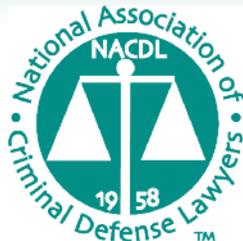


# ***Gideon* at 50:** **A Three-Part Examination of** **Indigent Defense in America**

## Part 2 – Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel



SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND FAIR TRIAL BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH RIGHT SHALL NOT BE DENIED TO ANY PERSON WHOSE INTERESTS ARE AFFECTED BY THE CRIME; TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENCE.



NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

March 2014

## Supported by a grant from the Foundation for Criminal Justice.

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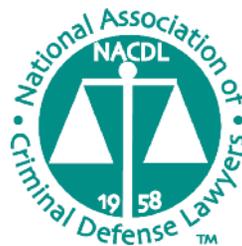
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# ***Gideon at 50:***

**A Three-Part Examination of Indigent Defense in America**

## **PART 2**

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### Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel

A 50-State Survey of Financial Eligibility  
Guidelines for Assigned Counsel

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By

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# ABOUT THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

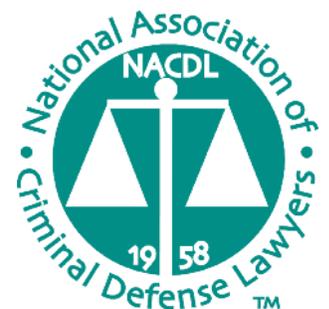
The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL's core mission is to: *Ensure justice and due process for persons accused of crime ... Foster the integrity, independence and expertise of the criminal defense profession ... Promote the proper and fair administration of criminal justice.*

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America's criminal defense bar, *amicus curiae* advocacy, and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL's approximately 9,500 direct members — and more than 90 state, local and international affiliates with an additional 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America's criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

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# ABOUT THE FOUNDATION FOR CRIMINAL JUSTICE

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The Foundation for Criminal Justice (FCJ) is organized to preserve and promote the core values of America’s criminal justice system guaranteed by the Constitution — among them due process, freedom from unreasonable search and seizure, fair sentencing, and access to effective counsel. The FCJ pursues this goal by seeking grants and supporting programs to educate the public and the legal profession on the role of these rights and values in a free society and assist in their preservation throughout the United States and abroad.

The Foundation is incorporated in the District of Columbia as a non-profit, 501(c)(3) corporation. All contributions to the Foundation are tax-deductible. The affairs of the Foundation are managed by a Board of Trustees that possesses and exercises all powers granted to the Foundation under the DC Non-Profit Foundation Act, the Foundation’s own Articles of Incorporation and its Bylaws.

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**T**he denial of counsel to those too poor to hire a lawyer based on arbitrary income eligibility guidelines undermines the central tenet of our criminal justice system: that every defendant should stand equal before the law. The idea that the poor and the wealthy should have equal access to justice is deeply imbedded in our notion of due process and fundamental fairness. Nearly 50 years ago, Justice Black referenced the following passage from Leviticus when ruling that an indigent defendant must be provided with a trial transcript on appeal: You shall not render an unjust judgment; you shall not be partial to the poor or defer to the great: with justice you shall judge your neighbor. Leviticus, c. 19, v. 15.

Today, we take it for granted that defendants who are too poor to hire an attorney will be provided with counsel free of charge. Sadly, as this 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel demonstrates, that is not the case. Not only do states restrict access to counsel through the use of unrealistic income eligibility guidelines, but they impose various fees for providing representation.

In an effort to avoid the constitutional mandate to provide counsel to those too poor to hire an attorney, states have redefined poverty. Instead of a realistic assessment of a defendant's financial resources and the actual costs associated with mounting an adequate defense, most states decide who is too poor to hire a lawyer by referencing the Federal Poverty Guidelines. The result is that defendants who receive needs-based public assistance, unemployment, disability and veteran's benefits are often deemed ineligible for assigned counsel.

Even when defendants are deemed eligible for assigned counsel, states impose various fees for representation. These fees can apply even in cases where a defendant is acquitted. Most states also attempt to recoup at least some of the costs of representation from a defendant. Defendants are not simply "indigent" or able to afford an attorney but are now classified as "marginally indigent." These defendants are expected to pay what little they have toward the cost of their defense both during the pendency of their case and potentially for years after the case has ended.

NACDL's 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel exposes a serious threat to the noble ideal of *Gideon*. This report documents how states use unrealistic and arbitrary guidelines to make decisions about who is eligible for assigned counsel. The report also calls into question the continued reliance on the Federal Poverty Guidelines when making eligibility determinations. It is a resource for the defense bar, assigned counsel plan administrators, judges and legislators. The information contained in this survey shows that states need to re-evaluate how they make eligibility determinations for assigned counsel in order to ensure that those who are too poor to hire a lawyer stand equal before the law.

***Jerry J. Cox***  
*President, NACDL*



# REDEFINING INDIGENCE: FINANCIAL ELIGIBILITY GUIDELINES FOR ASSIGNED COUNSEL

Reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.

*Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)

A defendant in a criminal case who is just above the poverty line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer.

*Fuller v. Oregon*, 417 U.S. 40, 53-54 (1974)

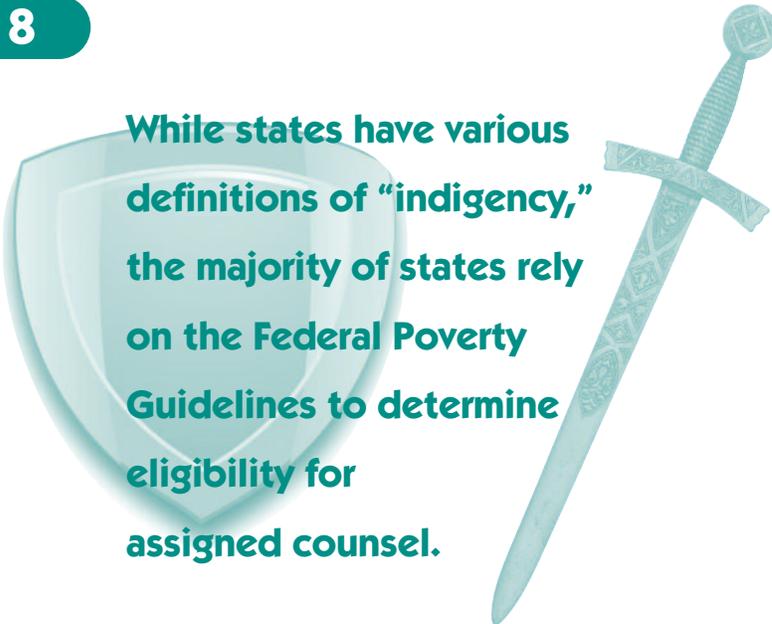
## Introduction

Fifty years ago the Supreme Court announced in *Gideon v. Wainwright* that any person who is “too poor to hire a lawyer” must be provided with counsel. The Court pointed out that “our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.” The Court reasoned that this “noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him.”

States have struggled to create indigent defense delivery systems that live up to the noble ideal that every defendant should stand equal before the law. Chronic underfunding has led to excessive caseloads which has in turn raised questions about the effectiveness of the legal representation provided to those too poor to hire a lawyer. While the effectiveness of the various indigent defense delivery systems across the country has repeatedly been called into question, what is seldom questioned is how states determine who is indigent.<sup>2</sup> For presumptively

counsel, and explains the origin of the Federal Poverty Guidelines and how they cannot accurately predict who is “too poor” to hire a lawyer. The survey then looks at the fees and costs imposed on supposedly indigent defendants who are assigned counsel. These include application fees, payable at the time a request for counsel is made, and reimbursement fees, payable at the conclusion of the case or over time.

While states have various definitions of “indigency,” the majority of states rely on the Federal Poverty Guidelines to determine eligibility for assigned counsel. Many states also consider forms of public assistance as income that defendants can presumably use to hire an attorney, and a few states consider a defendant’s ability to post bond when making eligibility determinations. This results in restrictive eligibility criteria that deny representation to defendants who are too poor to hire a lawyer. Defendants who are deemed ineligible for assigned counsel but who lack financial resources to hire an attorney are forced to waive their right to counsel.



**While states have various definitions of “indigency,” the majority of states rely on the Federal Poverty Guidelines to determine eligibility for assigned counsel.**

innocent defendants facing the powerful legal machinery of the state, the importance of this determination cannot be overstated.

This 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel<sup>3</sup> documents how states decide who is “too poor” to hire a lawyer. The survey looks at how states define “indigency” and whether or not that definition is consistent with ABA standards for providing defense services. It identifies which states rely on the Federal Poverty Guidelines when determining eligibility for assigned

Those defendants fortunate enough to qualify for assigned counsel are often forced to reimburse the state for the cost of representation. These “marginally indigent” defendants have to



**The term “indigent” is itself a misnomer. . . . Courts have never required that a defendant be wholly without means before they are eligible for assigned counsel.**

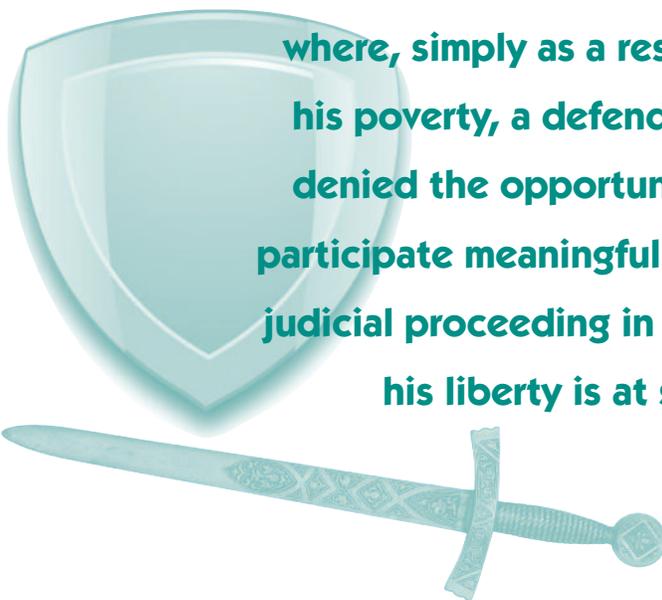
contribute whatever financial resources they have to their defense, with the end result being that they become truly indigent by the time their case is resolved. The requirement that marginally indigent defendants reimburse the state for the cost of their defense also discourages them from exercising their right to counsel.

## Who Is Too Poor to Hire a Lawyer?

The Supreme Court has devoted scant attention to the issue of who is “indigent,” although it should be noted that the term “indigent” is itself a misnomer. While those defendants who are “too poor to hire a lawyer” are typically referred to as “indigent,” courts have never required that defendants be wholly without means before they are eligible for assigned counsel.<sup>4</sup> In his letter of transmittal to President John F. Kennedy, accompanying the proposed legislation that would become the Federal Criminal Justice Act of 1964, Attorney General Robert F. Kennedy explained that “the term indigency is avoided because of its implication that only an accused who is destitute may need appointed counsel or services.”<sup>5</sup> In *Gideon*, the Court simply stated that those defendants who were “too poor to hire a lawyer” were entitled to counsel. No guidelines were proposed as to how a trial court would make the determination that a defendant was unable to afford counsel.

