

Access to Counsel and Timely Appointment

INDIANA TASK FORCE ON PUBLIC DEFENSE

FRIDAY, OCTOBER 27, 2017

Constitutional and Statutory Basis

Right to Counsel

When the right attaches

Critical stages

Timely appointment

Counsel must be present at all critical stages after the right attaches unless a valid waiver is made.

Waiver of Counsel

Knowing, intelligent and voluntary waiver required

Advisement by court on the dangers of self-representation

Right to Counsel in Indiana – Types of Cases

- *Criminal (felony and misdemeanor)
- *Juvenile delinquency and status
- *Children in Need of Services (CHINS)
- *Termination of Parental Rights

- *Appeals
- *Post-convictions
- *Child Support Contempt
- *Involuntary commitment
- *Probation or parole revocations

When the Right To Counsel Attaches

The right to counsel attached at the time when formal judicial proceedings have begun. *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008).

Commencement of prosecutorial process

Initial appearance before a magistrate judge, where one learns the charge against him, and his liberty is subject to restriction

In Indiana, however, the right to counsel attaches at the time of arrest. (*State v. Taylor*, 49 NE 3rd 1019)

Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the post-attachment proceedings ...**unless a valid waiver of the right is made.**

Critical Stages of Proceedings

Custodial interrogations both before and after commencement of prosecution

Preliminary hearings prior to commencement of prosecution where “potential substantial prejudice to defendant[s] rights inheres in the . . . confrontation”

Lineups and show-ups after commencement of prosecution;

Plea negotiations and at the entry of a guilty plea

Arraignments

Pre-trial period between arraignment and trial

Trials

Sentencing

Direct appeals as of right

Probation revocation

Parole revocation

What constitutes a valid waiver of rights?

Adults

Adult defendants may waive, but first the judge must:

- (1) inform the defendant of his or her right to appointed counsel; and
- (2) make the defendant “aware of the dangers and disadvantages of self-representation.”

The inquiry by the judge should be thorough and confirm that the defendant **voluntarily, knowingly, and intelligently** decided against using a lawyer and in favor of self-representation.

What constitutes a valid waiver? Juveniles

Indiana Criminal Rule 25, effective January 1, 2015:

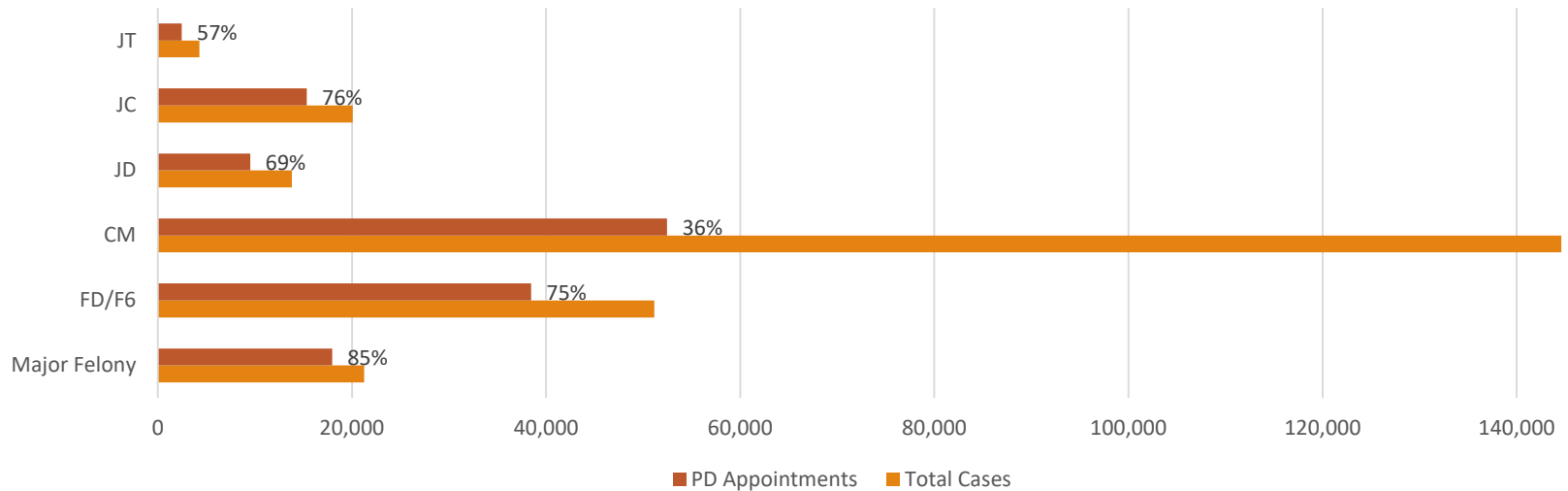
- Mandates appointment before a detention or initial hearing, if possibility that child can be removed from home.
- Limits waiver of counsel where the child has not first consulted with their appointed attorney.

