everroad v. State, 730 N.E.2d 222 (Ind. Ct. App. 2000).

b. Separate indigency hearing not required

Clenna v. State, 782 N.E.2d 1029 (Ind. Ct. App. 2003) (if defendant is found to be indigent as to attorney fees, then he is also as a matter of law indigent as to any fines and costs that are assessed).

Wooden v. State, 757 N.E.2d 212 (Ind. Ct. App. 2002) (where trial court found defendant indigent for purpose of appointing trial counsel and appellate counsel and stated that defendant would not be imprisoned for failure to pay fines and costs, separate indigency hearing was not required because purpose of requirement, to assure that defendant would not be imprisoned for inability to pay, had been met); see also Dunkley v. State, 787 N.E.2d 962 (Ind. Ct. App. 2003).

3. Timing of Indigency Hearing

The indigency hearing can be conducted at the time of sentencing or at the time the payment of the fines or costs are due. See Ind. Code § 35-38-1-18 and Ind. Code § 33-37-2-3.

Whedon v. State, 765 N.E.2d 1276 (Ind. 2002) (defendant's financial resources are more appropriately determined not at time of initial sentencing but at conclusion of incarceration); see also Johnson v. State, 27 N.E.3d 793 (Ind. Ct. App. 2015).

The order in which sentencing and an indigency hearing on defendant's ability to pay a fine or costs takes place is not critical, so long as an indigency hearing is conducted before the sentence is completed. Marshall v. State, 505 N.E.2d 853 (Ind. Ct. App. 1987). See also Meeker v. State, 395 N.E.2d 301 (Ind. 1979).

a. At time of sentence

Except as provided in IC 33-37-2-3(b), when the court imposes costs, it shall conduct a hearing to determine whether the convicted person is indigent. Ind. Code § 33-37-2-3(a).

For a detailed analysis of a defendant's ability to pay, see Subsection I.C.1.a

Except as provided in IC 35-38-1-18(b), whenever a court imposes a fine, it shall conduct a hearing to determine whether the convicted person is indigent. Ind. Code § 35-38-1-18(a).

For a detailed analysis of a defendant's ability to pay, see Subsection III.D.1

b. At time the payment of fine or costs is due

If the court suspends payment of the fine, the court shall conduct a hearing at the time the fine is due to determine whether the convicted person is indigent. Ind. Code § 35-38-1-18(b). If a court suspends payment of a fine under IC 35-38-1-18(b), the court retains jurisdiction over the convicted person until the convicted person has paid the entire amount of the fine. Ind. Code § 35-38-1-18(c).

For a detailed analysis of a defendant's ability to pay, see Subsection I.C., II.D and III.D.

A court may impose costs and suspend payment of all or part of the costs until the convicted person has completed all or part of the sentence. If the court suspends payment of the costs, the court shall conduct a hearing at the time the costs are due to determine

whether the convicted person is indigent. Ind. Code § 33-37-2-3(b). If the court suspends payment of costs, the court retains jurisdiction over the convicted person until the convicted person has paid the entire amount of the costs. Ind. Code § 33-37-2-3(c).

A defendant's financial resources are more appropriately determined not at the time of initial sentencing but at the conclusion of incarceration. Whedon v. State, 765 N.E.2d 1276 (Ind. 2002). See also Johnson v. State, 27 N.E.3d 793 (Ind. Ct. App. 2015).

Kimbrough v. State, 911 N.E.2d 621 (Ind. Ct. App. 2009) (because trial court did not order defendant to reimburse Public Defender fund or pay fine and costs until he completes executed portion of his sentence, it was not necessary to hold hearing to determine his current ability to pay).

The court may also wait until the completion of a defendant's term of probation to make a final indigency determination as to already imposed costs and fines. Purifoy v. State, 821 N.E.2d 409 (Ind. Ct. App. 2005).

4. Appellate Review

Although a fine cannot be enforced against an allegedly indigent defendant absent a hearing to determine indigency, where no attempt was being made to collect the fine, there is no appealable issue. Davidson v. State, 558 N.E.2d 1077 (Ind. 1990) (relying on Marshall v. State, 505 N.E.2d 853 (Ind. Ct. App. 1987)). Thus, a trial court's failure to provide an indigency hearing does not always require reversal.