The year after *Gideon* was decided, the Court ruled in *Hardy v. United States*<sup>6</sup> that an indigent defendant was entitled to a free copy of a complete trial transcript on appeal.<sup>7</sup> In Justice Goldberg’s concurring opinion in *Hardy*, he included a footnote wherein he attempts to define “indigence”:

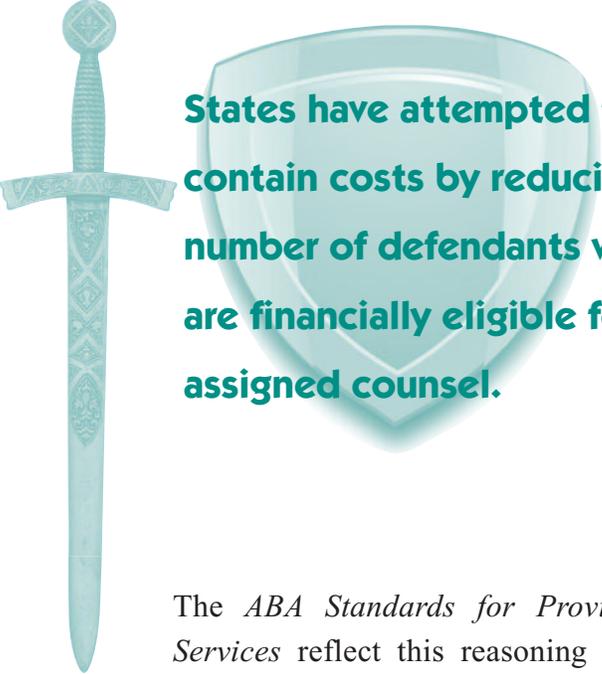
**Justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.**



Indigence “must be conceived as a relative concept. An impoverished accused is not necessarily one totally devoid of means.” An accused must be deemed indigent when “at any stage of the proceedings [his] lack of means... substantially inhibits or prevents the proper assertion of a [particular] right or claim of right.” Indigence must be defined with reference to the particular right asserted. Thus, the fact that a defendant may be able to muster enough resources, of his own or of a friend or relative, to obtain bail does not in itself establish his nonindigence for the purpose of purchasing a complete trial transcript or retaining a lawyer.<sup>8</sup>

The conception of indigency as a “relative concept” linked to the assertion of a particular right is consistent with the “noble ideal” that every defendant stands equal before the law. Defendants need not be “totally devoid of means,” nor must they be incapable of asserting a right; it is sufficient that their lack of financial resources “substantially inhibits” their defense.

This line of reasoning is reflected in the Court’s decision in *Ake v. Oklahoma*<sup>9</sup> two decades later. In *Ake*, the Court ruled that an indigent defendant is entitled to a psychiatrist when he has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial.<sup>10</sup> The Court pointed out that it “has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense.”<sup>11</sup> While *Gideon* references an “obvious truth,”<sup>12</sup> *Ake* references the “elementary principle” grounded in “fundamental fairness” and derived from the belief “that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.”<sup>13</sup>



**States have attempted to contain costs by reducing the number of defendants who are financially eligible for assigned counsel.**

The *ABA Standards for Providing Defense Services* reflect this reasoning and state that counsel should be provided to those who are “financially unable to obtain adequate representation without substantial hardship.”<sup>14</sup> Defendants need not be totally without means in order to be assigned counsel, instead, as a

practical matter, they must be unable to retain qualified counsel without suffering substantial hardship. The standard recognizes that there will often be situations where a defendant has some financial resources but not adequate resources to ensure effective representation. Despite this fact, less than a third of the states consider whether defendants will suffer substantial hardship if they are denied assigned counsel when making eligibility determinations.<sup>15</sup>

## Eligibility for Assigned Counsel

Following the Supreme Court’s decision in *Gideon*, states began to devise systems for providing counsel to indigent defendants charged with crimes. Determining who was “too poor to hire a lawyer” was something left to the individual states and, within the states, typically left to the discretion of the trial court. At first, it appears that many states spent little time making eligibility determinations. A defendant was too poor to hire a lawyer if he simply said that he was.<sup>16</sup>

The assumption was that anyone charged with a crime would hire the best attorney she could afford. The Supreme Court actually made this same assumption in *Gideon* when it noted that “there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses.”<sup>17</sup> But as the cost of providing indigent defense services has risen, states have attempted to contain costs by reducing the number of defendants who are financially eligible for assigned counsel.<sup>18</sup>

## Substantial Hardship

Some states have incorporated language from the American Bar Association’s “Standards for Providing Defense Services,” which recommend providing counsel “to persons who are financially

unable to obtain adequate representation without substantial hardship.”<sup>19</sup> These states define indigency as not simply the inability to hire an attorney, but rather the inability to hire an attorney without “substantial hardship.” Alabama, Florida, Hawaii, Indiana, Louisiana, Maryland, Michigan, Montana, Nevada, New Mexico and Oregon all use “substantial hardship” as a factor in eligibility determinations.

Several other states explicitly mention “economic necessities” or expenses which they categorize as “necessities.” In Alaska, an “indigent person” is one who cannot afford an attorney “without depriving the party or the party’s dependents of food, clothing, or shelter.” In Delaware, a defendant is considered “indigent” when he is unable to retain legal counsel without impairing his financial ability to provide the “economic necessities of life for himself and his family.” In Nebraska, defendants are indigent if they are unable to retain counsel “without prejudicing one’s financial ability to provide economic necessities for one’s self or one’s family.” Rhode Island defines an “indigent defendant” as someone “who after payment of necessary expenses for food, shelter and medical care” cannot afford to hire counsel. And in Utah, a defendant is indigent if she lacks the means to pay for legal counsel “without depriving the person or the family of that person of food, shelter, clothing and other necessities.”

### Federal Poverty Guidelines

The majority of states currently use some multiple of the Federal Poverty Guidelines to determine if a defendant is “indigent” and therefore eligible for assigned counsel. While it is unclear how the Federal Poverty Guidelines became intertwined with eligibility determinations for assigned counsel, there are a number of factors which may

have contributed to their adoption by the majority of states over the last 50 years. The first is that their development coincides with the Supreme Court’s decision in *Gideon* as well as the “War on Poverty” announced by the Johnson administration in January 1964.<sup>20</sup> Second, the Legal Services Corporation (LSC) was created by the Economic Opportunity Act of 1964 and was charged with providing civil legal services to the nation’s poor.<sup>21</sup> In determining eligibility guidelines for their services, the LSC decided to use 125 percent of the Federal Poverty Guidelines.<sup>22</sup> Over time, the Federal Poverty Guidelines were adopted by a variety of federal agencies as a method of determining eligibility for benefits. As costs associated with providing indigent defense rose, states turned to eligibility guidelines to control those costs. In searching for some objective criteria to use when making eligibility determinations, states began to adopt the Federal Poverty Guidelines.

**As costs associated with providing indigent defense rose, states turned to eligibility guidelines to control those costs.**



The Federal Poverty Guidelines were developed by Mollie Orshansky, an economist working for the Social Security Administration in the early 1960s.<sup>23</sup> The Guidelines were never meant to be



**The Guidelines are of limited value because they are based solely on the cost of food.**

a general measure of poverty;<sup>24</sup> they were only to be used to assess the relative risks of low economic status.<sup>25</sup> The U.S. Census Bureau has stated that “the official poverty measure should be interpreted as a statistical yardstick rather than a complete description of what people and families need to live.”<sup>26</sup>

The Guidelines are of limited value because they are based solely on the cost of food.<sup>27</sup> Orshansky used the data from the Department of Agriculture’s “Household Food Consumption Survey,” which indicated that Americans spent about one-third of their household income on food.<sup>28</sup> She then used the dollar amounts from the Department of Agriculture’s “Economy Food Plan,” which estimated the minimum amount of

money that could be spent on food in order to ensure an adequate level of nutrition, and multiplied those by three to arrive at the poverty thresholds.<sup>29</sup> Over the years, the Federal Poverty Guidelines have been updated annually based solely on the Consumer Price Index.

The Guidelines do not take into account the cost of housing, child care, health care, transportation or other necessary expenses. Tied to the assumption that one-third of household income will be spent on food and updated based solely on the Consumer Price Index, the Guidelines do not take into account relative changes in household budgets over the last 50 years. The Guidelines also don’t account for specific family composition or geographic location; “households” are simply made up of a certain number of people anywhere within the continental United States.

Despite their limitations, the Federal Poverty Guidelines, or percentage multiples of them, are used as eligibility criteria for a wide range of federal programs. To be eligible for the Department of Agriculture’s Women, Infants and Children Program (WIC), which provides food, nutrition education and health screening to pregnant women and children, household income must be below 185 percent of the Federal Poverty Guidelines.<sup>30</sup> To be eligible for the Supplemental Nutritional Assistance

Persons in Family / Household	2014 Federal Poverty Guidelines	150 Percent of Guidelines
1	\$11,670	\$17,505
2	\$15,730	\$23,595
3	\$19,790	\$29,685
4	\$23,850	\$35,775
5	\$27,910	\$41,865
6	\$31,970	\$47,955

Program (SNAP), formerly the Food Stamp Program, household income must be below 130 percent of the Federal Poverty Guidelines.<sup>31</sup> The Department of Agriculture’s National School Lunch Program provides free lunches to children from families with incomes at or below 130 percent of the Federal Poverty Guidelines; children from families with household incomes between 130 percent and 185 percent of the federal poverty guidelines are also eligible for reduced-price meals and cannot be charged more than 40 cents.<sup>32</sup>

To be eligible for the Department of Health and Human Services’ Low Income Home Energy Assistance Program (LIHEAP), which provides assistance in managing costs associated with energy bills and weatherization, household income must be below 150 percent of the Federal Poverty Guidelines.<sup>33</sup> The Department of Health and Human Services Children’s Health Insurance Program (CHIPs) serves uninsured children up to age 19 in families with incomes too high to qualify them for Medicaid. While states have broad discretion in setting income eligibility for CHIPs, 46 states and the District of Columbia cover children in families with income up to or above 200 percent of the Federal Poverty Guidelines and 24 of these states offer coverage to children in families with income at 250 percent of the Federal Poverty Guidelines or higher.<sup>34</sup>

Many states have chosen to define eligibility for assigned counsel in criminal proceedings based on a multiple of the Federal Poverty Guidelines. Viewed in isolation, that decision might appear reasonable. However, when compared to eligibility guidelines for federal assistance programs like WIC, SNAP, School Lunches, LIHEAP and CHIPs, their use to determine eligibility for assigned counsel is patently unreasonable. This is particularly true in light of the unrealistically low multiples utilized by many states.

Georgia defines an indigent person as a person charged with a misdemeanor who earns less than 100 percent of the Federal Poverty Guidelines. In Maine, defendants are eligible for assigned counsel if their income is below 110 percent of the Federal Poverty Guidelines. In Missouri, a defendant may be considered indigent if his or her gross pay and other sources of income do not exceed the Federal Poverty Guidelines. In Virginia, counsel is appointed if a defendant’s available funds are equal to or below 125 percent of the Federal Poverty Guidelines.

The result is that in Georgia, Maine, Missouri and Virginia, defendants earning less than \$15,000 a

**A defendant making just above 125 percent of the Federal Poverty Guidelines receives federal assistance to pay for food, heat and medical care for his children but is somehow not regarded by some states as too poor to hire a lawyer.**



year may be ineligible to receive state-funded representation because they have an income slightly above 125 percent of the Federal Poverty Guidelines but are eligible for federal assistance through WIC, SNAP, the School Lunch Program, LIHEAPS and CHIPs.



**A defendant should not be compelled to choose between posting bond and retaining counsel.**

A defendant making just above 125 percent of the Federal Poverty Guidelines receives federal assistance to pay for food, heat and medical care for his children but is somehow not regarded by some states as too poor to hire a lawyer.

