CHAPTER THREE
Bail and Extradition
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BAIL AND EXTRADITION

I. INTRODUCTION

A. PRE-TRIAL BAIL

After considering the results of the Indiana pretrial risk assessment system (if available), other relevant factors, and bail guidelines described in Ind. Code § 35-33-8-3.8, a court may admit a defendant to bail and impose conditions to assure the defendant's appearance at any stage of the legal proceedings, or, upon a showing by clear and convincing evidence that the defendant poses a risk of physical danger to another person or the community, to assure the public's physical safety. Ind. Code § 35-33-8-3.2.

1. Definition

Bail is security pledged to assure the appearance of an accused in court.

Hendrix v. State, 615 N.E.2d 483, 485 (Ind. Ct. App. 1993) (function of bail is to assure defendant's appearance at trial court proceedings up to and including disposition of the charges).

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

2. Function

Bail is to assure presence of accused at appropriate time and submission to authority of that court. Defendant should not be detained prior to trial if some other less oppressive means of securing defendant's presence is practicable. Hobbs v. Lindsey, 240 Ind. 74, 162 N.E.2d 85 (1959).

Brown v. State, 262 Ind. 629, 636, 322 N.E.2d 708, 712 (1975) ("The law confines the use of pretrial detention to only one end: namely, that the criminal defendant be present for trial. This limitation is implicit in the concept of bail.")

3. ABA Standards

Monetary conditions assure the defendant's appearance; they should not be used to punish or frighten the defendant, to placate public opinion, or to prevent anticipated criminal conduct. ABA Standards on Criminal Justice, Pretrial Release Standard 10-5.3(b), (c) (3rd ed., 2007).

Sherelis v. State, 452 N.E.2d 411 (Ind. Ct. App. 1983) (because an accused is presumed innocent, pretrial incarceration should not serve punitive purposes; pretrial bail allows the accused the opportunity to properly prepare a defense while insuring presence at trial).

4. Constitutional Right to Bail

a. Indiana Constitution

The right to bail is fundamental and deeply embedded in the Indiana Constitution. Under Article 1, Section 16, "Excessive bail shall not be required." With rare exception, the default position is bail and release. In Indiana, arrested persons have the right to have bail set on any charges other than murder or treason. Indiana Constitution Article I, § 17 (murder or treason not bailable, when proof is evident or presumption is strong). The bail provisions of the Indiana Constitution afford a greater right to bail than the federal Constitution. Ray v. State, 679 N.E.2d 1364, 1366 (Ind. Ct. App. 1997).

Green v. Petit, Sheriff, 222 Ind. 467, 54 N.E.2d 281 (1944) (appeal after denial of writ of habeas corpus; failure to fix bail in robbery case was error).

Schmidt v. State, 746 N.E.2d 369 (Ind. Ct. App. 2001) (while judge in her discretion may allow bail to be posted immediately after arrest, right to bail under Indiana Constitution does not vest until initial hearing).

Fry v. State, 990 N.E.2d 429, 440 (Ind. 2013) (addressing the "link between the presumptive right to bail and the presumption of innocence—something our case law also emphasizes").

PRACTICE POINTER: Occasionally it may be to the defendant's advantage to seek bail in a murder case where the State's evidence is weak or subject to attack. Under Article 1, § 17 of the Indiana Constitution, the issue for the trial court is whether the "proof is evident, or the presumption strong." Since the issue in a bail hearing in an Indiana murder case is, essentially, whether the State has a strong case, seeking bail in a murder case can be a useful, if potentially risky, discovery tool. Bail hearings in murder cases are often of great interest to news media.

b. Federal Constitution

Under the U.S. Constitution, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." United States v. Salerno, 481 U.S. 739, 755 (1987). The Eighth Amendment does not provide a right to bail but forbids "excessive bail" in cases where bail is set. Ray v. State, 679 N.E.2d 1364 (Ind. Ct. App. 1997). See also Carlson v. Landon, 342 U.S. 524 (1952). Bail is not excessive so long as it is reasonably calculated to assure the defendant's presence at trial. Stack v. Boyle, 342 U.S. 1 (1951). Bail should be individualized and set at "an amount reasonably calculated" to assure the defendant's return to court. Id. To the extent that individual counties mechanistically apply predetermined bail schedules without regard for the individual arrestee's personal circumstances, this practice violates both the Due Process and Equal Protection Clauses of the U.S. Constitution. Odonnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018) upholding on rehearing District Court's preliminary injunction of Harris County's predetermined bail schedule for alleged misdemeanants), *overruled on other grounds by* Daves v. Dallas Cnty., Texas, 22 F.4th 522 (5th Cir. 2022).

But see Galen v. Cty. of Los Angles, 322 F. Supp. 2d 1045, 1054 (C.D. Cal. 2004) ("Bail Reform Act and interpretive law made clear that criminal detainees could be

held without bail in certain circumstances even where the risk of flight was not great.")

"[T]he only issue to be resolved by a federal court presented with a habeas corpus petition that complains of excessive bail is whether the state judge has acted *arbitrarily* in setting that bail." U.S. ex rel. Fitzgerald v. Jordan, 747 F.2d 1120, 1133 (7th Cir. 1984) (emphasis in original).

5. Time for Challenging Bail

Denial of bail, or a decision setting bail unreasonably high, is a final judgment, subject to an immediate appeal by the defendant. Bradley v. State, 649 N.E.2d 100, 106 (Ind. 1995) Kerr, *Criminal Procedure* 16A § 11.8, p. 147 (1998 West Group).

Trial court error in refusing to let to bail pending trial is moot after defendant has been convicted and sentenced. Bixler v. State, 471 N.E.2d 1093, 1103 (Ind. 1984).

Ryan v. State, 42 N.E.3d 1019 (Ind. Ct. App. 2019) (Whether the conditions the trial court imposed on defendant once it released him on an appeal bond were an abuse of discretion became moot once the Indiana Supreme Court reinstated defendant's convictions and he was returned to incarceration. Also, by failing to initiate an immediate appeal under Appellate Rule 18 to challenge the conditions, defendant forfeited review of the issue).

6. Court Sets Bail

The power to establish bail is exclusively judicial and includes power to determine manner of making bail. Board of County Commissioners of Vanderburgh County v. Farris, 168 Ind. App. 309, 342 N.E.2d 642 (1976).

"Financial conditions other than unsecured bond should be imposed only when no other less restrictive condition of release will reasonably ensure the defendant's appearance in court. The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay." ABA Standards on Criminal Justice, Pretrial Release Standard 10-5.3(a) (3rd ed. 2007).

7. Consideration of Pretrial Risk Assessment System

A court shall consider the results of the Indiana pretrial risk assessment system (if available) before setting or modifying bail for an arrestee. Ind. Code § 35-33-8-3.8(a).

If the court finds, based on the results of the Indiana pretrial risk assessment system (if available) and other relevant factors, that an arrestee does not present a substantial risk of flight or danger to the arrestee or others, the court shall consider releasing the arrestee without money bail or surety, subject to restrictions and conditions as determined by the court, unless one (1) or more of the following apply:

(1) The arrestee is charged with murder or treason.
(2) The arrestee is on pretrial release not related to the incident that is the basis for the present arrest.
(3) The arrestee is on probation, parole, or other community supervision.

The court is not required to administer an assessment before releasing an arrestee if administering the assessment will delay the arrestee's release.

Ind. Code § 35-33-8-3.8(b).

8. Reasonableness of Bail

(a) Must not be greater than necessary to assure appearance of accused in court.

(b) Inability to procure the amount necessary to make bond does not, in and of itself, render the amount unreasonable. Mott v. State, 490 N.E.2d 1125 (Ind. Ct. App. 1986).

9. Local Rules

Some counties have adopted bail bond schedules. Check your county's local rules. Examples include the Hamilton County Criminal Rules, Appendix A; Rules of Organization and Procedure of the Marion Superior Court, Criminal Division, Appendix A; Wayne County Rule of Criminal Procedure 19(D)(G). All local rules can be found through the following link on the Indiana Court's website: https://www.in.gov/judiciary/2694.htm.

To the extent that individual counties mechanistically apply predetermined bail schedules without regard for the individual arrestee's personal circumstances, this practice violates both the Due Process and Equal Protection Clauses of the U.S. Constitution. Odonnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018) (upholding on rehearing District Court's preliminary injunction of Harris County's predetermined bail schedule for alleged misdemeanants), *overruled on other grounds by* Daves v. Dallas Cnty., Texas, 22 F.4th. 522 (5th Cir. 2022).

10. Attorney Acting as Surety

Defense counsel should not act as surety on a bond either for a client whom counsel represents or for any other client in the same or a related case, unless it is required by law or it is clear that there is no risk that counsel's judgment could be materially limited by counsel's interest in recovering the amount ensured. ABA Standards on Criminal Justice, Defense Function 4-1.7(m) (4th ed. 2015).

Ind. Code § 27-10-4-2(a) (1) (Class A misdemeanor for a bail agent to suggest or advise employment of any particular attorney to represent the bail agent's principal).

B. BAIL AND THE INDIGENT

Frequently, people are held in jail because they are too poor to make bail. See, e.g., Freed & Wald, *Bail in the United States: 1964* (A Report to the National Conference on Bail and Criminal Justice, Washington, D.C., May 27-29, 1964) (1964); Goldkamp, *Two Classes of Accused - A Study of Bail and Detention in American Justice* (1979); Wice, *Freedom for Sale - A National Study of Pretrial Release* (1974); Cohen, *Wealth, Bail, and the Equal Protection of the Laws,* 23 Vill. L. Rev. 977 (1977-78).

For an argument that detention of an indigent in default of bail which s/he cannot make violates the Habeas Corpus Clause, the Eighth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and similar state constitutional guarantees, see Foote, *The*

Coming Constitutional Crisis in Bail, 113 U. Pa. L. Rev. 959, 1125 (1965), reprinted in Foote, ed., *Studies on Bail*, 181-283 (1966).

C. RELEASE ON OWN RECOGNIZANCE (O.R.)

1. Statutory

The trial court may release the defendant on personal recognizance unless the State presents evidence relevant to a risk of non-appearance or a threat to the safety of the public, and the court finds by a preponderance of the evidence that the risk exists. Ind. Code § 35-33-8-3.2(a)(7).

2. ABA Standards

It should be presumed that defendants are entitled to release on personal recognizance on condition that they attend all required court proceedings and they do not commit any criminal offense. This presumption may be rebutted by evidence that there is a substantial risk of nonappearance or need for additional conditions as provided in Standard 10-5.2, or by evidence that the defendant should be detained under Standards 10-5.8, 10-5.9 and 10-5.10 or conditionally released pending diversion or participation in an alternative adjudication program as permitted under Standard 10-1.5(a) (3rd ed. 2007).