Any waiver of counsel must be made in open court, on the record and confirmed in writing, and in the presence of the child's attorney.

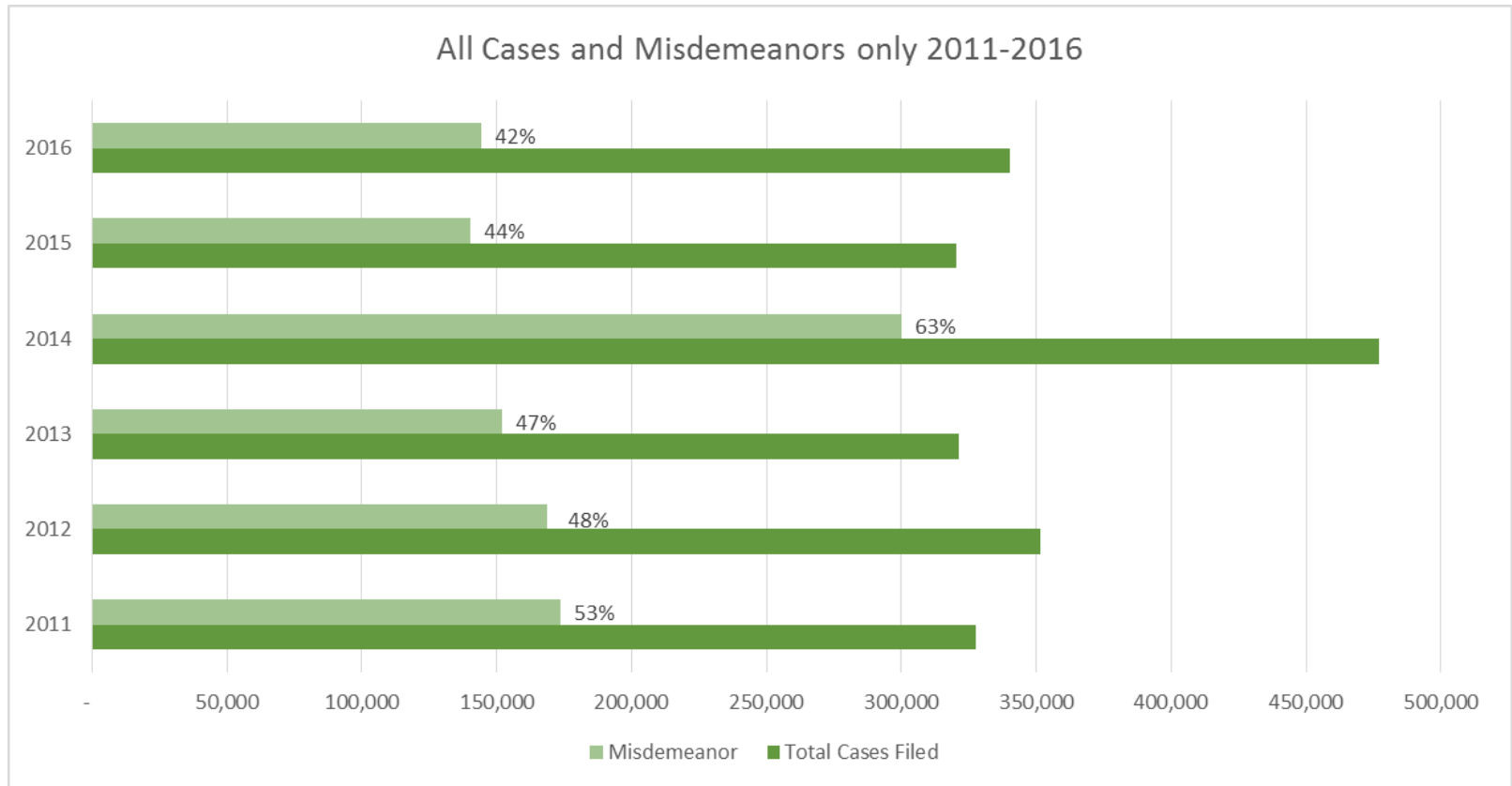
Waiver must be **knowing, intelligent and voluntary**.

