



Texas Criminal Defense Lawyers Association



Court Cost Pamphlet

Court Costs Pamphlet

Texas Court Cost Work Group

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I. Court Cost Checklist

Use this checklist and accompanying explanation to challenge court costs, fines, fees, and restitution.

TRIAL COURT

- Ability to pay inquiry on the record**
Ensure that an ability-to-pay inquiry is conducted on the record during or immediately after sentencing. (1)
- Improper Costs and Fees**
All costs must be authorized by statute. (5) Object to fees for services not performed. (14). Object to \$100 EMS Fee if offense committed before 1/1/2020. (15).
- Bill of costs**
Insist on getting a bill of costs. Make sure your client has not been charged costs under the new court-cost scheme created by SB 346 if the offense was committed before January 1, 2020. (2)(4)
- Crime Stoppers Fees**
Object to assessment if your client is not placed on community supervision. (13).
- Attorney Fees**
Object, unless the court has found that your client can pay. (3)
- Revocation or Adjudication**
Watch for and object if costs are reassessed upon revocation or adjudication. (8)(10).
- Repeat Costs and Fines**
Object to the assessment of same costs in multiple offenses that are tried in the same criminal transaction. (6). Object to second fine if your client is convicted of multiple offenses and the sentences run concurrently. (7).
- Peace Officer Fees**
Object to peace officer fees if your client is placed on deferred adjudication. (9). Check the accuracy of the fees on the bill of costs if the case is not deferred adjudication.
- Restitution**
Object if 1. Client cannot pay and 2. Recipient is not a victim of the offense. (12)
- Time Payment Fee**
Make sure this fee is not assessed prematurely. (11).

APPELLATE COURT

- Review Trial Checklist**
Complain about any problems on the trial checklist. (A-1).
- Peace Officer Fees**
Challenge if no fee record is in the record. (A-4).
- Oral Pronouncement**
Complain of the assessment of any fine or restitution order that was not orally pronounced at the original trial. (A-2).
- Effective Date of SB 346**
Challenge the conclusion that the new court cost system created under SB 346 went into effect on 1/1/2020 (a good counterargument is that the new system did not go into effect until 1/1/2021). (A-6).
- Adjudication hearing**
Any fine or restitution must be orally pronounced. (A-3).

Court Cost Checklist on Appeal

(A-1) Complain about any of the problems on the trial checklist. _____

(A-2) Complain of the assessment of any fine or restitution order that was not orally pronounced at the original trial.

(A-3) Complain of the assessment of any fine or restitution order at an adjudication hearing if it was not orally pronounced (even if the fine or restitution order was orally pronounced when your client was placed on deferred adjudication). _____

(A-4) Challenge the assessment of fees for the services of peace officers if the record does not contain a “fee record.”

(A-5) Challenge the constitutionality of the new fines and reimbursement fees under Senate Bill 346 on separation-of-powers principles (e.g., the transformation of the \$100 EMS court cost into a “fine”). _____

(A-6) Challenge the conclusion that the new court-cost system created under Senate Bill 346 went into effect on January 1, 2020 (a good argument exists that the new system did not go into effect until January 1, 2021). _____

Court Cost Checklist at Trial – Details

(1) Ensure that an ability-to-pay hearing is conducted on the record during or immediately after sentencing.

Article 42.15(a-1) of the Code of Criminal contains the following requirement:

[D]uring or immediately after imposing a sentence in open court . . . a court shall inquire on the record whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs.”

The requirement that courts hold ability-to-pay hearings has been in effect since September 1, 2017. The requirement that the hearing be conducted “on the record” became effective on September 1, 2021. Courts are to hold these hearings without being prompted. But in many district and county-level courts, these hearings are not being conducted. (They are more commonly held in justice and municipal courts.)

You should ask the trial court to conduct an ability-to-pay hearing as mandated by Article 42.15(a-1). And you should insist that it be on the record (unless you are in a non-record court such as a justice court).

The hearing is for the court to determine if the defendant is able to immediately pay any assessed fine, court costs, and restitution. If the court finds the defendant cannot do so, it has several options. Ideally, the court will simply waive these monetary obligations. (You should ask for this.) But the court may also order the defendant to perform community service in lieu of paying money. Also, the court may choose to put the defendant on a payment plan. The statute outlines the judge’s options.

The “bench book” used by the judges of the district and statutory county courts does not address ability-to-pay hearings. So you may need to educate the judges about this requirement. The most authoritative source is a bench card published by the Texas Office of Court Administration (OCA). There are actually two cards. The first is for judges in district courts and county-level courts. The second is for judges in justice and municipal courts. The charts are available

II. Court Cost Arguments

Court Cost Checklist at Trial

1. Ensure that an ability-to-pay hearing is conducted on the record during or immediately after sentencing. _____
2. Insist on getting a bill of costs. _____
3. Object to any order directing your client to pay the cost of a court-appointed attorney (unless the judge has found your client can afford to pay). _____
4. Make sure your client hasn't been charged costs under the new court-cost scheme created by SB 346 if the offense was committed prior to January 1, 2020. _____
5. Ensure that your client isn't charged costs that aren't statutorily authorized. _____
6. Object to the assessment of the same costs in multiple offenses that are tried in the same criminal action. _____
7. Object to the assessment of a second fine if your client is convicted of multiple offenses and the sentences are ordered to run concurrently. _____
8. Object if your client was assessed court costs when placed on regular community supervision and the same costs are assessed again when your client's community supervision is revoked. _____
9. Object to peace-officer fees if your client is placed on deferred adjudication.
10. Object if your client was originally assessed court costs when placed on deferred adjudication and the same costs are assessed again when your client is adjudicated. _____
11. Make sure the time payment fee has not been prematurely assessed. _____
Object to an order to pay restitution to any person or entity other than a victim of the offense. _____
12. Object to the assessment of any Crime Stoppers Fee if your client is not placed on community supervision.

13. Object to any Crime Stoppers Fee unless your client is ordered to repay all or part of a specific reward paid by Crime Stoppers related to your client's prosecution. _____
14. Object to any fees assessed for services that have not been performed. _____
15. Object to the assessment of the \$100 EMS court cost if costs are assessed under the fees in effect for offenses committed before January 1, 2020. _____

This is the strongest tool you have in your toolbox. If the judge chooses to waive the fees, there is no need to attack other problems with the monetary obligations that have been assessed.

(2) Insist on getting a bill of costs.

A bill of costs is a written itemization of the court costs assessed against a criminal defendant. It should include any order to repay the cost of the defendant's court-appointed attorney (if such an attorney was appointed).¹ It should also include any order to repay a crime-stoppers reward.² But it should not include the fine or any restitution amount. This is because a fine and an order to pay restitution are considered to be punitive. *Weir v. State*, 278 S.W.3d 364, 366 (Tex. Crim. App. 2009).

Court costs, on the other hand, are non-punitive. *Id.* Accordingly, court costs need not be included in a court's oral pronouncement of sentence. *Id.* at 367. But there is a requirement that the costs in any particular case be listed in a written bill of costs. If they are not listed, the court costs are not payable. The statute imposing this requirement is Article 103.001(b) of the Code of Criminal Procedure which says:

(b) In a court other than a justice or municipal court, a cost is not payable by the person charged with the cost until a written bill containing the items of cost is: (1) produced; (2) signed by the officer who charged the cost or the officer who is entitled to receive payment for the cost; and (3) provided to the person charged with the cost.³

So a cost cannot be collected in district and county-level courts until a bill of costs has been provided to the defendant.⁴ The purpose of the itemized bill of costs is "to prevent a defendant from paying unauthorized court costs."⁵ Without a bill of costs, you will not know what costs have been assessed and which costs might be subject to challenge.

You are entitled to a bill of costs. If the defendant never gets one, there is no requirement that any of the costs be paid. Often, the bill of costs will not be available at sentencing so there is no way to challenge improper costs at that time. However, costs believed to be improper can still be challenged in the trial court under Article 103.008 of the Code of Criminal Procedure. This statute allows for the filing of a motion to correct the court costs if it is done within one year after the date of the final disposition of the case.

(3) Object to any order directing your client to pay the cost of a court-appointed attorney (unless the judge has found your client can afford to pay).

A court actually can order a defendant who has been provided with a court-appointed attorney to repay the costs of the legal services provided. But a court can only do this upon making the statutorily required finding.

1 *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011).

2 It should also include any order to repay a crime-stoppers reward. *See* Tex. Code Crim. Proc. arts. 37.073, 42.152(a).

3 The requirements for the bill of costs in justice and municipal courts differ slightly. *See* Tex. Code Crim. Proc. art. 103.001(a).

4 *See Johnson v. State*, 423 S.W.3d 385, 395 (Tex. Crim. App. 2014).

5 *Id.*

There are two relevant statutes. The first statute is Article 26.05(g) of the Code of Criminal Procedure. In relevant part, the statute reads as follows:

“If the judge determines that a defendant has financial resources that enable the defendant to offset in part or whole the costs of the legal services provided . . . the judge shall order the defendant to pay . . . the amount that the judge finds the defendant is able to pay. . . .”

The second statute is Article 42A.301(b)(10) of the same code. It applies to orders of community supervision and similarly mandates that the judge determine that the defendant has the financial resources to pay the costs of the legal services provided.

The Court of Criminal Appeals has reinforced these statutory requirements:

Thus the defendant’s financial resources and ability to pay are explicit critical elements in the trial court’s determination of the propriety of ordering reimbursement of costs and fees.⁶

In numerous Texas counties, attorney’s fees are routinely charged back without any court finding that defendant can pay.⁷ Sometimes, the defendant will agree to pay this cost as part of a plea bargain. While it is not legally impermissible for a plea agreement to contain such a requirement, it would seem to go against public policy. You should object to any such term in a plea agreement. It is essentially an adhesion contract.

(4) Make sure your client hasn’t been charged costs under the new court-cost scheme created by SB 346 if the offense was committed prior to January 1, 2020.

Senate Bill 346 was passed by the 86th Texas Legislature in 2017. The bill says the new costs go into effect on January 1, 2020. But this doesn’t mean the new costs should be assessed in all convictions that occur on or after that date. SECTION 5.01 of the bill itself says:

Except as otherwise provided by law, the changes made in law by this Act apply only to a cost, fee, or fine on conviction for an offense committed on or after the effective date of this Act. An offense committed before the effective date of this Act is governed by the law in effect on the date the offense was committed, and the former law is continued in effect for that purpose.

Typically, court clerks prepare the bill of costs. Their task is to populate the bill with the proper costs. This is not an

6 *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010) (emphasis added). See also *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011); *Wilmuth v. State*, 419 S.W.3d 553, 565 (Tex. App.—San Antonio 2013, no pet.).