In the event the judicial officer determines that release on personal recognizance is unwarranted, the officer should include in the record a statement, written or oral, of the reasons for this decision. ABA Standards on Criminal Justice, Pretrial Release Standard 10-5.1(c) (3rd ed. 2007).

3. Criminal Rule 26. Pretrial release

Indiana Crim. Rule 26 strongly presumes that a person charged should be released without the payment of a cash bond and without conditions unless the State can prove that a person is a high risk of not appearing as ordered at future hearings or that the person is a high risk to be rearrested while on pretrial release. The Rule provides:

(A) If an arrestee does not present a substantial risk of flight or danger to self or others, the court should release the arrestee without money bail or surety subject to such restrictions and conditions as determined by the court except when:

(1) The arrestee is charged with murder or treason.

(2) The arrestee is on pre-trial release not related to the incident that is the basis for the present arrest.

(3) The arrestee is on probation, parole, or other community supervision.

(B) In determining whether an arrestee presents a substantial risk of flight or danger to self or other persons or to the public, the court should utilize the results of an evidence-based risk assessment approved by the Indiana Office of Court Services, and such other information as the court finds relevant. The court is not required to administer an assessment prior to releasing an arrestee if administering the assessment will delay the arrestee's release.

(C) If the court determines that an arrestee is to be held subject to money bail, the court is authorized to determine the amount of such bail and whether such bail may be satisfied

by surety bond and/or cash deposit. The court may set and accept a partial cash payment of the bail upon such conditions as the court may establish including the arrestee's agreement that all court costs, fees, and expenses associated with the proceeding shall be paid from said partial payment. If the court authorizes the acceptance of a cash partial payment to satisfy bail, the court shall first secure the arrestee's agreement that, in the event of failure to appear as scheduled, the arrestee shall forfeit the deposit and must also pay such additional amounts as to satisfy the full amount of bail plus associated court costs, fees, and expenses.

(D) Statements by Arrestee

(1) Prohibited Uses: Evidence of an arrestee's statements and evidence derived from those statements made for use in preparing an authorized evidence-based risk assessment tool are not admissible against the arrestee in any civil or criminal proceeding.

(2) Exceptions: The court may admit such statements:

(a) in a pretrial proceeding involving the arrestee; or

(b) in any proceeding in which another statement made in preparing an authorized evidence-based risk assessment tool has been introduced, if in fairness the statements ought to be considered together.

(3) No statements made for these purposes may be used in any other court except in a pretrial proceeding.

Effective Dates: Per the September 5, 2017, order amending this rule, "This rule in its entirety became effective September 7, 2016, in the pretrial pilot courts and courts using an approved evidence-based risk assessment under Section B." Further, per the September 5, 2017, order, "Sections C. and D. became effective September 7, 2016, in all courts. Sections A. and B. will be effective in all courts January 1, 2020."

a. Federal Constitutional Issues with Criminal Rule 26

In Odonnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018) (opinion on rehearing), the Fifth Circuit upheld the District Court's preliminary injunction of the Harris County predetermined bail schedule for alleged misdemeanants. The Circuit Court held that "the County's mechanical application of the secured bail schedule **without regard for the individual arrestee's personal circumstances**" violates both the Due Process and Equal Protection Clauses of the U.S. Constitution." (emphasis added), *overruled* on other grounds by Daves v. Dallas Cnty., Texas, 22 F.4th 522 (5th Cir. 2022).

To the extent that Criminal Rule 26 allows for the mechanical application of predetermined bail schedules, it violates both the Due Process and Equal Protection Clauses under the reasoning of Odonnell.

Moreover, judicial determinations of probable cause for warrantless arrests must be held within 48 hours of arrest to comply with the promptness requirement of the Fourth Amendment. County of Riverside v. McLaughlin, 500 U.S. 44, 111 S. Ct. 1661 (1991).

PRACTICE POINTER: Once appointed, counsel should consider filing a motion for bond reduction or release without money bail, which should ask the trial court to make an individualized assessment of defendant's circumstances to determine if requiring the defendant to post the amount established by the pre-determined bail schedule is appropriate.

4. Related Issues Under the Federal Constitution

One implication of Odonnell is that the Indiana initial hearing statute, Ind. Code § 35-33-7-3, which does not require a review of ability of indigent person to pay the prescheduled amount, abridges the right to due process and equal protection.

5. Related Issues Under Indiana Constitution - Right to Counsel at Bail Hearing

Indiana's right to counsel under Art.1, § 13 has a history of being interpreted more broadly than the Sixth Amendment. Brunson v. State, 394 N.E.2d 229 (Ind. Ct. App. 1979). Under the reasoning of State v. Taylor, 49 N.E.3d 1019, 1024 (Ind. 2016), a defendant has a right to counsel at a hearing where bail is set. Taylor held that under the Indiana Constitution, the right to counsel attaches **at the time of arrest**. Id. Therefore, a defendant should be afforded counsel at a bail hearing.

In Taylor, the chief deputy prosecutor and several police officers surreptitiously listened into what was supposed to be a private conversation between Taylor and his lawyer at the police station. Taylor and his lawyer discussed "all aspects" of the case, including location of evidence and defense trial strategy. The Court held that the eavesdropping violated state and federal rights to counsel.

PRACTICE POINTER: The Indiana Supreme Court has yet to address whether Taylor confers the right to counsel at a first appearance or bail hearing, but counsel should argue that it does, if for no other reason, to force Indiana's appellate courts to address this issue.

II. INDIANA STATUTES

Indiana statutes on bail are found at Ind. Code § 27-10 (Insurance), Ind. Code § 35-33-8, Ind. Code § 35-33-8.5, and Ind. Code § 35-33-9 (bail on appeal).

A. BAILABLE OFFENSES

1. Murder

a. Burden of Proof

Overruling 150 years of precedent, the Indiana Supreme Court ruled that Ind. Const. Art. I. Sec. 17, which provides that "[m]urder or treason shall not be bailable when the proof is evident or the presumption strong," puts the burden of proof on the State, not the defendant, in a bail hearing in a murder or treason case. See Fry v. State, 990 N.E.2d 429 (Ind. 2013). Because denial of bail in such cases are exceptions to the presumptive right to bail, the party seeking to apply the exception, the State, should bear the burden of proving it. To succeed, the State must meet the burden by preponderance of the evidence. And the evidence must show culpability of the actual greater crime for which

bail may be wholly denied, i.e. murder or treason, and not simply implicate a lesser-included offense such as voluntary or involuntary manslaughter. Hall v. State, 166 N.E.3d 406 (Ind. Ct. App. 2021).

b. Presumption Against Bail

Murder is not bailable if the State proves by a preponderance of the evidence that the proof is evident or the presumption strong" Ind. Code § 35-33-8-2; Ind. Const. Art. 1, § 17.

Fry v. State, 990 N.E.2d 429 (Ind. 2013) overruled 150 years of case law to hold that the State bears the burden of proof to show "that the proof is evident, or the presumption is strong" to deny bail for someone charged with murder or treason.

In the wake of Fry, it is unclear whether shifting the burden of proof to the State still means that "the presumption is against the right to be admitted to bail" in murder cases. See Phillips v. State, 550 N.E.2d 1290, 1294 (Ind. 1990). Fry often mentions this language from Phillips but never repudiates it, so while the Supreme Court shifted the burden of proof regarding bail in such cases, it arguably did not change the presumption against bail in these cases. Perhaps the Court will later clarify this issue.

> Weisheit v. State, 969 N.E.2d 1082 (Ind. Ct. App. 2012), *trans. denied* (even though many questions remained about the circumstances of the crime, the trial court did not abuse its discretion in denying bail to Defendant in a capital murder case under Ind. Const. art. I, § 17 and Ind. Code § 35-33-8-2(a) because proof was evident, and the presumption was strong that defendant killed two children in a fire).
>
> Hall v. State, 166 N.E.3d 406 (Ind. Ct. App. 2021) (security guard who shot woman driving away denied bail; claims of self-defense or sudden heat rebutted).

c. Hearing Required, if Properly Requested

The accused is to be afforded a hearing that will guarantee that bail is not denied unreasonably or arbitrarily. Phillips v. State, 550 N.E.2d 1290, 1295 (Ind.1990).

> State ex rel. Pearcy v. Circuit Court of Allen County, 262 Ind. 411, 317 N.E.2d 181 (1974) (granting motion to be let to bail by murder defendant without a hearing is error).

Defendant should submit memorandum and affidavits to show entitlement to bail.

> Morris v. State, 263 Ind. 370, 332 N.E.2d 90 (1975) (no error for trial court to deny motion for bail without a hearing, where defendant failed to submit memo or brief in support of motion).

Ind. Code § 35-33-8.5-6 provides:

> When any person is indicted for murder, the court in which the indictment is pending, upon motion, upon application by writ of habeas corpus, may admit the defendant to bail when it appears upon examination that the defendant is entitled to be let to bail.

d. Defendant's Right to Present Evidence of Affirmative Defense

In order to preserve the presumption of innocence to fully retain the constitutional due process rights, a defendant must have the opportunity to present evidence and witnesses on his or her behalf to rebut the State's burden that he or she "more likely than not committed the crime of murder (or treason)." Satterfield v. State, 30 N.E.3d 1271 (Ind. Ct. App. 2015).

2. Treason

"Murder or treason shall not be bailable, when the proof is evident, or the presumption strong." Ind. Const. Article 1, § 17.

Treason is no longer an offense defined by the Indiana Code. Kerr, *Criminal Procedure* 16A § 11.1b, page 110 (1998).

3. All Other Offenses Are Bailable

"Offenses, other than murder or treason, shall be bailable by sufficient sureties." Ind. Const. Article 1, § 17.

By statute, all crimes are bailable except in murder cases "if the State proves by a preponderance of the evidence that the proof is evident or the presumption strong." Ind. Code § 35-33-8-2.

a. Evidentiary Burdens

Due process places the burden on the prosecution to prove risk of non-appearance. This practice recognizes presumption of innocence and promotes uniform rules relating to availability of personal recognizance release. See LaFave & Israel, *Criminal Procedure*, §12.1(d).

B. RISK ASSESSMENT

Criminal Rule 26(B) advises Indiana courts to "utilize the results of an evidence-based risk assessment" when "determining whether an arrestee presents a substantial risk of flight or danger to self or other persons or to the public." The Indiana Office of Court Services has approved the Indiana Risk Assessment System – Pretrial Assessment Tool (IRAS-PAT) for use to assess risk at the pretrial stage under the Policy adopted by the Board of Directors of the Judicial Conference. The IRAS-PAT is designed to be predictive of both an arrestee's failure-to-appear and risk of violating pretrial supervision by committing a new offense. Ind. EBDM Pretrial Work Group, Pretrial Practices Manual, 8 (2018).