Rates of appointed counsel by case type

2016 Total Cases Filed and Public Defender Appointments by Case Type



Indiana's Misdemeanor Numbers



The Misdemeanor Problem

**Minor Crimes, Massive
Waste: The Terrible Toll
of America's Broken
Misdemeanor Courts**

- NACDL (2009)

“NACDL’s comprehensive examination of misdemeanor courts.....demonstrated that misdemeanor courts across the country are incapable of providing accused individuals with the due process guaranteed them by the Constitution. As a result, every year literally millions of accused misdemeanants, overwhelmingly those unable to hire private counsel, and disproportionately people of color, are denied their constitutional right to equal justice. And, taxpayers are footing the bill for these gross inefficiencies.”

NACDL Recommendations on Misdemeanor Representation

1. Divert misdemeanors that do not impact public safety to penalties that are less costly to taxpayers.
2. Reduce pressure on defendants to plead guilty, particularly at first appearance.
3. Enforce ethical obligations of all participants in misdemeanor adjudications.
4. Provide counsel for any defendant facing the possibility of incarceration.
5. Provide public defenders with the resources necessary to effectively represent their clients.

Factors Contributing to Waiver of Counsel

Absence of
Counsel

Deterrents to
asking for
counsel

Misdemeanor
caseloads

Absence of Counsel

Uninformed waiver of counsel

Non-uniform eligibility requirements for appointment

Conferring directly with prosecutors

Deterrents to Requesting Counsel, and other misdemeanor issues

Meet and plead mentality

Denial of bond/inability to make bond and the pressure to plead out

Inexperienced counsel in misdemeanor courts

Impact of increased collateral consequences on clients

Inadequate compensation for lawyer

No state reimbursement in Indiana

Lack of Uniformity for Eligibility

Adults

Public Defender Commission
Standard C:

Substantial Hardship Test –

- Examination of total financial picture
- Posting bond is not determinative
- Consideration of cost of private counsel, income, expenses, disposable income, liquid assets...

Juveniles

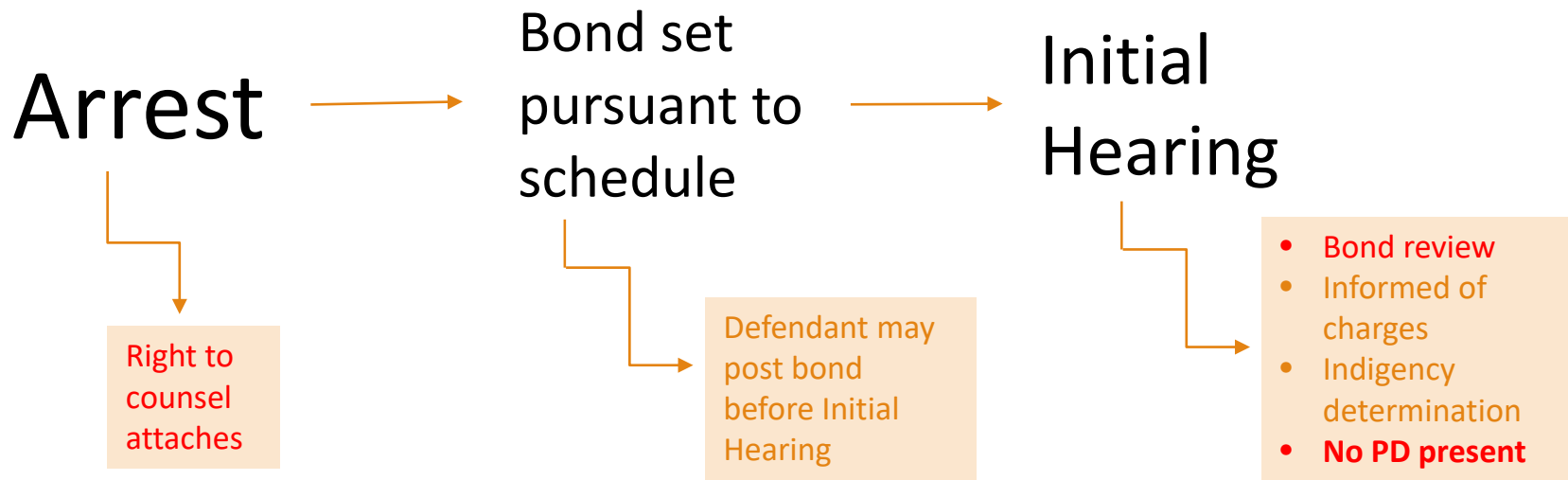
Appointments are conditioned only on 1) whether child has an attorney, and 2) whether child has waived the right to counsel.