7 In point of fact, most defendants cannot afford to pay this cost. See *Wiley v. State*, 410 S.W.3d 313, 317 (Tex. Crim. App. 2013) (indigent defendants are legally presumed to remain indigent). See also *Hutson v. State*, No. 11-19-00037-CR, 2021 WL 2836976 at *3 (Tex. App.—Eastland July 8, 2021, no pet.) (“Because the trial court determined that Appellant was indigent near the time of her conviction and because nothing in the record from Appellant’s trial demonstrated that she was able to pay all or part of her attorney’s fees, the trial court erred by ordering the repayment of those attorney’s fees.”).

easy task. The first step in calculating the proper costs is to determine when the offense was committed. If the offense was committed on or after January 1, 2020, then the new costs should be assessed. But if the offense was committed before January 1, 2020, then the old costs should be charged. What often happens is that the court clerk does not make this differentiation and simply charges the new costs. This happens a lot. At least two courts of appeals have struck down the assessment of the new costs created under Senate Bill 346.⁸ The costs were invalidated because the offenses in question were committed prior to January 1, 2020.

You can easily identify when the new costs created by Senate Bill 36 are assessed. If there is a charge for a “local consolidated court cost,” you will know you’re looking at the new costs. This is because the local consolidated court cost did not previously exist. There was only a state consolidated court cost.⁹

(5) Ensure that your client isn’t charged costs that aren’t statutorily authorized.

Courts can’t assess costs that aren’t authorized by statute.¹⁰ Yet, this happens frequently. For example, in *Hurlburt v. State*, a \$2 extradition fee was charged. There is no such court cost so the fee was struck.¹¹

Other times, a proper fee is assessed in an improper amount. In *Hurlburt*, a \$6.00 jury-reimbursement fee was assessed. But the statutorily authorized amount was \$4.00. The Waco Court of Appeals modified the fee so it was only for \$4.00.¹²

In *Kiser v. State*, a charge of \$66.43 was assessed against the defendant as a “jury lunch fee.” The Court of Appeals said the fee was improper; no statute authorized it.¹³

One common error is the charging of a fee that was authorized at one time, but is no longer authorized. This is especially common when the fee is folded into a consolidated court cost. The independent fee should go away, but sometimes it continues to be charged. A good example is found in *Taylor v. State*.¹⁴ Two fees were charged that had been folded into the consolidated court cost. The fees were invalidated.¹⁵

Ideally, the bill of costs will contain references to the statutes authorizing the fees. But this is not required. It is incumbent on defense counsel to have some familiarity with the proper court costs. The costs vary with the offense so it is not a simple proposition to know the appropriate fees. The criminal-court-cost charts published by the Texas Office of Court

8 *See Shuler v. State*, ___ S.W.3d ___, Nos. 05-20-00386-CR, 05-20-00416-CR, 2022 WL 9997 (Tex. App. Dallas Jan. 11, 2022, no pet. h.); *Hayes v. State*, No. 12-20 00222-CR, 2021 WL 1418400 (Tex. App.—Tyler April 14, 2021, no pet.) (mem. op., not designated for publication).

9 The new system of court costs created under Senate Bill 346 includes both a state consolidated court cost and a local consolidated court cost.

10 *Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014) (“Only statutorily authorized court costs may be assessed against a criminal defendant.”); Tex. Code Crim. Proc. art. 103.002 (“An officer may not impose a cost for a service not performed or for a service for which a cost is not expressly provided by law.”).

11 *Hurlburt v. State*, 506 S.W.3d 199, 204 (Tex. App.—Waco 2016, no pet.).

12 *Id.*

13 *Kiser v. State*, No. 12-14-00093-CR, 2015 WL 5139361 at *4 (Tex. App.—Tyler Sep. 2, 2015, no pet.) (mem. op., not designated for publication).

14 *Taylor v. State*, No. 13-20-00034-CR, 2021 WL 3196519 at *2 (Tex. App.—Corpus Christi July 29, 2021, no pet. h.) (mem. op., not designated for publication).

15 *Taylor v. State*, No. 13-20-00034-CR, 2021 WL 3196519 at *2 (Tex. App.—Corpus Christi July 29, 2021, no pet. h.) (mem. op., not designated for publication). *See also Aviles-Barroso v. State*, 477 S.W.3d 363, 398 (Tex. App.—Houston [14th Dist.] 2015, pet. ref’d) (no statutory authority existed to assess costs that had been folded into the consolidated court cost).

Administration are the best source of this information.¹⁶

(6) Object to the assessment of the same costs in multiple offenses that are tried in the same criminal action.

Article 102.073(a) of the Code of Criminal Procedure reads as follows:

In a single criminal action in which a defendant is convicted of two or more offenses or of multiple counts of the same offense, the court may assess each court cost or fee only once against the defendant.

In *Williams v. State*, the First Court of Appeals relied on this statute to delete duplicative court costs, saying:

Pursuant to article 102.073, a trial court “may assess *each court cost or fee* only once against the defendant.¹⁷

The *Williams* Court also provided this clarification:

Consistent with [article 102.073](#), where a defendant is convicted of two or more offenses or of multiple counts of the same offense in a single criminal action, and the convictions are the same category of offense and the costs are all the same, we hold that the court costs should be based on the lowest cause number.¹⁸

The statute is routinely violated in significant ways. For example, in *Lemus v. State*, the defendant pled guilty to seven charges in a single criminal action. He was charged with court costs of \$694 in one case and \$634 in each of the other six cases. So his court costs totaled \$4,498. The 14th Court of Appeals modified the judgment to delete the court costs assessed in the other six cases. The deleted court costs equaled \$3,804.¹⁹ So this objection is definitely worth making.

(7) Object to the assessment of a second fine if your client is convicted of multiple offenses and the sentences are ordered to run concurrently. _____

Perhaps the best explanation of this concept is found in *Williams v. State*:

With exceptions not applicable here, section 3.03(a) of the Penal Code provides, in relevant part, that “sentences shall run concurrently” when “the accused is found guilty of more than one offense arising out of the same criminal episode prosecuted in a single criminal action.” TEX. PENAL CODE

16 See <https://www.txcourts.gov/publications-training/publications/filing-fees-courts-costs/>.

17 *Williams v. State*, 495 S.W.3d 583, 590 (Tex. App.—Houston [1st Dist.] 2016), *pet. dismissed improvidently granted*, No. PD-0947-16, 2017 WL 1493488 (Tex. Crim. App. April 26, 2017) (emphasis in original).

18 *Id.*

19 See *Lemus v. State*, Nos. 14-18-00905-CR, 14-18-00906-CR, 14-18-00907-CR, 14-18-00908-CR, 14-18-00909-CR, 14-18-00910-CR, 14-18-00911-CR, 2020 WL 4521124 (Tex. App.—Houston [14th Dist.] Aug. 6, 2020, *pet. ref'd*) (mem. op., not designated for publication).

ANN. § 3.03(a) (West 2015). Appellant cannot be assessed more than one fine because a trial court's order that sentences run concurrently applies to the entire sentence, including fines. *See State v. Crook*, 248 S.W.3d 172, 174 (Tex. Crim. App. 2008).

Here, the jury assessed a \$10,000 fine against appellant in each of the three cases involved in this appeal. The trial court listed the \$10,000 fine in the judgment corresponding to each case. The trial court also ordered the sentences to run concurrently. Thus, appellant is only responsible for paying one of the \$10,000 fines. *See id.*²⁰

Please note that if multiple sentences are not ordered to run concurrently, then multiple fines may be assessed.

(8) Object if your client was assessed court costs when placed on regular community supervision and the same costs are assessed again when your client's community supervision is revoked.

Court costs in criminal cases are almost always assessed upon conviction. For example, Section 133.102 of the Local Government Code describes the consolidated court cost. It is to be assessed against “[a] person convicted of an offense.”²¹ And the term conviction is described in Section 133.101 as follows:

MEANING OF CONVICTION. In this subchapter,²² a person is considered to have been convicted in a case if: (1) a judgment, a sentence, or both a judgment and a sentence are imposed on the person; (2) the person receives community supervision, deferred adjudication, or deferred disposition; or (3) the court defers final disposition of the case or imposition of the judgment and sentence.

So costs are not only to be assessed when a person is convicted and there is no community supervision. Costs are also to be assessed when a defendant is placed on regular community supervision or deferred adjudication community supervision.²³

Accordingly, costs are not to be assessed a second time on a defendant whose community supervision is revoked. The costs were already assessed when the person was placed on community supervision.

(9) Object to peace-officer fees if your client is placed on deferred adjudication on or after September 1, 2021.

20 *Williams v. State*, 495 S.W.3d 583, 590 (Tex. App.—Houston [1st Dist.] 2016), *pet. dismissed improvidently granted*, No. PD-0947-16, 2017 WL 1493488 (Tex. Crim. App. April 26, 2017). Another helpful case is *Hurlburt v. State*, 506 S.W.3d 199, 201-04 (Tex. App.—Waco 2016, no pet.).

21 Tex. Loc. Gov't Code § 133.102.

22 Subchapter C of Chapter 133 of the Local Government Code.

23 At least this is the case for the consolidated court cost assessed under Section 133.102. The definition of “conviction” is Section 133.101 applies only to costs assessed under Subchapter C of Chapter 133. The definition of “conviction” is not necessarily the same for all court costs. *See* (9) on this checklist.

Court costs in criminal cases are almost always assessed upon conviction. But a person who has been placed on deferred adjudication has not been convicted.²⁴ So generally, a cost should not be assessed on a person who receives deferred adjudication. But an exception exists if the statute imposing the cost defines the term “conviction” to include deferred adjudication. An example is found Local Government Code, Section 133.101:

MEANING OF CONVICTION. In this subchapter,²⁵ a person is considered to have been convicted in a case if: (1) a judgment, a sentence, or both a judgment and a sentence are imposed on the person; (2) the person receives community supervision, deferred adjudication, or deferred disposition; or (3) the court defers final disposition of the case or imposition of the judgment and sentence.

Thus, costs in the subchapter (such as the consolidated court cost)²⁶ can be assessed when a person is placed on deferred adjudication. But there currently is no statute enlarging the meaning of the term “conviction” when it comes to fees for services of peace officers. There used to be such enlargements in the relevant statutes.²⁷ However, those enlargements were repealed by the 87th Legislature via Senate Bill 1923. The repeals went into effect on September 1, 2021.

Fees for the services of peace officers may not be the only court costs that cannot be assessed in deferred adjudication situations. You should always check the statute that imposes the cost to see if the definition of conviction has been expanded to include deferred adjudications.²⁸

(10) Object if your client was originally assessed court costs when placed on deferred adjudication and the same costs are assessed again when your client is adjudicated. _____

Court costs in criminal cases are almost always assessed upon conviction. For example, Section 133.102 of the Local Government Code describes the consolidated court cost. It is to be assessed against “[a] person convicted of an offense.”²⁹ And the term conviction is described in Section 133.101 as follows:

MEANING OF CONVICTION. In this subchapter,³⁰ a person is considered to have been convicted in a case if: (1) a judgment, a sentence, or both a judgment and a sentence are imposed on the person; (2) the person receives community supervision, deferred adjudication, or deferred disposition; or (3) the court defers final disposition of the case or imposition of the judgment and sentence.