Criminal Rule 26 encourages the use of approved risk assessments to assist in release decision-making at the earliest possible time following arrest. However, a risk assessment is not required to be completed in order for an individual to be released. Each court must assess its own resources and practices to ensure that arrestees are not unnecessarily held in jail. Courts are encouraged to explore funding options available at the state and local levels to fund enhancements to current practices.

Beachey v. State, 177 N.E.3d 850 (Ind. Ct. App. 2021) (reversing and remanding for new bond determination when trial court failed to order and consider results of pre-trial risk assessment report as mandated by CR 26).

Courts may utilize collateral information to assist with release decision-making, including the probable cause affidavit, victim statement(s), domestic violence screeners, substance abuse screeners, mental health screeners and criminal history to assist in making release decisions.

Ind. Code § 35-33-8-0.5 provides:

(a) The following definitions apply throughout this chapter:

(1) "Evidence based risk assessment" means an assessment:

(A) that identifies factors relevant to determine whether an arrestee is likely to:

(i) commit a new criminal offense; or
(ii) fail to appear;

if released on bail or pretrial supervision; and

(B) that is based on empirical data derived through validated criminal justice scientific research.

(2) "Indiana pretrial risk assessment system" means the statewide evidence-based risk assessment system described in subsection (b).

(b) Before January 1, 2020, the supreme court should adopt rules to establish a statewide evidence-based risk assessment system to assist courts in selecting the appropriate level of bail or other pretrial supervision for arrestees eligible for pretrial release. The system must consist of:

(1) an evidence-based risk assessment tool; and
(2) other rules as adopted by the supreme court.

(c) The Indiana pretrial risk assessment system shall be designed to assist the courts in assessing an arrestee's likelihood of:

(1) committing a new criminal offense; or
(2) failing to appear.

C. FIXING THE AMOUNT

1. Statutory Factors for Consideration at Bail Hearing

Monetary conditions should be set no higher than that amount reasonably required to assure the defendant's appearance in court.

Ind. Code § 35-33-8-4(b) requires the judicial officer to take into account:

(b) Bail may not be set higher than that amount reasonably required to assure the defendant's appearance in court or to assure the physical safety of another person or the community if the court finds by clear and convincing evidence that the defendant poses a risk to the physical safety of another person or the community. In setting and

accepting an amount of bail, the judicial officer shall consider the bail guidelines described in section 3.8 [Ind. Code 35-33-8-3.8] of this chapter and take into account all facts relevant to the risk of nonappearance, including:

(1) the length and character of the defendant's residence in the community;
(2) the defendant's employment status and history and the defendant's ability to give bail;
(3) the defendant's family ties and relationships;
(4) the defendant's character, reputation, habits, and mental condition;
(5) the defendant's criminal or juvenile record, insofar as it demonstrates instability and a disdain for the court's authority to bring the defendant to trial;
(6) the defendant's previous record in not responding to court appearances when required or with respect to flight to avoid criminal prosecution;
(7) the nature and gravity of the offense and the potential penalty faced, insofar as these factors are relevant to the risk of nonappearance;
(8) the source of funds or property to be used to post bail or to pay a premium, insofar as it affects the risk of nonappearance;
(9) that the defendant is a foreign national who is unlawfully present in the United States under federal immigration law; and
(10) any other factors, including any evidence of instability and a disdain for authority, which might indicate that the defendant might not recognize and adhere to the authority of the court to bring the defendant to trial.

2. Excessive Bail

a. Standard

Excessive bail is prohibited by the Indiana Constitution, Article 1 § 16: "Excessive bail shall not be required." Bail is excessive where amount set represents figure set higher than reasonably calculated to assure defendant's presence at trial. Hobbs v. Lindsey, 240 Ind. 74, 162 N.E.2d 85 (1959), *citing* Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1(1951). See also Ind. Code § 35-33-8-4(b).

But see Galen v. Cty. of Los Angles, 322 F. Supp. 2d 1045, 1054 (C.D. Cal. 2004) ("Bail Reform Act and interpretive law made clear that criminal detainees could be held without bail in certain circumstances even where the risk of flight was not great.").

Sherelis v. State, 452 N.E.2d 411, 413 (Ind. Ct. App. 1983) (once bail is made available, the amount set shall not be excessive, as this constitutes a denial of that right altogether).

Reviewing court will reverse amount of bail only for an abuse of discretion by the trial court. Mott v. State, 490 N.E.2d 1125 (Ind. Ct. App. 1986).

b. Examples of Excessive Bail

Hobbs v. Lindsey, 240 Ind. 74, 162 N.E.2d 85, 89 (1959) (where accused had no money or property of his own with which to provide bail, bail set at $171,400 was prima facie excessive, and burden was on State to show necessity or justification for unusual amount

of bail).

Sherelis v. State, 452 N.E.2d 411 (Ind. Ct. App. 1983) (one-million-dollar bail on defendant with strong familial and community contacts and no prior record was unreasonable in narcotics case; the "gravity of offense" alone was not sufficient to support likelihood of flight).

Sneed v. State, 946 N.E.2d 1255 (Ind. Ct. App. 2011) (although $25,000 bond was not excessive given severity of charges, trial court abused its discretion by requiring a cash-only payment of bail and denying defendant's request for option of a surety bond).

c. Excessive Bail Must be Justified

In the absence of a showing to the contrary, appellate court assumes that amount predetermined by trial court was reasonable. Hobbs v. Lindsey, 240 Ind. 74, 162 N.E.2d 85 (1959).

Amount in excess of that fixed by schedule, or custom, must be justified by evidence presented at bail hearing. Bail may be fixed in an amount higher than that usually required for serious crimes only if an evidentiary hearing is held. Mott v. State, 490 N.E.2d 1125 (Ind. Ct. App. 1986); Stack v. Boyle, 342 U.S. 1, 72 S. Ct. 1 (1951).

Williams v. State, 275 Ind. 434, 417 N.E.2d 328 (1981) (where the amount is considered on its merits and set in accordance with bail schedule, it is not excessive).

Reeves v. State, 923 N.E.2d 418 (Ind. Ct. App. 2010) (in setting bail, court must state nexus between criteria for bail and amount set, including defendant's job status, family ties to community, and character and reputation. Ind. Code § 35-38-8-4(b)).

D. TYPES OF RELEASE

Ind. Code § 35-33-8-3.2(a) provides the options available to a trial judge in order to let the accused to bail and assure his appearance. See Lake County Clerk's Office v. Smith, 766 N.E.2d 707 (Ind. 2002).

1. Defendant as Surety

Defendant may provide own bail by depositing cash or securities in full amount of bond with clerk of court. Ind. Code § 35-33-8-3.2(a)(1) authorizes courts to permit defendant to be released pursuant to a real estate bond where real property of defendant or another is offered in lieu of cash. If defendant appears in court, the value of the property is returned in full, as it shall not be foreclosed for the payment of fines, costs, fees, or restitution. If defendant does not appear, the real property is forfeited.

Requirements for accepting a real property bond vary from county to county.

2. Bonding Company or Other Sufficient "Solvent Sureties"

Bail agent must certify to court that she is financially able to pay bond in event of forfeiture. Bail agent collects a premium (10%) from the defendant, which is retained as charge for writing the bond. Bail agent may require collateral for the bond.

See also

Ind. Code § 27-10-4-5 (a bail agent who knowingly or intentionally executes a bail bond without collecting in full a premium for the bail bond, at the premium rate as filed with and approved by the commissioner, commits a Level 6 felony).

Ind. Code § 27-10-2-14(a) (bail agent is required to give written receipt for collateral).

3. Recognizance Bond

Release on personal recognizance is appropriate unless the State proves by a preponderance of the evidence that the defendant presents a risk of non-appearance or a threat to the physical safety of the public. Ind. Code § 35-33-8-3.2(a)(7).

a. Effect of Criminal Rule 4

Release under CR 4 (A) is equivalent to release on personal recognizance.

4. Cash Bond; 10 Percent Deposit

Local rules govern bond payment transaction. If the defendant fails to appear, the entire amount of bond is owed. If the defendant is convicted, the court may retain all or a part of the cash or securities to pay fines, costs, fees, restitution, and costs of publicly paid representation. The court may also retain an administrative fee of up to the lesser of $50.00 or 10% of the value of the deposit. Additional conditions may be imposed. See Ind. Code § 35-33-8-3.2(a)(2).

Turner v. Clary, 606 N.E.2d 878, 880 (Ind. Ct. App. 1993) (when a cash bail bond is posted to secure the release of a criminal defendant, the funds are held by the clerk while the defendant is at large and returned to the depositor unless the bond is forfeited due to the defendant's failure to appear).

Neeley v. State, 182 N.E.3d 234 (Ind. Ct. App. 2022) (abuse of discretion when trial court failed to remit to defendant $340 of deposit that should have remained after deducting amount trial court was authorized to retain for payment of costs and fees).

Ind. Code § 35-33-8-3.2 was enacted after Bennett v. State, 668 N.E.2d 1256, 1258 (Ind. Ct. App. 1996) (calling on the legislature to "draft a statute which allows the realistic collection of fines, costs, and restitution…. Access to the bond deposit would facilitate meaningful imposition of fines, costs, and restitution.").

a. Retaining of 10% Deposit

(1) To pay fines, costs, and restitution as ordered by the court

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

Goffinet v. State, 775 N.E.2d 1227 (Ind. Ct. App. 2002) (version of statute in effect before July 1, 2006, did not authorize trial court to order any money retained from bond remittance for any purpose unless bond was 10% cash or securities deposit; since defendant's father paid entire amount of bond in cash, trial court abused its discretion in retaining costs and fees).

Compare Wolff v. State, 2017 Ind. App. Lexis 893 (unpublished decision), 2017 Ind. App. Lexis 764 (order to publish decision) ($20,000 bond Defendant posted for release could not be credited toward the monthly-expenses bond required under Ind. Code § 35-46-3-6(c) for the care of his animals, which the authorities seized because Defendant had mistreated them).

Maroney v. State, 849 N.E.2d 745 (Ind. Ct. App. 2006) (extradition costs are "costs" that can be retained from 10% deposit of bail after defendant is convicted).

Dillman v. State, 2 N.E.3d 774 (Ind. Ct. App. 2014) (because defendant's $250 bond was a cash bond under Ind. Code § 35-33-8-3.2(a)(1) rather than a 10% cash or security deposit, the trial court was not authorized to retain the bond for any purpose).

Wright v. State, 949 N.E.2d 411 (Ind. Ct. App. 2011) (pursuant to Ind. Code § 35-33-8-3.2(a)(2), the trial court had authority to retain cash bail bond for fines, costs, and fees where defendant executed cash bail-bond agreement authorizing retention of all or part of bond in the event defendant failed to appear or was convicted; indigency hearing was not required).