Consideration of ability to pay is not at issue with youth.

Payment may be ordered later against parent or guardian.

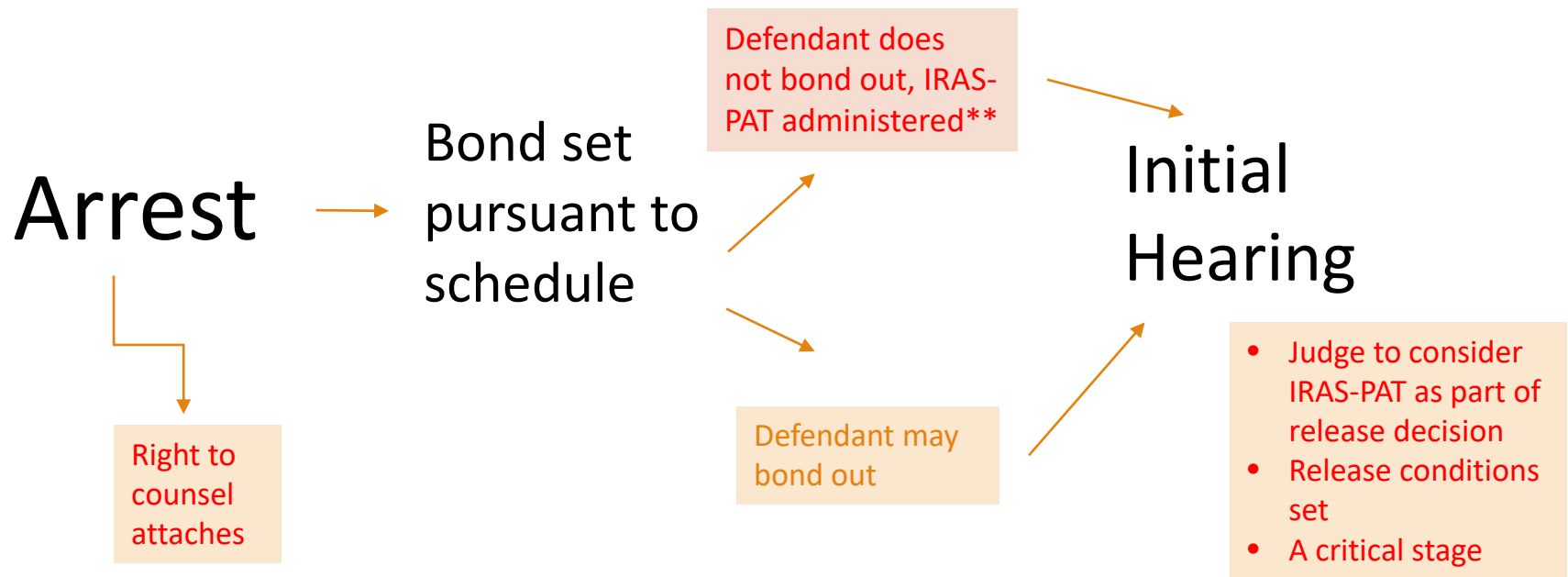
Procedures from Arrest to Initial Hearing

Prior to CR 26
Typical procedure



Procedures from Arrest to Initial Hearing

Pilot County Implementation of CR26



Attorneys must be appointed and prepared at the Initial Hearing

Judge will consider IRAS-PAT at the initial hearing

Will make release decision

Attorney must be there to argue on behalf of client for a release decision

Many pilot counties hiring full-time public defender to staff initial hearings

Pre-trial Release: Crim. R. 26

The improvement of Indiana's pretrial release practices will

- (a) encourage and empower trial judges to release arrestees earlier;
- (b) reduce pretrial detention expenses for local jails and enable many arrestees to return to their jobs and provide support for their families;
- (c) eliminate the unfair and often protracted incarceration of poor people who don't have the resources to purchase a bail bond or pay a bail deposit;
- (d) enhance the reliability of guilty pleas; and
- (e) realize the benefits of reduced recidivism and enhanced public safety that flow from the use of evidence-based risk assessment tools for pretrial release decisions.

