WHITHER THE BLOOD IN THE TURNIP?
COLLECTION OF COURT COSTS

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- Speaker: *Don't Do It Even If it Feels Good: Problem Areas with Potential to Cost You Your Credibility or Your Job*, Texas District and County Clerks Association Annual Conference, 2015
- Author/Speaker: *Guile and a Cat Diesel Power Cap: Basics You Need for Practically and Ethically Advising the Commissioners Court*, Texas District and County Attorneys Association Civil Law Seminar, 2014
- Author/Speaker: *Preventive Medicine for Viral Data: Public Information Act Practice Tips*, State Bar of Texas 25th Annual Suing and Defending Governmental Entities Course, 2013
- Author/Speaker: *Dirty, Rotten Scoundrels: A Field Guide* (*Practical Issues and Ethical Concerns in Removal and Quo Warranto Litigation*), Texas District and County Attorneys Association Annual Criminal and Civil Law Update, 2012
- Author/Speaker: *Section 1983 Entity Liability and Final Policymakers*, State Bar of Texas Government Law Boot Camp, 2012
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WHITHER THE BLOOD IN THE TURNIP? COLLECTION OF COURT COSTS

The best things in life are free
But you can give them to the birds and bees
I need money (that's what I want)

— BARRETT STRONG, *Money (That's What I Want)* (Anna Records 1960)

I. INTRODUCTION

Anyone who has litigation experience likely knows that court costs lurk as a significant, and often overlooked, item of expense in going to court. Whether in a multimillion-dollar tort case or a criminal action, costs frequently emerge as a proportionately significant liability. The propriety and amount of costs are subjects of keen interest, not only to the parties in a case but also to the courts and the Legislature. This writing seeks to coalesce the authoritative responses to those interests by the judiciary and the Legislature.

Before beginning this analysis, it should be noted what this article is *not*: a collections strategy resource. Instead, the objective here is to review the law governing the imposition of costs and the authorizations to pursue their recovery. Recent jurisprudence has seen a surge in litigation over costs in criminal cases, so it is from there that we embark.

II. CRIMINAL COURT COSTS

Arguably the predominant issue arising in litigation about criminal court costs is when court-appointed counsel fees may be included as a court cost and collected accordingly. As such, analysis of criminal costs will begin with that issue.

The procedures for appointment of counsel to represent an indigent criminal defendant are set forth in article 26.04 of the Code of Criminal Procedure.[1] Once a defendant is determined by the court to be indigent, it is presumed that the defendant remains indigent for the remainder of the proceedings in the case unless a material change in the defendant's financial circumstances occurs. Tex. Code Crim. Proc. Ann. art. 26.04(p) (West Supp. 2014); *see also Wiley v. State*, 410 S.W.3d 313, 317 (Tex. Crim. App. 2013). At the same time, an attorney appointed to represent a defendant in a criminal proceeding, including a habeas corpus hearing, "shall be paid a reasonable attorney's fee for performing" services in the course of representing the defendant, based on the time and labor required, complexity of the case and the experience and ability of the appointed lawyer. Tex. Code Crim. Proc. Ann. art. 26.05(a) (West Supp. 2014). Payment in compliance with this mandate is to be made from the general fund of the county in which the prosecution was instituted or habeas corpus hearing was held. *Id*. at (f). Those payments "*may* be included as costs of court."[2] *Id*. (emphasis added). It is at the intersection of county payment of the fee and inclusion of the fee as a court cost that the present conundrum resides.

Article 26.05 provides a map, albeit one that is less than mathematically precise, of that intersection. Under the statute:

> 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, including any expenses and costs, 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.

Tex. Code Crim. Proc. Ann. art. 26.05(g) (West Supp. 2014). By using the mandatory word "shall," the statute requires the court to order reimbursement to the

[1] As provided by the statute, a court called upon to decide a defendant's indigence may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. Tex. Code Crim. Proc. Ann. Art. 26.04(m) (West Supp. 2014). The court may not consider whether the defendant has posted or is capable of posting bail, except to the extent that it reflects the defendant's financial circumstances as measured by the considerations listed above. *Id*. In conducting this assessment, the Court of Criminal Appeals has strongly suggested that the balance should tip in favor of the defendant claiming indigence. *Whitehead v. State*, 130 S.W.3d 866, 876 (Tex. Crim. App. 2004) ("More consistent with the apparent legislative intent would be a requirement that judges accept the defendant's financial allegations (so long as they are made under oath) absent any reason to believe they are untrue or incomplete."). The determination must be one based present financial resources, which "does not allow speculation about possible future resources." *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013).

[2] Use of the word "may" is significant. In most statutory situations, use of the word "may" creates discretionary authority. Tex. Gov't Code Ann. § 311.016(1) (West 2013). This stands in contrast to use of the word "shall", which imposes a duty. *Id*. at (2). Logically enough, then, "may" and "shall" mean different things. *Dallas County Cmty. College Dist. v. Bolton*, 185 S.W.3d 868, 874 (Tex. 2005). The use of the word "may" in a statute shows that the provision is discretionary and not mandatory. *Hardy v. Marsh*, 170 S.W.3d 865, 870 (Tex. App.—Texarkana 2005, no pet.). "Shall", on the other hand, imposes a mandatory requirement. *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 392 (Tex. 2014).

extent of the defendant's ability to pay. *See* n. 2, *supra*. The key inquiry, then, is whether the defendant "has financial resources that enable him to offset" the costs of the legal services provided. If the court does not make that determination, it may not order the defendant to pay those particular costs. *Wiley*, 410 S.W.3d at 317; *Wolfe v. State*, 377 S.W.3d 141, 144 (Tex. App.—Amarillo 2012, no pet.).

When considering this issue, the court is not meting out punishment. As part of the larger picture, court costs are not part of the guilt or sentence of a criminal defendant, nor must they be proven at trial. *Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014). Rather, they are "a nonpunitive recoupment of the costs of judicial resources expended in connection with the trial of the case." *Id*. (quoting *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011)). To that end, the Code of Criminal Procedure requires that a judgment order a defendant to pay court costs. *Johnson*, 423 S.W.3d at 389; *accord Houston v. State*, 410 S.W.3d 475, 479 (Tex. App.—Fort Worth 2013, no pet.) (Code of Criminal Procedure requires judgment shall adjudge costs against defendant and order collection thereof); *see also* Tex. Code Crim. Proc. Ann. art. 42.15(a) (West Supp. 2014) (if defendant fined, judgment "shall be that the defendant pay the amount of the fine and all costs to the state"); Tex. Code Crim. Proc. Ann. art. 42.16 (West 2006) (if punishment is other than fine, judgment "shall also adjudge the costs against the defendant, and order the collection thereof as in other cases"); Tex. Gov't Code Ann. § 102.021 (West Supp. 2014) (person convicted of offense "shall pay" enumerated costs under Code of Criminal Procedure). Two takeaways should be clear from these authorities. First, court costs must be assessed against a convicted defendant. And, second, it is the trial court that orders that assessment, since it must be included in the judgment. *See, e.g., Collins v. State*, No. 01-12-00238-CR, 2014 Tex. App. LEXIS 3549, at *36 (Tex. App.—Houston [1st Dist.] Mar. 31, 2014, pet. ref'd) (mem. op., not designated for publication) ("The trial court is statutorily required to assess costs upon conviction.").

Only statutorily authorized costs may be assessed against a criminal defendant. *Johnson*, 423 S.W.3d at 389. In this context, costs are essentially divided into two categories: mandatory costs and discretionary costs. "A 'mandatory cost' is one other than attorney's fees that is a predetermined, legislatively mandated obligation imposed upon conviction." *Id*. Since costs of this nature are published publicly in the laws of the State of Texas, a criminal defendant has constructive knowledge of those laws and courts should take judicial notice of those laws. *Id*. Given the statutorily dictated nature of mandatory costs, when imposition of mandatory costs is challenged, appellate courts review the assessment of those costs to determine if there is a basis for the cost, not to determine if there was sufficient evidence offered at trial to prove each cost. *Id*. at 390. In other words, courts reviewing a mandatory cost consider whether a statute expressly authorizes the cost and whether that basis can be identified in relation to the case, not whether there is evidence to support the cost's imposition. *See Habib v. State*, 431 S.W.3d 737, 743 (Tex. App.—Amarillo 2014, pet. ref'd). The fact that most court costs are mandated by statute dispenses with the need to review sufficiency of the evidence to support the costs, unlike other criminal orders. *See Perez v. State*, 424 S.W.3d 81, 84 (Tex. Crim. App. 2014). Notably, in the present framework, legislatively mandated fees and costs may be withdrawn from an inmate's account without regard to his ability to pay. *Owen v. State*, 352 S.W.3d 542, 546 (Tex. App.—Amarillo 2011, pet. ref'd); *see also Shead v. State*, No. 07-15-00084-CV, 2014 Tex. App. LEXIS 2787, at *7 n. 5 (Tex. App.—Amarillo Mar. 24, 2015, no pet. h.) (mem. op.); *Gonzales v. State*, No. 07-14-00402-CV, 2015 Tex. App. LEXIS 1728, at *2 n. 2 (Tex. App.—Amarillo Feb. 24, 2015, no pet. h.) (mem. op.).

A. Discretionary Costs

As may be inferred from the discussion above, costs that do not fall within the "mandatory" rubric are evaluated differently. Court-ordered recoupment of appointed attorney's fees falls within the realm of "discretionary costs." *See Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014). The same is true of court-appointed investigative services and mental health experts. *See* Tex. Code Crim. Proc. Ann. art. 26.05(d) (West Supp. 2014); *accord O'Bryan v. State*, No. 13-10-00409-CR, 2011 Tex. App. LEXIS 2838, at *29-30 (Tex. App.—Corpus Christi Apr. 14, 2011, no pet.) (mem. op., not designated for publication) (applying standards for review of attorney's fee costs to investigative expenses).

While it has been said that "the criminal-justice system may not punish people for their poverty",[3] it also has been recognized that "[t]he State has a significant interest in assuring that persons with financial resources pay their costs and not take a free ride at the expense of its taxpayers." *Reed v. State*, 269 S.W.3d 619, 627 (Tex. App.—San Antonio 2008, no pet.) (quoting *Curry v. Wilson*, 853 S.W.2d 40, 46 (Tex. Crim. App. 1993) (orig. proceeding)).[4] So it is

[3] *Mathis v. State*, 424 S.W.3d 89, 93-94 (Tex. Crim. App. 2014) (plurality op.).

[4] *See also Harrell v. State*, 286 S.W.3d 315, 320 (Tex. 2009) ("The State's interest [in withdrawal orders under Government Code section 501.014(e)] is the efficient recoupment of court costs. The State provides legal services to indigent criminal defendants who cannot afford counsel,

that, once a defendant is declared indigent, 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). If the court determines that the defendant has financial resources enabling him to offset in whole or in part the costs of the legal services provided, the court shall order him to pay, as court costs, the amount that the court finds the defendant is able to pay. *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010). Thus, the defendant's financial resources and ability to pay are "explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of costs and fees." *Armstrong v. State*, 340 S.W.3d 759, 765-66 (Tex. Crim. App. 2011); *Mayer*, 309 S.W.3d at 556.