Blixt v. State, 872 N.E.2d 149 (Ind. Ct. App. 2007) (effective July 1, 2006, Ind. Code § 35-33-8-3.2(a) authorizes retention of cash bond if agreed to, and prior to that date, failure to object to agreement to retain cash bond constitutes waiver of issue on appeal).

Traylor v. State, 817 N.E.2d 611 (Ind. Ct. App. 2004), *trans. denied* (defendant posted entire amount of bail in cash and was therefore entitled to remittance of $30,000 cash bond).

Neeley v. State, 182 N.E.3d 234 (Ind. Ct. App. 2022) (abuse of discretion when trial court failed to remit to defendant deposit amount that should have remained after deducting amount trial court was authorized to retain for payment of costs and fees).

(2) To pay publicly paid costs of representation

Within thirty days after disposition of the charges, the court that admitted the defendant to bail shall order the clerk to remit the amount of the deposit remaining under Ind. Code § 35-33-8-3.2(a)(2) to the person who made the deposit. However, the clerk shall retain publicly paid costs of representation. The portion of the deposit that is not remitted to the defendant shall be deposited by the clerk in the supplemental public defender services fund established under Ind. Code § 33-40-3. Ind. Code § 35-33-8-3.2(b).

Mathis v. State, 776 N.E.2d 1283 (Ind. Ct. App. 2002) (because defendant was indigent and no finding had been made regarding his ability to pay, trial court only had authority to impose public defender fees in amount of $100 pursuant to Ind. Code § 35-33-7-6(c)).

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

b. Improper Application of Bond for Other Purposes

$20,000 bond Defendant posted for release could not be credited toward the monthly-expenses bond required under Ind. Code § 35-46-3-6(c) for the care of his animals, which the authorities seized because Defendant had mistreated them. Wolff v. State, 2017 Ind. App. Lexis 893 (unpublished decision), 2017 Ind. App. Lexis 764 (order to publish decision).

c. Cash bond: Bond-release agreement

If the court requires the defendant to deposit cash or cash and another form of security as bail, the court may require the defendant and each person who makes the deposit on behalf of the defendant to execute an agreement that allows the court to retain all or part of the cash to pay publicly paid costs of representation and fines, costs, fees, and restitution that the court may order the defendant to pay if the defendant is convicted. Before execution of the agreement, the defendant or person who makes the deposit on behalf of the defendant shall be advised that, upon conviction of the defendant, the court may retain from the cash deposited as bail all or a part of the cash to pay publicly paid costs of representation and fines, costs, fees, and restitution that the court may order the defendant to pay if the defendant is convicted. Ind. Code § 35-33-8-3.2(a).

The court may set and accept a partial cash payment of the bail upon conditions set by the court, including the arrestee's agreement (and the agreement of a person who makes a cash payment on behalf of an arrestee, if applicable) that all court costs, fees, and expenses associated with the proceeding shall be paid from the partial payment. If the court authorizes the acceptance of a cash partial payment to satisfy bail, the court shall first secure the arrestee's agreement (and the agreement of a person who makes a cash payment on behalf of an arrestee, if applicable) that, in the event of failure to appear as scheduled, the deposit shall be forfeited and the arrestee must also pay any additional amounts needed to satisfy the full amount of bail plus associated court costs, fees, and expenses. Ind. Code Ann. § 35-33-8-3.9 (b) and (c).

An indigency hearing is not required prior to the trial court retaining a bond pursuant to a bond release agreement. Wright v. State, 949 N.E.2d 411, 415 (Ind. Ct. App. 2011).

Wright v. State, 949 N.E.2d 411 (Ind. Ct. App. 2011) (where defendant gave the court authority to retain cash bond if she failed to appear or was convicted and she was convicted, she was not entitled to an indigency hearing prior to the court taking the bond).

Dillman v. State, 16 N.E.3d 445 (Ind. Ct. App. 2014) (although the trial court erred in releasing defendant's cash bond to pay costs and fees, this did not constitute an illegal

sentence and fundamental error that would allow Court to review defendant's appeal on the merits despite his failure to timely appeal the trial court's order. Although the trial court made its statement regarding costs and fees at sentencing, this order was not part of his sentence).

Neeley v. State, 182 N.E.3d 234 (Ind. Ct. App. 2022) (when defendant agreed to pay authorized court costs and fines in bond agreement, she was entitled to amount of deposit that remained after deducting costs and fees trial court was authorized to impose).

Garner v. Kempf, 93 N.E.3d 1091 (Ind. 2018) (holding bail bond "is an asset of the defendant" and "all other things being equal, the defendant is entitled to have this asset, less any authorized deductions, returned to him when the bond is released because it is no longer needed to secure his appearance at trial").

Practice Pointer: For offenses committed before July 1, 2006, Ind. Code § 35-33-8-3.2 applied only when the defendant posted a ten percent surety bond with the clerk of the court, and not when the defendant posted a full cash bond. See Goffinet v. State, 775 N.E.2d 1227 (Ind. Ct. App. 2002). See also Traylor v. State, 817 N.E.2d 611 (Ind. Ct. App. 2005) (defendant posted entire amount of bail in cash and was therefore entitled to remittance of $30,000 cash bond).

d. Notification

The individual posting bail for the defendant or the defendant admitted to bail must be notified by the sheriff, court, or clerk that the defendant's deposit may be forfeited by defendant's failure to appear or retained to pay fines, costs, fees and restitution. Ind. Code § 35-33-8-3.2(a)(2).

Cody v. State, 702 N.E.2d 364 (Ind. Ct. App. 1998) (defendant has standing to object to forfeiture of bond even if third party posted bond).

e. Exception: real estate bond

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

f. Forfeiture - Ind. Code § 35-33-8-7

Ind. Code § 35-33-8-7 provides for the forfeiture of bond not earlier than 120 days or more than 365 days after the defendant's failure to appear and issue a warrant for the defendant's arrest if the defendant was released on bond under section Ind. Code § 35-33-8-3.2(a)(2). However, if the court having jurisdiction over the criminal case receives written notice of a pending civil action or unsatisfied judgment against the criminal defendant arising out of the same transaction or occurrence forming the basis of the criminal case, funds deposited with the clerk of the court under Ind. Code § 35-33-8-3.2(a)(2) of this chapter may not be declared forfeited by the court, and the court shall order the deposited funds to be held by the clerk. If there is an entry of final judgment in favor of the plaintiff in the civil action, and if the deposit and the bond are subject to forfeiture, the criminal court shall order payment of all or any part of the deposit to the

plaintiff in the action, as is necessary to satisfy the judgment. The court shall then order the remainder of the deposit, if any, and the bond forfeited. Ind. Code § 35-33-8-7(b).

Turner v. Clary, 606 N.E.2d 878 (Ind. Ct. App. 1993) (the deposit of a cash bail bond does not extinguish the depositor's interest in the bond until the bond is actually forfeited. A judgment of forfeiture of a cash bail bond must be entered before the clerk could transfer the money to the State Auditor).

Zanders v. State, 800 N.E.2d 942 (Ind. Ct. App. 2003) (trial court erred in retaining a portion of defendant's bond deposit for extradition expenses as "costs" under Ind. Code § 35-33-8-3.2 after charges against him were dismissed with prejudice; while Ind. Code § 35-33-8-7 allowed for forfeiture based on failure to appear, trial court never initiated bond forfeiture statute after defendant's failure to appear).

5. Surrender of Defendant

a. Statutory Scheme

"At common law, sureties were empowered to seize defendants without an arrest warrant and to return them to the authorities' custody… However, our legislature has promulgated statutory guidelines applicable to sureties who seek to surrender defendants." In re Bond Forfeiture: Amwest Surety Insurance Co. v. State, 750 N.E.2d 865 (Ind. Ct. App. 2001) (interpreting and harmonizing statutes in Ind. Code § 27-10-2).

Mishler v. State, 660 N.E.2d 343 (Ind. Ct. App. 1996) (statutes do not authorize bail bondsmen to conduct forced entry of third party's home to search for defendant).

b. Permissive Surrender

Any time before there has been a breach of the undertaking in any type of bail and cash bond, the surety may surrender a defendant, or the defendant may surrender, to the official to whose custody the defendant was committed at the time bail was taken or to the official into whose custody the defendant would have been given if committed. Ind. Code § 27-10-2-5(a). See In re Bond Forfeiture: Amwest Surety Insurance Co. v. State, 750 N.E.2d 865 (Ind. Ct. App. 2001).

c. Mandatory Surrender

Ind. Code § 27-10-2-5(b) provides:

> Defendant shall be surrendered without return of premium for bond if guilty of:
>
> (1) changing address without notifying the defendant's bail agent or surety;
> (2) concealing one's self;
> (3) leaving the jurisdiction of the court without the permission of the defendant's bail agent or surety or the court; or
> (4) violating the defendant's contract with the bail agent or surety in a way that does harm to the bail agent or the surety or violates the defendant's obligation to the court.

See In re Bond Forfeiture: Amwest Surety Insurance Co. v. State, 750 N.E.2d 865 (Ind.

Ct. App. 2001).

E. CONDITIONS TO ASSURE APPEARANCE

Under Ind. Code § 35-33-8-3.2(a), the court may impose other conditions to assure defendant's appearance:

- reasonable restrictions on the activities, movements, associations and residence of the defendant during the period of release.
- place defendant under the reasonable supervision of a probation officer, pretrial services agency, or other appropriate public official. The court shall determine whether the defendant must pay the pretrial services fee under IC 35-33-8-3.3.
- release defendant into care of some qualified person or organization responsible for supervising the defendant and assisting defendant in appearing in court; (that person/organization need not be financially responsible for the defendant).
- except as provided in IC 35-33-8-3.6, require the defendant to refrain from direct or indirect contact with an individual and, if the defendant has been charged with an offense under IC 35-46-3, any animal belonging to the individual, including if the defendant has not been released from lawful detention.
- Require a defendant charged with offense under Ind. Code § 35-45-3 to refrain from owning, harboring, or training an animal.
- any other reasonable restrictions designed to assure the defendant's presence in court.

1. Reasonableness

Conditions of release may, within limits of Ind. Code § 35-33-8-3.2, be imposed according to court's exercise of discretion provided they relate to risk of non-appearance. Conditions must relate to the purpose of bail statute, i.e., securing defendant's presence at trial.

Tinsley v. State, 496 N.E.2d 1306 (Ind. Ct. App. 1986) (condition of bail, that persons arrested at theater for engaging in allegedly obscene performance could not go "on or about premises" of theater, was improper because it was not related to assuring persons' appearances at future legal proceedings).