Another problem with comparing a defendant's yearly income with the Federal Poverty Guidelines is the underlying assumption that, at the time the defendant is arrested, he or she would have the difference between his or her yearly income and the Federal Poverty Guidelines available to hire counsel. Whatever discretionary income a defendant who is earning slightly more than the Federal Poverty Guidelines might have at some point during the year, it is significantly less than the amount he will have over the course of an entire year.<sup>35</sup> In addition, for practical reasons, criminal defense

lawyers typically demand a retainer from a client before they undertake representation. It is unreasonable to expect defendants who make slightly more than the Federal Poverty Guidelines over the course of a year to be able to pay a lump sum retainer in order to retain counsel.<sup>36</sup>

**The Ability to Post Bond**

The *ABA Standards for Providing Defense Services* state that assigned counsel should not be denied "because bond has been or can be posted."<sup>37</sup> A defendant should not be compelled to choose between posting bond and retaining counsel. The right to bail and the right to counsel are independent of one another, and the standard recognizes defendants should not be denied assigned counsel because they have spent their limited financial resources to obtain pretrial release. While just over one-third of the states have adopted standards which make it clear that the posting of bond is not a justification for denying a defendant assigned counsel, one-fifth of the states have standards that explicitly identify the posting of bond as a consideration when determining eligibility for assigned counsel.

Florida considers whether a defendant "made bail in excess of \$5,000 or posted bond in any amount" when making a determination regarding indigency. Missouri requires the trial court to consider "all the circumstances of the case," which includes the "ability to make bond." New

State	Potentially Eligible	Presumed Ineligible
Georgia	100% to 150%	Above 150%
Maine	Below 100%	Above 110%
Missouri	Below 100%	Above 100%
Virginia	Below 125%	Above 125%

Jersey considers the “ability of the defendant to make bail and the source of the bail posted,” and West Virginia considers whether a defendant “has posted a cash bond for bail or has obtained release on bond ... and the amount and source of the money provided for such bond.” Using the fact that a defendant has made bail to deny him appointed counsel has the potential to force the defendant to choose between his liberty and his right to an attorney.

### Public Benefits as Income

While some states find defendants who are already receiving certain needs-based federal benefits automatically eligible for assigned counsel, other states actually consider these benefits as “income” when making eligibility determinations. Courts in Arizona, Arkansas, Delaware, Louisiana, Nebraska, South Dakota and Utah have held that forms of public assistance should be considered “income” when determining financial eligibility. Other states like Florida, Maine, Massachusetts, Missouri, New Hampshire, New Jersey, Ohio, Oregon, Virginia and Washington have statutory definitions of indigency that categorize needs-based benefits as “income”

The result is that a defendant can be receiving federally funded public assistance and be ineligible for assigned counsel. Even worse, those federal benefits, which are designed to meet basic needs, are viewed as income which can be used to retain counsel. This level of income is insufficient to retain private counsel but even if it were, it is unlikely that a defendant would choose to spend her limited financial resources on counsel rather than the necessities of life such as food and shelter. The categorization of public benefits as income artificially inflates the amount of money a defendant has to retain counsel.

### The Marginally Indigent

The clearest evidence that states have unjustly restrictive eligibility guidelines for assigned counsel is the designation of “marginally indigent defendants” or defendants who are “indigent but able to contribute.” States have created a category of defendants who they don’t regard as “indigent” and therefore entitled to assigned counsel, but who they acknowledge are still “too poor to hire a lawyer.” These defendants are required to sell off their meager assets to help offset the cost of assigned counsel.

Florida defines a “partially indigent” defendant as “a person unable to pay more than a portion of the fee charged by an attorney, including costs of investigation, without substantial hardship to the person or the person’s family.” Ohio defines “marginally indigent” defendants as those with a “total monthly gross income that is less than 187.5 percent of the current federally established poverty levels, pursuant to the Federal Poverty Guidelines.” In Kansas, a defendant is partially indigent “if the defendant’s combined household income and liquid assets are greater than the defendant’s reasonable and necessary living expenses but less than the sum of the defendant’s reasonable and necessary living expenses plus the anticipated cost of private legal representation.” Maine does a similar calcu-



**The result is that a defendant can be receiving federally funded public assistance and be ineligible for assigned counsel.**

lation and then requires a defendant to make periodic payments based on the amount by which income exceeds necessary expenses to reimburse the state for the cost of assigned counsel. Massachusetts categorizes defendants who have an income greater than 125 percent but less than 250 percent of the Federal Poverty Guidelines as “indigent but able to contribute.” Trial courts in Minnesota determine whether or not a defendant is able to make “partial payment,” while courts in Missouri can require a “limited cash contribution.” Courts in North Carolina have found that “partially indigent” defendants should contribute whatever they can to the cost of their representation.

The result is that many defendants who are “marginally indigent” are required to become “indigent” before counsel will be appointed. States refuse to acknowledge that these defendants are too poor to hire a lawyer and instead have created a new category of criminal defendants: indigent but able to contribute. These defendants are required to sell off whatever assets they own and to empty their savings accounts to offset the cost of assigned counsel. The end result is that the states make sure that those defendants who are marginally indigent at the time they are arrested will be completely destitute by the time the case ends,

**States make sure that those defendants who are marginally indigent at the time they are arrested will be completely destitute by the time the case ends, even if it ends in a dismissal.**

even if it ends in a dismissal. It makes little financial sense for the state to require a “marginally indigent” defendant to exhaust his financial resources when the end result will be that the state will have to provide some form of public assistance to that same defendant.

### Application Fees, Contributions And Reimbursement

Almost a decade after *Gideon*, the Supreme Court found a law that required a defendant to reimburse the state for the costs of representation to be unconstitutional. In *James v. Strange*,<sup>38</sup> a Kansas statute that required a defendant to pay the costs of representation within 60 days of receiving notice of the amount owed, or else the amount would become a civil judgment, was held to violate due process because a defendant was barred from asserting the ordinary civil protections afforded other debtors. While the Court recognized a state’s asserted interests in recovering the costs associated with providing a defense, the Court stated that such laws “need not blight in such discriminatory fashion the hopes of indigents for self-sufficiency and self-respect.”<sup>39</sup> The Court went on to find that the statute at issue “embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law.”<sup>40</sup>

Two years later, the Court validated a statute that required a defendant to reimburse the state for the cost of representation in *Fuller v. Oregon*.<sup>41</sup> Unlike the statute at issue in *James*, the statute in *Fuller* afforded the defendant all the protections of civil judgment debtors. In upholding the statute, the Court observed that the dividing line between those able to afford representation and those deemed to be “indigent” created a system where a defendant who was barely able to afford counsel would be at a disadvantage.

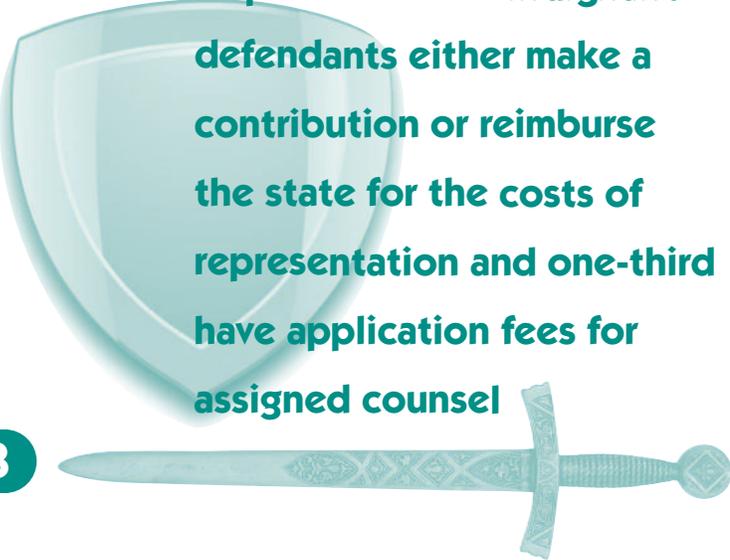
We live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise. A defendant in a criminal case who is just above the poverty line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer.<sup>42</sup>



The result is a disproportionate financial burden on those defendants who have limited financial resources. Those classified as “indigent” receive state-funded representation, the wealthy are able to use disposable income to retain counsel, but the working poor are expected to “borrow money” and sell off their “meager assets” when they need legal representation.

While the Supreme Court has said that indigent defendants may be required to make contributions toward the costs of representation, the *ABA Standards for Providing Defense Services* limit the obligation to reimburse the state for the costs of providing counsel to instances of fraud in obtaining the determination of eligibility and require that there be procedural safeguards in

State	Statute	Assigned Counsel Fees
Arizona	AZ ST § 9-499.09	\$25 Administration Assessment Fee (maximum)
California	CA Penal § 987.5(a)	\$50 Registration Fee (maximum)
Colorado	CO ST § 21-1-103	\$25 Processing Fee
Delaware	DE ST TI 29 § 4607	\$100 Administrative Fee
Florida	FL ST § 27.52(b)	\$50 Application Fee
Georgia	GA ST § 15-21A-6(c)	\$50 Application Fee
Indiana	IN ST § 35-33-7-6	\$100 Fee for Felony / \$50 for Misdemeanor
Kansas	KS ST § 22-4529	\$100 Application Fee
Massachusetts	MA ST 211D § 2A(f)	\$150 Counsel Fee (or 15 hours of community service)
Minnesota	MN ST § 611.17(c)	\$75 Co-Payment
New Mexico	NM ST § 31-15-12(c)	\$10 Application Fee
North Carolina	NC ST § 7A-455.1	\$60 Appointment Fee (if defendant convicted)
Ohio	OH ST § 120.36	\$25 Application Fee
Oklahoma	OK ST T 22 § 1355A	\$40 Application Fee
South Carolina	SC ST § 17-3-30(B)	\$40 Application Fee
Tennessee	TN ST § 40-14-103	\$50 Administrative Fee



**Virtually every state has some requirement that indigent defendants either make a contribution or reimburse the state for the costs of representation and one-third have application fees for assigned counsel**

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place before a defendant can be asked to contribute to the costs of representation.<sup>43</sup> Virtually every state has some requirement that indigent defendants either make a contribution or reimburse the state for the costs of representation and one-third have application fees for assigned counsel, although these fees can be waived. The requirement to make a contribution or to reimburse the state typically applies even if a defendant is not convicted, and there are seldom procedural safeguards to ensure that only defendants who are financially able to do so are required to make payments.

Even if states are permitted to require reimbursement from a defendant for the costs of representation, requiring a “marginally indigent” defendant to do so may not be in the state’s long-term financial interest. It makes little sense to require reimbursement from a defendant for the cost of legal services if that added financial burden will make the defendant dependent upon other forms of state aid for the necessities of life. In addition, states like Missouri and Wisconsin require that defendants be informed of their repayment obligations at the time they apply for

assigned counsel.<sup>44</sup> While this procedure is consistent with current ABA standards, it may discourage “marginally indigent” defendants from exercising their right to counsel.

## Conclusion

The 50-State Survey on page 24 details the way “indigency” is defined in all 50 states and the District of Columbia. The table includes each state’s definition of indigency, how it uses the Federal Poverty Guidelines, and whether it takes into consideration the ability to make bail and the receipt of public benefits when making an indigency determination. It also lists the criteria used by states when determining if defendants must contribute to the costs of their defense or reimburse the state for the entire costs of their defense.

As the Supreme Court observed in *Gideon*: “Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime.”<sup>45</sup> While states continue to spend vast sums of money on prosecuting and incarcerating defendants, they have been reluctant to spend the money necessary to ensure that those “too poor” to hire a lawyer have access to counsel. In an effort to reduce the costs associated with providing counsel to those “too poor” to hire a lawyer, states have enacted statutes that dictate financial eligibility criteria for assigned counsel. They have increasingly incorporated the Federal Poverty Guidelines into their calculations regarding eligibility and have created new categories of defendants who are “marginally indigent” or “indigent but able to contribute.” They have imposed application fees and contribution schedules on defendants who apply for assigned counsel and require defendants to reimburse the state for the costs of their defense at the conclusion of their case.

The result is that many defendants who are too poor to hire a lawyer fail to qualify for assigned counsel. They are considered ineligible for assigned counsel because their income exceeds strict financial guidelines that do not reflect the real costs associated with mounting an adequate defense or because they used what little financial resources they had to post bond. Even those defendants who do qualify for assigned counsel are required to reimburse the state for the cost of their defense.