Criminal Rule 26

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

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

Pre-trial pilot counties

Commission Counties:

LaPorte

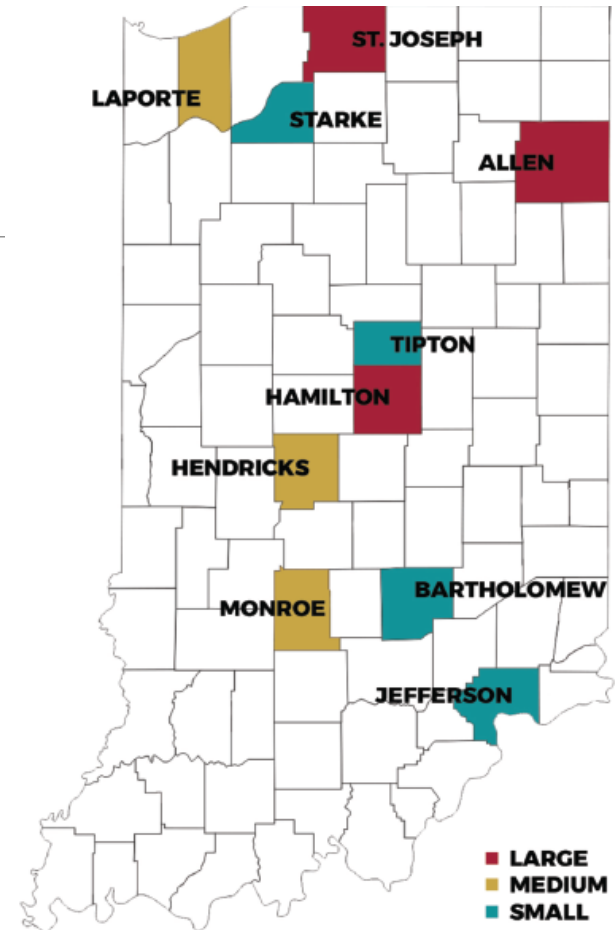
St. Joseph (has a Chief PD)

Allen (has a chief PD)

Hendricks (has a chief PD)

Monroe (has a chief PD)

Jefferson



Source: "Process Evaluation of the IRAS-PAT Pilot Program Implementation" Report to the Indiana Office of Court Services.

Timeline for Criminal Rule 26

“This rule in its entirety, became effective September 7, 2016 in the pretrial pilot courts and in courts using an approved evidence based risk assessment under Section B.

Sections C. and D. [related to cash bail and prohibition on statements by defendants being used outside of risk-assessment interviews] became effective September 7, 2016, in all courts.

Sections A. and B. will be effective in all courts January 1, 2020.”

IRAS-PAT instrument

Exhibit 1. IRAS-PAT Instrument

INDIANA RISK ASSESSMENT SYSTEM: PRETRIAL ASSESSMENT TOOL (IRAS-PAT)

Name: _____ Date of Assessment: _____
 Case#: _____ Name of Assessor: _____

Pretrial Items		Verified
1. Age at First Arrest	<input type="text"/>	<input type="checkbox"/>
0=33 or older		
1=Under 33		
2. Number of Failure-to-Appear Warrants Past 24 Months	<input type="text"/>	<input type="checkbox"/>
0=None		
1=One Warrant for FTA		
2=Two or More FTA Warrants		
3. Three or more Prior Jail Incarcerations	<input type="text"/>	<input type="checkbox"/>
0=No		
1=Yes		
4. Employed at the Time of Arrest	<input type="text"/>	<input type="checkbox"/>
0= Yes, Full-time		
1= Yes, Part-time		
2= Not Employed		
5. Residential Stability	<input type="text"/>	<input type="checkbox"/>
0=Lived at Current Residence Past Six Months		
1=Not Lived at Same Residence		
6. Illegal Drug Use During Past Six Months	<input type="text"/>	<input type="checkbox"/>
0=No		
1=Yes		
7. Severe Drug Use Problem	<input type="text"/>	<input type="checkbox"/>
0=No		
1=Yes		
Total Score:		<input type="text"/>

Scores	Rating	% of Failures	% of Failure to Appear	% of New Arrest
0-2	Low	5%	5%	0%
3-5	Moderate	18%	12%	
6+	High	29%	15%	17%

Conclusions from preliminary study of CR 26

Indiana moving toward implementation

Lack of consensus and commitment to the IRAS-PAT

Time and resources still an issue

Risk categorizations consistent with national trends

More data needed to fully examine early outcomes

More effort needed to fully implement in pilot counties

Questions?