These authorities establish that in order to assess court-appointed attorney's fees in a judgment, a trial court must determine that the defendant has financial resources that enable him to offset in part or in whole the costs of legal services provided. *Wolfe v. State*, 377 S.W.3d 141, 144 (Tex. App.—Amarillo 2012, no pet.). Not only must the trial court make a determination regarding the defendant's ability to pay, but the record must also reflect some factual basis to support that determination. *Id*.; *accord Mayes v. State*, No. 07-13-0344-CR, 2014 Tex. App. LEXIS 12104, at *16 (Tex. App.—Amarillo Nov. 5, 2014, no pet.) (mem. op., not designated for publication) ("the record must supply a factual basis supporting a determination the defendant is capable of repaying the attorney's fees levied."). Similarly, because a defendant who has previously been found indigent is presumed to remain indigent unless there is a "material change" in his financial status, in the absence of any indication in the record that his financial status has in fact changed, the evidence will not support an imposition of attorney's fees. *Wiley*, 410 S.W.3d at 317.

An order from the trial court under article 26.05(g) mandating the reimbursement of attorney's fees, along with the necessary and commensurate finding that a previously indigent applicant has the present financial wherewithal to pay those appointed attorney's fees, constitute the authority for a district clerk to assess attorney's fees within a bill of costs. *See In re Daniel*, 396 S.W.3d 545, 549 (Tex. Crim. App. 2013) (orig. proceeding) (holding absence of order with required findings indicated district clerk lacked authority to assess attorney's fees in bill of costs). And, if a trial court does not make a determination that a defendant's financial circumstances materially changed—supported by some factual basis in the record—the evidence will be insufficient to impose attorney's fees as court costs. *Yon v. State*, 440 S.W.3d 828, 834 (Tex. App.—Tyler 2013, no pet.). So, in summary, without record evidence demonstrating a defendant's financial resources to offset the costs of legal services, a trial court errs if it orders reimbursement of court-appointed attorney's fees, and absent a material change in a criminal defendant's financial resources established by competent legal evidence, once that defendant has been found to be indigent, he is presumed to remain indigent for the remainder of the proceedings. *Stinecipher v. State*, 438 S.W.3d 155, 165 (Tex. App.—Tyler 2014, no pet.); *Malone v. State*, No. 02-10-00383-CV, 2012 Tex. App. LEXIS 1429, at *8-9 (Tex. App.—Fort Worth Feb. 23, 2012, pet. denied) (mem. op.).

Even if a case is disposed of through a plea agreement, it remains necessary to prove the defendant's actual ability to pay at the time of the judgment or order at issue. *Meals v. State*, No. 07-12-0245-CV, 2013 Tex. App. LEXIS 939, at *6 (Tex. App.—Amarillo Jan. 31, 2013, no pet.) (mem. op.). The evidence necessary to meet this standard must be of a present nature; speculation about possible future resources is not permissible. *Cates v. State*, 402 S.W.3d 250, 252 (Tex. Crim. App. 2013). Accordingly, an article 26.05(g) determination of ability to pay must be made at the time of the judgment or order at issue. *Wolfe v. State*, 377 S.W.3d 141, 146 (Tex. App.—Amarillo 2012, no pet.). And, if community supervision is to be imposed:

> Whenever monetary payments are proposed as a term of probation, 'the court shall consider the ability of the defendant to make payments in ordering the defendant to make payments under this article.' This provision is mandatory: the trial judge *must* consider the defendant's ability to pay before imposing monetary conditions as a condition of probation.

Mathis v. State, 424 S.W.3d 89, 94 (Tex. Crim. App. 2014) (plurality op.) (citing Tex. Code Crim. Proc. Ann. art. 42.12, § 11(b) (West Supp. 2014)) (emphasis by the court). Moreover, a court is authorized to waive payment of a cost imposed on a defendant who defaults in payment if the court determines that the defendant is indigent, and that alternative methods of discharging the cost would impose an undue hardship on the defendant. Tex. Code Crim. Proc. Ann. art. 43.091 (West Supp. 2014).

How a particular court cost is collected entails consideration of both criminal and civil law principles. *See Armstrong v. State*, 340 S.W.3d 759, 766 (Tex. Crim. App. 2011) (recognizing withdrawal order under

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and if it turns out the person can contribute to his own defense, the State has an interest in ensuring taxpayers are reimbursed for the expenses they incurred.").

section 501.014(e), Government Code, constitutes civil law matter, but assessment of costs in criminal judgment and sufficiency of evidence to support imposition of attorney's fees is criminal law matter); *accord Harrell v. State*, 286 S.W.3d 315, 318 (Tex. 2009) (holding withdrawal order under section 501.014(e), Government Code, to be civil law matter).

Certainly, important constitutional safeguards are implicated if incarceration is the potential consequence for failing to repay attorney's fees. *See Mathis v. State*, 424 S.W.3d 89, 94 (Tex. Crim. App. 2014) (plurality op.) (quoting *Ex parte Gonzales*, 945 S.W.2d 830, 83 (Tex. Crim. App. 1997)) ("If the court ignores the defendant's ability to make payments, whether the payments are a condition of probation or for the costs of one's legal defense, it is possible that a defendant may be imprisoned solely due to his indigent status."). Consequently, a trial court's power to order reimbursement of attorney's fees "should be limited to the extent a defendant is reasonably able to do so." *Gonzales*, 945 S.W.2d at 834. These concepts are largely codified in article 43.03 of the Code of Criminal Procedure, which provides that a court may not order a defendant jailed for nonpayment of a fine or cost unless the court at a hearing makes a written determination that the defendant is not indigent and has failed to make a good faith effort to discharge the fines and costs, or the defendant is indigent, has failed to make a good faith effort to discharge the fines and costs, and could have discharged the fines and costs without experiencing any undue hardship. Tex. Code Crim. Proc. Ann. art. 43.03(d) (West Supp. 2014).

These circumstances are recounted not just to illuminate the court's obligatory considerations, but also to underscore that a court clerk's duties flow from the requisite judicial decision-making. The Code of Criminal Procedure provides that a criminal judgment "shall also adjudge the costs against the defendant, and order the collection thereof." Tex. Code Crim. Proc. Ann. art. 42.16 (West 2006); *Houston v. State*, 410 S.W.3d 475, 478 (Tex. App.—Fort Worth 2013, no pet.) Section 102.021 of the Government Code also requires the trial court to assess court costs. *Collins v. State*, No. 01-12-00238-CR, 2014 Tex. App. LEXIS 3549, at *36 (Tex. App.—Houston [1st Dist.] Mar. 31, 2014, pet. ref'd) (mem. op., not designated for publication); *see also* Tex. Gov't Code Ann. § 102.021 (West Supp. 2014) (convicted defendant "shall pay" enumerated court costs). Clerical authority to collect discretionary costs is derived directly from the court's findings and orders concerning those costs. *See In re Daniel*, 396 S.W.3d at 549. That trigger to collection authority is crucial, since the Code of Criminal Procedure expressly states that "[a]n officer may not impose a cost for a service not performed or for a service for which a cost is not expressly provided by law." Tex. Code Crim. Proc. Ann. art. 103.002 (West 2006). Article 26.05(g) of the Code of Criminal Procedure is the provision under which reimbursement of attorney's fees and associated expenses and costs is "expressly provided by law", and it requires judicial findings and orders before it may be invoked.[5] At the risk of overstating and oversimplifying the resulting conclusion, then, if the court orders assessment and collection of a discretionary cost, the clerk should do so. If the court does not order assessment of attorney's fees or other discretionary costs, they should not be included in the bill of costs.

B. Mandatory Costs

To come full circle, mandatory costs are dissimilar from their discretionary counterparts. Article 25.06(g) of the Code of Criminal Procedure—under which discretionary costs may be imposed—does not apply to fines and legislatively mandated fees. *Owen v. State*, 352 S.W.3d 542, 546 (Tex. App.—Amarillo 2011, pet. ref'd). Instead, a defendant convicted of a felony offense must pay certain statutorily mandated costs and fees. *Smith v. State*, 439 S.W.3d 451, 461 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Only statutorily authorized court costs may be assessed against a criminal defendant. *Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014). To the extent mandatory costs are statutorily authorized, however, convicted defendants have constructive notice of them. *Cardenas v. State*, 423 S.W.3d 396, 399 (Tex. Crim. App. 2014).[6] With regard to delineation of those costs, a clerk of a court is required to keep a fee record, and a statement of an item therein is prima facie evidence of the correctness of the statement. *Owen v. State*, 352 S.W.3d 542, 547 (Tex. App.—Amarillo 2011, pet. ref'd); *accord* Tex. Code Crim. Proc. Ann. art. 103.009(a), (c) (West 2006). In making this observation, the Amarillo Court

[5] Relying upon a court order to authorize imposition of discretionary costs also bears on how that decision may be challenged in appellate courts. If a district clerk imposes a discretionary cost without a court order, mandamus relief may be available from the Court of Criminal Appeals. *See In re Daniel*, 396 S.W.3d at 547-49. On the other hand, if the court orders imposition of discretionary costs, any mandamus relief would have to be sought in the first instance in the Court of Appeals. *See Ex parte Knight*, 401 S.W.3d 60, 66-67 (Tex. Crim. App. 2013) (orig. proceeding). As discussed below, though, the conventional method of challenging court-imposed costs is a direct appeal of the judgment imposing those costs.

[6] The facts that convicted defendants have constructive notice of mandatory court costs, and have the opportunity to challenge them on direct appeal, converge to satisfy due process concerns regarding the imposition of court costs. *See Cardenas*, 423 S.W.3d at 399.

of Appeals pointed out that criminal court costs often are confusing, in part because bills of costs customarily prepared by court clerks do not reflect the authority by which those costs are assessed.[7] *Id.* At the same time, while the Code of Criminal Procedure requires a cost and fee record to be kept, it is silent on the form of such a record except to the extent it must be certified and signed "by the officer who charged the costs or the officer who is entitled to receive payment for the cost," "stating that the costs that have accrued" if the cause is appealed. *McDonald v. State*, No. 05-12-00521-CR, 2013 Tex. App. LEXIS 13191, at *65-66 (Tex. App.—Dallas Oct. 23, 2013, pet. ref'd) (not designated for publication) (quoting Tex. Code Crim. Proc. arts. 103.001, 103.006).

Whatever the level of specificity within the bill of costs, when mandatory costs are challenged on appeal, the appellate court reviews the assessment of court costs to determine if there is a basis for the cost at issue, not whether sufficient evidence offered at trial proved each cost. *Habib v. State*, 431 S.W.3d 737, 743 (Tex. App.—Amarillo 2014, pet. ref'd). This "some basis" review is much more deferential than other evidentiary sufficiency reviews. *Collins v. State*, No. 06-13-00214-CR, 2014 Tex. App. LEXIS 5798, at *32 (Tex. App.—Texarkana May 30, 2014, pet. ref'd) (mem. op., not designated for publication). When a specific amount of court costs is written in the judgment, an appellate court errs when it deletes the specific amount if there is a basis for the cost. *Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014). Under this standard, a court cost assessment in a judgment has some basis in the record if the bill of costs equals or exceeds the amount assessed in the judgment. *Collins*, 2014 Tex. App. LEXIS 5798, at *32. Likewise, under this standard of review, there need only be an identification of a basis for the cost. *Habib*, 431 S.W.3d at 743. Alternatively, in the absence of any bill of costs, an appellate court may determine that there is a basis in the record for the amount of costs assessed by averting to the trial court's taking of judicial notice concerning mandatory cost statutes, determining that facts in the record show the various mandatory cost statutes have been triggered, and that the sum of these mandatory costs is equal to or greater than the amount of costs assessed by the trial court. *Adams v. State*, 431 S.W.3d 832, 837 (Tex. App.—Houston [14th Dist.] 2014, no pet.). This determination involves temporal considerations in addition to statutory correlation. The amount of a court cost imposed on a defendant in a criminal proceeding must be the amount established under the law in effect on the date the defendant is convicted of the offense. Tex. Gov't Code Ann. § 51.608 (West Supp. 2014).