States need to adopt standards for determining indigency that are consistent with ABA Standards for Providing Defense Services in order to ensure that those who are “too poor to hire a lawyer” have access to counsel. This includes allowing indigent defense providers, a neutral screening agency or the court to make eligibility determinations based on realistic estimates regarding the actual cost of retaining counsel.<sup>46</sup> Counsel must also be provided to those unable to obtain adequate representation without substantial hardship and should not be denied because of a person’s ability to post bond.<sup>47</sup> Finally, reimbursement of the costs of defense should not be required except on the ground of fraud during the eligibility determination and any contribution toward the costs of defense should not be imposed unless there are satisfactory procedural safeguards in place.<sup>48</sup>

While there is ample anecdotal evidence that restrictive eligibility guidelines induce defendants to waive counsel, research is needed to expose the full extent of this problem. It is clear, however, that defendants who fail to qualify for assigned counsel but lack the financial resources to hire a lawyer are forced to either represent themselves or pay a defense attorney for what amounts to representation in name only.

The widely held belief that if you cannot afford an attorney one will be provided to you free of charge is simply not true. Defendants today are still placed in the same position as Clarence Earl Gideon, who appeared in court “without funds and without a lawyer”<sup>49</sup> and requested the assistance of counsel but had his request denied. In redefining what it means to be “too poor to hire a lawyer,” too many states have been able to ignore the central premise of *Gideon* that “lawyers in criminal courts are necessities, not luxuries.”<sup>50</sup>

## Endnotes

1. John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of Their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173 (2013).

2. See NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009).

3. The term “assigned counsel” refers to any lawyer who is paid by the government to represent a person accused of a crime and includes both public defenders and private attorneys who participate in indigent defense delivery systems.

4. See *Hardy v. United States*, 375 U.S. 277, 292-94 (1964) (Goldberg, J., concurring) (arguing that the government should provide free trial transcripts to those defendants “who cannot afford to purchase one,” rather than only those defendants who are wholly without means); *Adkins v. E.I. DuPont de Nemours & Co.*,

**While states continue to spend vast sums of money on prosecuting and incarcerating defendants, they have been reluctant to spend the money necessary to ensure that those “too poor” to hire a lawyer have access to counsel.**



335 U.S. 331, 339 (1948) (“We cannot agree with the court below that one must be absolutely destitute to enjoy the benefits of the statute.”).

5. H.R. REP. NO. 88-864, at 7 (1963), *reprinted in* 1964 U.S.C.C.A.N. 2990, 2995 (referring to 18 U.S.C. § 3006A(a)).

6. *Hardy v. United States*, 375 U.S. 277 (1964).

7. *See id.* at 282 (“We conclude that this counsel’s duty cannot be discharged unless he has a transcript of the testimony and the evidence presented by the defendant and also the court’s charge to the jury, as well as the testimony and evidence presented by the prosecution.”).

8. *Id.* at 289 n.7 (Goldberg, J., concurring) (citations omitted) (quoting ATT’Y GEN.’S COMM. ON POVERTY & THE ADMIN. OF CRIMINAL JUSTICE, REPORT ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 8 (1963)).

9. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

10. *See id.* at 84 (“[W]here the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.”).

11. *Id.* at 76.

12. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

13. *Ake*, 470 U.S. at 76.

14. ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES, STANDARD 5-7.1: ELIGIBILITY FOR ASSISTANCE (1992).

15. The following states consider whether defendants will suffer “substantial hardship” if they are denied assigned counsel: Alabama, Florida, Hawaii, Indiana, Louisiana, Maryland, Michigan, Montana, Nevada, New Mexico, Oregon.

16. *See* ROBERT L. SPANGENBERG ET AL., U.S. DEP’T OF JUSTICE, CONTAINING THE COSTS OF INDIGENT DEFENSE PROGRAMS: ELIGIBILITY SCREENING AND COST RECOVERY PROCEDURES 9 (1986): (“In the past, in many jurisdictions, counsel was appointed simply on the request of the defendant. Some judges asserted that the time and effort necessary for eligibility screening was unwarranted, since only a few defendants would be excluded.”).

17. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

18. *See* ROBERT L. SPANGENBERG ET AL., U.S. DEP’T OF JUSTICE, CONTAINING THE COSTS OF INDIGENT DEFENSE PROGRAMS: ELIGIBILITY SCREENING AND COST RECOVERY PROCEDURES 1 (1986): (“Between 1978 and 1982 the cost of providing indigent defense services in U.S. state courts more than tripled, rising sharply from approximately 200 million to over 600 million dollars.”).

19. ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES, STANDARD 5-7.1: ELIGIBILITY FOR ASSISTANCE (1992).

20. *See* Gordon M. Fischer, *The Development and History of the Poverty Thresholds*, 55 SOC. SEC. BULL. 43, 43 (1992).

21. *See* 42 U.S.C. § 2996b(a) (2012) (“There is established in the District of Columbia a private nonmembership organization nonprofit corporation, which shall be known as the Legal Services Corporation, for the purpose of providing financial sup-

port for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.”).

22. *See* 45 C.F.R. § 1611.3(b) (1977) (“Unless specifically authorized by the Corporation, a recipient shall not establish a maximum annual income level that exceeds one hundred and twenty five (125%) of the official poverty threshold as defined by the Office of Management and Budget.”).

23. *See* Fischer, *supra* note 20, at 3 (“The poverty thresholds were developed in 1963-64 by Mollie Orshansky.”)

24. *See id.* (stating that Orshansky’s original purpose for the thresholds was not to measure poverty).

25. *See id.* (stating that Orshansky’s intent for the poverty thresholds was to “develop a measure to access the relative risks of low economic status . . . among different demographic groups of families with children”).

26. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & CHERYL HILL LEE, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, at 45 (2005), <http://www.census.gov/prod/2005pubs/p60-229.pdf>.

27. *See* Fischer, *supra* note 20, at 4 (describing how Orshansky developed the poverty thresholds using food plans prepared by the Department of Agriculture).

28. *See id.* (stating that the data underlying Orshansky’s plan came from the Agriculture Department’s 1955 Household Food Consumption Survey).

29. *See id.* at 5 (articulating Orshansky’s “multiplier methodology” for deriving the poverty thresholds).

30. *See WIC Income Eligibility Guidelines* 2012-2013, U.S. DEP’T OF AGRICULTURE (July 13, 2012), <http://www.fns.usda.gov/wic/howtoapply/incomeguidelines.htm>.

31. *Supplemental Nutritional Assistance Program*, U.S. DEP’T OF AGRICULTURE (October 4, 2012), [http://www.fns.usda.gov/snap/applicant\\_recipients/eligibility.htm#income](http://www.fns.usda.gov/snap/applicant_recipients/eligibility.htm#income).

32. *National School Lunch Program*, U.S. DEP’T OF AGRIC. 2 (August 2012), <http://www.fns.usda.gov/cnd/lunch/AboutLunch/NSLPFactSheet.pdf>.

33. *LIHEAP Eligibility Criteria*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (May 8, 2012), <http://www.acf.hhs.gov/programs/ocs/resource/liheap-eligibility-criteria>.

34. *See CHIPS Eligibility Standards*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Childrens-Health-Insurance-Program-CHIP/CHIP-Eligibility-Standards-.html>.

35. *See* Adam M. Gershowitz, *The Invisible Pillar of Gideon*, 80 IND. L. J. 571 at 587 (2005) (discussing the financial resources available to a defendant making 125 percent of the Federal Poverty Guidelines).

36. *Id.* at 588 (discussing the incentives for criminal defense attorneys to charge a substantial retainer).

37. ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES, STANDARD 5-7.1: ELIGIBILITY FOR ASSISTANCE (1992).

38. *James v. Strange*, 407 U.S. 128 (1972).

39. *Id.* at 141-142.

40. *Id.*

41. *Fuller v. Oregon*, 417 U.S. 40 (1974).

42. *Id.* at 53-54.

43. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, STANDARD 5-7.2: REIMBURSEMENT, NOTICE AND IMPOSITION OF CONTRIBUTION (1992).

44. See *Missouri Application and Affidavit for Public Defender Services, Notice of Intent to File Claim for Legal Services*, [http://www.publicdefender.mo.gov/clients/Application\\_Services.pdf](http://www.publicdefender.mo.gov/clients/Application_Services.pdf); see also *Wisconsin Administrative Code, State Public Defender Board 6.015, Written Notice of Payment Obligation for Legal Representation*, [http://docs.legis.wisconsin.gov/code/admin\\_code/pd/6](http://docs.legis.wisconsin.gov/code/admin_code/pd/6).

45. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

46. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, STANDARD 5-7.3: DETERMINATION OF ELIGIBILITY (1992).

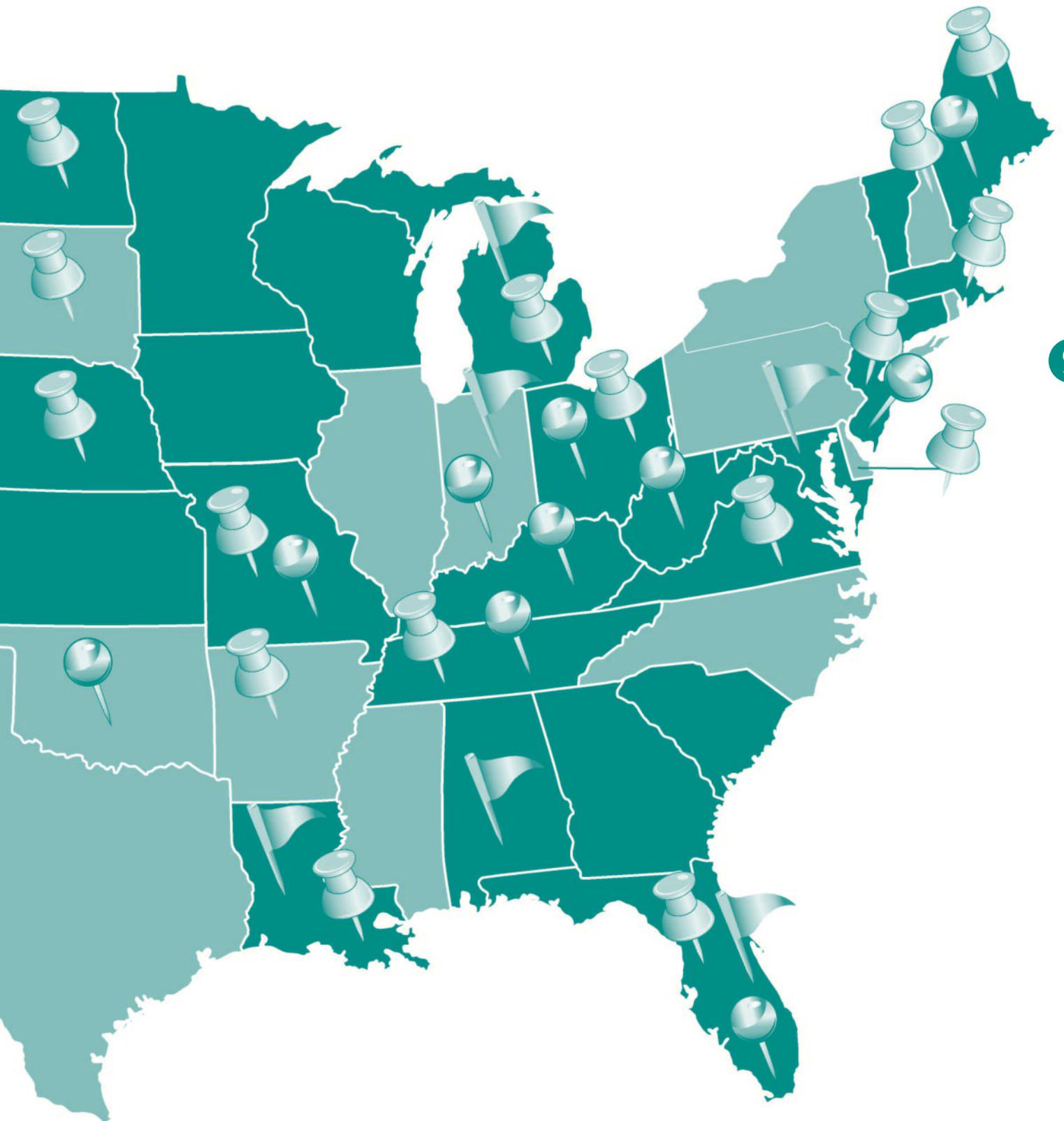
47. ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES, STANDARD 5-7.1: ELIGIBILITY FOR ASSISTANCE (1992).

48. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, STANDARD 5-7.2: REIMBURSEMENT, NOTICE AND IMPOSITION OF CONTRIBUTION (1992).

49. *Gideon v. Wainwright*, 372 U.S. 335, 337 (1963).

50. *Id.* at 344.





## **MAP OF INCOME ELIGIBILITY GUIDELINES FOR ASSIGNED COUNSEL IN THE 50 STATES**

# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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### ALABAMA

**Definition:** Any person who under oath or affirmation states that he or she is unable to pay for his or her representation, and who is found by the court to be financially unable to pay for his or her representation. AL ST § 15-12-1(4)

**FPG:** Indigent if income is below 125% and the person is unable to pay the cost of an attorney or between 125% and 200% if the failure to appoint counsel would result in substantial hardship. AL ST § 15-12-1(4)(a)(b)

**Bail:** N/A

**Public Benefits:** N/A

**Repayment:** A court may require a convicted defendant to pay the fees of court-appointed counsel. AL ST § 15-12-25(a)(1). Payment can be a condition of probation. AL ST § 15-12-25(b)(2). Nonpayment can be the basis for contempt. AL ST § 15-12-25(c)(2)

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### ALASKA

**Definition:** A person who, at the time need is determined, does not have sufficient assets, credit, or other means to provide for payment of an attorney and all other necessary expenses of representation without depriving the party or the party's dependents of food, clothing, or shelter. AK ST § 18.85.170(4)

**FPG:** The court can assume that a defendant's expenses are equal to the Federal Poverty Guidelines. Rule of Criminal Procedure 39.1(h)(2)

**Bail:** Release on bail does not preclude a finding that a person is indigent. AK ST § 18.85.120(b)

**Public Benefits:** Presumptively eligible if receiving benefits. Rule of Criminal Procedure 39.1(f)

**Repayment:** Upon conviction, a defendant can be assessed the "costs of appointed counsel" pursuant to a schedule of costs based on the offense charged. See Rule of Criminal Procedure 39(c)(d)

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### ARIZONA

**Definition:** A person who is not financially able to employ counsel. AZ ST RCRP Rule 6.4(a)

**FPG:** N/A

**Bail:** Comments to RCRP Rule 6.4(a) say court should not consider release on bail when determining indigence.

**Public Benefits:** Factors include social security and unemployment compensation. See *Morger v. Superior Court In and For Pima County*, 637 P.2d 310 (1981)

**Repayment:** If the court finds that an indigent defendant has financial resources which offset, in part, the costs of the legal services provided, the court shall order the defendant to pay whatever amount it finds he is able to pay without incurring substantial hardship. Failure to pay can be the basis for contempt. AZ ST RCRP Rule 6.7(d). Public Defenders are required to seek reimbursement from defendants. AZ ST § 11-584(c)

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# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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### ARKANSAS

**Definition:** An indigent person is a person who, at the time his or her need is determined, is without sufficient funds or assets to employ an attorney or afford other necessary expenses incidental thereto. AR ST § 16-87-201

**FPG:** N/A

**Bail:** The state cannot force a defendant to choose between posting bond and obtaining counsel. See *Hill v. State*, 802 S.W.2d 144 (1991)

**Public Benefits:** Court can consider income from governmental programs such as social security and unemployment benefits. See *Hill v. State*, 802 S.W.2d 144 (1991)

**Repayment:** At the time of final disposition of any charges pending against a defendant represented by a public defender, the public defender shall ask the court to enter a judgment against the defendant in favor of the state of Arkansas for legal services rendered pursuant to a schedule of costs based on the offense charged. AR ST § 16-8-218 (c)

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### CALIFORNIA

**Definition:** A person who is financially unable to employ counsel is considered indigent. CA GOVT § 27707. The test is whether or not a private attorney would be interested in representing the defendant in his present economic circumstances. See *Williams v. Superior Court*, 38 Cal. Rptr. 291 (1964)

**FPG:** N/A

**Bail:** It is improper for a court to refuse to appoint counsel solely because the defendant has posted bond. See *Williams v. Superior Court*, 38 Cal. Rptr. 291 (1964)

**Public Benefits:** N/A

**Repayment:** In any case in which a party is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the proceedings, the court may make a determination of the ability of the party to pay all or a portion of the cost of such legal assistance. CA GOVT § 27712(a)

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### COLORADO

**Definition:** An indigent person is one whose financial circumstances prevent the person from having equal access to the legal process. *Colorado Chief Justice Directive 04-04*

**FPG:** Eligible if income is less than 125% of the Federal Poverty Guidelines and may be eligible if income is between 125% and 218%. Ineligible if income is above 218% of the Federal Poverty Guidelines. *Colorado Chief Justice Directive 04-04*

**Bail:** N/A

**Public Benefits:** The court may consider Social Security Supplemental Income and unemployment benefits but may not consider other forms of public assistance such as SNAP. *Colorado Chief Justice Directive 04-04*

**Repayment:** In any case when a court determines that a defendant is able to repay all or part of the expense of state-supplied or court-appointed counsel or any ancillary expenses incurred in representing such defendant, the court shall assess such fees or costs against such defendant. CO ST § 21-1-106

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# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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### CONNECTICUT

**Definition:** An indigent defendant is a person who does not have the financial ability at the time of his request for representation to secure competent legal representation and to provide other necessary expenses of legal representation. CT ST §51-297(f)

**FGP:** A defendant charged with a misdemeanor may be eligible if his annual income is below 150% and if charged with a felony if his income is less than 200% of the Federal Poverty Guidelines. *Division of Public Defender Services Income Eligibility Guidelines.*

**Bail:** N/A

**Public Benefits:** N/A

**Repayment:** If at any time, either during or after the disposition of his case, a defendant who is receiving or has received public defender services based on his indigency becomes financially able to meet all or some part of the cost of the services rendered to him, he shall be required to reimburse the commission, in such amounts as he can reasonably pay, either by a single payment or by installments of reasonable amounts, in accordance with a schedule of charges for public defender services prepared by the commission. CT ST 51-298(a)(1)

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### DELAWARE

**Definition:** A defendant is considered indigent when he is unable to retain legal counsel without impairing his financial ability to provide economic necessities of life for himself and his family. *See Potter v. State, 547 A.2d 599 (1988)*

**FGP:** N/A

**Bail:** N/A

**Public Benefits:** The trial court should consider additional resources which may be available to the defendant, including real and personal property, bank accounts, social security payments, and unemployment or other benefits. *See Potter v. State, 547 A.2d 599 (1988)*

**Repayment:** A court may require a convicted defendant who has utilized court-appointed attorneys or the Public Defender's Office to pay the costs of defense in that court. 10 Del. C. § 8601(a)

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### DISTRICT OF COLUMBIA

**Definition:** Financially unable to obtain adequate representation. DC CODE § 11-2601

**FGP:** N/A<sup>1</sup>

**Bail:** Not a factor in determining eligibility.

**Public Benefits:** N/A

**Repayment:** Whenever the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney... or to the court for deposit in the Treasury as a reimbursement to the appropriation. DC CODE § 11-2606

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1. Eligibility is determined based in part on the Department of Labor's Lower Living Standards, which are significantly higher than the Federal Poverty Guidelines.

# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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### FLORIDA

**Definition:** “Indigent” shall mean a person who is unable to pay for the services of an attorney, including costs of investigation, without substantial hardship to the person or the person’s family; “partially indigent” shall mean a person unable to pay more than a portion of the fee charged by an attorney, including costs of investigation, without substantial hardship to the person or the person’s family. FL ST RCRP 3.111

**FPG:** Defendants are indigent if their household income is below 200% of the Federal Poverty Guidelines or if the person is receiving Temporary Assistance for Needy Families-Cash Assistance, poverty-related veterans’ benefits, or Supplemental Security Income (SSI). FL ST § 27.52(2)(a)

**Bail:** Applications for the appointment of counsel must include the amount of bail posted and the source of the funds. FL ST § 27.52(1)(a)(5). Judges should consider if a defendant has been released on bail in an amount of \$5,000 or more. FL ST § 27.52(4)(a)(1)

**Public Benefits:** Applications for the appointment of counsel must include income from social security benefits, veterans’ benefits, workers’ compensation, other regular support from absent family members, public or private employee pensions, re-employment assistance or unemployment compensation. FL ST § 27.52(1)(a)(2)

**Repayment:** Convicted defendants are liable for payment of the costs of prosecution, without regard to the defendant’s current ability to pay. FL ST § 938.27. Counsel may be provided to a partially indigent person on request, provided that the person defrays that portion of the cost of representation and the reasonable costs of investigation as he or she is able without substantial hardship to the person or the person’s family. FL ST RCRP 3.111

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### GEORGIA

**Definition:** An indigent defendant is a person charged with a misdemeanor who earns less than 100 percent of the Federal Poverty Guidelines or a person charged with a felony who earns less than 150 percent of the federal poverty guidelines unless there is evidence that the person has other resources that might reasonably be used to employ a lawyer without undue. In no case shall a person whose maximum income level exceeds 150 percent of the federal poverty level be an indigent person or indigent defendant. GA ST § 17-12-2(6)

**FPG:** Must make below 100 percent of the Federal Poverty Guidelines to qualify for representation on a misdemeanor charge. Must make below 150 percent of the Federal Poverty Guidelines to qualify for representation on a felony charge. Ineligible if income exceeds 150 percent of the Federal Poverty Guidelines

**Bail:** N/A

**Public Benefits:** N/A

**Repayment:** When a defendant who is represented by a public defender is convicted, the court may impose as a condition of probation repayment of all or a portion of the cost for providing legal representation and other expenses of the defense if the payment does not impose a financial hardship upon the defendant or the defendant’s dependent or dependents. GA ST § 17-12-51

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# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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### HAWAII

**Definition:** Indigency is the “financial inability to obtain legal counsel.” HI ST § 802-4. A defendant is indigent if “unable to obtain counsel without substantial financial hardship to himself or his family”. HRS *See State v. Mickle*, 56 Haw. 23, 525 P.2d 1108 (1974)

**FPG:** Defendants whose income is at or below 150% of the federal Poverty guidelines automatically qualify for representation. *State of Hawaii Office of the Public Defender*

**Bail:** N/A

**Public Benefits:** Defendants who are eligible for or who are receiving food stamps (TANF) are automatically eligible. *State of Hawaii Office of the Public Defender*

**Repayment:** If the court is satisfied that the defendant is financially able to make partial payment for representation . . . the court shall direct payment for such representation as the interests of justice may dictate. HI ST § 802-6

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### IDAHO

**Definition:** “Indigent person” means a person who, at the time his need is determined pursuant to section 19-854, Idaho Code, is unable to provide for the full payment of an attorney and all other necessary expenses of representation ID ST § 19-851(4)

**FPG:** A defendant is presumed to be indigent if his monthly income does not exceed one hundred eighty-seven percent (187%) of the Federal Poverty Guidelines. ID ST § 19-854(2)(a)

**Bail:** Release on bail does not necessarily prevent a person from being an indigent person. ID ST § 19-854(4)

**Public Benefits:** Defendants are presumed to be indigent if they receive, or their dependents receive, public assistance in the form of food assistance, health coverage, cash assistance or child care assistance. ID ST § 19-854(2)(b)

**Repayment:** Upon conviction for any crime an indigent person who receives the services of an attorney provided by the county may be required by the court to reimburse the county for all or a portion of the cost of those services related to the conviction, unless the requirement would impose a manifest hardship on the indigent person. The current inability of the indigent person to pay the reimbursement shall not, in and of itself, restrict the court from ordering reimbursement. ID ST § 19-854(7)

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### ILLINOIS

**Definition:** A defendant need not be entirely without funds for purposes of having the right to appointed counsel; rather, a defendant may be indigent if he lacks financial resources on a practical basis to retain counsel. *See People v. Adams*, 328 Ill.Dec. 232, 388 Ill.App.3d 762, 903 N.E.2d 892 (App. 3 Dist.2009)

**FPG:** N/A

**Bail:** Release on bail does not preclude a finding of indigency. *See People v. Miller*, 23 Ill.App.3d 149, 318 N.E.2d 739 (App. 5 Dist. 1974.)