So costs are not only to be assessed when a person is convicted and there is no community supervision. Costs are also to be assessed when a defendant is placed on regular community supervision or deferred adjudication community supervision.³¹

24 *Ex parte Welch*, 981 S.W.3d 183, 185 (Tex. Crim. App. 1998) (“Deferred adjudication is not a conviction.”).

25 Subchapter C of Chapter 133 of the Local Government Code.

26 *See* Texas Loc. Gov’t Code § 133.102.

27 For example, Article 102.011(j) of the Code of Criminal Procedure said “[i]n this article, ‘conviction’ has the meaning assigned by Section 133.101, Local Government Code.” This subsection has been repealed.

28 The new time payment fee does not apply in deferred adjudications. *See* the last paragraph of (11) on this checklist.

29 Tex. Loc. Gov’t Code § 133.102.

30 Subchapter C of Chapter 133 of the Local Government Code.

31 At least this is the case for the consolidated court cost assessed under Section 133.102. The definition of “conviction” is Section 133.101 applies only to costs assessed under Subchapter C of Chapter 133. The definition of “conviction” is not necessarily the same for all court costs. *See* (9) and (11) on this checklist.

Accordingly, costs are not to be assessed a second time on a defendant who was placed on deferred adjudication and was later adjudicated. The costs were already assessed when the person was placed on community supervision.

(11) Make sure the time payment fee has not been prematurely assessed.

An appeal stops the clock in regard to the defendant owing any fees. This also means the time payment fee cannot be assessed during the pendency of an appeal. In *Dulin v. State*, the Court of Criminal Appeals declared:

The pendency of an appeal stops the clock for purposes of the time payment fee. Consequently, the assessment of the time payment fees in Appellant's case is premature, and the fees should be struck in their entirety, without prejudice to them being assessed later if, more than 30 days after the issuance of the appellate mandate, the defendant has failed to completely pay any fine, court costs, or restitution that he owes.³²

By finding the assessment of the time payment fee premature, the *Dulin* Court sidestepped the issue of the time payment fee's constitutionality. Several courts of appeals had found the fee partially unconstitutional because it violated the test set out in *Peraza v. State*.³³ In *Peraza*, the Court of Criminal Appeals said:

We hold that, if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be expended for legitimate criminal justice purposes, then the statute allows for a constitutional application that will not render the courts tax gatherers in violation of the separation of powers clause. A criminal justice purpose is one that relates to the administration of our criminal justice system. Whether a criminal justice purpose is "legitimate" is a question to be answered on a statute-by-statute/case-by-case basis."³⁴

So an argument can still be made that the time payment fee – as it existed prior to Senate Bill 346 becoming effective – is partially unconstitutional. The fee has been revamped under Article 102.030 of the Code of Criminal Procedure. The new statute seems to direct the fee to legitimate criminal justice purposes.³⁵ Please note that the new statute doesn't define "conviction" so the fee shouldn't be assessed in deferred adjudications.³⁶

(12) Object to an order to pay restitution to any person or entity other than a victim of the offense.

Article 42.037(a) of the Code of Criminal Procedure reads, in pertinent part, as follows:

In addition to any fine authorized by law, the court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offense or to the compensation to victims of crime fund established under Subchapter J, Chapter 56B, to the extent that fund has paid compensation to or on behalf of the victim.

32 *Dulin v. State*, 620 S.W.3d 129, 133 (Tex. Crim App. 2021).

33 See e.g., *Dulin v. State*, 583 S.W.3d 351, 353 (Tex. App.—Austin 2019), *vacated*, 620 S.W.3d 129 (Tex. Crim App. 2021); *Kremplewski v. State*, No. 01-19-00033-CR, 2019 WL 3720627 at *3 (Tex. App.—Houston [1st Dist.]), *vacated*, No. PD-0848-19, 2021 WL 1940635 *Tex. Crim App. May 12, 2021); *Ovalle v. State*, 592 S.W.3d 615, 618 (Tex. App.—Dallas 2020), *vacated*, No. PD-0127-20, 2021 WL 1938672 (Tex. Crim. App. May 12, 2021).

34 *Peraza v. State*, 467 S.W.3d 508, 517-18 (Tex. Crim App. 2015) (emphasis added).

35 The fee is now to be used by cities or counties to improve the collection of court costs.

36 See discussion in (9) above.

A defendant may be ordered to pay restitution “only to a victim of an offense for which the defendant is charged.”³⁷ The Eastland Court of Appeals has clarified the meaning of “victim” as follows:

A trial court is authorized to order a defendant convicted of an offense to pay restitution to a victim of the offense or to a crime victim’s assistance fund, not to an agency of the State of Texas such as a community supervision department.³⁸

There are numerous cases explaining various aspects of the term victim. One such case is *Martin v. State* from the Court of Criminal Appeals.³⁹ *Martin* said a restitution order may not compensate all victims of a general fraud scheme when the defendant was only charged with defrauding one investor.⁴⁰

The bottom line is that trial courts frequently impose restitution orders that are not legally authorized. Be on the lookout for these improper orders.

(13) Object to the assessment of any Crime Stoppers Fee if your client is not placed on community supervision.

Section 42A.301(b) of the Code of Criminal Procedure contains a list of 21 basic conditions of community supervision that may be imposed. Condition 19 authorizes a court to order the defendant to:

pay a fine in an amount not to exceed \$50 to a crime stoppers organization, as defined by Section 414.001, Government Code, and as certified by the Texas Crime Stoppers Council.

Sometimes, a court will impose this fee in a case in which the defendant has not been placed on community supervision. This is impermissible. Consider this passage from an opinion by the Eastland Court of Appeals regarding Article 42A.301(b)((19):

[A] trial court may impose a fee of up to \$50 to be paid to a crime stoppers organization as a condition of community supervision.⁴¹

The Eastland Court of Appeals modified the judgment in the case to delete the \$50 fee.⁴² We should expect similar rulings if we challenge the Crime Stoppers fee in cases in which the defendant has not been placed on community supervision.

(14) Object to any Crime Stoppers Fee unless your client is ordered to repay all or part of a specific reward paid by Crime Stoppers related to your client’s prosecution.

37 *Hanna v. State*, 426 S.W.3d 87, 91 (Tex. Crim. App. 2014). See also *Burt v. State*, 445 S.W.3d 752, 758 (Tex. Crim. App. 2014) (“trial judge does not have authority to order restitution to anyone except the victim(s) of the offense for which the defendant is convicted”).

38 *Goodman v. State*, No. 11-21-00109-CR, 2021 WL 5830719 at *2 (Tex. App.—Eastland Dec. 9, 2021, no pet.).

39 *Martin v. State*, 874 S.W.2d 674 (Tex. Crim. App. 1999).

40 *Id.* at 679-80.

41 *Hutson v. State*, No. 11-19-00037-CR, 2021 WL 2836976 at *2 (Tex. App.—Eastland July 8, 2021, no pet.) (emphasis added).

42 *Id.*

Section 42A.301(b) of the Code of Criminal Procedure contains a list of 21 basic conditions of community supervision that may be imposed. Condition 19 authorizes a court to order the defendant to:

pay a fine in an amount not to exceed \$50 to a crime stoppers organization, as defined by Section 414.001, Government Code, and as certified by the Texas Crime Stoppers Council.

The Eastland Court of Appeals recently made this statement in regard to this fine:

The trial court's judgment also imposed a \$50 Crime Stoppers fee. When a person is convicted of an offense, a separately assessed \$50 fee for Crime Stoppers is inappropriate unless the defendant is ordered to repay all or part of a specific reward paid by a crime stoppers organization related to the prosecution of the defendant. . . . [N]othing in the appellate record reflects that any reward was paid by a crime stoppers organization with respect to the prosecution of Appellant. Accordingly, we modify the trial court's judgment to delete the \$50.00 Crime Stoppers fee.⁴³

The point is that Crime Stoppers must actually have paid a reward. If that didn't happen, the fee should not be assessed.

(15) Object to fees assessed for services that have not been performed.

Fees for the services of peace officers are not to be assessed if the particular service was not actually performed. In *Cravey v. State*, the bill of costs included \$225 in sheriff's fees. But the record only supported sheriff's fees of \$75. The Texarkana Court of Appeals modified the judgment to reflect only the \$75 in sheriff's fees.⁴⁴

Sometimes fees will be assessed for the services of peace officers that are mutually exclusive (in most cases). For example, there is a \$5 fee for an arrest without a warrant. There is also a \$50 fee for an arrest pursuant to a warrant. It is not unusual to see both fees assessed. Typically, only one of these services has been performed.

We should carefully check the fees that are assessed for the services of peace officers to see if those services were actually performed.

(16) Object to the assessment of the \$100 EMS court cost if costs are assessed under the fees in effect for offenses committed before January 1, 2020.

In *Casas v. State*, the Fort Worth Court of Appeals declared the \$100 EMS fee to be unconstitutional:

The code of criminal procedure authorizes the imposition of an additional \$100 court cost upon conviction of an intoxication offense to be allocated for emergency medical services, trauma facilities, and trauma-care systems. Tex. Code Crim. Proc. Ann. art. 102.0185. . . . Although courts may not operate as tax gatherers, which is a function reserved to the executive branch of government, courts may collect fees in criminal cases as part of its judicial function "if the statute under which court costs are assessed (or an interconnected statute) provides for an allocation of such court costs to be

⁴³ *Hutson v. State*, No. 11-19-00037-CR, 2021 WL 2836976 at *2-*3 (Tex. App.—Eastland July 8, 2021, no pet.).

⁴⁴ *Cravey v. State*, No. 06-21-00050-CR, 2021 WL 5263689 at *6-*7 (Tex. App.—Texarkana Nov. 12, 2021, no pet.).

expended for legitimate criminal justice purposes.” . . . [T]he medical-services cost suffers from the same infirmity that the court of criminal appeals found applicable to portions of a consolidated fee imposed as a court cost upon criminal conviction under the local government code. *Salinas*, 523 S.W.3d at 107. . . . Neither the statute authorizing the collection of the emergency-services cost nor its attendant statutes direct the funds to be used for a legitimate, criminal-justice purpose; therefore, it is a tax that is facially unconstitutional.⁴⁵

Several other intermediate appellate courts have followed the Fort Worth Court’s lead.⁴⁶ As long as the offense was committed before January 1, 2020, the assessment if this fee cannot stand; it is facially unconstitutional.

Court Cost Checklist on Appeal

(1) Complain about any of the problems on the trial checklist.