Mott v. State, 490 N.E.2d 1125 (Ind. Ct. App. 1986) (trial court did not err in requiring that $40,000 bail imposed upon defendant charged with rape while armed with a deadly weapon and unlawful deviate conduct be executed only with sureties and not by payment of ten percent cash bond in view of defendant's prior criminal history and limited ties to the community).

But see Sneed v. State, 946 N.E.2d 1255 (Ind. Ct. App. 2011) (trial court abused its discretion by requiring a cash-only payment of bail and denying defendant’s request for option of a surety bond).

DeWees v. State, 180 N.E.3d 261 (Ind. 2022) (nonfinancial conditions - such as electronic monitoring, community supervision, no-contact orders, and restrictions on activities or place of residence - are often sufficient to ensure defendant's appearance at trial and community safety unless person poses flight risk or risk to public safety).

2. Drug testing

A "trial court must make an individualized determination that the accused is likely to use drugs while on bail before it is reasonable to place restrictions on the individual based on that contingency." Steiner v. State, 763 N.E.2d 1024, 1027-28 (Ind. Ct. App. 2002) 774 N.E.2d 517 (trial court erred by imposing random drug testing as a condition of bail where no evidence indicated that the defendant would use drugs while admitted to bail), *trans. denied*.

3. Refrain from contact with victim of violent crimes

If a court releases a defendant who is charged with committing a violent crime (as defined in IC 5-2-6.1-8) that results in bodily injury to a person without holding a bail hearing in open court, the court shall include as a condition of bail the requirement that the defendant refrain from any direct or indirect contact with the victim: (1) for ten (10) days after release; or (2) until the initial hearing; whichever occurs first. Ind. Code § 35-33-8-3.6 (b).

At the initial hearing, the court may reinstate or modify the condition that the defendant refrain from direct or indirect contact with the victim. Ind. Code § 35-33-8-3.6 (c).

4. Domestic Violence Cases

Ind. Code § 5-33-8-6.5 prohibits a court from releasing a person arrested for a crime of domestic violence (as described in IC 35-41-1-6.3) on bail until at least eight (8) hours from the time of the person's arrest. Moreover, the court may require a person charged with domestic violence to wear a monitoring device as a condition of bail, and to pay any costs associated with the device. See Ind. Code § 35-33-8-11.

5. Bail for Foreign National Unlawfully Present in U.S.

Ind. Code § 35-33-8-4.5 provides that if bail is set for a defendant who is a foreign national who is unlawfully present in the United States under federal immigration law, the defendant may be released from custody only by posting a: (1) cash bond in an amount equal to the bail; (2) real estate bond in which the net equity in the real estate is at least two (2) times the amount of the bail; or (3) surety bond in the full amount of the bail that is written by a licensed and appointed agent of an insurer (as defined in IC 27-10-1-7).

If the defendant for whom bail has been posted fails to appear in court as ordered because the defendant has been taken into custody or deported by a federal agency, or arrested and incarcerated for another offense, the bond posted may not be declared forfeited by the court and the insurer that issued the bond is released from any liability regarding the defendant's failure to appear. Ind. Code § 35-33-8-4.5(b).

F. ALTERING OR REVOKING BAIL, AND FAILURE TO APPEAR

Either party may petition for alteration or revocation of bail if circumstances change or new information relevant to the amount of bond is discovered. Ind. Code § 35-33-8-5.

1. Good Cause

A petition to alter or revoke bond is made in the court where the criminal case is pending and may be granted upon a showing of good cause. In reviewing motion, credible hearsay

evidence is admissible to establish good cause. Ind. Code § 35-33-8-5(a).

a. Increasing Bail

(1) Cannot Raise *Sua Sponte*

The trial court cannot impose an additional amount of bail without a request or evidence to support an increase outlined in Ind. Code § 35-33-8-5(b). Matter of Brettin, 723 N.E.2d 913 (Ind. Ct. App. 2000).

Riley v. State, 129 N.E.3d 218 (Ind. Ct. App. 2019) (trial court abused its discretion in increasing defendant's bail because the State made no request to increase his bail and did not present any additional evidence relevant to a high risk of defendant's non-appearance in court; statutory requirements for increasing bail were not met).

Cole v. State, 997 N.E.2d 1143 (Ind. Ct. App. 2013) (trial court abused its discretion in raising defendant's bail from $2,500 to $10,000 after newly appointed public defender requested bond reduction and State merely opposed bail reduction but did not seek increase in bail).

(2) High Risk of Nonappearance

When the State presents additional clear and convincing evidence relevant to a high risk of nonappearance, based on the factors in Ind. Code § 35-33-8-4(b), the court may increase bail. Ind. Code § 35-33-8-5(b)(1).

A hearing must be afforded accused before bail is increased. Vacendak v. State, 264 Ind. 101, 340 N.E.2d 352, 358 (1976).

Matter of Brettin, 723 N.E.2d 913 (Ind. Ct. App. 2000) (trial court's order increasing defendant's bail constituted alteration of previous amount and therefore entitled defendant to hearing pursuant to Ind. Code § 35-33-8-5).

Hughes v. Sheriff of Vigo County, 268 Ind. 21, 373 N.E.3d 144 (1978) (trial court justified in increasing bond from $5,000 to $10,000, given (1) consideration of juvenile record, (2) conduct while out on bond, (3) convictions for additional felonies, (4) additional criminal complaints).

(3) Defendant poses a risk to safety

The court may increase bail if the State presents clear and convincing evidence that the defendant poses a risk to the physical safety of another person or the community. If the additional evidence presented by the State is DNA evidence tending to show that the defendant committed additional crimes that were not considered at the time the defendant was admitted to bail, the court may increase or revoke bail. Ind. Code § 35-33-8-4(b),

Johnson v. State, 114 N.E.3d 908 (Ind. Ct. App. 2018) (trial court did not abuse discretion by increasing defendant's bond when detective testified at bond reduction hearing that, following incarceration for current offense, defendant arranged for the assault of a confidential informant whom he was accused of

raping).

PRACTICE POINTER: Before a higher bail can be justified on the grounds that the defendant poses a risk of harm to another person or to the community, the State has the burden of proving this by clear and convincing evidence. Ind. Code § 35-33-8-4(b) and Ind. Code § 35-33-8-5(b)(2). Indiana courts have yet to consider whether the community safety provision within the Code conflicts with the right to bail guaranteed by Article 1, § 17 of the Indiana Constitution. Ray v. State, 679 N.E.2d 1364, 1366 n.4 (Ind. Ct. App. 1997).

b. Decreased Bail - Substantial Mitigating Factors

When the defendant presents additional evidence of substantial mitigating factors, which reasonably suggests defendant recognizes court's authority to bring him to trial (see factors set forth in Ind. Code § 35-33-8-4(b)), the court may reduce bail, unless there is clear and convincing evidence that the defendant poses a risk to another person or to the community. Ind. Code § 35-33-8-5(c).

(1) Erroneous denial of bail reduction

Lopez v. State, 985 N.E.2d 358 (Ind. Ct. App. 2013) (trial court abused its discretion in denying defendant's motion to reduce bond, which trial court had set at $3,000,000 surety plus $250,000 cash; trial court gave little weight to six factors in Ind. Code § 35-33-8-4(b) that favored defendant and did not consider that the State had already seized $3,000,000 from defendant's safety deposit boxes; the extraordinarily high bail was significantly higher than reasonably calculated to assure defendant's presence in court and thus violated his constitutional rights).

Winn v. State, 973 N.E.2d 653 (Ind. Ct. App. 2012) (trial court abused discretion in denying request to reduce $25,000 cash bond to 10% surety bond where defendant was without funds to post full cash bond).

2. Conditions to Revoke/Burden of Proof

Ind. Code 35-33-8-5(d) provides:

(a) The court may revoke bail or an order for release on personal recognizance upon clear and convincing proof by the state that:

(1) while admitted to bail the defendant:

(A) or the defendant's agent threatened or intimidated a victim, prospective witnesses, or jurors concerning the pending criminal proceeding or any other matter;

(B) or the defendant's agent attempted to conceal or destroy evidence relating to the pending criminal proceeding;

(C) violated any condition of the defendant's current release order.

(D) failed to appear before the court as ordered at any critical stage of the proceedings; or

(E) committed a felony or a Class A misdemeanor that demonstrates instability and a disdain for the court's authority to bring the defendant to trial.

(2) the factors described in Ind. Code § 35-40-6-6(1)(A) and Ind. Code § 35-40-6-6(1)(B) exist or that the defendant otherwise poses a risk to the physical safety of another person or the community; or

(3) a combination of the factors described in subdivisions (1) and (2) exists.

3. Failure to Appear

Under Ind. Code § 27-10-2-12 the bail agent or surety has 365 days to produce defendant or prove that defendant's non-appearance was excusable (e.g., illness, death, no notice, incarceration). See Ind. Code § 27-10-2-12(b) (2). See also In re Bond Forfeiture: Amwest Surety Insurance Co. v. State, 750 N.E.2d 865 (Ind. Ct. App. 2001).

Allegheny Mutual Casualty Co. v. State, 474 N.E.2d 1051 (Ind. Ct. App. 1985) (surety challenged adequacy of legal notice regarding hearing on state's petition to revoke bond, which resulted in order of forfeiture; clerk's affidavit established notice to surety and bonding company, surety's agent; trial courts have no duty to search for party's current address when party does not provide adequate information to trial court).

Frontier Insurance Company v. State, 769 N.E.2d 654 (Ind. Ct. App. 2002) (trial court erred in its judgment of bond forfeiture and imposition of late surrender fees because it failed to send required notice to bond agent and surety at addresses listed in bond).

See also Ind. Code § 35-33-8-7 and 8.

4. Contempt

Trial Courts may not use their contempt powers to impose sanctions for violations of bail orders. Hunter v. State, 102 N.E.3d 326 (Ind. Ct. App. 2018).

G. EFFECT OF MOTION TO DISMISS ON BAIL ORDER

If court grants defendant's motion to dismiss and denies discharge of defendant, so that State can amend or refile charges, any prior order imposing conditions of release pending trial shall stand unless otherwise modified or removed by order of court. Ind. Code § 35-34-1-4(d) and (e).

III. INDIANA RULE – CRIMINAL RULE 26

Criminal Rule 26 provides:

(A) If an arrestee does not present a substantial risk of flight or danger to self or others, the court should release the arrestee without money bail or surety subject to such restrictions and conditions as determined by the court except when:

(1) The arrestee is charged with murder or treason.

(2) The arrestee is on pre-trial release not related to the incident that is the basis for the present arrest.

(3) The arrestee is on probation, parole, or other community supervision.