**Public Benefits:** N/A

**Repayment:** Whenever the court appoints counsel to represent a defendant, the court may order the defendant to pay a reasonable sum to reimburse either the county or the state for such representation. IL ST CH 725 § 5/113-3.1(a). Any sum ordered may not exceed \$500 for a defendant charged with a misdemeanor, \$5,000 for a defendant charged with a felony. IL ST CH 725 § 5/113-3.1(b)

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# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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### INDIANA

**Definition:** A “defendant does not have to be totally without means to be entitled to counsel. If he legitimately lacks the financial resources to employ an attorney, without imposing substantial hardship on himself or his family, the court must appoint counsel to defend him.” *Moore v. State*, 273 Ind. 3, 401 N.E.2d 676 (1980) “It is not possible to set specific monetary guidelines for the determination of indigency.” *Hall v. State*, 826 N.E.2d 99 (Ind. App. 2005)

**FPG:** N/A

**Bail:** The fact that a defendant posted bail is a factor in determining indigency. See *Moore v. State*, 273 Ind. 3, 401 N.E.2d 676 (1980)

**Public Benefits:** N/A

**Repayment:** If the court finds that the person is able to pay part of the cost of representation by assigned counsel, the court shall order the person to pay the following: For a felony action, a fee of one hundred dollars (\$100). For a misdemeanor action, a fee of fifty dollars (\$50). IN ST 25-33-7-6(c)(1),(2). If at any stage of a prosecution for a felony or a misdemeanor the court makes a finding of ability to pay the costs of representation, the court shall require payment by the person of the following costs in addition to other costs assessed against the person: Reasonable attorney’s fees if an attorney has been appointed for the person by the court. IN ST 33-40-3-6(a)(1),(2)

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### IOWA

**Definition:** An indigent person is someone whose income is at or below 125% of the Federal Poverty Guidelines, unless the court determines they are able to pay for an attorney. IA ST § 815.9(1)(a). A person whose income is above 125% but below 200% is not indigent unless the court makes a finding that not appointing counsel would cause substantial hardship. IA ST § 815.9(1)(b)

**FPG:** Presumptively eligible if income at or below 125% of the Federal Poverty Guidelines. IA ST § 815.9(1)(a). Eligible if failure to appoint counsel would result in substantial hardship if income above 125% and below 200% of the Federal Poverty Guidelines. IA ST § 815.9(1)(b)

**Bail:** N/A

**Public Benefits:** N/A

**Repayment:** If a person is granted an appointed attorney, he is required to reimburse the state the total cost of legal assistance. IA ST § 815.9(3). If convicted in a criminal case, the court shall order the payment of the costs of legal assistance as restitution or order community service in lieu of restitution. IA ST § 815.9(5). If acquitted in a criminal case, the court shall order the payment of all or a portion of the cost of legal assistance, to the extent the person is reasonably able to pay. IA ST § 815.9(6)

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# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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### KANSAS

**Definition:** An indigent defendant is someone who is financially unable to employ counsel. If the defendant's assets and income are not sufficient to cover the anticipated cost of effective representation, the defendant shall be determined indigent in full or in part and the court shall appoint an attorney. KS ST 22-4504(b)

**FPG:** An eligible defendant shall mean a person whose combined household income and liquid assets equal less than the most current Federal Poverty Guideline. KAR § 105-4-1

**Bail:** N/A

**Public Benefits:** N/A

**Repayment:** The Kansas State Board of Indigent Defense Services sets attorney cost reimbursement rates based on the level of offense and whether the case went to trial. They range from \$300 to \$8,635. KAR § 105-11-1

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### KENTUCKY

**Definition:** A “needy person” or “indigent person” means a person eighteen years of age or older who, at the time his or her need is determined, is unable to provide for the payment of an attorney and all other necessary expenses of representation. KY ST § 31.100(3)(a)

**FPG:** The Federal Poverty Guidelines are one of the factors considered when determining indigency. KY ST § 31.120(2)(h)

**Bail:** Payment of bail by the defendant or another person is a factor considered when determining indigency. KY ST § 31.120(2)(l)

**Public Benefits:** N/A

**Repayment:** The court shall conduct a hearing to determine whether a person who has requested a public defender is able to pay a partial fee for legal representation, the other necessary services and facilities of representation, and court costs. The court shall order payment in an amount determined by the court and may order that the payment be made in a lump sum or by installment payments to recover money for representation provided. KY ST § 31.211(1)

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### LOUISIANA

**Definition:** A person will be deemed “indigent” who is unable, without substantial financial hardship to himself or to his dependents, to obtain competent, qualified legal representation on his own. “Substantial financial hardship” is presumptively determined to include all defendants who receive public assistance ... or earns less than two hundred percent of the Federal Poverty Guideline. LA RS § 15.175(A)(1)(b)

**FPG:** Defendants earning less than 200% of the Federal Poverty Guidelines are presumptively indigent. LA RS § 15.175(A)(1)(b)

**Bail:** Release on bail alone shall not disqualify a person for appointment of counsel. LA RS § 15.175(B)(2)

**Public Benefits:** The court may consider such factors as income or funds from employment or any other source, including public assistance. LA RS § 15.175(B)(1)

**Repayment:** To the extent that a person is financially able to provide for an attorney, other necessary services, and facilities of representation and court costs, the court shall order him to pay for these items. The court may order payment in installments, or in any manner which it believes reasonable and compatible with the defendant's financial ability. LA RS § 15.176(A)

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# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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### MAINE

**Definition:** A defendant does not have sufficient means with which to employ counsel if the defendant's lack of resources effectively prevents the defendant from retaining the services of competent counsel. ME R RCRP 44(b)

**FPG:** The defendant's income must be below 110% of the Federal Poverty Guidelines to be eligible for assigned counsel. Maine Commission on Indigent Legal Services Chapter 401, Section 1 (2)(D)

**Bail:** Cash bail is considered an asset for determining eligibility for assigned counsel. Maine Commission on Indigent Legal Services Chapter 401, Section 1 (1)(B)

**Public Benefits:** When determining eligibility, income includes Social Security, TANF, VA, unemployment and workers compensation. Maine Commission on Indigent Legal Services Chapter 401, Section 1 (1)(A)

**Repayment:** If a defendant's income exceeds necessary monthly expenses, the applicant should be required to make periodic payments based on that amount to reimburse the state for the cost of assigned counsel. Maine Commission on Indigent Legal Services Chapter 401, Section 1 (2)(E) Cash bail is also used to reimburse counsel fees paid by the state. Maine Commission on Indigent Legal Services Chapter 401, Section 2 (1)

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### MARYLAND

**Definition:** A defendant is indigent if he cannot provide the full payment of an attorney and all other necessary expenses of representation without undue financial hardship. MD CRIM PROC § 16-210(a)

**FPG:** For an individual whose assets and net annual income are less than 100% of the federal poverty guidelines, eligibility may be determined without an assessment regarding the need of the applicant. MD CRIM PROC § 16-210(b)

**Bail:** The fact a defendant has posted bail cannot be used as a ground to deny appointed counsel. *See Baldwin v. State*, 51 Md. App. 538 (1982)

**Public Benefits:** N/A

**Repayment:** A court exercising criminal jurisdiction shall order a defendant to reimburse the state for services rendered to the defendant by the Public Defender as a term or condition of a sentence, judgment, or probation imposed by the court, unless the court affirmatively finds that the defendant cannot make the reimbursement; and waives the term or condition. MD CRIM PROC § 16-211(c)(1)(i),(ii)

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# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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### MASSACHUSETTS

**Definition:** An indigent person is someone who is receiving an annual income, after taxes, 125 percent or less of the Federal Poverty Guidelines. MA R S CT 3:10, Section 1(f)(ii)

**FPG:** Defendants who make less than 125% of the Federal Poverty Guidelines are considered “indigent” and those making more than 125% but less than 250% are considered “indigent but able to contribute.” MA R S CT 3:10, Section 1(g)(i),(ii)

**Bail:** N/A

**Public Benefits:** A person is considered indigent if they are receiving certain needs-based forms of public assistance. MA R S CT 3:10, Section 1(f)(i). Income for purposes of determining indigency includes payments from social security and public assistance programs. MA R S CT 3:10, Section 1(e)

**Repayment:** If a party is determined to be indigent but able to contribute, the judge shall order the party to pay a reasonable amount to the probation officer or other appropriate court employee toward the cost of counsel. The amount ordered to be paid shall be based on the financial circumstances of the party. MA R S CT 3:10, Section 10(c)(ii)

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### MICHIGAN

**Definition:** A defendant is considered to be indigent if he or she is unable, without substantial financial hardship to himself or herself or to his or her dependents, to obtain competent, qualified legal representation. Substantial financial hardship shall be rebuttably presumed if the defendant receives personal public assistance or earns an income less than 140% of the Federal Poverty Guideline. MI ST 780.991(3)(b)

**FPG:** Defendant rebuttably presumed eligible if income is less than 140% of the Federal Poverty Guideline. MI ST 780.991(3)(b)

**Bail:** N/A

**Public Benefits:** The court may consider such factors as income or funds from employment or any other source, including personal public assistance. MI ST 780.991(3)(a). Receiving certain forms of public assistance creates a rebuttable presumption of eligibility. MI ST 780.991(3)(b)

**Repayment:** N/A

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### MINNESOTA

**Definition:** A defendant is financially unable to obtain counsel if the court determines that the defendant, through any combination of liquid assets and current income, would be unable to pay the reasonable costs charged by private counsel in that judicial district for a defense of the same matter. MN ST § 611.17(a)(2)

**FPG:** Courts cannot rely solely on the Federal Poverty Guidelines, but they can be used as a factor when determining eligibility for assigned counsel. *See State v. Jones*, 772 N.W.2d 496 (Minn. 2009)

**Bail:** N/A

**Public Benefits:** If a defendant receives “means tested government benefits,” they are presumptively eligible for assigned counsel. MN ST § 611.17(a)(1),(2)

**Repayment:** If the court determines that the defendant is able to make partial payment, the court shall direct the partial payments to the state general fund. MN ST § 611.20(2). A court may order a defendant to reimburse the state for the cost of the public defender. The court may accept partial reimbursement from the defendant if the defendant’s financial circumstances warrant establishing a reduced reimbursement schedule. MN ST § 611.20(4)(a)

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# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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### MISSISSIPPI

**Definition:** A defendant is indigent when he or she is unable to employ counsel. MS ST § 99-15-15

**FPG:** Varies by County

**Bail:** N/A

**Public Benefits:** Varies by County

**Repayment:** N/A

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### MISSOURI

**Definition:** A defendant is indigent when it appears from all the circumstances of the case including his ability to make bond, his income and the number of persons dependent on him for support that the person does not have the means at his disposal or available to him to obtain counsel in his behalf and is indigent. MO ST 600.086(1)

**FPG:** A defendant may be considered indigent if his or her gross pay and other sources of income do not exceed the Federal Poverty Guidelines. MO CSR 10-3.010(2)(A)

**Bail:** The ability to make bail is considered a factor when determining indigency. MO ST 600.086(1)

**Public Benefits:** Unemployed defendants receiving public assistance are eligible for defense services regardless of the amount of the benefits. MO CSR 10-3.010(2)(A). If a defendant is receiving disability payments, pension, unemployment compensation or Social Security, this is considered income. MO CSR 10-3.010(2)(A)

**Repayment:** If a person is determined to be eligible and if he or she is able to provide limited cash contributions toward the cost of representation without imposing a substantial hardship, such contributions shall be required as a condition of representation. If at any time, either during or after the disposition of the case, defendants become financially able to meet all or some part of the cost of services rendered, they shall be required to reimburse the commission in such amounts as they can reasonably pay, either by a single payment or by installments of reasonable amounts, in accordance with a schedule of charges for public defender services prepared by the commission.<sup>2</sup> MO CSR 10-3.010(2)(A)

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<sup>2</sup>. The schedule of charges varies based on the level of offense and the point at which the case was resolved. Reimbursement amounts range from \$65 for the early resolution of a misdemeanor to \$12,500 for a charge that carries the death penalty.

## NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

### 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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#### MONTANA

**Definition:** A defendant is indigent if the defendant's gross household income is at or less than 133% of the Federal Poverty Guidelines or disposable income and assets are insufficient to retain competent private counsel without substantial hardship to the applicant or the members of the applicant's household. MT ST 47-1-111(3)(a),(b)

**FPG:** A defendant is indigent if the defendant's household income is less than 133% of the Federal Poverty Guidelines. MT ST 47-1-111(3)(a)

**Bail:** A defendant may not be deemed ineligible for assigned counsel based solely on an ability to post bail. MT ST 47-1-111(4)

**Public Benefits:** Public benefits may be considered since "gross household income" is defined as "all income received by all individuals of a household while they are members of the household." MT ST 15-30-2337

**Repayment:** The court shall determine whether a convicted defendant should pay the costs of counsel assigned to represent the defendant as follows: a plea of guilty to one or more misdemeanor charges is \$250; a plea of guilty to one or more felony charges is \$800. MT ST 46-8-113(1)(a). If the case goes to trial, the defendant shall pay the costs incurred by the office of state public defender for providing the defendant with counsel in the criminal trial. MT ST 46-8-113(1)(b)

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#### NEBRASKA

**Definition:** Indigent shall mean the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family. NE ST § 29-3901(3)

**FPG:** Defendants whose annual gross income is less than 125% of the Federal Poverty Guidelines are considered indigent. District Court Local Rule 3-13(B)(7)(a)(ii)

**Bail:** Funds used for posting bail are not considered "available funds" for the purposes of retaining counsel. District Court Local Rule 3-13(B)(2)

**Public Benefits:** Social security, unemployment benefits and other forms of public assistance may be considered as "income." District Court Local Rule 3-13(B)(5) See also *State v. Lafler*, 224 Neb. 613 (1987)

**Public Benefits:** Varies by County

**Repayment:** N/A

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# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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### NEVADA

**Definition:** A defendant is indigent if “payments for counsel would place an undue hardship on his ability to provide the basic necessities of life for himself and his family. *Rodriguez v. County of Clark*, 120 Nev. 798 (2004)

**FPG:** Varies by County<sup>3</sup>

**Bail:** N/A

**Public Benefits:** Varies by County

**Repayment:** If a defendant for whom an attorney is appointed at public expense on account of indigency has property subject to execution or acquires such property within 6 years after the termination of the attorney’s representation, the court shall determine the value of the legal services provided and shall render judgment for that amount.<sup>4</sup> NV ST 178.398

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### NEW HAMPSHIRE

**Definition:** A defendant is indigent if the defendant is financially unable to obtain counsel. NH ST § 604-A:2. The determination of a defendant’s financial ability to obtain counsel shall be made by comparing the defendant’s assets and incomes with the minimum cost of obtaining qualified private counsel. NH ST § 604-A:2-c

**FPG:** N/A

**Bail:** N/A

**Public Benefits:** Income includes all income, whether earned or not, from any source. NH ST § 604-A:2-c

**Repayment:** Any adult defendant who has had counsel assigned at the expense of the state shall be ordered by the court to repay the state the fees and expenses paid by the state on the defendant’s behalf according to a schedule established by the administrator of the cost containment unit.<sup>5</sup> NH ST § 604-A:9

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3. Nevada’s Indigent Defense Commission issued a report which found that the methods utilized in Nevada’s courts and defender offices to determine eligibility for assigned counsel vary widely. See “Final Report and Recommendations of Supreme Court Indigent Defense Commission” at page 20.

4. The court may also order a defendant to pay all or any part of the expenses incurred by the county, city or state in providing the defendant with an attorney which are not recovered pursuant to NV ST 178.398. The order may be made at the time of or after the appointment of an attorney and may direct the defendant to pay the expenses in installments.

5. The state may also collect from the defendant a service charge of up to 10 percent of the total amount of fees and expenses owed by such defendant.

# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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### NEW JERSEY

**Definition:** An indigent defendant is a person who is formally charged with the commission of an indictable offense and who does not have the present financial ability to secure competent legal representation and to provide all other necessary expenses of representation. NJ ST 2A:158A-2

**FPG:** Annual gross income must be below 125% of the Federal Poverty Guidelines to assign counsel. *See New Jersey Courts: Income Eligibility Guidelines for Indigent Defense Services*

**Bail:** The ability of the defendant to make bail and the source of that bail are considered. NJ ST 2A:158A-14(d)

**Public Benefits:** Income attributed to a defendant includes unemployment, disability, social security and veteran's benefits as well as other forms of public assistance including food stamps. *New Jersey Uniform Defendant Intake Form*

**Repayment:** In all cases where it appears that the defendant has or reasonably expects to have means to meet some part, though not all, of the cost of the services rendered to him, he shall be required to reimburse the office in such amounts as he can reasonably be expected to pay. NJ ST 2A:158A-16. The reasonable value of the services rendered to a defendant may in all cases be a lien on any and all property to which the defendant shall have or acquire an interest. NJ ST 2A:158A-17(a)

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### NEW MEXICO

**Definition:** A "needy person" means a person who, at the time his need is determined by the court, is unable, without undue hardship, to provide for all or a part of the expenses of legal representation from available present income and assets. NM ST § 31-16-2(C)

**FPG:** The New Mexico Public Defender Department refers to the Federal Poverty Guidelines when determining eligibility for assigned counsel.

**Bail:** Release on bail does not necessarily prevent him from being a needy person. NM ST § 31-16-5(B)

**Public Benefits:** N/A

**Repayment:** To the extent that a person is able to provide for an attorney and the other necessary services of representation, the court may order him to provide for their payment. NM ST § 31-16-5(C). The district attorney may recover reimbursement, from each person who has received legal assistance and who, on the date on which suit is brought, is financially able to reimburse the state for it but refuses to do so. NM ST § 31-16-7(B)

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### NEW YORK

**Definition:** An indigent defendant is someone who is financially unable to afford counsel. NY CRIM PRO §§ 170.10 and 180.10. Courts must make a significant inquiry into a defendant's ability to engage a lawyer. *See People v. McKiernan*, 84 NY2d 915 (1994)

**FPG:** Varies by County<sup>6</sup>

**Bail:** N/A

**Public Benefits:** Varies by County

**Repayment:** N/A

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6. A report concluded that New York State had guidelines for the appointment of counsel in only a few of its 62 counties and that, even in those counties, the guidelines were not uniformly applied. *See "The Commission on the Future of Indigent Defense Services: Final Report to the Chief Judge of New York State" (2006), at 15-16.*

# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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### NORTH CAROLINA

**Definition:** An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation. NC ST § 7A-450

**FPG:** N/A

**Bail:** N/A

**Public Benefits:** N/A

**Repayment:** In all cases the court shall direct that a judgment be entered for the money value of services rendered by assigned counsel plus any sums allowed for other necessary expenses which shall constitute a lien as prescribed by the general law of the state applicable to judgments. The value of services shall be determined in accordance with rules adopted by the Office of Indigent Defense Services.<sup>7</sup> NC ST § 7A-455(b)

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### NORTH DAKOTA

**Definition:** North Dakota Commission on Legal Counsel for Indigents has the authority to define “indigency.” ND ST 54-61-01

**FPG:** Defendants making more than 125% of the Federal Poverty Guidelines generally do not qualify for assigned counsel. *North Dakota Commission on Legal Counsel for Indigents: Guidelines to Determine Eligibility for Indigent Defense Services*

**Bail:** Bail should not be a factor in determining indigency. *North Dakota Commission on Legal Counsel for Indigents: Guidelines to Determine Eligibility for Indigent Defense Services*

**Public Benefits:** Automatically eligible if receiving TANF or SSI. Sources of income considered include social security, veterans and unemployment benefits. *North Dakota Commission on Legal Counsel for Indigents: Guidelines to Determine Eligibility for Indigent Defense Services*

**Repayment:** A defendant for whom counsel is provided at public expense shall reimburse the state such sums as the state expends on the defendant’s behalf. Unless it finds that there is no likelihood that the defendant is or will be able to pay attorney’s fees and expenses, the court, in its judgment of conviction, shall order the defendant to reimburse the presumed amount of indigent defense costs and expenses. ND ST 29-07-01.1(2)(b)

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7. No judgment shall be entered unless the defendant is convicted. NC ST § 7A-455(c)

# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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### OHIO

**Definition:** An indigent person is an individual who at the time his need is determined is unable to provide for the payment of an attorney and all other necessary expenses of representation. OH ST § 120.03(B)(1) An indigent defendant is someone who is unable to obtain counsel. OH ST RCRP 44(A),(B) *See also State v. Tymcio*, 325 N.E.2d 55 (1975)

**FPG:** Presumed eligible if making less than 125% of the Federal Poverty Guidelines. “Marginally Indigent” defendants are those making below 187.5% but more than 125% of the Federal Poverty Guidelines.

**Bail:** Release on bail shall not prevent a person from being determined to be indigent. OH ST § 120.03(B)(1) Any bail/bond expenses for the particular offense at issue should be taken into consideration when determining eligibility. OH ADC 120-1-03 (5)

**Public Benefits:** Presumed eligible if receiving certain types of public assistance. OH ADC 120-1-03(C)(2) However, other sources of income considered are: unemployment compensation, workers compensation, social security compensation, disability compensation, and all other similar forms of compensation/governmental assistance comprising household income. OH ADC 120-1-03(A)(1)

**Repayment:** Marginally Indigent Defendants (who make between 125% and 187.5% of the Federal Poverty Guidelines) are subject to recoupment, contribution, or partial payment programs. OH ADC 120-1-03(B)

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### OKLAHOMA

**Definition:** An indigent defendant is someone who “is financially unable or without adequate funds or resources to employ counsel.” *McCraw v. State*, 476 P.2d 370 (Okla. Cr. 1970)

**FPG:** N/A

**Bail:** Posting bail creates a rebuttable presumption that a defendant is not indigent. OK ST T 22 § 1355A(D)

**Public Benefits:** N/A

**Repayment:** The court may order any person represented by assigned counsel to pay the costs for representation in full or in installments after a judicial determination that the person is financially able to pay such costs. *Oklahoma Court of Criminal Appeals Rule 1.14(B)*

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### OREGON

**Definition:** A person is financially eligible for appointed counsel if the person is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person’s dependent family. OR ST § 151.485(1)

**FPG:** Defendants making less than 130% of the Federal Poverty Guidelines are presumptively eligible. *ACP / Verification Desk Manual, Oregon Judicial Department*

**Bail:** Appointed counsel may not be denied to any defendant merely because the defendant has or is capable of depositing security for release. OR ST § 135.050(3)

**Public Benefits:** Social security, unemployment and veterans benefits are considered when determining eligibility. *ACP / Verification Desk Manual, Oregon Judicial Department*