All 16 problems noted on the trial court checklist can be advanced on appeal. The ability to advance court-cost issues on appeal was clearly articulated by the Fort Worth Court of Appeals in *Ingram v. State*:

The State argues that Appellant waived his right to challenge the imposed court costs—a nonsystemic, nonpenal challenge—because he raises it for the first time on appeal. We conclude that Appellant may raise these complaints on appeal, even though he did not raise them to the trial court, because the costs were not imposed in open court or itemized in the judgment. See *London v. State*, 490 S.W.3d 503, 506-07 (Tex. Crim. App. 2016); see, e.g., *Bowden v. State*, No. 14-14-00955-CR, 502 S.W.3d 913, 914-15, 2016 WL 6123363, at *1 (Tex. App.—Houston [14th Dist.] Oct. 18, 2016, pet. filed) (holding, under *London*, constitutional challenge to cost under the local government code may be raised for the first time on appeal); *Rogers v. State*, No. 02-16-00047-CR, 2016 WL 4491228, at *1 (Tex. App.—Fort Worth Aug. 26, 2016, pet. filed) (mem. op., not designated for publication) (holding same regarding cost under code of criminal procedure).⁴⁷

(2) Complain of the assessment of any fine or restitution order that was not orally pronounced at the original trial.

“[F]ines generally must be orally pronounced in the defendant’s presence.⁴⁸ The same goes for restitution. In *Hill v. State*, the Tyler Court of Appeals declared:

⁴⁵ *Casas v. State*, 524 S.W.3d 921, 925-26 (Tex. App.—Fort Worth 2017, no pet.).

⁴⁶ See e.g., *Richardson v. State*, 606 S.W.3d 375, 384 (Tex. App.—Houston [1st Dist.] 2020, pet. ref’d); *Tadeo v. State*, Nos. 14-19-00113-CR, 14-19-00116-CR, 2020 WL 2991517 at *4 (Tex. App.—Houston [14th Dist.] June 4, 2020, pet. ref’d); *Deaver v. State*, No. 07-18-00370, 2020 WL 560581 at *5 (Tex. App.—Amarillo Feb. 4, 2020, pet. ref’d); *Robison v. State*, No. 06-17-00082-CR, 2017 WL 4655107 (Tex. App.—Texarkana Oct. 18, 2017, pet. ref’d) (mem. op., not designated for publication);

⁴⁷ *Ingram v. State*, 503 S.W.3d 745, 748 (Tex. App.—Fort Worth 2016, pet. ref’d).

⁴⁸ *Armstrong v. State*, 340 S.W.3d 759,767 (Tex. Crim. App. 2011). See also *Weir v. State*, 278 S.W.3d 364, 366 (Tex. Crim. App. 2009) (contrasting costs with fines which are punitive in nature and generally must be orally pronounced in the defendant’s presence); *Wiedenfeld v. State*, 450 S.W.3d 905, 907 (Tex. App.—San Antonio 2014, no pet.) (“Fines must be orally pronounced in the defendant’s presence.”); *Crisp v. State*, 413 S.W.3d 224, 225-26 (Tex. App.—Fort Worth 2013, pet. ref’d); *Coronel v. State*, 416 S.W.3d 550, 556 (Tex. App.—Dallas 2013, pet. ref’d);

In contrast, fines generally must be orally pronounced in the defendant's presence. TEX CODE CRIM. PROC. ANN. art. 42.03 § 1(a) (West Supp. 2011); *Armstrong*, 340 S.W.3d at 767. Fines are clearly punitive in nature, and they are intended to be part of the convicted defendant's sentence as they are imposed pursuant to Chapter 12 of the Texas Penal Code, entitled "Punishments." See *Armstrong*, 340 S.W.3d at 767; *Weir*, 278 S.W.3d at 366. Similarly, restitution is also punitive. See *Weir*, 278 S.W.3d at 366; *Ex parte Cavazos*, 203 S.W.3d 333, 338 (Tex. Crim. App. 2006).⁴⁹

This problem could be brought up at trial, but the trial court would likely then assess any fine or restitution orally. This is why this is a better argument on appeal.

(3) Complain of the assessment of any fine or restitution order at an adjudication hearing if it was not orally pronounced (even if the fine or restitution order was orally pronounced when your client was placed on deferred adjudication).

In *Taylor v. State*, the Court of Criminal Appeals said:

[W]hen an accused receives deferred adjudication, no sentence is imposed. Then, when guilt is adjudicated, the order adjudicating guilt sets aside the order deferring adjudication, including the previously imposed fine. This is in stark contrast to regular probation, where the sentence is imposed but suspended when probation is granted. It is true that there are some similarities, in the appellate context, between regular probation and deferred adjudication probation. Nevertheless, as we recently recognized in *Donovan v. State*, "[t]he fact that deferred adjudication defendants are given the same right to appeal does not mean that they are treated the same as regular probation defendants in other respects."

In this case, the order granting Taylor deferred adjudication was set aside. Taylor was not sentenced until his guilt was adjudicated. At that time, the judge did not orally pronounce a fine, but included a fine within the written judgment. When there is a conflict between the two, the oral pronouncement controls. Since the judge did not orally assess a fine as part of Taylor's sentence when guilt was adjudicated, the Court of Appeals was correct to delete the fine from the judgment.⁵⁰

Our intermediate courts of appeals have routinely followed *Taylor*.⁵¹ Often, the appellate courts will strike down both a fine and a restitution order.⁵²

This problem could be brought up at trial, but the trial court would likely then assess any fine or restitution orally. This is why this is a better argument on appeal.

49 See *Hill v. State*, 440 S.W.3d 670, 674 (Tex. App.—Tyler 2012, no pet.) (emphasis added). In *Cavazos*, the Court of Criminal Appeals reiterated a longstanding holding that "restitution is punishment."

50 *Taylor v. State*, 131 S.W.3d 497, 502 (Tex. Crim. App. 2004) (internal citations omitted).

51 See e.g., *Moore v. State*, Nos. 09-20-00106, 09-20-00107, 2022 WL 107190 at *2-*3 (Tex. App.—Beaumont Jan. 12, 2022, no pet. h.) ("[I]n a deferred adjudication situation, the fine from the original order of deferred adjudication does not carry over if the defendant is adjudicated guilty, unless the trial court imposes a fine at the proceeding adjudicating guilt when it orally pronounces the defendant's sentence."); *Davis v. State*, No. 14-20-00290-CR, 2021 WL 1222787 at *3-*4 (Tex. App.—Houston [14th Dist.] April 1, 2021, pet. ref'd); *Tate v. State*, No. 04-19-00158, 2019 WL 4647706 at *1-*2 (Tex. App.—San Antonio Sep. 25, 2019, pet. ref'd).

52 See e.g., *Wesley v. State*, No. 06-19-00269, 2020 WL 3456599 at *2-*3 (Tex. App.—Texarkana June 25, 2020, no pet.) (modifying judgment to delete both a fine and a restitution order).

(4) Challenge the assessment of fees for the services of peace officers if the record does not contain a “fee record.

Article 103.009 of the Code of Criminal Procedure requires sheriffs to keep fee records. The fee record “must contain a statement of each fee or item of cost charged for a service rendered in a criminal action or proceeding.”⁵³ Additionally, the fee record must contain “the number and style of the action or proceeding.”⁵⁴

It seems that the Legislature intended for the services of peace officers listed in the bill of costs to be based on the fee record. But fee records are rarely prepared. It might be worth challenging the fees assessed for the services of peace officers if there is no fee record in the appellate record. But this challenge does not appear to have ever been made in the courts of appeals. So it would be a novel challenge.

(5) Challenge the constitutionality of the new fines and reimbursement fees under Senate Bill 346 on separation-of-powers principles (e.g., the transformation of the \$100 EMS court cost into a “fine”).

As discussed in (16) on the trial court checklist, the \$100 EMS fee is unconstitutional. The Legislature attempted to solve this problem in 2017 via Senate Bill 346. The Legislature amended Article 102.0185 which had previously called for the payment of a \$100 “cost.” The new law changes the nomenclature to a \$100 “fine.” Everything else remains the same. The money is still directed to the same place – “the account established under Section 773.006, Health and Safety Code.”⁵⁵ Numerous other costs have been relabeled as “fines” or “reimbursement fees.” The question is whether this change in nomenclature makes the \$100 assessment and other problematic assessments constitutional.

The Legislature’s theory is that revenue from fines does not need be directed to a legitimate criminal justice purpose. The idea is that fines are punishment. So they are not like court costs which do have to be directed to a legitimate criminal justice purpose). But this concept is questionable.⁵⁶

In *King v. State*, the Eastland Court of Appeals succinctly phrased the question facing an appellate court regarding a court cost’s constitutionality:

In other words, a reviewing court must determine whether the fee is a disguised tax on a criminal defendant, which is unconstitutional, or a fee for a legitimate criminal justice purpose, which is constitutional. See *Casas v. State*, 524 S.W.3d 921, 925-27 (Tex. App.—Fort Worth 2017, no pet.).⁵⁷

There is certainly an argument to be made concerning these new “fines” and “reimbursement fees.” If they do not go to legitimate criminal justice purposes they are arguably a “disguised tax.” And that would be unconstitutional.

But even if these fines and reimbursement fees can pass constitutional muster, they would still have to be orally

53 Tex. Code Crim. Proc. art. 103.009(a).

54 Tex. Code Crim. Proc. art. 103.009(b).

55 The account funds emergency medical services, trauma hospitals and related items.

56 One commentator has noted that “[i]t is more than a matter of semantics.” Robby Chapman, *The Consolidation of Court Costs and Reimagining of Fines in Texas: Five Important Considerations*, The Recorder, April 2020 at 8.

57 *King v. State*, No. 11-17-00179-CR, 2021 WL 2836631 at *2 (Tex. App.—Eastland July 8, 2021, no pet.) (emphasis added).

pronounced.⁵⁸ If that does not occur, they cannot stand.

(6) Challenge the conclusion that the new court-cost system created under Senate Bill 346 went into effect on January 1, 2020 (a good argument exists that the new system did not go into effect until January 1, 2021).

The effective date of the bill is stated to be January 1, 2020. But there is an argument to be made that the actual effective date of the new fees is January 1, 2021. This is because of Section 51.607(c) of the Government Code which says:

“Notwithstanding the effective date of the law imposing or changing the amount of a court cost or fee included on the list, the imposition or change in the amount of the court cost does not take effect until the next January 1 after the law takes effect.”

If Section 51.607 is given effect, the effective date of the new court-cost scheme would be January 1, 2021. This argument has not yet been attempted in the courts of appeals. The Office of Court Administration (OCA) has said this argument is faulty:

Reconciling SB 346, Gov’t Code § 51.607, and Gov’t Code 51.608, it is OCA’s position that the bill takes effect January 1, 202. The Comptroller of Public Accounts has also indicated that the changes in SB 346 are effective January 2, 2020.⁵⁹

Significantly, this argument has not yet been made in any of the intermediate courts of appeals. It is definitely worth a try.