Challenges to court costs may be asserted on direct appeal without the need for an objection at trial to preserve the evidentiary sufficiency complaint. *Mayer v. State*, 309 S.W.3d 552. 556 (Tex. Crim. App. 2010). They also may be asserted by filing a motion to correct costs under article 103.008 of the Code of Criminal Procedure within one year after final disposition of the defendant's case. *See* Tex. Code Crim. Proc. Ann. art. 103.008(a) (West 2006). The two mechanisms are not mutually exclusive. Article 103.008 is an alternate means of raising errors in court costs, and it does not foreclose a defendant from seeking correction of costs by direct appeal. *See Sturdivant v. State*, 445 S.W.3d 435, 440-41 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd); *see also Cardenas v. State*, 423 S.W.3d 396, 399 (Tex. Crim. App. 2014) (convicted defendant may object to court costs on direct appeal or in proceeding under article 103.008, Code of Criminal Procedure).

Another, more limited, means by which an aggrieved inmate may challenge costs is through the judicially-crafted procedure following entry of a withdrawal notification under section 501.014(e) of the Government Code.[8] Under section 501.014, the Texas Department of Criminal Justice ("TDCJ") maintains inmate accounts for each inmate in its custody, which consists of all money that an inmate has on his or her person, all money received with the inmate upon admission to TDCJ custody and all money the inmate receives during his or her confinement. Tex. Gov't Code Ann. § 501.014(a) (West 2012). The statute then provides:

> On notification by a court, the department shall withdraw from an inmate's account any amount the inmate is ordered to pay by order of the court under this subsection. … The department shall make a payment under this subsection as ordered by the court to either the court or the party specified in the court order. The department is not liable for withdrawing or failing to withdraw money or making payments or failing to make payments under this subsection. The

[7] To be sure, many court clerks throughout the state now do, in fact, relate the statutory basis for each itemized cost in their officially-issued bills of costs.

[8] Inmate accounts maintained by TDCJ frequently have been referred to as inmate "trust" accounts. However, the term "trust" has been removed from the statutory references, so the accounts now are simply inmate accounts. *Douglas v. Turner*, 441 S.W.3d 337, 339 n. 1 (Tex. App.—Waco 2013, no pet.). The court in *Douglas* noted that the change signified that TDCJ is not in a trustee/beneficiary relationship wherein the department would be "burdened with all the duties of a trustee with regard to the inmate's money." *Id.*

> department shall make withdrawals and payments from an inmate's account under this subsection according the following schedule of priorities:
> …
> (4) as payment in full for all orders for court fees and costs;
> (5) as payment in full for all orders for fines; and
> (6) as payment in full for any other court order, judgment, or writ.

Tex. Gov't Code Ann. § 501.014(e)(4)-(6) (West 2012). Withdrawal orders under this provision are civil in nature. *Harrell v. State*, 286 S.W.3d 315, 318 (Tex. 2009).[9]

In *Harrell*, the Texas Supreme Court applied the requisites of procedural due process to section 501.014(e) proceedings. *Id*. at 319. Doing so led the court to hold that an inmate subject to a withholding order is entitled to notice (via receipt of a copy of the order, or other notification, from the trial court) and an opportunity to be heard (via a motion contesting the costs assessed), though that opportunity need not be afforded before funds are withdrawn. *Id*. at 321. Importantly, the court did not hold that the opportunity to be heard is synonymous with free rein to challenge every aspect of the assessed costs. Rather, the court observed that "withdrawal notifications under the statute are based on an amount identified in a prior court document. Harrell was a party to the underlying action and notified of the costs assessed when the convicting court sentenced him. If he believed they were erroneous, he was free to contest them at the time they were assessed." *Id*. at 320. Consequently, the latitude to challenge costs is focused on variations between the amount in the withdrawal order and the amounts in the underlying criminal judgment. *See id*. More broadly, due process considerations require affording an inmate the opportunity to contest the dollar amount and the statutory basis of the withdrawal by a motion to modify, correct, or rescind the withdrawal notification. *Williams v. State*, 332 S.W.3d 694, 698 (Tex. App.—Amarillo 2011, pet. denied). It is the trial court's disposition of such a motion, rather than the withdrawal notification itself, that creates a final appealable order. *Id*.

But, again, the permissible scope of a challenge to costs in this type of proceeding is not global. An objection in a withdrawal notification proceeding may not properly take the place of a challenge to the propriety of costs by way of direct appeal. To contest the assessment of court costs and attorney's fees, complaint must be made by direct appeal of the criminal judgment. *Malone v. State*, No. 02-10-00383-CV, 2012 Tex. App. LEXIS 1429, at *8 (Tex. App.—Fort Worth Feb. 23, 2012, pet. denied). A civil action (such as a withdrawal notification challenge under Government Code section 501.014(e)) is not the appropriate vehicle for contesting the assessment of court costs and attorney's fees. *Id*. at *9. Where an aggrieved inmate does not raise this issue in a direct appeal, he waives his challenges to the assessment of court costs and attorney's fees in the civil withdrawal proceeding. *Id*.

It is true that court costs are not payable until a written bill of costs is produced or is ready to be produced, containing the items of cost and signed by the officer who charged the cost or the officer who is entitled to receive payment of the cost. Tex. Code Crim. Proc. Ann. art. 103.001 (West 2006). Despite that requirement, an appellate challenge to costs is not automatically validated by the absence of a bill of costs. A record on appeal can be supplemented after-the-fact with a bill of costs,[10] and a bill of costs need not appear in the record to support a particular amount of court costs[11]—especially when the costs at issue are mandated by statute and, thus, subject to the old adage that "ignorance of the law is no excuse". *Johnson v. State*, 423 S.W.3d 385, 388 (Tex. Crim. App. 2014). But the same may not be true of withdrawal notification proceedings. *See Massey v. State*, No. 07-12-0132-CV, 2012 Tex. App. LEXIS 3800, at *4-5 (Tex. App.—Amarillo May 14, 2012) (order) (remanding motion to rescind withdrawal notification

[9] While the Supreme Court referred to "withdrawal orders" throughout its opinion in *Harrell*, the current trend is to refer to them as "withdrawal notifications," inasmuch as they are not "orders" in the traditional sense of a court order, judgment, or decree issued after notice and hearing in either a civil or criminal proceeding. *Snelson v. State*, 341 S.W.3d 582, 583 n. 2 (Tex. App.—Amarillo 2010, no pet.); *accord Bond v. State*, No. 11-10-00370-CV, 2012 Tex. App. LEXIS 8501, at *2-3 (Tex. App.—Eastland 2012, no pet.) (mem. op.). The term "withdrawal notification" is used to avoid confusion with the underlying court order or judgment ordering the payment of a sum falling within at least one of the six priority categories listed in section 501.014(e) of the Government Code. *Williams v. State*, 322 S.W.3d 301, 301 n. 1 (Tex. App.—Amarillo 2010, no pet.).

[10] *See also Penn v. State*, No. 14-13-00263-CR, 2014 Tex. App. LEXIS 10308, at *13 (Tex. App.—Houston [14th Dist.] Sept. 16, 2014, no pet.) (mem. op., not designated for publication) ("That the bill of costs was not prepared until after the trial court signed the judgment does not defeat the lawfulness of the bill of costs.").

[11] *See also Adams v. State*, 431 S.W.3d 832, 837 (Tex. App.—Houston [14th Dist.] 2014, no pet.) ("… an assessment of an amount of costs may be affirmed without a bill of costs.").

where no bill of costs appeared in record to establish amounts and statutory bases for costs). Whatever the procedural vehicle employed, challenging mandatory costs is a task demanding specificity. Appellate courts will not undertake review of the correctness of each cost if the appealing party does not challenge the correctness of any specific cost listed in the bill of costs. *See Houston v. State*, 410 S.W.3d 475, 479 (Tex. App.—Fort Worth 2013, no pet.).

That is not to say that all challenges to mandatory costs fail, though. As a general matter, successful complaints about mandatory costs generally assert that the particular cost is inapplicable under the facts, is unauthorized or is unconstitutional. For instance, one court has upheld a complaint that a graffiti eradication fee was statutorily unauthorized in a felony DWI case. *See Jones v. State*, No. 06-12-00107-CR, 2013 Tex. App. LEXIS 2832, at *18-19 (Tex. App.—Texarkana Mar. 19, 2013, no pet.) (mem. op., not designated for publication). Also, the Amarillo Court of Appeals has sustained a challenge to imposition of witness fees against a defendant in the absence of statutory authorization to do so. *See Hindman v. State*, No. 07-10-00243-CR, 2012 Tex. App. LEXIS 5017, at *17-18 (Tex. App.—Amarillo June 22, 2012, pet. ref'd) (mem. op., not designated for publication) (citing *Sikalasinh v. State*, 321 S.W.3d 792, 798 (Tex. App.—Amarillo 2010, no pet.). Logically, too, if a statute does not explicitly authorize a fee, its assessment will be erroneous. *See Busby v. State*, 984 S.W.2d 627, 630-31 (Tex. Crim. App. 1998) (finding no authority to assess fees for substitute prosecutor and invalidating its inclusion in bill of costs). Perhaps the most sensational of such challenges is one based on asserted unconstitutionality. In one such attack, those portions of the "DNA Record Fee" dedicated to the state highway fund and to funding the criminal justice planning account, under article 102.020 of the Code of Criminal Procedure, were held unconstitutional in a court-cost challenge on direct appeal. *See Peraza v. State*, No. 01-12-00690-CR, 2014 Tex. App. LEXIS 13915, at *18, *29, *33 (Tex. App.—Houston [1st Dist.] Dec. 30, 2014, pet. granted).[12]

It has long been true in Texas that one of the significant distinctions between judgments in criminal and civil cases is the importance of the oral pronouncement by the court in the former. *See* Tex. Code Crim. Proc. Ann. art. 42.03(a) (West Supp. 2014) (providing sentence must generally be "pronounced" in defendant's presence); *see also Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004) ("[a] defendant's sentence must be pronounced orally in his presence."). The judgment, including the sentence assessed, is simply the written embodiment of that oral pronouncement. *Taylor v. State*, 131 S.W.3d 497, 500 (Tex. Crim. App. 2004). Within that context, an appellate court has held that a trial court's failure to orally pronounce a fine during the defendant's sentencing made inclusion of the fine in the judgment improper, so the court modified the judgment to delete the fine. *Cox v. State*, No. 02-13-00596-CR, 2015 Tex. App. LEXIS 1849, at *2-3 (Tex. App.—Fort Worth Feb. 26, 2015, no pet.) (mem. op., not designated for publication). By important contrast, however, statutorily mandated fees and costs need not be pronounced in open court. *Armstrong v. State*, 340 S.W.3d 759, 766 (Tex. Crim. App. 2011).

Returning to the distinction between cost categories, perhaps the most significant difference between the two types of costs is that a defendant's inability to pay is relevant to whether discretionary costs properly may be imposed, but not to whether mandatory costs are assessed. A person convicted of a criminal offense shall pay the statutorily mandated fees found in section 102.021 of the Texas Government Code "irrespective of the defendant's ability to pay". *Wolfe v. State*, 377 S.W.3d 141, 147 (Tex. App.—Amarillo 2012, no pet.) (citing *Williams v. State*, 332 S.W.3d 694, 700 (Tex. App.—Amarillo 2011, pet. denied)). In short, inability to pay has no bearing on whether assessment of a mandatory cost is proper.

With these general concepts in mind, attention may turn to more specific issues that may arise during or after entry of a judgment that imposes costs, whether discretionary or mandatory.