(B) In determining whether an arrestee presents a substantial risk of flight or danger to self or other persons or to the public, the court should utilize the results of an evidence-based risk assessment approved by the Indiana Office of Court Services, and such other information as

the court finds relevant. The court is not required to administer an assessment prior to releasing an arrestee if administering the assessment will delay the arrestee's release.

(C) If the court determines that an arrestee is to be held subject to money bail, the court is authorized to determine the amount of such bail and whether such bail may be satisfied by surety bond and/or cash deposit. The court may set and accept a partial cash payment of the bail upon such conditions as the court may establish including the arrestee's agreement that all court costs, fees, and expenses associated with the proceeding shall be paid from said partial payment. If the court authorizes the acceptance of a cash partial payment to satisfy bail, the court shall first secure the arrestee's agreement that, in the event of failure to appear as scheduled, the arrestee shall forfeit the deposit and must also pay such additional amounts as to satisfy the full amount of bail plus associated court costs, fees, and expenses.

(D) Statements by Arrestee

(1) Prohibited Uses: Evidence of an arrestee's statements and evidence derived from those statements made for use in preparing an authorized evidence-based risk assessment tool are not admissible against the arrestee in any civil or criminal proceeding.

(2) Exceptions: The court may admit such statements:

(a) in a pretrial proceeding involving the arrestee; or

(b) in any proceeding in which another statement made in preparing an authorized evidence-based risk assessment tool has been introduced, if in fairness the statements ought to be considered together.

(3) No statements made for these purposes may be used in any other court except in a pretrial proceeding.

A. Federal Constitutional Issues with Criminal Rule 26

In Odonnell v. Harris County, 892 F.3d 147, 163 (5th Cir. 2018) (opinion on rehearing), the Fifth Circuit upheld the District Court's preliminary injunction of the Harris County predetermined bail schedule for alleged misdemeanants. The Circuit Court held that "the County's mechanical application of the secured bail schedule **without regard for the individual arrestee's personal circumstances**" violates both the Due Process and Equal Protection Clauses of the U.S. Constitution." Id. at 546 (emphasis added), *overruled on other grounds by* Daves v, Dallas Cnty., Texas, 22 F.4th 522 (5th Cir. 2022).

To the extent that Criminal Rule 26 allows for the mechanical application of predetermined bail schedules, it violates both the Due Process and Equal Protection Clauses under the reasoning of Odonnell.

One implication of Odonnell is that the Indiana initial hearing statute, Ind. Code § 35-33-7-3, which does not require a review of ability of indigent person to pay the prescheduled amount, abridges the right to due process and equal protection.

PRACTICE POINTER: Once appointed, counsel should consider filing a motion for bond reduction, which should ask the trial court to make an individualized assessment of defendant's circumstances to determine if requiring the defendant to post the amount established by the pre-determined bail schedule is appropriate.

B. Related Issues Under Indiana Constitution - Right to Counsel at Bail Hearing

Under the reasoning of State v. Taylor, 49 N.E.3d 1019, 1021 (Ind. 2016), a defendant has a right to counsel at a hearing where bail is set. Taylor held that under the Indiana Constitution, the right to counsel attaches *at the time of arrest*. Id. Therefore, a defendant should be afforded counsel at a bail hearing.

In Taylor, the chief deputy prosecutor and several police officers surreptitiously listened into what was supposed to be a private conversation between Taylor and his lawyer at the police station. Taylor and his lawyer discussed "all aspects" of the case, including location of evidence and defense trial strategy. The Court held that the eavesdropping violated state and federal rights to counsel.

PRACTICE POINTER: Admittedly, the Indiana Supreme Court has yet to address whether Taylor confers the right to counsel at a bail hearing, but counsel should argue that it does, if for no other reason, to force Indiana's appellate courts to address the issue

IV. SPECIAL PROBLEMS IN PRETRIAL DETENTION

A. PAROLEES AND PROBATIONERS

Ind. Code § 35-33-8-6 provides:

> The court may detain, for a maximum period of fifteen (15) calendar days, a person charged with any offense who comes before it for a bail determination if the person is on probation or parole. During the fifteen (15) day period, the prosecuting attorney shall notify the appropriate parole or probation authority. If that authority fails to initiate probation or parole revocation proceedings during the fifteen (15) day period, the person shall be treated in accordance with the other sections of [Ind. Code § 35-33-8].

B. EMERGENCY TRANSFER OF INMATES AWAITING TRIAL

1. In Danger of Serious Bodily Injury or Death or Represents Threat to Safety of Others - County Jail

The sheriff, prosecuting attorney, defendant or counsel, attorney general, or the court may move for transfer of inmate awaiting trial to another county jail or to a facility of DOC. Illness or other medical condition is not considered "in danger of serious bodily injury or death." Ind. Code § 35-33-11-1.

a. Pre-Transfer Hearing

There is no provision for notice to or participation by the inmate until after the transfer. See Ind. Code § 35-33-11-2.

> Parr v. State, 504 N.E.2d 1014, 1018 (Ind. 1987) (State moved to transfer defendant to DOC because of prior criminal record and inadequate local facilities. Defendant filed written objection and requested a hearing. Trial court ordered transfer without hearing. Held, defendant failed to present sufficient facts to support claim of prejudice. Note that Parr claimed error under Ind. Code § 35-33-11-2. Under this

provision, defendant must request hearing *after* being transferred. Parr never requested a post-transfer hearing. In addition, Parr appears to have been transferred under Ind. Code § 35-33-11-3 (overcrowding or inadequacy of local penal facility) not Ind. Code § 35-33-11-1).

b. Post-Transfer Hearing

Either the inmate or the receiving facility is entitled to a post-transfer hearing upon request. The inmate "may refuse a transfer if the only issue is his/her personal safety." Ind. Code § 35-33-11-2.

Parr v. State, 504 N.E.2d 1014 (Ind. 1987) (defendant must request hearing after his transfer).

2. Overcrowding or Inadequacy of Penal Facility

Upon petition by the sheriff alleging that the local penal facility is overcrowded or inadequate, the court may order inmates transferred to another facility that has agreed to accept them. Only inmates serving sentences for crimes may be transferred to another county jail or to the Department of Correction because of overcrowding or inadequacy of the facility, unless the overcrowding or inadequacy of the facility also requires the transfer of inmates awaiting trial or sentencing. See Ind. Code § 35-33-11-3.

3. Return to County Jail

Ind. Code § 35-33-11-4 provides:

> Whenever the court finds that the circumstances which necessitated a transfer under this chapter no longer exist, it shall order the sheriff to return the inmate to the county jail from which he was transferred.

C. BAIL AND UNIFORM CRIMINAL EXTRADITION ACT

A person who has broken the terms of bail may be extradited. Ind. Code § 35-33-10-3(5)(c).

1. Must Admit Prisoner to Bail before Warrant Issues

Ind. Code § 35-33-10-3(17) provides:

> *Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment* under the laws of the state in which it was committed, the judge must admit the person arrested to bail by bond or undertaking, with sufficient sureties, and in such sum as he deems proper, for his appearance before him at a time specified in such bond or undertaking, and for his surrender, to be arrested upon the warrant of the governor of the state. *The prisoner shall not be admitted to bail after issuance of a warrant by the governor of this state.* (Emphasis added).

See also:

Ind. Code § 35-33-10-3(18) (discharge and recommit);

Ind. Code § 35-33-10-3(19) (admitted to bail and fails to appear).

D. FEDERAL BAIL FOR DETAINED ALIENS

Jennings, et al. v. Rodriguez, on behalf of class, 138 S. Ct. 830 (2018) (detained aliens have no right to periodic bond hearings).

V. BAIL PENDING APPEAL OF CONVICTION

A. RIGHT TO BAIL PENDING APPEAL, Ind. Code § 35-33-9

1. No Constitutional Right/Matter of Legislative Grace

A convicted defendant is presumed guilty on appeal, and there is no state or federal constitutional right to bail pending appeal. Tyson v. State, 593 N.E.2d 175, 177-78 (Ind. 1992).

The right to bail pending appeal is statutory. In re Pisello, 293 N.E.2d 228, 230 (Ind. Ct. App. 1973).

2. Discretionary with Court except for a Fine-Only sentence

Ind. Code § 35-33-9-1 grants court the discretionary power to authorize bail pending appeal. Willis v. State, 492 N.E.2d 45, 47 (Ind. Ct. App. 1986).

A person may not be admitted to bail pending appeal if he has been convicted of a Class A felony (for a crime committed before July 1, 2014) or a Level 1 or Level 2 felony (for a crime committed after June 30, 2014). Ind. Code § 35-33-9-1.

Ind. Code § 35-33-9-6 provides:

> Where a penalty in a criminal case is a fine only, the defendant may have a stay of execution on appeal as provided by law.
>
> Everly v. State ex rel. Sullivan County, 10 Ind. App. 15, 37 N.E. 556 (1894) (stay of execution in a criminal case is sufficient consideration for the appeal bond).

3. If Denied in Trial Court, Appellate Court May Consider

Appellate courts have authority to consider application for bail pending appeal and are not limited to reviewing the trial court's determination for abuse of discretion. Willis v. State, 492 N.E.2d 45, 47 (Ind. Ct. App. 1986); Ind. Code § 35-33-9-1; Ind.App.R.18; Ind. App. R. 39(E); and Trial Rule 62(D)(1).

4. Fixing Amount

Court shall fix bail in a reasonable amount, considering the nature of the offense and the penalty adjudged, to assure defendant's compliance with terms of bail. Ind. Code § 35-33-9-4.

B. ELIGIBILITY FOR ADMISSION TO BAIL

1. Ineligibility

Grassmyer v. State, 429 N.E.2d 248, 252 (Ind. 1981) (bail statutes do not violate equal protection in excluding persons likely to disregard conditions of bail).

a. Class A/Level 1 Felonies

A person may not be admitted to bail pending appeal if he has been convicted of a Class A felony (for a crime committed before July 1, 2014) or a Level 1 or Level 2 felony (for a crime committed after June 30, 2014). Ind. Code § 35-33-9-1.

> Carter v. State, 467 N.E.2d 694 (Ind. 1984) (defendant was properly denied an appeal bond where defendant was convicted of class A felony).

2. Must File Petition

Ind. Code § 35-33-9-2 provides:

> When a person has been sentenced to a term of imprisonment and has filed an appeal, that person may file a petition for bail pending appeal unless he is barred from admission to bail pending appeal by [Ind. Code § 35-33-9-1]. The petition must be filed in the court in which the case was tried, and a copy shall be sent to the prosecuting attorney of the circuit where the judgment was rendered.

3. Defendant's Burden

Because of presumption of guilt after conviction, defendant bears burden of demonstrating compelling reasons to allow him to remain free pending appeal. Three factors to consider are: (1) probability of reversible error at trial; (2) risk of flight; and (3) potential dangerousness of defendant. Tyson v. State, 593 N.E.2d 175, 178 (Ind. 1992).