58 See (2) on this appellate checklist.

59 See Question 1 in “Frequently Asked Questions concerning SB 346” at <https://www.txcourts.gov/media/1444982/questions-from-webinar.pdf>.

Introduction: Ability to Pay Guidance

Introduction

The laws governing fines and fees in Texas have changed rapidly over the past five years. This Guidance will help you understand those changes and provide best practices for implementing those changes easily and efficiently.

In Texas, costs and fines are assessed along with a criminal charge, whether it be a Class C misdemeanor or a first degree felony. Costs and fines can easily run in the thousands, which can pose a significant strain on low-income and even middle class families. Failure to pay these amounts can result in a slew of consequences, such as a suspension of a driver's license, extension of probation, or incarceration. However, these penalties are harmful for low-income folks and the communities they live in, furthering cycles of poverty and limiting opportunities for growth.

Texas law requires courts to consider ability to pay when setting fines and fees so that low-income folks can disentangle themselves from the criminal legal system, and avoid being punished for their poverty. In order to set people up for success at sentencing, it is crucial that courts follow the letter and the spirit of these laws. It may seem like a daunting task, but it can be done without overburdening courts or litigants.

This Guidance explains the current fines and fees statutory scheme in Texas. Additionally, it analyzes new legislation, including the requirement that courts conduct an ability to pay assessment on the record at judgment in a criminal case. Finally, this Guidance provides best practices for judges and practitioners that can be readily adopted by courts.

Brief Summary

At sentencing, courts are required to conduct ability to pay assessments on the record to determine a person's capacity to afford fines and costs associated with their sentence. The court can only assess an amount the court finds a person is able to afford.

Even after judgment, however, people have the right to have their fines and costs reassessed based on ability to pay. At any point, if a person notifies the Court that they are having difficulty paying their fines and costs, the Court must reconsider the fines and costs.

The topics highlighted in this guidance are not only legally required by courts to consider, they are also efficient practice. Addressing folks' costs and fines at the outset of a case can help ensure successful progression of a sentence, and prevents courts and attorneys from spending time on the back end to address delinquent balances.

What it Means to Be Poor

For those experiencing poverty, affording the basic necessities for life is a challenge. This difficulty is compounded by the cost of fines and fees in the criminal legal system, forcing folks to choose between providing for their families or satisfying court-ordered debts. There are several metrics to gauge the income folks need to care for themselves and their families, and these metrics can also be used to understand a person's inability to afford fines and fees.

- *HUD's Income Limits.* HUD sets income limits to determine eligibility for public housing assistance, and to determine income thresholds to afford housing in a given area in the country.¹¹

¹ These calculations can be broken down by county, and even by various metro areas within the state. The income limits can be found at https://www.huduser.gov/portal/datasets/il/il2020/select_Geography.odn.

These income limits are categorized as “low,” “very low,” and “extremely low.” For example, a “low income” for a single-person household in Texas is \$42,050. “Very low” income for a single person house hold is \$26,300. With increasing costs of housing, HUD’s guidelines prove very informative in understanding the amount of money folks need to survive.

- A full-time employee making minimum wage in Texas earns \$13,920 before any taxes— just 33% of the “low” HUD standard and 53% of the “very low” standard.
- *MIT’s Living Wage Calculator*. The developers of this metric appreciate that folks “working in low-wage jobs make insufficient income to meet minimum standards given the local cost of living,” and developed this calculator to help “individuals, communities, and employers determine a local wage that allows residents to meet minimum standards of living.”²
- For example, a living wage for a single adult is:
 - \$14.33 in Harris County
 - \$15.21 in Dallas County
 - \$13.14 in McLennan County
- To put this in perspective, the minimum wage in Texas is still \$7.25 an hour.

Before Ordering Costs, Fees, and Fines:

Before ordering costs, fees, and fines, courts must conduct specific inquiries into the defendant’s ability to pay *on the record* to ensure that folks are not set up to fail. For those who are unable to afford costs and fees, waiver is appropriate. For those who are indigent and cannot complete additional community service without undue hardship, waivers of fines are also appropriate. For those who are low-income but still able to pay something, the court must only assess fines, costs, and fees in affordable amounts.

Ability to Pay Determinations - Mandatory, and must be on the record (Article 42.15(a-1)).

“[D]uring or immediately after imposing a sentence in a case in which the defendant entered a plea in open court as provided by Article 27.13, 27.14(a), or 27.16(a), a court shall inquire on the record whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs.”³

Under Texas Code of Criminal Procedure Article 42.15(a-1), courts are required to conduct ability to pay assessments on the record at sentencing. This entails a specific finding of the defendant’s current financial status and whether they will be able to afford financial conditions of a criminal judgment.

The Code does not outline how exactly this assessment must be done, but courts may reasonably conclude that a person is unable to pay assessments without undue hardship if the any of the following apply:

2 The MIT Living Wage Calculator can be found at <https://livingwage.mit.edu/>. Calculations are broken down by county.

3 Tex. Code Crim. Pro. Ann. art. 42.15(a-1).

- Eligibility for representation by a court-appointed attorney or public defender;⁴
 - This creates a presumption of indigency, which is an element to waiving fines and costs.
 - Under 24.04(m), the court “may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant’s financial circumstances as measured by the considerations listed in this subsection.” This means that courts should not be considering factors such as the person’s ability to borrow money or whether or not the person’s parents or other relatives can afford to pay for an attorney.
- Current receipt of any needs-based public assistance/benefits;
 - This indicates that the government has already made a finding of indigency on a person’s behalf.
- Household size/number of dependents as compared to net income:
 - Net income is below 100% of HUD’s “very low” individual income limit for public housing;⁵
 - Net income is below MIT’s living wage calculator for the given jurisdiction;⁶or
 - Homelessness or housing insecurity.
 - Courts should subtract significant recurring costs (i.e., treatment for disability or long-term ailment, child support payments) when calculating net income for the purposes of ability to pay findings.

Much of the information courts need to determine ability to pay can be gleaned from as worn affidavit detailing a person’s financial situation.⁷ To endorse information provided in the affidavit, a person can attach pay stubs, proof of receipt of government benefits, monthly bills, and any other information that they feel is relevant to explaining their financial situation.

Intentionality. This finding must be specific to the person who may be ordered to pay fines or costs. If done with intention, these findings will avoid setting low-income folks up for failure by assessing amounts they have no hopes of paying. It will prevent unnecessary incarceration or extensions of probation sentences for a person’s inability to pay. It will also ensure smoother court procedures in the long-term as courts will see fewer cases of financial delinquency.

Flexibility. These findings must also be flexible and understand that a person’s financial situation can change. Reassessments are required in cases where individuals experience difficulty in keeping up with payments. Furthermore, as discussed later on in this Guidance, it is wholly appropriate for already-ordered amounts to be reevaluated and even waived entirely during asentence.⁸⁸

“Reimbursement Fees” are now explicitly eligible for waiver “(Article 43.015(3)).

SB 1373 added “reimbursement fees” to the definition of “costs” as a category eligible for waiver under Texas Code of Criminal Procedure Article 43.015(3). Reimbursement fees include, but are not limited to:

4 Factorstoconsider when appointing counsel are listed under Tex.Code Crim. Pro.Art. 24.04(m).

5 Incomelimitscanbefoundathttps://www.huduser.gov/portal/datasets/il/il2020/select_Geography.odn.

6 TheMITLivingWageCalculatorcanbefoundat <https://livingwage.mit.edu/>.

7 The Supreme Court of Texas approved the Statement of Inability to Afford Payment of Court Costs, which can be found at <https://www.txcourts.gov/media/1436042/stmtofinability.pdf>. This is just an example of an affidavit that can be submitted to the court to detail a person’s financial situation; any other sworn, detailed statement can be used.

8 Tex.CodeCrim.Pro.ann.art.43.035(a).

- Payments for pretrial intervention programs⁹
- Fees to cover the services of peace officers for their time in a given case¹⁰
- Fees to cover the arrest and investigation of intoxication charges¹¹

The explicit inclusion of pretrial diversion fees as waivable costs is a considerable development in the area of indigent defense. Previously, these programs have been largely only accessible to wealthier individuals. Now, the Code specifically provides that if a court deems a person a good candidate for pretrial diversion programs but the person is unable to pay the associated fees, the court should waive the fees and allow them access to the program. This will decrease post-conviction supervision loads and court dockets, and give individuals access to diversion programs they normally are kept out of due to their poverty. The process of waiving such fees is described in more detail below.

If Fines, Fees, and Costs are Imposed, Which Can Be Reduced or Waived?

Costs

Under Tex. Code Crim. Pro. Ann. art. 43.015(3), “costs” include any fees, including a reimbursement fee (described above), imposed by the court. This includes:

- Probation monthly supervision fees
 - Includes additional separate fees associated with probation, such as urinary analysis fees
- Court costs
- Pretrial fees¹²

While fines are only waivable if the person both (1) cannot afford to pay, and (2) cannot perform community service without undue hardship,¹³ waiver of costs is appropriate with *only a finding of inability to pay*.¹⁴ The legislature saw fit to make this distinction in 2019 with the passage of Senate Bill 346, due to the fact that unlike fines, costs are non-punitive, and therefore it does not make sense to convert costs into community service. This is consistent with precedent set by the Texas Court of Criminal Appeals, *see, e.g., Weir v. State*, 278 S.W.3d 364, 367 (Tex. Crim. App. 2009) (“we hold that court costs are not punitive[.]”).

The “ability to pay” threshold is a broader standard than indigency. Therefore, even folks who are not necessarily considered indigent by the court may still be unable to pay court costs, and are still eligible to have them waived.

⁹ Tex. Code Crim. Pro. Ann. arts. 102.012 and 102.0121.

¹⁰ *Id.* at Art. 102.011

¹¹ *Id.* at Art. 102.018.

¹² Tex. Code Crim. Pro. Ann. art. 43.015(3). This is a change that was implemented with the passage of SB1373 (2021).

¹³ Tex. Code Crim. Pro. Ann. art. 43.091(a).

¹⁴ *Id.* at 43.091(c)(1).

Probation-specific costs are waivable (Arts. 43.091(d), 42A.652(b))

Community supervision fees are waivable under both Article 43.091 and Article 42A.652(b). Article 42A.652(b) explicitly permits the Court to waive community supervision fees if the Judge determines such payment would cause the defendant significant financial hardship. This includes monthly supervision fees, along with miscellaneous fees charged to the probation department, such as urinalysis fees. For these defendants, the monthly fee may be wholly waived outright (i.e., set to \$0 a month).

However, for those that the court deem able to afford the costs of their community supervision, the Code dictates that monthly community supervision fees range between \$25 and \$60.¹⁵ As ability to pay determinations ought to be individualized, monthly fees should be assessed within this range to the level a person is able to afford. For example, it may be appropriate to set the monthly fee to \$25 for those who earn a steady income at 200% of the “very low” HUD individual income limit.