C. Particular Questions

1. What are the proper court costs and fees that can be included in a Bill of Costs and Inmate Withdrawal Notification for:

    a. An inmate who has been sent directly to TDCJ-ID or State Jail as the result of a plea?
    b. An inmate who has been sent directly to TDCJ-ID or State Jail as the result of a bench or jury trial?
    c. An inmate who has been originally placed on community supervision and is ultimately revoked and sent to TDCJ-ID or State Jail?

The general principles discussed above will be applicable to all of the circumstances encompassed by these questions, with a notable variation—discussed below—that may present itself when revocation of community supervision is involved. So, where a

[12] On March 25, 2015, the Court of Criminal Appeals granted the state's petition for discretionary review in *Peraza*, so the status of that court cost remains far from definitively settled. Until the Court of Criminal Appeals rules in *Peraza*, however, prudence may dictate avoiding assessment or collection of the article 102.020 "DNA Record Fee".

defendant is sent directly to prison after a plea or trial, discretionary costs are properly assessed and collected from an inmate who was previously determined to be indigent only if the convicting court finds that the defendant has financial resources that enable him to offset the costs in part or in whole and orders the defendant to pay as court costs the amount it finds the defendant is able to pay. Tex. Code Crim. Proc. Ann. art. 26.05(g) (West Supp. 2014); *accord Wiley v. State*, 410 S.W.3d 313, 317 (Tex. Crim. App. 2013). Discretionary costs are generally understood to be those for which reimbursement may be ordered under article 26.05(g) of the Code of Criminal Procedure. *See Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014) (contrasting "discretionary" cost from "mandatory" cost; referencing former by citation to article 26.05(g)). In addition to attorney's fees, these costs have been inferentially viewed as encompassing investigator's fees. *See Wilkerson v. State*, 391 S.W.3d 190, 198 (Tex. App.—Eastland 2012, pet. dism'd); *O'Bryan v. State*, No. 13-10-00409-CR, 2011 Tex. App. LEXIS 2838, at *30 (Tex. App.—Corpus Christi Apr. 14, 2011, no pet.) (mem. op., not designated for publication). Similarly, reimbursement for the expenses of mental health or other experts appears to be viewed as subject to article 26.05(g). *See Perez v. State*, No. 07-10-0147-CR, 2011 Tex. App. LEXIS 5724, at *18 n. 16 (Tex. App.—Amarillo 2011, pet. dism'd) (mem. op., not designated for publication).

Within this context, the defendant's financial resources and ability to pay are explicit critical elements in the trial court's determination of the propriety of ordering reimbursement of discretionary costs and fees. *Armstrong v. State*, 340 S.W.3d 759, 765-66 (Tex. Crim. App. 2011); *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010). There also must be a trial court determination that the defendant's indigent financial circumstances materially changed, supported by some factual basis in the record. *Yon v. State*, 440 S.W.3d 828, 834 (Tex. App.—Tyler 2013, no pet.); *accord Wiley*, 410 S.W.3d at 317 (defendant found indigent presumed to remain indigent absent "material change" in financial status supported by indication in record that financial status has in fact changed). Key indicators of indigence are a trial court's appointment of counsel for the defendant and a trial court's order for a free reporter's record on appeal. *See Mayes v. State*, No. 07-13-0344-CR, 2014 Tex. App. LEXIS 12104, at *17 (Tex. App.—Amarillo Nov. 5, 2014, no pet.) (mem. op., not designated for publication); *see also Mathis v. State*, 424 S.W.3d 89, 96 (Tex. Crim. App. 2014) (plurality op.) (noting affidavits of indigency plus appointment of counsel at trial and on appeal were "some evidence" of inability to pay community supervision expense).

These factors must be accounted for even in a case disposed of by plea agreement. *See Meals v. State*, No. 07=12-0245-CV, 2013 Tex. App. LEXIS 939, at *5-6 (Tex. App.—Amarillo Jan. 31, 2013, no pet.) (mem. op.). That the law concerning discretionary costs is structured to favor and protect indigent defendants should be clear. Like many legal protections, though, these strictures may be subject to waiver. Where an inmate, in pleading guilty, "affirmatively, intelligently, voluntarily, knowingly, and unambiguously waived his right to contest or appeal any future" withdrawal proceeding "to collect fees, costs, and fines connected with his underlying criminal conviction", the Texarkana Court of Appeals held the inmate's motion to rescind withdrawal of funds from his inmate account was properly denied. *Preston v. State*, No. 06-11-00129-CV, 2012 Tex. App. LEXIS 2023, at *5 (Tex. App.—Texarkana Mar. 15, 2012, no pet.) (mem. op.). In any event, while the requirements for assessing discretionary costs may be stringent, they never even ripen into relevance until the defendant is actually ordered to pay discretionary costs. *See Figueroa v. State*, 250 S.W.3d 490, 517 (Tex. App.—Austin 2008, pet. ref'd), *cert. denied*, 555 U.S. 1185 (2009).

Should discretionary costs be ordered by the court, review of their correctness is committed to the Court of Appeals (on direct appeal) or the convicting court (by way of a motion to correct costs under article 103.008, Code of Criminal Procedure). *See Cardenas v. State*, 423 S.W.3d 396, 399 (Tex. Crim. App. 2014); *see also Harrell v. State*, 286 S.W.3d 315, 320 (Tex. 2009) (suggesting appropriate challenge to propriety of court-ordered costs is by direct appeal, rather than complaint regarding withdrawal order). Regardless of the route review may take, if the court orders reimbursement of discretionary costs, article 26.05(g) of the Code of Criminal Procedure is triggered. *See Armstrong v. State*, 340 S.W.3d 759, 765 (Tex. Crim. App. 2011) ("Under Article 26.05(g) of the Texas Code of Criminal Procedure, a trial court has the authority to order the reimbursement of court-appointed attorney's fees"). Once a statute provides for imposition of a court cost, taxing that cost is a ministerial duty of the clerk, who fulfills that duty by filing a bill of costs in the record. *Waste Mgmt. of Tex. v. Tex. Disposal Sys. Landfill*, No. 03-10-00826-CV, 2014 Tex. App. LEXIS 12391, at *11 (Tex. App.—Austin Nov. 14, 2014, no pet.) (mem. op.). If the court does not order reimbursement of discretionary costs, article 26.05(g) is not triggered, so those costs should not be included in the bill of costs. *See* Tex. Code Crim. Proc. Ann. art. 103.002 (West 2006) (officer may not impose cost if cost "is not expressly provided by law"). And, logically enough, if attorney's fees are not assessed in the certified bill of costs, a withdrawal notification imposing those fees will be ineffective. *Bond v. State*, No. 11-10-00370-CV, 2012 Tex. App.

LEXIS 8501, at *7 (Tex. App.—Eastland Oct. 11, 2012, no pet.) (mem. op.).

Mandatory costs are a different matter. A mandatory cost is one other than attorney's fees that is "a predetermined, legislatively mandated obligation imposed upon conviction." *Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014). A defendant convicted of a felony must pay certain statutorily mandated costs and fees. *Smith v. State*, 439 S.W.3d 451, 461 (Tex. App.—Houston [1st Dist.] 2014, no pet.). Statutorily mandated fees, as set forth in section 102.021 of the Government Code, must be paid by a person convicted of a criminal offense "irrespective of the defendant's ability to pay". *Wolfe v. State*, 377 S.W.3d 141, 147 (Tex. App.—Amarillo 2012, no pet.) (citing *Williams v. State*, 332 S.W.3d 364, 367 (Tex. App.—Amarillo 2011, pet. denied)). An assessment of mandatory costs is proper if there is an identification of a basis for the cost. *Habib v. State*, 431 S.W.3d 737, 743 (Tex. App.—Amarillo 2014, pet. ref'd). Where a bill of costs is included in the record, a court cost assessment in a judgment has some basis in the record if the total from the bill of costs equals or exceeds the amount assessed in the judgment. *Collins v. State*, No. 06-13-00214-CR, 2014 Tex. App. LEXIS 5798, at *33 (Tex. App.—Texarkana May 30, 2014, pet. ref'd) (not designated for publication). In the absence of a bill of costs, there will be a basis in the record for the amount of costs assessed by the trial court if judicial notice is taken of the mandatory cost statutes, then a determination is made that facts in the record show that the various mandatory cost statutes have been triggered and that the sum of these mandatory costs is equal to or greater than the amount of costs assessed by the trial court. *Adams v. State*, 431 S.W.3d 832, 837 (Tex. App.—Houston [14th Dist.] 2014, no pet.). For purposes of a withdrawal order, legislatively mandated fees and costs may be withdrawn from an inmate's account without regard to his ability to pay. *Owen v. State*, 352 S.W.3d 542, 546 (Tex. App.—Amarillo 2011, pet. ref'd). And, if the defendant does not pay the court costs imposed within 30 days of the date the judgment of conviction is entered, the $25 "time payment" fee prescribed by section 133.103 of the Local Government Code is properly assessed as a mandatory cost. *See* Tex. Loc. Gov't Code Ann. § 133.103(a) (West. Supp. 2014); *see also Lawrence v. State*, 420 S.W.3d 329, 337 (Tex. App.—Fort Worth 2014, pet. ref'd).

Determining which mandatory costs are applicable in a particular case is a function of the type of case at issue. *Garcia v. State*, No. 01-11-00985-CR, 2013 Tex. App. LEXIS 4277, at *6 (Tex. App.—Houston [1st Dist.] Apr. 4, 2013, no pet.) (mem. op., not designated for publication) (mandated costs and fees vary depending on type of offense, underlying facts and procedural history of case); *see also Adams*, 431 S.W.3d at 837 (bases for mandatory costs derived from whether facts in record show mandatory cost statutes have been triggered). As provided by article 42.01 of the Code of Criminal Procedure, the Texas Office of Court Administration ("OCA") has prepared forms for judgments in criminal cases.[13] *See* http://www.txcourts.gov/rules-forms/forms.aspx. Those forms include spaces for the court to order that court costs be paid. Availability of those forms harkens to another resource provided by OCA: Comprehensive charts for calculation of court costs to be imposed and collected in a felony or misdemeanor case where a conviction is entered. At least one Texas court has looked to the felony court cost chart as a relevant reference point for ascertaining proper assessment of costs in felony cases. *See Jones v. State*, No. 06-12-00107-CR, 2013 Tex. App. LEXIS 2832, at *18 (Tex. App.—Texarkana Mar. 19, 2013, no pet.) (mem. op., not designated for publication). Of particular usefulness is the identification within each chart of the statutory basis for each prescribed cost, along with its categorization of offenses for which each cost is, or is not, properly assessed and collected.

The chart for felony costs may be accessed at: http://www.txcourts.gov/media/681164/dc-felctcst090113.pdf. For misdemeanor costs, the appropriate chart may be accessed at: http://www.txcourts.gov/media/683440/cc-misdctcst-orig090113.pdf. Authorized costs upon conviction in justice of the peace courts may be accessed at: http://www.txcourts.gov/media/683441/justicecourtconvictionscourtcostchart010114.pdf. The chart detailing costs upon conviction in municipal court may be accessed at: http://www.txcourts.gov/media/683443/municourtconvictionscourtcostchart010114.pdf.

Review of the OCA's court cost charts reveals them to be accurate and thorough. Since the spectrum of costs assessed and collected will vary depending on the type of case involved, the reader is referred to the OCA's charts rather than wasting time and space by essentially recounting the substance of the charts here. However, a couple of minor caveats are appropriate.