**Repayment:** If the court finds that the defendant has financial resources that enable the defendant to pay in full or in part the costs of the legal and other services to be provided at state expense, the court shall enter a limited judgment requiring that the person pay the amount that it finds the person is able to pay without creating substantial hardship in providing basic economic necessities to the person or the person’s dependent family. OR ST § 151.487(1)

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# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

## 50-State Survey of Financial Eligibility Guidelines for Assigned Counsel

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### PENNSYLVANIA

**Definition:** A defendant is indigent if the person is without financial resources or is otherwise unable to employ counsel. PA ST RCRP 122

**FPG:** Varies by County

**Bail:** N/A

**Public Benefits:** Varies by County

**Repayment:** N/A

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### RHODE ISLAND

**Definition:** An “indigent defendant” includes a person who, after payment of necessary expenses for food, shelter and medical care, does not have sufficient income or assets to enable him or her to retain counsel. RI ST § 12-15-8

**FPG:** N/A

**Bail:** N/A

**Public Benefits:** Defendants receiving needs-based government assistance are automatically eligible.

**Repayment:** N/A

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### SOUTH CAROLINA

**Definition:** A person is indigent if the person is financially unable to employ counsel. SC R A CT Rule 602

**FPG:** A defendant is presumed indigent if the person’s net family income is less than or equal to the Federal Poverty Guidelines. SC R A CT Rule 602

**Bail:** N/A

**Public Benefits:** N/A

**Repayment:** The appointment of counsel creates a claim against the assets and estate of the person who is provided counsel in an amount equal to the costs of representation. SC ST § 17-3-40(A). If it appears that the person has some assets but they are insufficient to employ private counsel, the court, in its discretion, may order the person to pay these assets or a portion thereof to the Office of Indigent Defense. SC ST § 17-3-45(A)

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### SOUTH DAKOTA

**Definition:** An indigent defendant does not have sufficient money, credit, or property to employ counsel and pay for the necessary expenses of his representation. SD ST § 23A-40-6

**FPG:** Indigency should be considered without resort to artificially pre-determined standards or guidelines such poverty guidelines used to determine eligibility for public assistance. See *Sate v. Dale*, 439 N.W.2d 112 (S.D. 1989)

**Bail:** N/A

**Public Benefits:** Social security and unemployment income should be considered when determining eligibility. See *Sate v. Dale*, 439 N.W.2d 112 (S.D. 1989)

**Repayment:** If the court finds that funds are available for payment from a defendant, the court may order that the funds be paid as a reimbursement either during the time a charge is pending or after the disposition of the charge, regardless of whether the defendant has been acquitted or the case has been dismissed by the prosecution or by order of the court.<sup>8</sup> SD ST § 23A-40-10

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8. A lien upon all the property, both real and personal, of any person, for whom legal counsel or a public defender has been appointed, may also be filed. SD ST § 23A-40-11

# NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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### TENNESSEE

**Definition:** An “indigent person” is one who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney. TN ST § 8-14-201

**FPG:** The Federal Poverty Guidelines are a factor in determining indigency. TN ST § 8-14-202(c)(4)

**Bail:** The ability to make bail is a consideration when determining indigency. TN ST § 8-14-202(c)(6)  
*See also State v. Gardner, 626 S.W.2d 721 (Tenn. Crim. App. 1981)*

**Public Benefits:** All income, regardless of source, is considered. TN ST § 8-14-202(c)(3)

**Repayment:** If the court appoints counsel to represent an accused but finds the accused is financially able to defray a portion or all of the cost of the representation, the court shall enter an order directing the party to pay any sum that the court determines the accused is able to pay. The sum shall be subject to execution as any other judgment and may also be made a condition of a discharge from probation. TN ST § 8-14-202(e)

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### TEXAS

**Definition:** Indigent means a person who is not financially able to employ counsel. TX CRIM PRO Art. 1.051(b)

**FPG:** Varies by County<sup>9</sup>

**Bail:** The court or the courts’ designee may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant’s financial circumstances. TX CRIM PRO Art. 26.05(m)

**Public Benefits:** Varies by County

**Repayment:** If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, the court shall order the defendant to pay during the pendency of the charges or, if convicted, as court costs the amount that it finds the defendant is able to pay. TX CRIM PRO Art. 26.05(g)

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### UTAH

**Definition:** “Indigency” means that a person: does not have sufficient income, assets, credit, or other means to provide for the payment of legal counsel and all other necessary expenses of representation without depriving that person or the family of that person of food, shelter, clothing, and other necessities; or has an income level at or below 150% of the United States Poverty Guidelines. UT ST § 77-32-202(3)(a)

**FPG:** Defendants are eligible for assigned counsel if they earn 150% or less of the Federal Poverty Guidelines.

**Bail:** N/A

**Public Benefits:** Financial assistance from state and federal programs may be considered when determining eligibility. *See State v. Vincent, 883 P.2d 278 (Utah 1994)*

**Repayment:** N/A

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9. A survey of the 254 counties in Texas found that 38 counties found defendants eligible for assigned counsel if they made less than 100% of the Federal Poverty Guidelines, 54 counties found defendants eligible for assigned counsel if they made less than 125% of the Federal Poverty Guidelines and 6 counties found defendants eligible for assigned counsel if they made less than 150% of the Federal Poverty Guidelines. See “The Costs and Benefits of an Indigent Defendant Verification Study” by the Texas Task Force on Indigent Defense (2007), at 3.

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### VERMONT

**Definition:** A “needy person” is someone who does not have sufficient assets or income to retain counsel. *See State v. Morgan*, 789 A.2d 928 (2001)

**FPG:** Defendants must pay a portion of the cost of representation based on a formula derived from the Federal Poverty Guidelines. VT ST T. 13 § 5238(b)

**Bail:** Release on bail does not necessarily disqualify a person from being a needy person. VT ST T. 13 § 5236(b)

**Public Benefits:** N/A

**Repayment:** The court shall require any person assigned counsel to pay for all or part of the cost of representation based upon his or her ability to pay. In all cases the court shall order a minimum payment of \$50.00. The amount of repayment is based on a defendant’s income relative to the Federal Poverty Guidelines; defendants who make more than 200% of the Federal Poverty Guidelines must repay 100% of the costs of representation. VT ST T. 13 § 5238(b)

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### VIRGINIA

**Definition:** An indigent defendant is one whose income is equal to or less than 125% of the Federal Poverty Guidelines. VA ST § 19.2-159(B)(3)

**FPG:** Counsel shall be appointed for the accused if his available funds are equal to or below 125% of the Federal Poverty Guidelines. VA ST § 19.2-159(B)(3). If the available funds of the accused exceed 125% of the Federal Poverty Guidelines the court may, in exceptional circumstances, appoint an attorney to represent the accused. VA ST § 19.2-159(B)(3)

**Bail:** N/A

**Public Benefits:** Defendants who are receiving state or federally funded public assistance are presumptively eligible. VA ST § 19.2-159(B). Social Security and veterans benefits are considered as income. VA ST § 19.2-159(B)(1)

**Repayment:** If the defendant is convicted, the amount allowed by the court to the attorney appointed to defend him shall be taxed against the defendant as a part of the costs of prosecution and, if collected, the same shall be paid to the Commonwealth, or the county, city or town, as the case may be. VA ST § 19.2-163(2)

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### WASHINGTON

**Definition:** Indigent means a person who, at any stage of a court proceeding, is receiving certain types of public assistance, or has an annual income, after taxes, of 125 percent or less of Federal Poverty Guidelines. WA ST 10.101.010(3)

**FPG:** A defendant making 125% or less of the Federal Poverty Guidelines is eligible for assigned counsel. WA ST 10.101.010(3)(c)

**Bail:** The appointment of counsel shall not be denied because the person has posted or is capable of posting bail. WA ST 10.101.020(2)

**Public Benefits:** Income includes cash payments such as reimbursements received from social security and public assistance programs. WA ST 10.101.010(2)(b)

**Repayment:** Indigent and able to contribute means a person who is unable to pay the anticipated cost of counsel because his or her available funds are less than the anticipated cost of counsel but sufficient for the person to pay a portion of that cost. WA ST 10.101.010(4). All persons determined to be indigent and able to contribute shall be required to execute a promissory note at the time counsel is appointed. WA ST 10.101.020(5)

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#### WEST VIRGINIA

**Definition:** Defendants are presumptively eligible if they are receiving assistance from certain federal programs that are based on the Federal Poverty Guidelines or have an income below 125% of the Federal Poverty Guidelines.<sup>10</sup> *West Virginia Public Defender Services: Financial Guidelines for Determining Eligibility*

**FPG:** Defendants may be eligible if their income is below 125% of the Federal Poverty Guidelines. *West Virginia Public Defender Services: Financial Guidelines for Determining Eligibility*

**Bail:** Whether a defendant has posted a cash bond or has obtained release on bond through the services of a professional bondsman is a factor in determining eligibility. WV ST § 29-21-16(e)(8)

**Public Benefits:** N/A

**Repayment:** N/A

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#### WISCONSIN

**Definition:** Defendants are eligible for appointed counsel if the anticipated costs of retained counsel exceeds the assets and income deemed available to pay the costs of legal representation.<sup>11</sup> *Wisconsin Administrative Code: State Public Defender Board 3.03(a)(b)*

**FPG:** Income is available to apply to the costs of legal representation if it exceeds 115% of the Federal Poverty Guidelines. *Wisconsin Administrative Code: State Public Defender Board 3.03(3)*

**Bail:** N/A

**Public Benefits:** Defendants are eligible for assigned counsel if their only income is from certain needs-based assistance programs. *Administrative Code: State Public Defender Board 3.03(5)*

**Repayment:** A person has the ability to pay some amount towards the costs of legal representation if the person has a gross income in excess of the Federal Poverty Guidelines. *Administrative Code: State Public Defender Board 6.025(1)*. Amount of contribution is determined by a schedule set by the State Public Defender Board.<sup>12</sup>

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10. The agency [West Virginia Public Defender Services] shall establish, and periodically review and update financial guidelines for determining eligibility for legal representation made available under the provisions of this article. The agency shall adopt a financial affidavit form for use by persons seeking legal representation made available under the provisions of this article. WV ST § 29-21-16(a)

11. The State Public Defender Board is responsible for promulgating rules regarding financial eligibility for assigned counsel. WI ST 977.02

12. See *Wisconsin Administrative Code: State Public Defender Board 6.01 and 6.02*.

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### WYOMING

**Definition:** Any person financially unable to obtain adequate representation who is charged with a crime is entitled to appointed counsel. Wyoming Rules of Criminal Procedure 44(a)(1). A person is entitled to the appointment of counsel if, at the time counsel is needed, the person is unable to provide for the full payment of an attorney and all other necessary expenses of representation. Wyoming Rules of Criminal Procedure 44 (d)

**FPG:** N/A

**Bail:** Release on bail does not necessarily prevent a person from being determined to be needy. WY ST § 7-6-106(b)

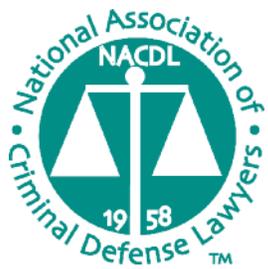
**Public Benefits:** All sources of income are considered. Wyoming Rules of Criminal Procedure 44 (d)(2)

**Repayment:** If the court determines the person is able to provide any amount as reimbursement, the court shall order the person to reimburse the state for all or part of the costs of the services provided. WY ST § 7-6-106(c). If the court orders release on bail pending trial or appeal, probation before sentence, suspended sentence or probation, the court shall order the needy person as a condition of bail, sentence or probation to repay the state for expenses and services provided by appointed attorneys if the court determines the defendant has an ability to pay or that a reasonable probability exists that the defendant will have an ability to pay. WY ST § 7-6-106(e)

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