Fines (Articles 43.09 and 42.15)

Fines are assessed as a punishment specific to the charge. All ranges of charges can carry fines with them. Courts can set most fines very low or at \$0 at the outset.

A waiver of a fine is appropriate and necessary for those who are unable to pay. A court should waive all or part of a fine if a person is both (1) indigent, and (2) unable to complete an alternative discharge method without undue hardship.¹⁶ This includes fines that were imposed by a jury.

Articles 43.09 and 42.15 lay out these alternative methods of discharging fines, the most common of which is community service. However, the Code defines community service several ways, including work and job skills training, or GED preparatory classes.¹⁷ Courts are encouraged to take advantage of this broad range of community service to incentivize participation in programs that can lead to better outcomes for the individual.

In determining whether a person is unable to perform community service without undue hardship, the court may consider several factors. The Code of Criminal Procedure lists a few of the most common factors contributing to undue hardship:

- (1) significant physical or mental impairment or disability;
- (2) pregnancy and childbirth;
- (3) substantial family commitments or responsibilities, including child or dependent care;
- (4) work responsibilities and hours;
- (5) transportation limitations;
- (6) homelessness or housing insecurity; and
- (7) any other factor the court determines relevant.¹⁸

It is worth noting that “undue hardship” does not equate total impossibility. The Code does not require a person to exhaust every avenue possible before deeming community service an unsuitable replacement for a fine. A person can have completed community service previously but still experience an undue hardship in completing additional hours to

¹⁵ Tex.CodeCrim.Pro. Ann. art. 42A.652(a).

¹⁶ Tex.CodeCrim.Pro. Ann. art. 43.091.

¹⁷ *Id.* at 43.09(h).

¹⁸ *Id.* at (b).

discharge a fine due to the factors listed above.

If a person is indigent *and* faces an undue hardship in completing one of the alternative methods for discharging the fine, the Code dictates that waiver of all or part of the fine is the appropriate course of action. If only part of the fine is waived, the remaining balance must still be an amount that the person is able to afford.

Furthermore, it is recommended that courts offer *all individuals* the opportunity to complete various forms of community service, such as enrolling in job skills training or completing GED courses, in the interests of providing opportunities for personal growth.

Attorney's Fees

A defendant found indigent when counsel was appointed “is presumed to remain indigent for the remainder of the proceedings in the case unless a *material change* in the defendant’s financial circumstances occurs.”¹⁹ Absent a finding of a material change in a person’s finances from the time of appointment of counsel, a person is presumptively, and factually, indigent, and must not be charged attorney’s fees, even as part of a plea negotiation.

The court can only assess attorney fees only if the court makes a finding that the person’s financial circumstances have changed and the person now has an ability to pay those fees.²⁰ Thus, “the defendant’s financial resources and ability to pay are *explicit critical elements* in the trial court’s determination of the propriety of ordering reimbursement of costs and fees.”²¹ A finding of a material change in a person’s ability to pay must be made to lawfully assess reimbursement for a court-appointed attorney, and only the same financial factors considered when appointing an attorney may be considered when reassessing whether or not the person can later pay.²²

Payment plans. (Art. 42.15(a-1)).

It is important to note that assessed fines and costs (including supervision costs) ought to be proportionate to a person’s income. A person making \$30,000 a year should not be assessed the same amount in fines and costs as a person making \$100,000 a year, and payment plans should not take up a substantial portion of a person’s income. In order to provide some structure and predictability to payments, courts are authorized to create payment plans under Article 42.15(a-1) (1). However, if a person experiences difficulty in maintaining this payment schedule, courts are authorized and encouraged to reassess the person’s ability to pay under Article 43.035, as described below.

Furthermore, it is best practice for courts to ensure that payment plans are not inordinately long. If the court sets a low monthly payment on a large balance, and the person diligently pays that amount each month, the person should not be trapped in a payment plan for many months or even years due to the large balance. This sets people up for failure due to their lack of resources. Instead, the court should reassess the total balance and waive the remaining fines and costs after six to twelve months of payments. Furthermore, courts should never extend sentences of community supervision solely due to inability to pay fines and costs in a timely manner.

19 Tex.Crim.Proc. Code Ann. art. 26.04(p) (emphasis added).

20 *Id.* at 26.05(g); *see also* Wolfe v. State, S.W.3d 141, 144 (Tex. App. 2012) (“By now, it is well established that in order to assess court-appointed fees in a judgment, a trial court must determine that the defendant has the financial resources that enable him to offset in part or in whole the costs of legal services provided).

21 Mayerv.State,309S.W.3d552,556(Tex. Crim. App. 2010) (emphasis added).

22 Factors to consider when appointing counsel are listed under Tex. Code Crim. Pro. Art. 24.04(m).

The Right to Have Ability to Pay Reassessed (Article 43.035)

Under Tex. Code Crim. Pro. Ann. art. 43.035, courts must reassess fines and costs if they have reason to believe the person is struggling to pay. A person may notify the court of their inability to afford assessed fines and costs via:

- (1) Voluntarily appearing and informing the court or the clerk of the court in the manner established by the court for that purpose;
- (2) Filing a motion with the court;
- (3) Mailing a letter to the court; or
- (4) Any other method established by the court for that purpose.

If the person provides the court with this above-listed notice under 43.035, the court must determine whether the fines and charges should be satisfied through the methods listed under 42.15(a-1). Furthermore, if a person provides the court with this notice and the court declines to grant relief on the papers, the court *must* conduct a hearing on the matter (“If a defendant notifies the court that the defendant has difficulty paying the fine and costs in compliance with the judgment, the court shall hold a hearing to determine whether that portion of the judgment imposes an undue hardship on the defendant.”)²³

The same options of full waiver, reduction, and payment plans are available to discharge already-assessed fines and costs.

When a Person is Struggling to Keep Up with Payments (Mandatory Reassessment Under 43.035)

If a person falls behind on payments, the court is required by statute to conduct an assessment of ability to pay and provide the defendant with the opportunity to explain their financial situation.²⁴ From there, the court ought to assess whether a full waiver, reduction, or payment plan for costs and fines is necessary. Finances and circumstances are ever-changing, and re-evaluation of monetary obligations may sometimes be necessary. A person should not be punished for their poverty.

Conclusion

Texas law provides clear guidance on assessing fines and costs for justice-involved individuals, and outlines remedies the court must implement for those who are unable to afford fines and costs. Appreciating and understanding these laws ensure that our courts continue to operate in the interests of justice, and not at the expense of Texans experiencing poverty.

Contact

For questions regarding this guidance, feel free to contact Harjeen Zibari, attorney at the Texas Fair Defense Project, at hzibari@fairdefense.org, or at 512-838-3697.

²³ Tex. Code Crim. Proc. Ann. art. 43.035(a).

NO.

STATE OF TEXAS

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IN THE DISTRICT COURT

vs.

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25TH JUDICIAL DISTRICT

LAVACA COUNTY, TEXAS

**MOTION TO WAIVE COURT COSTS AND ATTORNEY’S FEES
DUE TO DEFENDANT’S INDIGENT STATUS/INSUFFICIENT FUNDS**

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW the Defendant in the above entitled and numbered cause, by and through his attorney of record, and pursuant to Articles 26.05 and 43.091, Texas Code of Criminal Procedure, presents this Motion to Waive Court Costs and Attorney’s Fees Due to Indigent Status/Insufficient Funds, and as grounds therefore, would show this Court the following:

I.

OVERVIEW OF RELIEF REQUESTED

The Defendant respectfully requests that at this juncture the Court waive all court costs and attorney’s fees associated with the above numbered cause. The Defendant is indigent and is shown to have limited resources, so that an imposition of court costs and attorney’s fees would result in undue hardship. Therefore, the Defendant asks this Court to exercise its power under Article 43.091, Texas Code of Criminal Procedure, and waive all court costs and attorney’s fees.

II.

**THE COURT HAS STATUTORY AUTHORITY TO WAIVE
COURT COSTS AND ATTORNEY’S FEES**

Article 43.091, Texas Code of Criminal Procedure, states:

“WAIVER OF PAYMENT OF FINES AND COSTS FOR CERTAIN DEFENDANTS AND FOR CHILDREN. A court may waive payment of all or part of a fine or costs¹ imposed on a defendant if the court determines that:

- (1) The defendant is indigent or does not have sufficient resources or income to pay all or part of the fine or costs”

Additionally, Article 26.05(a), Texas Code of Criminal Procedure, states that “counsel, *other than an attorney with a public defender’s office . . .* shall be paid a reasonable attorney’s fee” for court appointed representation. (emphasis added). Subsection (g) further state that a judge shall order the defendant to pay the reimbursement fee for a court-appointed attorney, but only “*If the judge determines that a defendant has financial resources that enable the defendant to offset in part or in whole.*” TEX. CODE CRIM. PROC. art. 26.05(g) (emphasis added).

In *Wiley v. State*, the Texas Court of Criminal Appeals interpreted this provision to mean that “once a defendant is declared indigent, a trial court may order a defendant to pay for costs of ‘legal services provided’ – but only if it first deter-

¹ See Article 43.015(3), which defines “cost” as “include[ing] any fee imposed on a defendant by the court at the time a judgment is entered.” See also 2021 Tex. Sess. Law Serv. Ch. 106 (S.B. 1373) (effective Sept. 1, 2021), which amends Art. 43.015(3) to expressly include “any fee, including a reimbursement fee, imposed on a defendant by the court.”

mines that the defendant has financial resources that enable him to offset in part or in whole the costs [.]” 410 S.W.3d 313, 317 (Tex. Crim. App. 2013) (finding the record was insufficient to support an order for attorney’s fees when the trial court failed to find the defendant’s financial status changed after initially finding him to be indigent when appointing counsel). *See also Garcia v. State*, 2015 WL 2124799 (Ct. App.-San Antonio, 2015) (holding that in order to impose attorney’s fees on a defendant represented by a public defender’s office, the trial court had to find that a material change occurred and the defendant had the ability to pay court costs and attorney’s fees).

III.

THE DEFENDANT’S INDIGENT STATUS/INSUFFICIENT FUNDS QUALIFY DEFENDANT FOR A WAIVER OF COURT COSTS

The Court made a finding of the Defendant’s indigence when it appointed Texas RioGrande Legal Aid Lavaca County Public Defender to represent the Defendant.

Art. 26.04(p), Texas Code of Criminal Procedure, states that “a defendant who is determined by the court to be indigent is presumed to remain indigent for the remainder of the proceedings in a case...” Given this court’s finding of the Defendant’s indigent status/limited finances, the Defendant respectfully asks this court to adhere to its finding of indigency/limited resources and waive court costs and attorney’s fees at this time.

The Defendant’s sworn-to Affidavit of Indigence and the Court’s Order Appointing Texas RioGrande Legal Aid as counsel is attached to this motion as Exhibit A.

IV.