The first is that the costs delineated in the charts pertain to original criminal actions in the discrete courts to which each of the charts relates. That becomes relevant when considering a case appealed from one trial court to another court ordinarily exercising original jurisdiction. As an illustration,

[13] *See* Tex. Code Crim. Proc. Ann. art. 41.01, § 4 (West Supp. 2014) ("The Office of Court Administration of the Texas Judicial System shall promulgate a standardized felony judgment form that conforms to the requirements of Section 1 of this article. A court entering a felony judgment shall use the form promulgated under this section.").

where a county-level court affirms the judgment of a municipal court, the county-level court is not itself "convicting" the defendant, so that defendant would not be subject to costs and fees prescribed for those who are convicted in a county-level court. Tex. Att'y Gen. Op. No. GA-1063 (2014), at 2. If the convicting municipal court is not a court of record, though, such that trial in the count-level court is de novo, the defendant may properly be considered to have been "convicted" in the county-level court. *See id*. at 6.[14]

The second concerns bond forfeiture cases, which are something of an anomaly. Bond forfeiture cases are criminal cases, with final state-court jurisdiction vested in the Court of Criminal Appeals. *Safety Nat'l Cas. Corp. v. State*, 305 S.W.3d 586, 588 (Tex. Crim. App. 2010). Even so, article 22.10 of the Code of Criminal Procedure provides that in bond forfeiture cases, "the proceedings had therein shall be governed by the same rules governing other civil suits." Tex. Code Crim. Proc. Ann. art. 22.10 (West 2009). Based on this statute, it has been determined that—despite the criminal nature of such cases—civil court costs are properly assessed in bond forfeiture proceedings at the trial court level after entry of a judgment nisi. *Dees v. State*, 865 S.W.2d 461, 462 (Tex. Crim. App. 1993); *Ranger Ins. Co. v. State*, 312 S.W.3d 266, 268 (Tex. App.—Dallas 2010, no pet.).

Further, there is a potential circumstance that has not yet been fully addressed. That question concerns what costs may properly be included in a bill of costs and an inmate withdrawal notification for an inmate who has been originally placed on community supervision, but is ultimately revoked and sent prison. The concern here focuses primarily on discretionary costs, in light of the fact article 26.05(g) does not apply to mandatory costs. *See Owen v. State*, 352 S.W.3d 542, 546 (Tex. App.—Amarillo 2011, pet. ref'd). Mandatory costs must be paid, regardless of the procedure through which the inmate is ultimately incarcerated in the TDCJ. *See Smith v. State*, 439 S.W.3d 451, 461 (Tex. App.—Houston [1st Dist.] 2014, no pet.). This is true without regard to the convicted defendant's ability to pay. *Wolfe v. State*, 377 S.W.3d 141, 147 (Tex. App.—Amarillo 2012, no pet.). And the judgment must order the defendant to pay court costs. *Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014); *Houston v. State*, 410 S.W.3d 475, 478 (Tex. App.—Fort Worth 2013, no pet.). Hence, mandatory costs may be withdrawn from an inmate's account without regard to his ability to pay. *Id*. But what of discretionary costs ordered to be paid in the judgment or order imposing community supervision or deferred adjudication? Are those costs properly collectible after revocation if the defendant then asserts indigence as a challenge to those previously-imposed costs?

As noted earlier, the preferred method for a defendant to challenge imposition of court costs is by direct appeal of the judgment or order that imposed the costs. *See Harrell v. State*, 286 S.W.3d 315, 320 (Tex. 2009). Yet, it might not be unreasonable to argue that preferred is not synonymous with exclusive. *But cf. Malone v. State*, No. 02-10-0038-CV, 2012 Tex. App. LEXIS 1429, at *8 (Tex. App.—Fort Worth Feb. 23, 2012, pet. denied) ("To contest the assessment of court costs and attorney's fees, complaint must be made by direct appeal of the criminal judgment."). If we ignore *Malone* and assume that to be the case, the logical conclusion might be that an inmate would not be precluded from a later challenge on revocation to costs imposed in the original order imposing community supervision.[15] As the law has recently developed, however, the window for asserting that type of challenge is not so expansive.

In *Wiley v. State*, 410 S.W.3d 313 (Tex. Crim. App. 2013), the Court of Criminal Appeals considered whether a defendant could challenge discretionary costs under article 26.05(g) originally imposed in a judgment granting community supervision when the challenge is asserted in an appeal from revocation of that community supervision. The courrt's analysis began by recounting that a sufficiency of the evidence claim is subject to procedural default in one or both of two ways.

The first occurs when a defendant fails to raise an objection to the imposition of attorney's fees as a condition of community supervision at the time it is initially imposed in the trial court. *Wiley*, 410 S.W.3d at 317. The second occurs when, regardless of whether there has been an objection at trial, the defendant fails to raise his sufficiency claim in an appeal immediately following his placement on community supervision, waiting instead to raise the issue for the first time in his appeal from a later revocation order. *Id*. Parting ways from the Court of Appeals' earlier decision in the case, the Court of Criminal Appeals found the second type of procedural default applicable. *Id*. at 318.

Particular scrutiny focused upon the fact that the reimbursement of attorney's fees was not imposed only as a condition of community supervision, but also was

[14] The equivocal nature of these observations stems from the Attorney General's own trepidation in offering a firm conclusion, which in turn flowed from the fact that the questions posed in the request for opinion did not inquire about any specific cost statutes. *See id.* at 2-3.

[15] Whether the original order imposed community supervision upon conviction or in conjunction with granting deferred adjudication is largely immaterial for the present purposes. Orders revoking deferred adjudication and orders revoking ordinary community supervision are reviewed in the same manner. *Lawrence v. State*, 420 S.W.3d 329, 331 (Tex. App.—Fort Worth 2014, pet. ref'd).

independently imposed in the judgment granting community supervision. *Id*. at 319-20. Explicitly, the court noted that "the specific terms of the judgment (rightly or wrongly) included as court costs the reimbursement of appointed attorney's fees." *Id*. at 320 (parenthetical by the court). That being so, the court concluded that, "the appellant could readily have raised this [evidentiary] sufficiency claim in a direct appeal from the initial judgment imposing supervision." *Id*. at 320. The bill of costs in *Wiley* was dated the same day as the judgment imposing community supervision and was, by the terms of the judgment itself indicated in bold capital letters, attached. By his signature on the judgment, the appellant expressly acknowledged having read and understood it, so the court concluded that the appellant was aware of the requirement that he pay court costs, including the cost of court appointed attorney's fees, at the time he signed the judgment. *Id*. Thus, said the court, he would have known to challenge the sufficiency of the evidence to support the reimbursement requirement as of the time of any direct appeal from that judgment. *Id*. at 321. "Instead of doing so, he waived his right to appeal, though not required to do so by the terms of the negotiation with the State." His choice to do so, the court found, "must work as a forfeiture of the claim, and he may not, consistent with our case law, attempt to resuscitate it in a later appeal from the revocation of his community supervision." *Wiley v. State*, 410 S.W.3d 313, 321 (Tex. Crim. App. 2013).

That reimbursement of attorney's fees ordinarily is imposed not only as a condition of community supervision, but also under authority of article 26.05(g) within the judgment as "court costs" appears to be key. *See Lewis v. State*, 423 S.W.3d 451, 458 (Tex. App.—Fort Worth 2013, pet. ref'd). In an appeal from revocation of deferred adjudication, the *Lewis* court observed that if the requirement to pay discretionary costs had "been a deal-breaker, Appellant could have chosen not to forego his right to appeal and plead guilty. Instead, the record shows that Appellant expressly waived the right to appeal from the order placing him on deferred adjudication." *Id.* at 458-59. Having done so, the court held, he forfeited his complaint on appeal from revocation of deferred adjudication regarding the requirement in the original judgment that he repay attorney's fees. *Id.* at 459.

Following *Wiley*, the Court of Criminal Appeals rejected a Court of Appeals determination that a challenge to assessment of discretionary costs in a deferred adjudication order was proper when the appeal was from the judgment adjudicating the appellant's guilt. *Perez v. State*, 424 S.W.3d 81, 86 (Tex. Crim. App. 2014). The court noted its earlier recognition that "a defendant placed on deferred adjudication community supervision may raise issues relating to the original plea proceeding, such as evidentiary sufficiency, only in appeals taken when deferred adjudication community supervision is first imposed." *Id*. (citing *Manuel v. State*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999)). Following from this principle, the court flatly stated that "[a]ny and all complaints about the imposition of the court costs could and should have been made in a timely appeal of the deferred-adjudication order." *Id*. As a result, the appellant in *Perez* forfeited any appellate complaint about the imposition of costs in the original deferred adjudication order, and was limited to complaints about costs subsequently imposed in the judgment adjudicating the appellant's guilt. *Id*.

Earlier this year, the high court tied these principles together. In *Riles v. State*, 452 S.W.3d 333 (Tex. Crim. App. 2015), the court was again confronted with a challenge to discretionary costs imposed in a deferred adjudication order, which was raised in an appeal from the judgment revoking deferred adjudication. As a starting point, the court clarified that its *Wiley* opinion does, in fact, premise procedural default on an appellant's knowledge of, and failure to challenge, an issue. 452 S.W.3d at 337. This was relevant in *Riles* because the order imposing deferred adjudication stated the defendant was ordered to pay a $500 fine and "all court costs including Court Appointed Attorney Fee", but the space for a specific dollar figure simply read "Court Costs: see attached." *Id*. at 334. The bill of costs, reflecting the actual amount of the court appointed attorney fee, was issued sometime after the order. *Id*. at 334-35. Nonetheless, the court found that the sum of the written admonishments signed by the appellant, which included notice that the required costs of community supervision could include the fee for her court appointed attorney, the appellant's signature on her Application for Community Supervision, which stated she would reimburse the county for the compensation of appointed counsel, and the Order for Deferred Adjudication, which indicated she would be required to pay all court costs including the "Court Appointed Attorney Fee," indicated that the appellant had notice of the imposition of discretionary costs in the deferred adjudication order. *See id.* at 337. The court noted that appellant's challenge was that there was no evidence of her ability to pay the fee, which the court saw as a challenge to assignment of the fee as a whole. So, since the appellant was effectively challenging the evidence to support the requirement that she pay an attorney fee at all, the dollar amount of the fee would be inconsequential. *Id*. Even if the dollar amount had mattered, though, the court explained that the appellant could file for an extension of time to await issuance of the bill of costs, and that if the bill of costs was issued so late as to prevent the appellant from being able to appeal it within the applicable time period, "an

extension of time to appeal should be granted." *Id*. at 337-38. Because the appellant had knowledge that she was under an order to reimburse appointed attorney's fees, but did not challenge that order by an initial appeal and instead waited to raise the issue until two years later when her community supervision was revoked, the court held she had forfeited her claim by procedural default. *Id*. at 338.

When these cases are synthesized, they establish that, when court costs are ordered within a probation judgment, a challenge to costs—including discretionary costs—must be raised in a direct appeal of the order that imposes community supervision or deferred adjudication. If no appeal from the initial order is taken, a later challenge to costs imposed by the original order (usually after revocation) will fail because of procedural default. It should be noted here that *Riles* left unaddressed the imposition of subsequent costs in the order revoking community supervision. *See Riles*, 452 S.W.3d at 338; *cf. Perez*, 424 S.W.3d at 86 (holding failure to appeal deferred adjudication order forfeited complaint concerning costs imposed in that order, but not costs imposed by revocation order).