> Tyson v. State, 593 N.E.2d 175, 178 (Ind. 1992) (these factors are similar to those considered by the federal courts).

4. Conditions of Undertaking

Sureties must fulfill the usual qualifications, and defendant must promise to perfect the appeal and to surrender if appeal is dismissed or denied or if judgment or reversal requires surrender. Ind. Code § 35-33-9-3.

C. INDIANA APPELLATE REVIEW

Appellate court's review under former Appellate Rule 6(B) (now Appellate Rule 18) is not de novo, nor is it limited to review of trial court's abuse of discretion. Court has ability to examine factors pertinent to bail decision, but trial court should be granted appropriate deference on issue where trial court is in best position to judge. Tyson v. State, 593 N.E.2d 175 (Ind. 1992).

Appeals court decisions on bail are not subject to appellate review.

> Naked City v. State, 434 N.E.2d 576, 579 n.1 (Ind. Ct. App. 1982) ("The granting of an

appeal bond by the Court of Appeals is in aid of appellate jurisdiction as set forth in the Indiana Supreme Court Rules. These Rules do not provide for any further review of the bond issue, since any ruling on the petition for an appeal bond pending the appeal is collateral and incidental to a review of the substantive law questions, evidentiary questions, and procedural questions which were used in the guilt determining process during the prosecution and at trial.").

D. EFFECTS

1. Stay of Judgment of Conviction

The award of bail automatically stays sentence. Time prior to grant of bail petition counts toward good time credit, as does time after surrender. Ind. Code § 35-33-9-5 and Kindred v. State, 362 N.E.2d 168 (Ind. 1977).

2. Loss of Jurisdiction

Trial court loses jurisdiction to order sentence executed if person on bail is not recalled to court within reasonable time after appeal certified. Woods v. State, 583 N.E.2d 1211 (Ind. 1992).

> Woods v. State, 583 N.E.2d 1211 (Ind. 1992) (State violated its duty of prompt action in criminal cases and the trial court lost jurisdiction when the execution of defendant's sentence was delayed for five and a half years through no fault of the defendant).

VI. MAKING AN EFFECTIVE APPLICATION FOR BAIL

This section is a reprint, with certain minor changes (such as references to statutes) of "Pretrial Representation of the Poor - Advocating ROR, Low Bail, and Other Release Mechanisms" by Jean Corigliano. Permission of the New York State Defender's Association, Inc., to reprint is gratefully acknowledged.

A. MAKE COMPLETE BAIL APPLICATIONS

Research consistently confirms that a defendant's pretrial release or detention is the most important factor affecting the eventual outcome of a case. Lawyers often do not make complete bail applications because they feel certain that attainable release conditions will not be set even if their clients are eligible for bail. However, thorough, accurate and repeated bail arguments are needed to educate judges.

B. SEEK LESS RESTRICTIVE BAIL CONDITIONS

Where there is risk of flight, or a defendant's record is such as to raise concerns about community safety (though not a statutory criterion), other available community resources for less restrictive bail conditions, such as home detention or referral to a probation officer, or some other option within the purview of Ind. Code § 35-33-8-3.2, may be more desirable.

C. ARGUING FOR BAIL

Defense attorneys must refocus the inquiry on the statutory criteria for determining applications for bail or recognizance listed in Ind. Code § 35-33-8-4(b). The focus of every bail application

should be on the risk that the accused will flee prosecution. "In evaluating these and any other factors, the judicial officer should exercise care not to give inordinate weight to the nature of the present charge..." ABA Standards, Pretrial Release, Standard 10-5.1(c).

When making an application for bail, emphasize client's "community ties" and other forces which discourage fleeing prosecution. Verify all information contained in an ROR report prepared by a pretrial release agency or department of probation.

The defendant has a right to a copy of his "rap sheet." Review this with defendant, explaining to the court the mitigating circumstances surrounding prior arrests, arraignments, and convictions. Point out to the court changes in your client's character, habits, living arrangements or mental condition since his last arrest, history of voluntary appearances in court when required and the fact that bench warrants were not issued.

D. RENEWING APPLICATIONS FOR BAIL

A bail application can be renewed at each stage of the criminal proceedings. If your client is denied bail at arraignment or bail is set at an unattainable sum, a new application may be warranted by additional evidence. Note, also, speedy trial rights under CR 4(A). At pretrial hearings, be ready to test the sufficiency of the felony complaint.

Indiana gives defendants the opportunity to be heard and the right to argue for attainable release conditions. If a case is pending in a local criminal court, the Indiana Code provides what is, in effect, an appeal to a higher court on the issue of bail. A writ of *habeas corpus* may be brought to test the legality of a bail decision. At each level, attorneys should make due process and equal protection arguments.

Ind. Code § 35-33-8-3.2(a)(7) and Ind. Crim. Rule 26 create a presumption in favor of release, as does the federal government and many other jurisdictions.

E. CREATIVE OPTIONS

- Use partially secured or unsecured bonds to overcome the resistance of judges.
- Look beyond the bail statutes for means to attain client's release.
- Explore the possibility of an early diversion of the case from the criminal process through the use of community agencies.
- Pretrial release agencies (publicly funded or run by government agencies or supported by private contributions, foundations, and churches) exist in some counties. These agencies may provide an avenue for finding appropriate and "qualified persons or organizations" to supervise defendant once he is released.

VII. EXTRADITION

A. IN GENERAL

1. Things to Know

Extradition involves the arrest and return of a person who has been convicted of crime, incarcerated, and escaped from incarceration in another state. To challenge the legality of an arrest in asylum (sending) state, accused must petition for a writ of habeas corpus. If the court

grants a hearing, it will only decide the:

(1) authenticity of the warrant and
(2) identity of the accused.

Extradition is not a criminal trial, and normal rules of evidence do not apply. If the court is satisfied as to authenticity and identity, then the accused must be delivered to the demanding state. Robertson v. State, 587 N.E.2d 117 (Ind. 1992). See 93 ALR2d 912, supp. Sec. 15.

The leading U.S. Supreme Court case interpreting the Extradition Clause is Michigan v. Doran, 439 U.S. 282, 99 S. Ct. 530 (1978).

2. Extradition Act

Ind. Code § 35-33-10-3 specifies procedures to extradite persons charged with crimes in other states.

See also, Art. IV, §2 of the U.S. Constitution which provides, "A person charged in any state with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

See also 18 USCS § 3182, noting that states cannot impose more stringent standards or refuse demand for extradition on basis of requirements not articulated by federal law. Johnson v. Burke, 238 Ind. 1, 148 N.E.2d 413 (1958).

a. Only Two States Have Not Adopted

Forty-seven (47) states have adopted Uniform Criminal Extradition Act (UCEA). One state has adopted the newer Uniform Extradition and Rendition Act. Only South Carolina and Mississippi have adopted neither of these. See Heitman v. State, 627 N.E.2d 1307, 1310 n.8 (Ind. Ct. App. 1994).

Article IV, § 2 of the U.S. Constitution is authority for two states to agree on the extradition of a person charged with a crime. Smothers v. State, 741 So.2d 205 (Miss. 1999).

3. Out-of-State Probationer or Parolee Compact

See Ind. Code § 11-13-4-1.

B. STATUTORY PROCEDURES

1. Request for Extradition - Documents Required

Demand [for extradition] shall not be recognized by the governor unless:

(a) in writing,
(b) "including a copy of an indictment, information or affidavit made before a magistrate substantially charging the person demanded with having committed acts which are a crime under the law of that state." Ind. Code § 35-33-10-3(3),

(c) copy of the charging document must be authenticated by the executive authority (authentication is prima facie evidence of its truth).

2. Investigation by Indiana Authorities

Governor has authority to direct that an investigation of the demand be made by the Attorney General or any prosecuting officer of the State. Ind. Code § 35-33-10-3(4).

3. Requirements to Issue Order

The accused must have been present in the demanding state at the time of the crime (Ind. Code § 35-33-10-3(5) (a)), or committed an act in Indiana, or in a third state, "intentionally resulting in a crime in the state whose executive authority is making the demand." Ind. Code § 35-33-10-3(7).

The accused is present in Indiana. Ind. Code § 35-33-10-3(5)(b).

The accused is: (a) lawfully charged with a crime; (b) escaped confinement; (c) violated release conditions; (d) a portion of a sentence remains unexecuted; and (e) the person claimed has not been discharged or otherwise released from the sentence, in the claiming state. Ind. Code § 35-33-10-3(5)(c).

4. Arrest Procedure If Extradition Warrant Issues

If the governor is satisfied as to the validity of the demand, he shall sign a warrant of arrest, to be executed by a sheriff, marshal, coroner, or other person he may think fit to execute the warrant. Ind. Code § 35-33-10-3(8) authorizes the arrest of the accused wherever he may be found in the state. Ind. Code § 35-33-10-3(9).

5. Notice to the Accused and Advisements of Rights

Pursuant to Ind. Code § 35-33-10-3(11), prior to delivery to foreign state's executive authority, the accused has the right to:

- Notice of demand for accused's surrender;
- Notice of crime charged;
- Advisement of right to counsel.

6. Arrest Under Court Warrant, or Without a Warrant

Extradition may also be had by charging the accused with a crime in another state before a judge of this state. Ind. Code § 35-33-10-3(14).

a. Charging Options

The accused can be charged by oath of any "credible person" before a judge of this state or by complaint made in this state on affidavit of any "credible person" in another state. Ind. Code § 35-33-10-3(14).

b. Basis for Court Warrant

Warrants may issue on the same grounds required in issuance of a governor's warrant, as follows: the accused committed a crime in any other state, fled from that state, and is believed to have been found in Indiana. Ind. Code § 35-33-10-3(14).

c. Warrantless Arrest

Arrest may be made without a warrant upon "reasonable information" that an accused stands charged in the courts of another state with an offense punishable by death or a sentence in excess of one year (Ind. Code § 35-33-10-3(15)), provided the accused is brought before a judge with all practicable speed, and an oath is sworn as provided under Ind. Code § 35-33-10-3(14).

Sivard v. Pulaski County, 809 F.Supp. 631 (N.D. Ind. 1992) and 17 F.3d 185 (7th Cir. 1994) (laxity of Massachusetts authorities in providing necessary documentation for extradition was not "emergency or extraordinary circumstance" and, therefore, did not justify allegedly unconstitutional delay in detention of 17 days between warrantless arrest and initial hearing).

d. Interim Detention Until Governor's Warrant Is Secured

If the identity of the accused is established, and that the accused fled the jurisdiction [except where the act is alleged to have been committed in Indiana or a third state "intentionally resulting in a crime" in the demanding state, under Ind. Code § 35-33-10-3(7)], the judge shall commit the defendant to jail by a warrant specifying such time "as will enable the arrest of the accused to be made under warrant of the governor" on demand of the state where a crime is charged. Ind. Code § 35-33-10-3(16).

