The Bill of Costs – Who, What, When, Where, Why?

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In October 2012, I wrote a short article about the bill of costs for this publication. I advanced ten specific suggestions for clerks while noting that several significant questions had yet to be answered.

Since then, the Court of Criminal Appeals has published a number of opinions touching on the bill of costs and related court cost issues. These opinions have shed light on several matters that were previously unclear.

As a result of these clarifying opinions, the October 2012 document is out of date and a new overview of the bill of costs is needed. Accordingly, I have prepared this up-to-date look at the bill of costs that attempts to answer five basic questions:

(1) Who is supposed to prepare the bill of costs?
(2) What information should the bill of costs contain?
(3) When should the bill of costs be produced?
(4) Where should the bill of costs be directed?
(5) Why is a bill of costs necessary in the first place?

Let's look at each question in turn.

Who is supposed to prepare the bill of costs?

This is the easiest of our five questions. In *Johnson v. State*, 423 S.W.3d 385, *14 (Tex. Crim. App. 2014), the Court of Criminal Appeals declared that bills of costs "are produced by the clerk rather than the trial judge." The duty to produce the bill of costs rests squarely on the clerk of the court.

What information should the bill of costs contain?

The bill of costs must be in writing and is to contain "the items of cost." Tex. Crim. Proc. Code Ann., art. 103.001. This does not mean the bill of costs should contain <u>all</u> of the financial obligations imposed on a convicted criminal defendant. Rather, bills of costs should contain only court costs. Court costs are those financial obligations intended to recoup "the costs of judicial resources expended in connection with the trial of the case." *See Weir v. State*, 278 S.W.3d 364, 366-67 (Tex. Crim. App. 2009).

Neither fines nor restitution should appear on the bill of costs. Fines and restitution constitute punishment and are part of the defendant's sentence, *Id.* at 366. They are not imposed

in order to recoup the costs of judicial resources expended. Thus, they simply are not court costs. Only court costs – not punishments – should be listed on the bill of costs.

The Court of Criminal Appeals has identified two types of court costs: (1) mandatory costs; and (2) discretionary costs. *Johnson v. State* at *6. Both types of costs should be shown on the bill of costs.

A mandatory cost is a "predetermined, legislatively mandated obligation that is imposed upon conviction" provided that "certain conditions precedent are met." *Id.* A list of these mandatory "items of cost" should appear on every bill of costs. Ideally, the statute authorizing each cost on the itemized list should also be identified. For example, in a felony conviction, the consolidated court cost should be listed as follows: "Consolidated Court Cost [Loc. Gov't Code, Sec. 133.102] . . . $133.00"

Attorney's fees are a discretionary cost. As the Court of Criminal Appeals explained:

> a trial court may order a defendant to pay for the costs of 'legal services provided' – but only if it first determines that the 'defendant has financial resources that enable him to offset in part or in whole the costs.'

Wiley v. State, 410 S.W.3d 313, 317 (Tex. Crim. App. 2013). Because an order to pay attorney's fees serves to recoup the costs of judicial resources, an attorney's fees assessment is a court cost. As with mandatory court costs, the discretionary attorney's fee cost should be listed on the bill of costs.

In relatively rare circumstances, a court may order a defendant to repay a reward paid by a crime stoppers organization. The amount of any such required repayment is a court cost that should also be shown on the bill of costs.

In addition to containing the above-described items of costs, the bill of costs must be signed by the clerk and must be certified. *Johnson v.* State at *17.

One note about mandatory costs is in order. As mentioned by the Court of Criminal Appeals in *Johnson*, some mandatory costs are to be imposed only if certain conditions precedent are met. For example, peace officer fees are to be imposed only if certain services have been performed by peace officers in the case. As noted by the *Johnson* Court, "[a]n officer may not impose a cost for a service not performed." *Id.* at *7, n.3. The best practice to document the services of peace officers in a particular case is through the use of a sheriff's fee record. *See* Tex. Crim. Proc. Code Ann. art. 103.009. Ideally, a sheriff's fee record will be attached to the bill of costs to support the assessment of sheriff's fees. However, no appellate court opinion has yet addressed whether sheriff's fee records are required to support the imposition of peace office fees.

When should the bill of costs be produced?

Judge Elsa Alcala recently opined as to the very best time to produce a bill of costs:

> It also appears, at least to me, that a trial court can easily prevent almost all due- process litigation concerning a bill of costs by simply providing the bill to a defendant at the time he is sentenced (notice), and giving him time to review it and voice any concerns (an opportunity to be heard).

Perez v. State, No. PD-0498-13, 2014 Tex. Crim. App. LEXIS 269, at *24 (Tex. Crim. App. March 12, 2014) (Alcala, J., concurring).

Production of the bill of costs at sentencing is ideal because due process is wholly satisfied at that time. *See Harrell v. State*, 286 S.W.3d 315, 320 (Tex. 2008) (defendant who "was notified of the costs assessed when the convicting court sentenced him" and could have contested the costs at that time "received all that due process demands"). However, the bill of costs is not required to be produced at this point in the process. The Court of Criminal Appeals has explicitly declared that "bills of costs . . . are authorized to be produced after trial." *Johnson v. State* at *14. This is because defendants have other opportunities at later points in time to challenge the assessment of court costs. In *Cardenas v.* State, 423 S.W.3d 396, *5 (Tex. Crim. App. 2014), the Court of Criminal Appeals declared:

> Convicted defendants have constructive notice of mandatory court costs set by statute and the opportunity to object to the assessment of court costs against them for the first time on appeal or in a proceeding under Article 103.008 of the Texas Code of Criminal Procedure. Appellant's right to due process of law has been satisfied with respect to notice and an opportunity to be heard regarding the imposition of court costs.