COURT COSTS AND ATTORNEY’S FEES ARE NOT INTENDED TO BE PUNITIVE

The Court of Criminal Appeals has held that court costs are not punitive and are not intended to be part of a convicted defendant’s sentence as are fines and restitution. *Weir v. State*, 278 S.W. 3d 364, 366-67 (Tex. Cr. App. 2009). Rather, court costs are intended as a “nonpunitive ‘recoupment of the costs of judicial resources expended in connection with the trial of the case.’” *Id.* at 366. Because court costs are “purely compensatory and not punitive,” the Court is able to consider the defendant’s financial ability to recoup court costs. *Id.* Similarly, attorney’s fees are referred to as “reimbursement fees” in Article 26.05. Therefore, the Court should not consider the punishment or rehabilitative effect of imposing court costs on a defendant the way it would with a fine or restitution.

Further, Article 43.091(d) states that “[a]t any time during the defendant’s period of community supervision, the court, on the court’s own motion or by motion of the attorney representing the state, may reconsider the waiver of the fine or costs.” This means that if the Defendant later has sufficient resources or income during their probation, the Court may order the Defendant to pay all or part of the waived amount of the costs.

VI.

REQUEST FOR A HEARING IN THE EVENT COURT COSTS AND ATTORNEY’S FEES ARE NOT WAIVED

Without waiving the foregoing requests, the Defendant submits that should this Honorable Court fail to grant this request to waive court costs and attorney’s fees, that a hearing be held on the record for the Court to make a finding of the Defendant’s financial circumstances.

Senate Bill 1373, approved on May 24, 2021, and effective September 1, 2021, amends Article 42.15 to state: Notwithstanding any other provision of this article, during or immediately after imposing a sentence in a case in which the defendant entered a plea in open court as provided by Article 27.13, 27.14(a), or 27.16(a), a court shall inquire **on**

the record whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs. (emphasis added).

Furthermore, as stated above, in order to impose attorney's fees on a defendant represented by a public defender's office, Article 26.05(g) requires that the court make a finding that a material chance has occurred such that the indigent defendant now has the ability to pay attorney's fees. *See also Wiley v. State*, 410 S.W.3d 313, 315 (Tex. Crim. App. 2013), and *Garcia v. State*, 2015 WL 2124799.

Therefore, the Defendant requests that a hearing on his financial status and ability to afford court costs and the reimbursement of attorney's fees be held prior to imposing any such fees in this cause.

**VII.
CONCLUSION AND PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court will grant this, the Defendant's Motion to Waive Court Costs and Attorney's Fees Due to Defendant's Indigent Status/Insufficient Funds; or in the alternative, that this Court schedule this matter for a hearing on the record and that at such hearing this Motion will be in all things granted.

Respectfully Submitted,
Texas RioGrande Legal Aid
Lavaca County Public Defender
200 W 4th Street
Hallettsville, Texas 77964
Tel/Fax: (361) 450-6730

By: _____
State Bar No.

NO.

STATE OF TEXAS

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IN THE DISTRICT COURT

vs.

25TH JUDICIAL DISTRICT

LAVACA COUNTY, TEXAS

**ORDER ON DEFENDANT’S MOTION
TO WAIVE COURT COSTS AND ATTORNEY’S FEES
DUE TO DEFENDANT’S INDIGENT STATUS/INSUFFICIENT FUNDS**

Having considered the Defendant’s Motion to Waive Court Costs and Attorney’s Fees, the Court, having considered such motion and the evidence in support of the motion, and arguments of counsel, it is hereby ORDERED AND DECREED that said motion should be:

GRANTED IN FULL: All court costs and attorney’s fees are waived at this time.

GRANTED IN PART: _____

DENIED.

Signed on _____.

JUDGE PRESIDING

NO.

STATE OF TEXAS

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IN THE DISTRICT COURT

vs.

25TH JUDICIAL DISTRICT

LAVACA COUNTY, TEXAS

**ORDER FOR SETTING ON DEFENDANT’S ABILITY TO PAY HEARING WITH
COURT REPORTER**

On _____, the Defendant filed a Motion to Waive Court Costs and Attorney’s Fees Due to Defendant’s Indigent Status/Insufficient Funds and in the alternative of a waiver requested a hearing on the record as to whether the Defendant’s ability to pay all or part of the fine and costs.

The Court finds that the party is entitled to a hearing on this matter, and it is THEREFORE ORDERED that a hearing on the record is set for _____, at _____.

Signed on _____.

JUDGE PRESIDING

Tex. Code of Crim. Proc. Ann. Art. 26.05(g) requires a determination made by the Court, of fees and costs that the defendant is able to pay, this includes reimbursement fees. For a Court to order the imposition of such fees upon the defendant, there must be sufficient evidence from which a court could determine a defendant's present ability to pay the assessed fees and costs related to legal services. *Id.*; see also *Mayer v. State*, 309 S.W.3d 552, 553 (Tex. Crim. App. 2010); see also *Ex parte Gonzales*, 945 S.W.2d 830, 833 (Tex. Crim. App.) (stating it is "illogical for a trial court to appoint a defendant counsel and then find the defendant in contempt and sentence him... for failure to reimburse the county for the expense of this defense without first considering his ability to make payments").

Defendant was determined to be indigent and is represented by court appointed counsel for the above cause number and related causes. Defendant's continued custody has further aggravated her financial situation and provides further proof that defendant is *presently* unable to afford employment of counsel. Thus, the defendant is presently indigent. Defendant's indigence further operates to provide for her inability to pay fees, fines, and costs if any be required of her upon final judgment.

5. Mr. Smith requests the mandatory ability-to-pay inquiry.

Subject to the above cited authorities and without waiving the foregoing requests, the Defendant submits that an inquiry on the record be held for the Court to make a finding of the Defendant's financial circumstances, for the purpose of determining the amount the Defendant will be ordered to pay upon final judgment. Tex. Code of Crim. Proc. Art. 42.15(a-1) contemplates such a request and states in relevant part:

"(a-1) Notwithstanding any other provision of this article, during or immediately after imposing a sentence in a case in which the defendant entered a plea in open court as provided by Article 27.13, 27.14(a), or 27.16(a), a court shall inquire on the record whether the defendant has sufficient resources or income to immediately pay all or part of the fine and costs."

6. Mr. Smith prays for relief from this Court.

Mr. Smith respectfully prays that this Honorable Court will grant this motion after the ability-to-pay inquiry has been conducted on the record.

Respectfully submitted,
CONCHO VALLEY PUBLIC
DEFENDER OFFICE
113 W. Beauregard
San Angelo, Texas

By: _____
ATTORNEY
State Bar No.

CERTIFICATE OF SERVICE

I hereby certify that a copy of Defendant's Motion to Waive Court Costs, Fines, and Fees Due to Defendant's Indigent Status/Insufficient Funds was delivered to the _____ Attorney's Office, ADDRESS via electronic service, on this the __ day of _____, 2022.

By: _____
ATTORNEY

CAUSE NUMBER _____.

STATE OF TEXAS

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IN THE _____

V.

_____ COUNTY, TEXAS

DEFENDANT’S MOTION TO WAIVE COMMUNITY SUPERVISION FEES

COMES NOW, (Client’s name), by and through Counsel and pursuant to Texas Code of Criminal Procedure Articles 42A.652, 42A.655, and 42A.701, requests this Honorable Court to waive, reduce, or suspend payment of community supervision fees. In support of this motion, (Client) shows the Court the following:

I. FACTS

1. (Client) has been charged with (Charge).
2. Negotiations with the (County) District Attorney’s Office have resulted in a plea offer of (insert plea deal here, i.e., 4 years community supervision).
3. Because deferred adjudication is community supervision, the court must assess a monthly community supervision fee unless in assessing her ability to pay under Articles 42A.654 and 42A.652(b) it finds that to do so would create a significant financial hardship.
4. (Client) is indigent and community supervision fees would cause significant financial hardship.
5. Counsel for the above cause number was appointed, and this representation is pro-bono.
6. (Insert mitigating information that describes financial situation, such as:
 - Single mother?
 - Disabled?
 - Taking care of elderly parents?
 - Relevant Undue hardship considerations under 43.091(b), if any, to argue why additional community service shouldn’t be assessed.
7. (Client) is unable to afford the costs of community supervision. *See Exhibit A, Statement of Inability to Afford Court Costs.*
8. (Client) receives the following means-tested government benefits: SNAP Food Benefits, Housing Assistance, and Medicaid. *See Exhibit*____, *Government Benefits.*
9. She works part-time as home healthcare assistant for her disabled mother; she works from home. When she can work, she averages _____ a month. *See Exhibit* _____, *Paystubs.*

II. APPLICABLE LAW

Fees and Costs

10. Community Supervision fees are authorized under Article 42A.652(a) of the Texas Code of Criminal Procedure. Judges are to set fees between \$25 and \$60 a month.
11. However, Article 42A.652(b) explicitly permits the Court to waive or reduce community supervision fees or suspend monthly payments if the Judge determines such payment would cause the defendant significant financial hardship.
12. Additionally, Article 42A.655 states that the court shall consider ability to pay before ordering the defendant to pay payments under Chapter 42A of the Texas Code of Criminal Procedure.

13. Waiver or reduction of (Client's) costs, including supervision costs, is necessary and appropriate in this case.
14. Under Tex. Code Crim. Pro. Ann. art. 43.091(c)(1), waiver of costs is appropriate if the defendant is "indigent or does not have sufficient resources to pay."
15. As established above, (Client) is indigent and does not have sufficient resources to pay her costs, including her probation costs. Therefore, her costs should be waived in full.
16. Unlike fines, community service is not appropriate for costs.¹ However, even if it were appropriate to convert costs into community service, it would not be appropriate in this case, since _____ cannot perform community service without undue hardship.
17. When determining whether or not community service imposes an undue hardship for the purposes of waiving a fine, courts should consider many factors, including the person's childcare obligations and work obligations. Tex. Code Crim. Pro. Ann. art. 43.091(b). As established above, _____ works and provides childcare his young child, making community service incredibly difficult.
18. In addition, we are currently in the midst of a global pandemic. The Travis County metro area is among the highest in Covid-19 rates in the entire state, with 35,000 confirmed cases at the time of filing and nearly 20,000 total fatalities.² Because of the pandemic, community service providers have suspended operations indefinitely in accordance with Travis County Adult Probation Department policy. Leaving the house for any non-essential purpose puts _____ and her two children at risk of contracting the virus and spreading it to others. _____'s work and childcare responsibilities, in addition to the Covid-19 pandemic, create undue hardship in _____ completing community service.
19. Article 43.091(c)(1) of the Texas Code of Criminal Procedure specifies that a waiver of costs is appropriate if the defendant is "indigent or does not have sufficient resources to pay." Tex. Code Crim. Proc. art. 43.091(c). Because _____ is indigent and has no hope of paying the costs owed to the court, the entirety of her costs should be waived.