B. RESTITUTION

The sentencing court is required to hold a hearing on the defendant's ability to pay before ordering restitution as a condition of probation. Ind. Code § 35-38-2-2.3(a)(6); Miller v. State, 502 N.E.2d 92, 96 (Ind. 1986) (citing Smith v. State, 471 N.E.2d 1245, 1249 (Ind. Ct. App. 1984)); Sales v. State, 464 N.E.2d 1336, 1340 (Ind. Ct. App. 1984). However, if entered as part of an executed sentence, the restitution is simply a money judgment, and no hearing is required on defendant's ability to pay.

For a detailed analysis of a defendant's ability to pay, see Subsection IV.B.5, *Ability to pay*.

PRACTICE POINTER: For a discussion on equal protection concerns with restitution statutes and indigence, see Smith v. State, 471 N.E.2d 1245 (Ind. Ct. App. 1984) (citing Sales v. State, 464 N.E.2d 1336 (Ind. Ct. App. 1984)).

C. POST-INDIGENCY HEARING PROCEDURE

A defendant's indigency status does not preclude the trial court from imposing costs, fines, or restitution. However, the trial court lacks authority to stay the execution of judgment imposing fine and costs until after defendant has served his sentence. McRoy v. State, 794 N.E.2d 539 (Ind. Ct. App. 2003). Furthermore, an order to pay may not be enforced against an indigent. Whedon v. State, 765 N.E.2d 1276 (Ind. 2002).

1. Imprisonment/probation revocation for failure to pay

a. No imprisonment

An indigent person may not be imprisoned for failure to pay fines or costs. Whedon v. State, 765 N.E.2d 1276 (Ind. 2002).

b. Exceptions

Revocation of probation and imprisonment for failure to pay costs, fine, or restitution violates due process absent findings of willful refusal or that alternative forms of punishment are not adequate to satisfy interests in punishment and deterrence. Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L.Ed.2d 221 (1983). However, this rule does not apply to an indigent defendant. State v. Irvin, 259 Ind. 610, 291 N.E.2d 70, 74 (1973).

Champlain v. State, 717 N.E.2d 567 (Ind. 1999) (where defendant not only failed to make effort to pay restitution but had also transferred assets in order to avoid doing so, revocation of suspended sentence was appropriate).

Bahr v. State, 634 N.E.2d 543 (Ind. Ct. App. 1994) (where defendant willfully failed to make payments on his restitution obligation and court found that kind of help defendant needed was provided by imprisonment, revocation of defendant's probation did not violate fundamental fairness).

2. No advisement

Sentencing courts are no longer required to inform an indigent defendant that he cannot be imprisoned for failing to pay fines and costs. Owens v. State, 947 N.E.2d 482, 483 (Ind. Ct. App. 2011).

3. Partial payment of representation costs

If, after a hearing to determine indigency, the court determines that a convicted person is able to pay part of the costs of representation, the court shall order the person to pay the amount of not more than the cost of the defense services rendered on behalf of the person. The clerk of the court shall deposit the amount paid by a convicted person under this subsection in the county's supplemental public defender services fund established under IC 33-40-3-1. Ind. Code § 33-37-2-3(e).

A person ordered to pay part of the cost of representation has the same rights and protections as those of other judgment debtors under the Constitution of the State of Indiana and under Indiana law. Ind. Code § 33-37-2-3(f). Davis v. State, 843 N.E.2d 65 (Ind. Ct. App. 2006) (trial court erred in prospectively ordering defendant to reimburse public defender fund in amount of \$16,350 for trial and appeal; no authority to order a presently indigent defendant to pay based on possible future earnings or other speculative prospective wealth).

For a list of accounts to which the defendant's money is applied, see Ind. Code § 33-37-4-1(d) and (e).

VI. REMOVAL / BAR FROM PUBLIC OFFICE

Ind. Code § 35-50-5-1.1 provides:

- (a) Whenever a person is convicted of a misdemeanor under IC 35-44-1 (bribery or official misconduct) the court may include in the sentence an order rendering the person incapable of holding a public office of trust or profit for a fixed period of not more than ten (10) years.
- (b) Whenever any officer of a governmental entity is convicted of a misdemeanor under IC 35-44-1 (bribery or official misconduct) the court may enter an order removing the officer from office.