Thus, the bill of costs need not be in front of the judge at sentencing. And the judge is under no compulsion to orally pronounce the amount of court costs to be assessed against the defendant.

A question not yet addressed is whether the bill of costs must be available to the judge when he or she signs the judgment. The answer is no in regard to the assessment (*i.e.*, imposition) of court costs. "[M]atters pertaining to the imposition of court costs need not be brought to the attention of the trial court, including a bill of costs prepared after a criminal trial." *Johnson v. State* at *21. Regarding the portion of the judgment ordering that the costs be paid and collected, the best practice is that a bill of costs be available to the judge. A brief explanation of this point is in order.

A judgment must "adjudge the costs against a defendant." Tex. Crim. Proc. Code Ann., art. 45.16 (West xxxx). This mandate is satisfied by language in the judgment simply stating that court costs are adjudged against the defendant. There is no requirement that a specific amount of

court costs be listed on the judgment. *See Armstrong v. State*, 340 S.W.3d 759, 766 (Tex. Crim. App. 2011). But the judge may choose to list a specific amount of court costs on the judgment. Either way, a bill of costs is not necessary before a judge may "adjudge" (*i.e.*, assess) court costs.

A judgment must also order a defendant to pay court costs, *Johnson v. State* at *5 and must order that court costs be collected. Tex. Code Crim. Proc. Ann., art. 42.16. Though the best practice may be for a bill of costs to be available to the judge when ordering the payment and collection of assessed court costs, Article 103.001 provides that a cost is not payable until a bill of costs is produced or is "ready to be produced" – a term that has never been defined. *See Perez v. State* at *19-20 (Alcala, J., concurring). The Court of Criminal Appeals explained this principle in the *Johnson* opinion at *23-24:

> Article 103.001 of the Texas Code of Criminal Procedure states that "[a] cost is not payable by the person charged with the cost until a written bill is produced or is ready to be produced . . . . Article 103.001 was intended to prevent a defendant from paying unsubstantiated court costs. Article 103.003 authorizes designated government agents to collect only money that is payable. . . . Thus, Article 103.001 appears to act as a prohibition on the ability of designated state agents from collecting nonpayable, but assessed court costs.

As the foregoing paragraph shows, there is a condition precedent to a cost being payable. That condition precedent is that a bill of costs is produced or ready to be produced.

In summary, a bill of costs need not be available to the trial judge before adjudging (*i.e.*, assessing) court costs against a defendant. Though a bill of costs need not be available to a trial judge before ordering a defendant to pay (and a clerk to collect) court costs, the best practice is that a bill of costs be made available to the trial judge before he or she signs the judgment.

Where should the bill of costs be directed?

Ultimately, the defendant should be provided with a copy of the bill of costs (or a chance to obtain a copy). This way the defendant is notified of the costs assessed against him so that he or she may make any desired challenge concerning the costs.

Ideally, the defendant will receive a copy of the bill of costs at sentencing as recognized by Judge Alcala. *See above.* But as the Court of Appeals has recognized, a great many defendants will not receive any bill of costs at sentencing:

> [W]hile some defendants in some cases may have an opportunity to recognize a basis to object to the imposition of court costs in open court if an itemized bill is available to them, most defendants, like Appellant, will not, because their court costs were not imposed in open court, the judgment did not contain a written amount of court

> costs, or it contained only an aggregate figure – the accuracy of which may not be verifiable at the time of imposition.

*Johnson v. State at *11.*

One notification alternative is to provide the defendant with a copy of the bill of costs when he or she appeals. *See Johnson v. State* at *27, n. 2 (Cochran, J., concurring) ("a bill of costs filed with the appellate record 'is the most expedient, and therefore, preferable method' of informing the defendant of the court costs assessed and of correcting them if necessary.").

Of course, only a small percentage of convicted defendants bring appeals. Because it can be a logistically difficult undertaking to provide bills of costs to non-appealing defendants – especially if the defendant is serving time in prison – the best practice would be to provide bills of costs to defendants at sentencing.

Why is a bill of costs necessary in the first place?

This question can be answered in two words – due process. The Fifth Amendment to the U.S. Constitution declares that no person shall "be deprived of . . . life, liberty or property, without due process of law." The 14th Amendment announces that no "State shall deprive any person of life, liberty, or property, without due process of law." Additionally, our Texas Constitution, Article I, Section 19 states that "[n]o citizen of this State shall ever be deprived of life, liberty, [or] property . . . except by due course of the law of the land."

A court order commanding a criminal defendant to pay court costs is a classic example of the government depriving a person of property. Such a deprivation is permissible, but only if the defendant has been provided due process. The two basic elements of due process are notice and an opportunity to be heard.

The Texas Legislature was mindful of due process when passing Article 103.001 of the Code of Criminal Procedure. As mentioned earlier, this statute prohibits the payment and collection of court costs in the absence of a bill of costs or one being ready to be produced to the defendant.

Conclusion

Clerks are responsible for preparing bills of costs in each criminal case resulting in a conviction. In order to be effective, the bill of costs must list the assessed costs with particularity. In order to afford a defendant an opportunity to contest any assessed costs, the best practice is to provide a bill of costs to the defendant along with the judgment. Good luck in your efforts to produce these important documents.