III. PRAYER

For the reasons stated above and in the interest of justice, (client) respectfully requests that the Court waive or reduce her community supervision fees under 42A.652 of the Texas Code of Criminal Procedure. If the Court elects not to grant this relief immediately, (Client) requests a hearing on this motion.

March 10, 21

Respectfully submitted,

By: _____

¹ While fines are only waivable if the person cannot perform community service without undue hardship (Tex. Code Crim. Pro. Ann. art. 43.091(a)), waiver of costs is appropriate with only a finding of inability to pay (43.091(c)(1)). The legislature saw fit to make this distinction in 2019 with the passage of Senate Bill 346, due to the fact that unlike fines, costs are non-punitive, and therefore it does not make sense to convert them into community service.

² See TEXAS DEPARTMENT OF STATE HEALTH SERVICES, Texas COVID-19 Dashboard, <https://cutt.ly/ehqgVBS> (updated daily).

CERTIFICATE OF SERVICE

A copy of this motion and related exhibits has been served on the (County) District Attorney's Office, via email to Assistant Criminal District Attorney ***.

November 11, 21

Respectfully submitted,

By: _____

CAUSE NUMBER _____.

STATE OF TEXAS

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IN THE _____

vs.

_____ COUNTY, TEXAS

ORDER WAIVING COMMUNITY SUPERVISION FEE

This ____ day of _____, 2021, it is ORDERED, ADJUDGED AND DECREED that, because _____ is indigent and community supervision fees create a significant financial hardship:

_____ community supervision fees in cause number _____ be waived under Article 42.652(b) of the Texas Code of Criminal Procedure;

_____ community supervision fees in cause number _____ be reduced to _____ a month under Article 42.652(b) of the Texas Code of Criminal Procedure;

_____ community supervision fees in cause number _____ be suspended until _____ under Article 42.652(b) of the Texas Code of Criminal Procedure;

March 10, 22

JUDGE PRESIDING

STATE OF TEXAS

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v.

**MOTION TO WAIVE COSTS, INCLUDING SUPERVISION COSTS
AND ATTORNEY’S FEES**

To the Honorable Court:

COMES NOW, _____, by and through Counsel and pursuant to Texas Code of Criminal Procedure Articles 43.035 and 43.091, requests this Honorable Court to waive payment of community supervision costs for cause number _____. Additionally, _____ requests that this Honorable Court waive his court costs under Article 43.091 of the Texas Code of Criminal Procedure for the above-referenced cause number, as well as wrongfully-assessed attorney’s fees. In support of this motion _____ shows the Court the following:

FACTS

1. _____ is indigent. Although his counsel for the above-referenced cause was retained, this representation is pro bono.
2. _____ currently receives _____, a means-tested government benefit. *See Exhibit A, Statement of Inability to Afford Payment of Court Costs.*
3. _____ is the father of two children, and pays monthly court-ordered child support for his oldest. *Exhibit B, Child Support Order.* These payments almost equal _____’s entire monthly income.
4. The onset of COVID-19 has made it difficult for _____ to secure and maintain employment, but _____. When he can work, he averages \$____. *Exhibit, Paystub.* _____’s income is _____% of the Federal Poverty Level.
5. In __ (year____, __ (client)_____ was charged with _____. He was sentenced to _____.
6. His community supervision period was extended to May of 2020, in part due to his inability to pay the costs associated with probation.
7. Each month, he must pay a \$_____ probation fee, which was increased from the originally ordered \$60 monthly fee in an attempt to have his outstanding costs paid off quicker. Additionally, _____ pays \$81 a month for his court-ordered ignition interlock device.
8. Due to _____’s limited finances, he currently owes \$875 to the probation department, \$575 of which is delinquent, as well as an additional \$452.10 to the court in the above-referenced cause number. *Exhibit D, Bills of Cost.*
9. Despite being found indigent and in need of counsel by this court, _____ was also ordered to pay attorney’s fees in the amount of _____.
10. These amounts impose a substantial hardship on _____, as he does not have sufficient income to make these payments in addition to his court-ordered child support obligations, the costs of providing for the two children in his care, and his monthly payments for necessities.
11. When _____ isn’t working, he provides childcare for his 3-year-old child.

ARGUMENT

Fines and Costs

12. Under Tex. Code. Crim. Pro. Ann. Art. 42.15(a-1), courts must consider a person's ability to pay fines and costs during or immediately after imposing a sentence. If the defendant is unable to pay, the court must determine whether fines and costs should be discharged through a payment plan, community service, or waiver.
13. Under Tex. Code Crim. Pro. Ann. art. 43.015(3), "costs" include any fees that were ordered by the court at judgement. This includes probation fees and all related costs, which this Court ordered to be paid at the time of judgement.¹
14. Under Tex. Code Crim. Pro. Ann. art. 43.035, a person may challenge his fines and costs at any time after judgment if the person is unable to pay. If the person files a motion under 43.035, the court must determine whether the fines and charges should be satisfied through the methods listed under 42(a-1).
15. Waiver of _____ fines and costs is necessary and appropriate in this case.
16. Under Tex. Code Crim. Pro. Ann. art. 43.091(c)(1), waiver of *costs* is appropriate if the defendant is "indigent or does not have sufficient resources to pay."
17. As established above, _____ is indigent and does not have sufficient resources to pay his costs, including his probation costs. Therefore, his costs should be waived in full.
18. Unlike fines, community service is not appropriate for costs.² However, even if it were appropriate to convert costs into community service, it would not be appropriate in this case, since _____ cannot perform community service without undue hardship.
19. When determining whether or not community service imposes an undue hardship for the purposes of waiving a *fine*, courts should consider many factors, including the person's childcare obligations and work obligations. Tex. Code Crim. Pro. Ann. art. 43.091(b). As established above, _____ works and provides childcare his young child, making community service incredibly difficult.
20. In addition, we are still currently in the midst of a global pandemic. The _____ County metro area is among the highest in Covid-19 rates in the entire state, with _____ confirmed cases at the time of filing and nearly 70,000 total fatalities in the state.³ Further, community service has been suspended for over a year in most of the state due to the pandemic, with providers only recently offering new opportunities. Additionally, while vaccine distribution has begun, there is still uncertainty regarding its effectiveness against new variants. Leaving the house for any non-essential purpose puts _____ and his two children at risk of contracting the virus and spreading it to others. _____'s work and childcare responsibilities, in addition to the Covid-19 pandemic, create undue hardship in _____ completing community service.
21. _____ is indigent, and the financial burden of his fines and court costs in this case, including significant on going supervision costs, is harming himself and his family. Texas law is clear that in such circumstances, waiver of costs is the only appropriate option.
22. Article 43.091(c)(1) of the Texas Code of Criminal Procedure specifies that a waiver of costs is appropriate if the defendant is "indigent or does not have sufficient resources to pay." Tex. Code Crim. Proc. art. 43.091(c). Because _____ is indigent and has no hope of paying the costs owed to the court, the entirety of his costs

1 Additionally, Article 42A.655 states that the court shall consider ability to pay before ordering the defendant to make payments under Chapter 42A of the Texas Code of Criminal Procedure. Article 42A.652(b) explicitly permits the Court to waive community supervision fees if the Judge determines such payment would cause the defendant significant financial hardship.

2 While fines are only waivable if the person cannot perform community service without undue hardship (Tex. Code Crim. Pro. Ann. art. 43.091(a)), waiver of costs is appropriate with only a finding of inability to pay (43.091(c)(1)). The legislature saw fit to make this distinction in 2019 with the passage of Senate Bill 346, due to the fact that unlike fines, costs are non-punitive, and therefore it does not make sense to convert them into community service.

3 See TEXAS DEPARTMENT OF STATE HEALTH SERVICES, Texas COVID-19 Dashboard, <https://dshs.texas.gov/coronavirus/cases.aspx> (updated daily).

should be waived

23. Furthermore, because Mr. _____ is indigent and cannot complete additional community service without undue hardship, his fines in this cause should be waived under Tex. Code. Crim. Pro. Ann. art. 43.035.

Attorney's Fees

24. There was no legal basis to assess court-appointed attorney fees in this case. _____ was found indigent when he was appointed counsel. A defendant found indigent when counsel was appointed “is presumed to remain indigent for the remainder of the proceedings in the case unless a material change in the defendant’s financial circumstances occurs.” Tex. Crim. Proc. Code Ann. art. 26.04(p). Upon sentencing, absent a finding of a material change, _____ was presumptively (and factually) indigent.
25. The court can only assess attorney fees upon a finding on the record that the defendant has the ability to pay those fees. Tex. Crim. Proc. Code Ann. art. 26.05(g); *see also Wolfe v. State*, 377 S.W.3d 141, 144 (Tex. App. 2012) (“By now, it is well established that in order to assess court-appointed attorney’s fees in a judgment, a trial court must determine that the defendant has financial resources that enable him to offset in part or in whole the costs of legal services provided.”).
26. Thus, “the defendant’s financial resources and ability to pay are *explicit critical elements* in the trial court’s determination of the propriety of ordering reimbursement of costs and fees.” *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010) (emphasis added).
27. No finding of ability to pay was ever made for _____, and therefore the court-appointed attorney fees assessed against him were unlawful. In addition to _____’s indigency, the court should waive payments of the costs of court-appointed counsel because they were illegally assessed against _____.

III. PRAYER

For the reasons stated above and in the interest of justice, _____ respectfully requests that the Court waive his court costs, including community supervision costs and attorney’s fees, under Articles 43.035 and 43.091 of the Texas Code of Criminal Procedure for the above-referenced cause number. If the Court elects not to grant this relief immediately, _____ requests a hearing on this motion under Article 43.035(a) of the Texas Code of Criminal Procedure.

{Date}

Respectfully submitted,

CERTIFICATE OF SERVICE

A copy of this motion and related exhibits has been served on the _____ Attorney's Office, via email to _____.

Respectfully Submitted,

CAUSE NUMBER _____.

STATE OF TEXAS

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IN THE _____

V.

_____ COUNTY, TEXAS

ORDER WAIVING COURT COSTS, INCLUDING COMMUNITY SUPERVISION COSTS

This ____ day of _____, 20__, it is ORDERED, ADJUDGED AND DECREED that, because _____ is indigent and his costs, including the costs of community supervision, create a significant financial hardship:

_____ Mr. _____ community supervision costs in cause number _____ be waived under Article 42A.652(b) of the Texas Code of Criminal Procedure;

_____ Mr. _____ community supervision fees in cause number _____ be reduced to \$_____ a month under Article 42A.652(b) of the Texas Code of Criminal Procedure;

_____ Mr. _____ fine in cause number _____ be waived under Article 43.045 of the Texas Code of Criminal Procedure

_____ All outstanding court costs relating to cause # _____ against Mr. _____ be waived under Article 43.091 of the Texas Code of Criminal Procedure.

JUDGE PRESIDING

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