Intervening case law from the intermediate Courts of Appeals appears to emphasize this distinction. So, where an appellant fails to challenge on direct appeal an imposition of costs—including discretionary costs—within a community supervision order, he or she is barred by procedural default from challenging those costs in an appeal of an order revoking community supervision, and they stand. *See Weast v. State*, No. 07-14-00298-CR, 2014 Tex. App. LEXIS 13467, at *5-6 (Tex. App.—Amarillo Dec. 16, 2014, no pet.) (mem. op., not designated for publication). The same is true with regard to a withdrawal notification proceeding. *See Moore v. State*, No. 06-14-00209-CV, 2015 Tex. App. LEXIS 3059, at *10-11 (Tex. App.—Texarkana Mar. 31, 2015, no pet. h.) (mem. op.); *accord Shead v. State*, No. 07-15-00084-CV, 2015 Tex. App. LEXIS 2787, at *7 n. 5 (Tex. App.—Amarillo Mar. 24, 2015, no pet. h.) (mem. op.). However, subsequent costs relating to the revocation proceeding and imposed in a timely-appealed revocation order may properly be challenged. *See Weast*, 2014 Tex. App. LEXIS 13467, at *6-7; *see also Moore*, 2015 Tex. App. LEXIS 3059, at *11. Moreover, the Court of Criminal Appeals in an unpublished opinion concluded that erroneous characterization of community supervision fees and inaccurate calculation of the unpaid total of those fees in a revocation judgment could not have been known or raised at the time of the original community supervision order. For that reason, procedural default, under *Wiley v. State*, 410 S.W.3d 313 (Tex. Crim. App. 2013), of an appellate complaint about those issues did not apply. Because the appellant had not objected to the fee issues at the time the revocation judgment was entered, however, the court remanded to the Court of Appeals to determine whether the complaint had been waived by that failure and, if not, to assess its merit. *Stuckey v. State*, No. PD-0286-15, 2015 Tex. Crim. App. Unpub. LEXIS 383, at *2 (Tex. Crim. App. May 20, 2015) (per curiam) (not designated for publication).

As intimated by the unpublished *Stuckey* opinion, determining proper court costs and fees to be included in a post-revocation bill of costs also raises the issue of unpaid community supervision fees and restitution. Under the Code of Criminal Procedure, "[i]n all revocations of a suspension of the imposition of a sentence the judge shall enter the restitution or reparation due and owing on the date of the revocation." Tex. Code Crim. Proc. Ann. art. 42.03, § 2(b) (West Supp. 2014). Almost identically, upon revocation of community supervision following a hearing, "[t]he judge shall enter the amount of restitution or reparation owed by the defendant on the date of revocation in the judgment in the case." Tex. Code Crim. Proc. Ann. art. 42.12, § 23(a) (West Supp. 2013). Under these provisions, a trial court is required to order the payment of all reparations due and owing after a defendant's community supervision is revoked. *McKinney v. State*, No. 02-12-00479-CR, 2014 Tex. App. LEXIS 4246, at *6 (Tex. App.—Fort Worth Apr. 17, 2014, pet. ref'd) (per curiam) (mem. op., not designated for publication). Often, in addition to inclusion in the judgment, these "reparations" are reflected on a balance sheet submitted to the sentencing court by Community Supervision and Corrections Department, which is viewed as similar to a certified bill of costs. *See Conner v. State*, 418 S.W.3d 742, 744 (Tex. App.—Houston [1st Dist] 2013, no pet.); *Beard v. State*, No. 09-13-0392-CR, 2013 Tex. App. LEXIS 15168, at *6-7 (Tex. App.—Beaumont Dec. 18, 2013, no pet.) (mem. op., not designated for publication); *see also Edwards v. State*, No. 09-13-00360-CR, 2014 Tex. App. LEXIS 3820, at *6-7 (Tex. App.—Beaumont Apr. 9, 2014, no pet.) (mem. op., not designated for publication). When the amounts in the judgment and the balance sheet align, an appellate court may find a basis in the record for an order to pay the indicated amount of reparations. *See Conner*, 418 S.W.3d at 744. Importantly in this framework, the Due Process and Equal Protection clauses of the United States Constitution require the trial court to first make an inquiry into the ability of the defendant to pay fees ordered to have been paid before revoking based upon the failure to pay. *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983). Nonetheless, if the court enters an order for payment of "reparations," such an order has a statutory basis. *See McKinney*, 2014 Tex. App. LEXIS at *5-6; *Edwards*, 2014 Tex. App. LEXIS 3820, at *6-7.

2. Are expenses such as mental health evaluations, investigator fees and expert witness fees collectible – even in instances when indigent defense attorney's fees are not?

As mentioned above, discretionary costs are properly assessed and collected from an inmate who was previously determined to be indigent only if the convicting court finds that the defendant has financial resources that enable him to offset the costs in part or in whole and orders the defendant to pay as court costs the amount it finds the defendant is able to pay. Tex. Code Crim. Proc. Ann. art. 26.05(g) (West Supp. 2014); *accord Wiley v. State*, 410 S.W.3d 313, 317 (Tex. Crim. App. 2013). For these purposes, discretionary costs are generally understood to be those for which reimbursement may be ordered under article 26.05(g) of the Code of Criminal Procedure. *See Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014) (contrasting "discretionary" cost from "mandatory" cost; referencing former by citation to article 26.05(g)). In addition to attorney's fees, these costs have been inferentially viewed as encompassing investigator's fees. *See Wilkerson v. State*, 391 S.W.3d 190, 198 (Tex. App.—Eastland 2012, pet. dism'd); *O'Bryan v. State*, No. 13-10-00409-CR, 2011 Tex. App. LEXIS 2838, at *30 (Tex. App.—Corpus Christi Apr. 14, 2011, no pet.) (mem. op., not designated for publication). Similarly, reimbursement for the expenses of mental health or other experts appears to be viewed as subject to article 26.05(g). *See Perez v. State*, No. 07-10-0147-CR, 2011 Tex. App. LEXIS 5724, at *18 n. 16 (Tex. App.—Amarillo 2011, pet. dism'd) (mem. op., not designated for publication).

Since mental health, investigative and expert fees are considered to fall within the same legal framework as appointed attorney's fees for purposes of any reimbursement order, they are subject to the same legal rules as appointed attorney's fees. Consequently, as provided by article 26.05(g) of the Code of Criminal Procedure, if the trial court orders those fees imposed as costs, they should be assessed in the bill of costs and collected unless an appellate court deletes them on direct appeal. If the trial court does not order them to be imposed, they should not be included in the bill of costs or collected.

3. After an inmate has been released from incarceration, is there any authority to collect expenses which could not lawfully be collected while the inmate was in prison?

Overall, there does not appear to be any statutory or case law that qualifies the authority to collect court costs or fees on the basis of incarceration or release. Within the context of article 26.05(g) of the Code of Criminal Procedure, the defendant's financial resources and ability to pay are the critical elements in the trial court's determination of whether costs and fees are properly assessed, not his or her custody status. *See Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010). Moreover, the applicability of mandatory court costs is triggered by conviction, not incarceration. *See Cardenas v. State*, 423 S.W.3d 396, 399 (Tex. Crim. App. 2014) ("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."). To cut to the chase, if collection of costs is unauthorized while the defendant is in prison, it does not become proper merely by virtue of the defendant's release.

Having said that, it is not necessarily true that release from incarceration means the defendant is out of TDCJ custody. An inmate remains in TDCJ custody while on parole. *Roberts v. State*, No. 02-11-00500-CV, 2013 Tex. App. LEXIS 1221, at *2 (Tex. App.—Fort Worth Feb. 7, 2013, no pet.) (mem. op., not designated for publication) (citing Tex. Gov't Code Ann §§ 508.001(6), 508.143(a) (West 2012)). And an inmate's conviction does not "cease to exist" when the inmate is placed on parole. *In re Hart*, 351 S.W.3d 71, 76 (Tex. App.—Texarkana 2011, orig. proceeding). In a like manner, a withdrawal notification does not become void when an inmate is placed on parole. *Id.* Indeed, nothing in section 501.014(e) prohibits collecting fines or court costs during a defendant's subsequent prison stay. *Roberts*, 2013 Tex. App. LEXIS 1221, at *3; *In re Hart*, 351 S.W.3d at 76. In other words, the inmate remains in TDCJ custody while on parole and a trial court's withdrawal notification is still effective to collect court costs from the inmate's account should the inmate return to prison. *Roberts*, 2013 Tex. App. LEXIS 1221, at *3; *accord In re Hart*, 351 S.W.3d at 76. But a more practical problem remains, whether the inmate is released on parole or on completion of his or her sentence.

The Government Code provides that, when an inmate is discharged or released on parole, mandatory supervision, or conditional pardon, the TDCJ "shall provide the inmate" with the money held in the inmate's account. Tex. Gov't Code Ann. § 501.015(a)(2) (West 2012). Viewing the issue from a pragmatic standpoint, section 501.014(e) allows court costs to be collected from an inmate's money during incarceration, free from any obstruction the inmate may try to employ except a motion to rescind or correct the withdrawal notification. When the inmate is released, though, he or she receives all of the money in the account that could have been accessed for purposes of cost collection. Once that money reaches the inmate's hands, it becomes all but assured that it will be unavailable for satisfaction of court costs or other obligations. Of course, conventional means of

executing the financial aspect of the judgment remain viable. *See* Tex. Code Crim. Proc. Ann. art. 43.07 (West Supp. 2014) (execution for fine and costs "shall be collected and returned as in civil actions"). Since the law governing civil judgment enforcement is expressly made applicable, the defendant's homestead and statutorily-listed personal property will be exempt from seizure for any cost claim, though. *See* Tex. Prop. Code Ann. §§ 41.001(a), 42.001(a), (b), 42.002(a) (West 2014).

4. In order to collect from an inmate who has been released, would a court have to first make a determination that the former inmate is no longer indigent? If so, what court? Would it have to be the sentencing court, or could another court make the determination?

The answer to the immediately-preceding question largely answers this one to the extent it inquires about the relationship between custody status and authority to collect costs. In summarized terms, whether the inmate is incarcerated is essentially irrelevant to the issue of whether authority to assess and collect a cost exists. The determination that is critical to authorization for imposition of discretionary costs is the previously-discussed order of the court for reimbursement under article 26.05(g), Code of Criminal Procedure, informed by the defendant's financial resources and ability to pay at the time judgment is entered. *See Armstrong v. State*, 340 S.W.3d 759, 765-66 (Tex. Crim. App. 2011) (defendant's financial resources and ability to pay are explicit critical elements in court's determination of propriety of reimbursement order); *Mayer v. State*, 309 S.W.3d 552, 556 (Tex. Crim. App. 2010) (same); see also *Wolfe v. State*, 377 S.W.3d 141, 146 (Tex. App.—Amarillo 2012, no pet.) (article 26.05(g) determination of defendant's ability to pay must be made at time of judgment or order). As to mandatory costs, they must be ordered and paid, regardless of indigence implications. *See Smith v. State*, 439 S.W.3d 451, 461 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Wolfe v. State*, 377 S.W.3d 141, 147 (Tex. App.—Amarillo 2012, no pet.). The amount of a particular mandatory cost to be assessed is the amount established under the law in effect on the date the defendant is convicted of the offense. Tex. Gov't Code Ann. § 51.608 (West Supp. 2014).

If an order for reimbursement is to be entered, it is accomplished by provision in the judgment as part of the costs in the case. *See* Tex. Code Crim. Proc. Ann. art. 26.05(g) (West Supp. 2014); *see also id*. art. 42.15(a) (West Supp. 2014), 42.16 (West 2006) (requiring inclusion of costs in judgment). The judgment in a criminal case is the "written declaration of the court signed by the trial judge and entered of record showing the conviction or acquittal of the defendant." Tex. Code Crim. Proc. Ann. art. 42.01, § 1 (West Supp. 2014). As such, the trial judge hearing the case appropriately enters the art. 26.05(g) order.