7. Procedure When Charges Are Pending in Indiana

If a prosecution has been instituted against the accused under the laws of this state, but not concluded, the governor at his discretion either may surrender him on the demand of the executive authority of another state or may hold him until he has been tried and discharged or convicted and punished in this state. Ind. Code § 35-33-10-3(20).

C. CHALLENGING LEGALITY OF EXTRADITION: HABEAS PROCEEDING

Method for testing legality of the extradition is the application for a writ of habeas corpus. Ind. Code § 35-33-10-3(11).

1. Burden on Defendant to Dispute

With regard to petitions filed in extradition setting, burden is on defendant to dispute extradition once prima facie case of identity has been established. Daher v. State, 572 N.E.2d 1304 (Ind. Ct. App. 1991).

Decker v. State, 577 N.E.2d 959 (Ind. 1991) (State made prima facie case as to identity of person whom Texas wished to extradite when it established that fingerprints taken in Texas of person wanted by that state matched fingerprints taken of detainee in Indiana).

Extradition is not criminal trial, and normal rules of evidence do not apply. Robertson v. State, 587 N.E.2d 117 (Ind. 1992).

2. Must Apply for Writ of Habeas Corpus

When the accused, his attorney or friends state they desire to test the legality of the arrest, the accused shall be taken "forthwith" before a magistrate, who shall fix a reasonable time to the accused within which to apply for a writ of *habeas corpus*. When application for a writ is made by the accused, notice shall be given to the prosecuting attorney of the county where the arrest was made, and the accused is in custody, and the agent of the demanding state. Ind. Code § 35-33-10-3(11). See Knoche v. State, 607 N.E.2d 972 (Ind. 1993).

3. Scope of Court's Inquiry

When the governor of asylum state has granted extradition and the party sought files a petition for habeas corpus, the court or magistrate need decide only:

(1) whether the extradition documents are in order on their face;
(2) whether the petitioner has been charged with a crime in the other state;
(3) whether petitioner is the person named in the request for extradition; and
(4) whether petitioner is a fugitive (present in the demanding state at the time of the crime, then having subsequently left).

Michigan v. Doran, 439 U.S. 282, 99 S. Ct. 530 (1978); Decker v. State, 577 N.E.2d 959, 960 (Ind.1991).

New Mexico ex rel. Ortiz v. Reed, 524 U.S. 151, 118 S. Ct. 151(1998) (respondent's claim that he feared revocation of his parole without due process, and physical harm if he returned to prison in the state seeking extradition, was "not the kind of issue that may be tried in the asylum state.").

a. Failure to File Return Writ of Habeas Corpus

Ind. Code § 34-25.5-3-4 requires immediate filing of a return by custodial officer.

Failure to file return writ does not provide ground for *habeas* relief. Masden v. State, 355 N.E.2d 398 (Ind. 1976).

> Robertson v. State, 587 N.E.2d 117 (Ind. 1992) (failing to file return following arrest pursuant to governor's extradition warrant was not reversible error, even though custodial officer normally would be required to file return immediately, given that trial court was apprised of nature of case and authority for arrest, warrant and appended papers were available to all who were concerned, and return would not have conveyed new information if filed immediately).

b. Affidavits Not Complying with Indiana Law

Robertson v. State, 587 N.E.2d 117, 118 (Ind. 1992) (defendant claimed notary jurat insufficient under Indiana law. Affidavits were issued according to Michigan law and were not required to comply with Indiana law in. The governor of Michigan properly certified the papers).

c. Identification

Robertson v. State, 587 N.E.2d 117 (Ind. 1992) (comparison of fingerprints from extraditing state with fingerprints from asylum state supported identification in extradition proceedings).

Decker v. State, 577 N.E.2d 959 (Ind. 1991) (slight differences in a name or spelling do not defeat identification).

d. Guilt or Innocence

Robertson v. State, 587 N.E.2d 117 (Ind. 1992) (any question as to whether actual escape occurred or how much time was to be served in extraditing state is not matter to be determined in asylum state; guilt or innocence is not issue in asylum state).

4. Duty to Deliver

If the criteria have been met, the asylum state has a duty to deliver the fugitive upon proper demand. The duty to deliver is ministerial and asylum state has no discretion. Puerto Rico v. Branstad, 483 U.S. 219, 107 S. Ct. 2802 (1987), New Mexico ex rel. Ortiz v. Reed, 524 U.S. 151, 118 S. Ct. 151 (1998).

Even if the court reviewing the demand finds that facts presented to it conclusively establish that the accused has not committed a crime under the law of the state where charges have been brought, the accused must still be released to the executive authority of the demanding state for extradition.

California v. Superior Court of California, 482 U.S. 400, 107 S. Ct. 2433 (1987) (the only issue is whether the indictment, information or charging document states the elements of the offense).

5. Delay in Retrieving Prisoner by Extradition State

a. Indiana authority

Indiana precedent and statutory authority does not provide much direction on how long Indiana authorities can hold a prisoner when the extradition state has not taken steps to retrieve the prisoner. See Ind. Code § 35-33-10-3 and Meek v. State, 262 Ind. 618, 321 N.E.2d 205 (1975).

Meek, *supra* (where defendant challenged an "unreasonable delay of more than a month from the time Defendant was first taken into custody until the date of" the extradition hearing; court found that defendant had not provided any precedent to "require his release for that amount of delay.").

Lawrence v. King, et al., 203 Ind. 252, 180 N.E. 1 (1932) (an "alleged fugitive may be apprehended and held for a reasonable time in order to give the executive of the state in which the offense is alleged to have been committed an opportunity to make a demand for the surrender of the person so held," without defining what reasonable amount of time constitutes; however, court did order individual discharged due to Indiana governor's inadequate return because it failed to show any demand whatever of the Governor of Tennessee).

b. Federal authority

Federal statutory authority notes that if no agent from an extradition state "appears within thirty days from the time of arrest, the prisoner may be discharged." 18 USCS § 3182. This language should at least give Indiana courts an idea of what is a reasonable delay for balancing the interests of Art. 4, § 2 and the due process clause of the Fourteenth Amendment and Art. 1, § 12 of the Indiana Constitution.

Federal law is controlling as to interstate extradition. State v. Hooker, 626 P.2d 1111 (Ariz. Ct. App. 1981).

> State v. Hooker, 626 P.2d 1111 (Ariz. Ct. App. 1981) (trial judge was within discretion to release prisoner when no out-of-state agent had either come to pick up defendant or made a demand for his return within 30 days of the fugitive's arrest).

Although the language of the statute is permissive using the word "may" some jurisdictions have given it mandatory effect.

> Hill v. Roberts, 359 So.2d 911 (Fla. Ct. App. 1978) (finding mandatory although noting that the period is tolled for delays attributable to the defendant).

But see other jurisdictions challenging this reading of Prettyman and finding language permissive.

> State v. Paskowski, 647 S.W.2d 238 (Tenn. Crim. App. 1983) (finding permissive although noting the purpose of 18 USCS § 1382 "is to prevent indefinite incarceration of a prisoner in an asylum state").
>
> State v. Campbell, 761 P.2d 393 (Mont. 1988) (noting also that release of defendant does not mean that extradition proceedings cannot once again be started against defendant).
>
> Godsey v. Houston, 584 So.2d 389 (Miss. 1991) (language not mandatory and time begins for arrest when governor of asylum state issues rendition warrant and is tolled when habeas proceedings are commenced).
>
> Breckenridge v. Hindman, 691 P.2d 405 (Kan. Ct. App. 1984) (50-day hold on murder suspect not outside judge's discretion).
>
> People v. Superior Ct. of Los Angeles, 182 Cal. Rptr. 132 (Cal. Ct. App. 1982).

c. Other States

A few other jurisdictions have statutorily mandated a 30-day holding period and while such statutes from other jurisdictions would not be controlling, they might be useful for persuasive value to argue that holding an individual for much more than 30 days is unreasonable. See State v. Phillips, 587 N.W.2d 29 (Minn. 1998) (interpreting Minn.Stat. § 629.15) and Commonwealth v. Lyons, 1979 Phila. Cty. Rptr. LEXIS 41.

d. Motion to Quash Extradition Processing

Rather than simply moving for release of a prisoner due to the extradition state's failure to retrieve a prisoner, the defense may consider filing a motion to quash extradition

processing due to the extradition state's failure to provide paperwork in a timely fashion.

Smedley v. Holt, 541 P.2d 17 (Alas. 1975) (Motion to Quash upheld where outside state did file paperwork, but they failed to establish that he had been convicted of a crime or that he had broken parole).

If the failures in Smedley establish a basis for the granting of a motion to quash, then the failure to file any documents at all should also provide a basis. See Lawrence v. King, et al., 180 N.E. 1 (Ind. 1932), for support where individual ordered released due to Indiana governor's inadequate return because it failed to show any demand whatever of the Governor of Tennessee.

D. APPEALING EXTRADITION ORDER

1. Right to Appeal

Article 7, § 6 of the Indiana Constitution guarantees the right to one appeal.

2. Court of Appeals

Appellate Rule 14(A)(7) provides appeal from denial of application for writ of *habeas corpus* is to court of appeals.

3. Grounds

Authenticity of warrant or identity of person.

4. Prepare for Appeal Even Before Habeas Hearing

Even before a trial court hears and rules on a petition for writ of habeas corpus, counsel should:

- prepare a motion to stay the extradition order upon possible denial of the petition; see Trial Rule 62(D); Appellate Rule 39; and Appellate Rule 18.
- review Appellate Rule 9, regarding initiating an appeal with a notice of appeal.
- If concerned that trial court clerk will not meet deadlines, review procedures to file motions to compel filing of notice of completion of clerk's record and filing of notice of completion of transcript; see Ind. Appellate Rule 10(F) and Ind. Appellate Rule 10(G).
- Examine rules and procedures for petitions for rehearing (Appellate Rule 54) and petitions for transfer (Appellate Rules 56-58).

Counsel should also review rules regarding the contents, formatting, and deadlines for briefs. See Appellate Rules 43-48, and appendices and Appellate Rules 49-51.

PRACTICE POINTER: Once an extradition order issues, the accused may be extradited *immediately*. If counsel is not ready to lay the groundwork for the appeal in the trial court at the conclusion of the habeas hearing, it is very likely that the client may be extradited before the Supreme Court obtains jurisdiction. Bear in mind that the normal procedures for appellate review must be followed as a part of petitioning court of appeals for review of the extradition order.