An attempt by another court or judge (unless sitting as an appellate judge or by assignment or exchange of benches in the convicting trial court) to alter a court cost order would constitute a collateral attack. This is so because a collateral attack is an attempt to avoid the binding force of a judgment in a proceeding not instituted for the purpose of correcting, modifying or vacating the judgment, but in order to obtain some specific relief which the judgment currently stands as a bar against. *Browning v. Prostock*, 165 S.W.3d 336, 346 (Tex. 2005). Collateral attacks on final judgments are generally disallowed because it is the policy of the law to give finality to the judgments of the courts. *Id*. at 345. A collateral attack against a criminal judgment is permitted only if the prior judgment is void, and not merely voidable. *Rhodes v. State*, 240 S.W.3d 882, 887 (Tex. Crim. App. 2007). A judgment in a criminal case is void "only in rare circumstances—usually due to lack of jurisdiction." *Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001). More particularly, a judgment of conviction for a crime is void when:

> (1) the document purporting to be a charging instrument (i.e. indictment, information, or complaint) does not satisfy the constitutional requisites of a charging instrument, thus the trial court has no jurisdiction over the defendant, (2) the trial court lacks subject matter jurisdiction over the offense charged, such as when a misdemeanor involving official misconduct is tried in a county court at law, (3) the record reflects that there is no evidence to support the conviction, or (4) an indigent defendant is required to face criminal trial proceedings without appointed counsel, when such has not been waived, in violation of *Gideon v. Wainwright*.[16] While we hesitate to call this an exclusive list, it is very nearly so.

Nix, 65 S.W.3d at 668 (footnote added). It has been suggested that a judgment is not void if the defect could have been reformed on direct appeal of the judgment in question or by a nunc pro tunc order. *Rhodes*, 240 S.W.3d at 888. As discussed extensively above, an erroneous order to reimburse discretionary costs under article 26.05(g) is subject to challenge and correction on direct appeal. For that reason, *Rhodes*

[16] Given that the central issue here is reimbursement of appointed counsel fees, the last circumstance will generally be inapplicable in a case subject to the present analysis.

suggests that an error of that sort does not render the judgment void.

While that is so, costs may be subject to a motion for correction under article 103.008 of the Code of Criminal Procedure. See Tex. Code Crim. Proc. Ann. art. 103.008 (West 2006). Under that provision, "[o]n the filing of a motion by a defendant not later than one year after the date of the final disposition of a case in which costs were imposed, the court in which the case is pending or was last pending shall correct any error in the costs." *Id*. at (a). By its explicit terms, the statute requires the motion to be determined by the court in which the case was pending.

5. Is there a statute of limitations on court cost collection efforts? If so, how long and when does it begin to run?

Answering this question requires focus on the nature of the obligation sought to be enforced. Court costs are "a nonpunitive recoupment of the costs of judicial resources expended in connection with the trial of the case." *Johnson v. State*, 423 S.W.3d 385, 390 (Tex. Crim. App. 2014) (quoting *Armstrong v. State*, 340 S.W.3d 759, 767 (Tex. Crim. App. 2011)). To that end, the Code of Criminal Procedure requires that a judgment order a defendant to pay court costs. *Johnson*, 423 S.W.3d at 389; *accord Houston v. State*, 410 S.W.3d 475, 479 (Tex. App.—Fort Worth 2013, no pet.) (Code of Criminal Procedure requires judgment shall adjudge costs against defendant and order collection thereof); *see also* Tex. Code Crim. Proc. Ann. art. 42.15(a) (West Supp. 2014) (if defendant fined, judgment "shall be that the defendant pay the amount of the fine and all costs to the state"); Tex. Code Crim. Proc. Ann. art. 42.16 (West 2006) (if punishment is other than fine, judgment "shall also adjudge the costs against the defendant, and order the collection thereof as in other cases"); Tex. Gov't Code Ann. § 102.021 (West Supp. 2014) (person convicted of offense "shall pay" enumerated costs under Code of Criminal Procedure). As a result, the obligation to be enforced is a judicially-determined liability for costs within a judgment. *See Harrell v. State*, 286 S.W.3d 315, 320 (Tex. 2009) (basis of withdrawal notification is cost amount "identified in a prior court document"). By contrast, statutes of limitations proceed from the presumption that claims are extinguished, or ought to be held extinguished whenever they are not litigated in the proper forum within the prescribed period. *S.V. v. R.V.*, 933 S.W.2d 1, 3 (Tex. 1996). The primary purpose of a statute of limitations is to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend while witnesses are available and the evidence is fresh in their minds. *Price v. Estate of Anderson*, 522 S.W.2d 690, 692 (Tex. 1975). Such statutes "afford plaintiffs what the legislature deems a reasonable time to present their cases and protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise." *S.V.*, 933 S.W.2d at 3. In short, they prescribe the period of time to "bring suit," which generally is understood to mean filing a petition within the limitations period and using diligence to have the defendant served with process. *See Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990). Court costs, on the other hand, are imposed at the end of litigation in a judgment. In short, we are concerned here with what happens at the end of a case, not the beginning.

The Code of Criminal Procedure provides that execution of a criminal judgment's assessment of a fine and costs "shall be collected and returned as in civil actions." Tex. Code Crim. Proc. Ann. art. 43.07 (West Supp. 2014). Law applicable to civil judgments provides that, "[i]f a writ of execution is not issued within 10 years after the rendition of a judgment of a court of record or a justice court, the judgment is dormant and execution may not be issued on the judgment unless it is revived." Tex. Civ. Prac. & Rem. Code Ann. § 34.001(a) (West 2014). That statute further provides that, if a writ of execution is issued within 10 years after rendition of a judgment but a second writ is not issued within 10 years after issuance of the first writ, the judgment becomes dormant. *Id*. at (b). A dormant judgment may be revived by scire facias or by an action of debt brought not later than two years after the judgment becomes dormant. *See* Tex. Civ. Prac. & Rem. Code Ann. § 31.006 (West 2014). Even if the judgment is not dormant, exemptions from seizure for satisfaction of the judgment may apply. *See* Tex. Prop. Code Ann. §§ 41.001(a), 42.001(a), (b), 42.002(a) (West 2014).

While general judgment enforcement principles may apply, the statutory mechanism for withdrawal from a TDCJ inmate's account also is pertinent. *See* Tex. Gov't Code Ann. § 501.014(e) (West 2012). Section 501.014(e) contains no explicit time limit on when a withdrawal notification may be entered. *See, generally*, Tex. Gov't Code Ann. § 501.014(e) (West 2012). Nor has a court adopted any common law limitation or repose period for such proceedings. To the contrary, a trial court possesses jurisdiction to issue a withdrawal notification for an obligation to pay costs of court as long as the costs remain unpaid. *Bond v. State*, No. 11-10-00370-CV, 2012 Tex. App. LEXIS 8501, at *5 (Tex. App.—Eastland Oct. 11, 2012, no pet.) (mem. op.). Indeed, some of the reported cases construing section 501.014(e) have involved considerable periods of time between entry of a conviction and entry of a withdrawal notification. *See, e.g.*, *Harrell v. State*, 286 S.W.3d 315, 318-21 (Tex.

2009) (challenged withdrawal orders issued nine and three years after convictions, district court's denial of motion to rescind withdrawal orders affirmed); *Massey v. State*, No. 07-12-0132-CV, 2012 Tex. App. LEXIS 3800, at *1, *4-5 (Tex. App.—Amarillo May 14, 2012) (order) (withdrawal notifications entered almost three years after inmate had been released from custody after full service of sentences; time lapse not mentioned as ground for remand to afford inmate opportunity to assert challenges to particular costs); *cf. In re Daniel*, 396 S.W.3d 545, 549 (Tex. Crim. App. 2013) (orig. proceeding) (bill of costs issued nine years after judgment of conviction; particular cost invalidated based on lack of district clerk authority to assess attorney's fee reimbursement without court order, not lapse of time). Likewise, in withdrawal notification proceedings, the State as a sovereign entity is not subject to the defense of laches. *Bond*, 2012 Tex. App. LEXIS 8501, at *5-6.

If, however, the trial court incorporates a withdrawal notification into the judgment of conviction, any modification of the withdrawal notification must occur within the period of time during which the trial court retains plenary power over the judgment. *See Jackson v. State*, 362 S.W.3d 817, 819-20 (Tex. App.—Amarillo 2012, no pet.). Delayed service of the notification is not the same as untimely modification of the it, though, and will not invalidate the notification on its own. *See England v. State*, No. 03-12-00635-CV, 2013 Tex. App. LEXIS 6660, at *7 (Tex. App.—Austin May 31, 2013, pet. denied) (mem. op.). In this vein, it should not be overlooked that an inmate is entitled to receive all funds in his or her inmate account upon release from TDCJ. *See* Tex. Gov't Code Ann. § 501.015(a)(2) (West 2012). As a consequence, while there may be no explicit limitations period, reality may dictate that funds are likely to become unavailable for satisfying a cost order if the inmate lawfully leaves prison.

6. Does the Texas Debt Collections Act or any other consumer protection law apply to court cost collection efforts?

Since federal law is similar and informative to Texas' statutory debt collection protections, coherent analysis may begin with the federal Fair Debt Collection Practices Act ("FDCPA"). *See* 15 U.S.C. § 1692 et seq. The federal statute prohibits an array of "unfair or unconscionable means to collect or attempt to collect any debt." *See* 15 U.S.C. § 1692f. Also prohibited are certain communications with consumers in connection with collection of a debt. *See* 15 U.S.C. § 1692c. Crucially, the FDCPA's provisions generally apply only to "debt collectors." *Pollice v. Nat'l Tax Funding, L.P.*, 225 F.3d 379, 403 (3d Cir. 2000). For purposes of the FDCPA, a "debt collector" is any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. 15 U.S.C. § 1692a(6).

However, the term "debt collector" does not include "any officer or employee of the United States or any State to the extent the collecting or attempting to collect any debt is in performance of his official duties". *Id*. at (6)(C). In turn, the term "State" means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing. So, for present purposes, counties are political subdivisions of the State of Texas. Tex. Const. art. XI, § 1. So, too, are cities considered political subdivisions of the State. *See, e.g., City of Watauga v. Gordon*, 4344 S.W.3d 586, 589 (Tex. 2014) (noting city, as political subdivision of state, is protected by governmental immunity); *City of Aspermont v. Rolling Plains Groundwater Conservation Dist.*, 258 S.W.3d 231, 233 (Tex. 2008) (same). Thus, to the extent a clerk of a municipal, county-level or district court, or his or her deputy or assistant, is pursuing official duties of the clerk's office, he or she is not considered a "debt collector" under the FDCPA and the federal statute is inapplicable to the court clerk's collection efforts. *Pollice*, 225 F.3d at 403.

Even if the statutory exclusion from the definition of "debt collector" was not applicable, though, the FDCPA would not appear to reach a governmental entity's cost collection efforts. As a threshold matter, a suit brought under the FDCPA must involve a "debt" within the meaning of the statute. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). For the statute's purposes, "debt" is defined as "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5). Under this definition, not all obligations to pay are considered "debts" subject to the FDCPA. *Hawthorne v. Mac Adjustment*, 140 F.3d 1367, 1371 (11th Cir. 1998). Rather, the FDCPA may be triggered only when an obligation to pay arises out of a specified "transaction," the ordinary meaning of which necessarily implies some type of business dealing between parties. *Id*. At a minimum, a "transaction" under the FDCPA must involve some kind of business dealing or other consensual obligation, so the term does not include a negligence damages judgment. *Id*. Because a "transaction" under the FDCPA must involve some kind of business dealing or other consensual obligation, the statute does not apply where

a defendant attempts to collect a state court judgment for damages. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). Similarly, municipal fines cannot reasonably be understood as "debts" arising from consensual transactions for goods and services. *Gulley v. Markoff & Krasny*, 664 F.3d 1073, 1075 (7th Cir. 2011). By the same token, taxes are used for communal purposes; those who pay them do not receive individual benefits, but rather a general public benefit. *Berman v. GC Servs. Ltd. P'ship*, 146 F.3d 482, 486 (7th Cir. 1998). Nor are taxes "primarily for personal, family, or household purposes". As such, they are not "debts" under the FDCPA. *Id*. at 487. More broadly, a statutory obligation to pay money does not arise "out of a transaction" involving personal, family, or household property. *Shorts v. Palmer*, 155 F.R.D. 172, 174 (S.D. Ohio 1994). Like the liabilities considered by the courts above, court costs are statutorily imposed assessments, not business or consensual obligations. *See Johnson v. State*, 423 S.W.3d 385, 389 (Tex. Crim. App. 2014). Viewed in that light, it seems reasonably clear that court cost collection efforts in criminal cases are not subject to the FDCPA.

Under the Texas Debt Collection Act ("TDCA"), a consumer may sue for threats, coercion, harassment, abuse, unconscionable collection methods or misrepresentations made in connection with the collection of a debt. *DeVoll v. Demonbreun*, No. 04-14-00116-CV, 2014 Tex. App. LEXIS 13865, at *5 (Tex. App.—San Antonio Dec. 31, 2014, no pet.) (citing Tex. Fin. Code Ann. §§ 392.310-392.404 (West 2006)). A "consumer" is "an individual who has a consumer debt." Tex. Fin. Code Ann. § 392.001(1) (West 2006). In turn, a "consumer debt" is "an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction." *Id*. at (2). So, for a collection practice to be actionable under the TDCA, the debt at issue must arise out of a consumer transaction. *Garcia v. Jenkins Babb, L.L.P.*, 569 Fed. App'x 274, 277 (5th Cir. 2014). Within these definitions and principles, a judgment debtor is not a consumer, and a judgment ordering a defendant to pay money is not a consumer debt. *DeVoll*, 2014 Tex. App. LEXIS 13865, at *5-6. Moreover, the TDCA defines "consumer debt" similarly to its federal counterpart's definition of "debt". *Garcia*, 569 Fed. App'x at 276. Based on that similarity, a claim that fails to establish the requisite transaction-based debt will fail under the TDCA just as under the FDCPA. *See* id. at 277. And, given a clerk's office's governmental status, it is just as fatal to a potential TDCA or Deceptive Trade Practices-Consumer Protection Act[17] claim that neither statute clearly and unambiguously provides for a waiver of immunity from suit for governmental units. *Univ. of Houston Main Campus v. Simons*, No. 01-02-00368-CV, 2002 Tex. App. LEXIS 7598, at *7 (Tex. App.—Houston [1st Dist.] Oct. 24, 2002, no pet.) (not designated for publication). Accordingly, it is difficult to envision a viable claim against a clerk's office or the political subdivision it serves for court cost collection efforts under federal or state debt collection or consumer protection laws.

7. <u>If a governmental entity has previously collected amounts for costs it was not authorized to collect, does the entity have any liability or obligation to account for and/or return the funds so collected?</u>

The entities of primary concern here are counties, cities and the State, as those are the entities that operate the courts in which criminal court costs are assessed and collected. As noted above, counties are political subdivisions of the State of Texas. Tex. Const. art. XI, § 1. Cities are political subdivisions, as well. *See City of Watauga v. Gordon*, 4344 S.W.3d 586, 589 (Tex. 2014); *City of Aspermont v. Rolling Plains Groundwater Conservation Dist.*, 258 S.W.3d 231, 233 (Tex. 2008). Sovereign immunity protects the State and its agencies from suit unless the State consents by waiving immunity. *Tex. Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 353 (Tex. 2013). Political subdivisions of the State are protected from lawsuits for damages by governmental immunity. *Rolling Plains Groundwater Conservation Dist. v. City of Aspermont*, 353 S.W.3d 756, 759 (Tex. 2011); *Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009). Sovereign and governmental immunity encompass both immunity from liability, which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether. *Lubbock County Water Control & Improvement Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 (Tex. 2014); *accord Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2002). Immunity from suit deprives the courts of jurisdiction and thus completely bars a plaintiff's claim. *Id*.; *accord Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009) (immunity from suit is jurisdictional and bars suit).

Because the decision to require the public to bear the costs and consequences of a particular governmental action requires balancing numerous policy considerations, courts have consistently deferred to the Legislature, as the public's elected representative body, to decide whether and when to waive the

[17] *See* Tex. Bus. & Com. Code Ann. § 17.41 et seq. (West 2011 & Supp. 2014).

government's immunity. *Church & Akin*, 442 S.W.3d at 300-01. When the Legislature makes the policy decision to enact a statute that waives governmental immunity, it can do so "only by clear and unambiguous language." *Id*. (quoting *Tooke v. City of Mexia*, 197 S.W.3d 325, 328-29 (Tex. 2006). In fact, the Legislature has imposed this requirement of clear and unambiguous language upon itself. *See* Tex. Gov't Code Ann. § 311.034 (West 2013) ("a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."). The initial question, therefore, is whether any statute by clear and unambiguous language waives governmental entity's immunity from a claim for unauthorized collections.

Section 51.321 of the Government Code previously imposed liability upon a district clerk who charged and received a higher fee than authorized under subchapter D of chapter 51 for a sum four times the amount unlawfully charged and received. *See Dallas County v. Sweitzer*, 881 S.W.2d 757, 763 (Tex. App.—Dallas 1994, writ denied) (quoting Tex. Gov't Code § 51.321). However, that provision was repealed in 1995 and not recodified elsewhere. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 641, § 1.05 (Lexis); *compare* Tex. Loc. Gov't Code Ann. § 118.801 (West 2008) (providing liability of county officer who demands and receives unauthorized fee).[18] Concurrently, the cost and fee provisions of the Code of Criminal Procedure do not expressly waive immunity or even provide an explicit or implied cause of action concerning costs and fees, other than the motion for correction of costs authorized by article 103.008. *See* Tex. Code Crim. Proc. Ann. art. 103.008 (West 2006).

There are means of avoiding immunity when seeking a return of payments to the government, however. The Texas Constitution waives immunity for suits brought under the Takings Clause.[19] *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 236 (Tex. 2011). Takings claims have been recognized as available to recover unlawfully collected fees. *See, e.g.*, *Kubosh v. City of Houston*, 2 S.W.2d 463, 468-69 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); *Camacho v. Samaniego*, 954 S.W.2d 811, 826-27 (Tex. App.—El Paso 1997, pet. denied); *Bowles v. Clipp*, 920 S.W.2d 752, 756-57 (Tex. App.—Dallas 1996, writ denied); *Vannerson v. Klevenhagen*, 908 S.W.2d 37, 41 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Merrill v. Carpenter*, 867 S.W.2d 65, 67 (Tex. App.—Fort Worth 1993, writ denied). A claim of this nature is governed by the two-year statute of limitations provided by section 16.003(a) of the Civil Practice and Remedies Code, and it accrues when payment to the county is made. *Lubbock County v. Trammel's Lubbock Bail Bonds*, 80 S.W.3d 580, 584 (Tex. 2002).

Yet these cases may not be as determinative as they seem at first blush, since they all involved collection of unauthorized fees before judgment. *See id*. In the context considered here, any collections efforts by a court clerk or governmental collections office will be under order of a court, in the case of article 26.05(g) discretionary costs, and pursuant to statute, in the case of mandatory costs. *See Johnson v. State*, 425 S.W.3d 385, 389 (Tex. Crim. App. 2014). Since the convicting court must include costs in the judgment,[20] a civil suit to recover any of those costs by claiming they were unauthorized would necessarily constitute an impermissible collateral attack on the criminal judgment. Collateral attacks on final judgments are generally disallowed because it is the policy of the law to give finality to the judgments of the courts. *Browning v. Prostock*, 165 S.W.3d 336, 345 (Tex. 2005). A collateral attack against a criminal judgment is permitted only if the prior judgment is void, and not merely voidable. *Rhodes v. State*, 240 S.W.3d 882, 887 (Tex. Crim. App. 2007). A judgment in a criminal case is void "only in rare circumstances—usually due to lack of jurisdiction." *Nix v. State*, 65 S.W.3d 664, 668 (Tex. Crim. App. 2001). It also is worth recalling here that a judgment likely is not void if the defect could have been reformed on direct appeal of the judgment in question or by a nunc pro tunc order. *See Rhodes*, 240 S.W.3d at 888.

In the present context, challenges to court costs may be asserted in any one or more of three ways (direct appeal, motion for correction of costs and motion to rescind or modify withdrawal notification), as discussed above. When there exists provision for compensation or return of property, a constitutional

[18] The county officers referenced in section 118.801 are those "named in this chapter". Tex. Loc. Gov't Code Ann. § 118.801(a) (West 2008). Officers named in chapter 118 are the County Clerk (subchapters B and C), the county judge (subchapter D) justices of the peace (subchapter E), the sheriff and constables (subchapter F), the county treasurer (subchapter G), the county surveyor (subchapter H) and the county tax assessor-collector (subchapter I).

[19] *See* Tex. Const. art. I, § 17(a).

[20] *See Johnson*, 423 S.W.3d at 389; *accord Houston v. State*, 410 S.W.3d 475, 479 (Tex. App.—Fort Worth 2013, no pet.) (Code of Criminal Procedure requires judgment shall adjudge costs against defendant and order collection thereof); *see also* Tex. Code Crim. Proc. Ann. art. 42.15(a) (West Supp. 2014) (if defendant fined, judgment "shall be that the defendant pay the amount of the fine and all costs to the state"); Tex. Code Crim. Proc. Ann. art. 42.16 (West 2006) (if punishment is other than fine, judgment "shall also adjudge the costs against the defendant, and order the collection thereof as in other cases").

takings claim is necessarily premature. *City of Dallas v. VSC, LLC*, 347 S.W.3d 231, 236 (Tex. 2011). Further, a person who pays a tax or fee voluntarily and without duress does not have a valid claim for its repayment even if the tax or fee is later held to be unlawful. *Dallas County Cmty. College Dist. v. Bolton*, 185 S.W.3d 868, 876 (Tex. 2005). "The voluntary payment rule encourages resolution of disputes over an assessment before it is paid and the collector has relied on possession, especially when the collector is the government and the stability of the public fisc is at stake. It is better for the government to know that revenue is unavailable than it is to make refunds after budgets have been drawn and expenditures authorized." *Lowenburg v. City of Dallas*, 261 S.W.3d 54, 59 (Tex. 2008). Predictably, it could be argued that failure to pay court costs will result in some detriment or penalty, rendering the payment non-voluntary. But any failure to pay a tax or fee ultimately results in some detriment or penalty, so a claimant who seeks the refund of an illegally paid fee must do more than demonstrate that a penalty or other detriment would have resulted from nonpayment. *Camacho v. Samaniego*, 954 S.W.2d 811, 826 (Tex. App.—El Paso 1997, pet. denied). If the entity has to seek payment through the courts, then no duress is present; but if the governmental authority can impose a penalty without recourse to the courts, duress is present. *Id*. This rule is logical, since governmental resort to legal action allows the obligated party to protest the tax or fee and refuse to pay without suffering irreparable harm. Under these circumstances, payment can be characterized as voluntary even if the tax or fee is illegal. *Id*. Viewed from a slightly different perspective, it has been recognized that due process requires that persons who have paid illegal or invalid taxes or fees under duress have some recourse to recover those funds. *Bolton*, 185 S.W.3d at 882 n. 9. Even so, the availability of a motion to correct or retax costs in the trial court and to assert cost challenges on direct appeal provide procedures to contest the costs through judicial review, thus satisfying due process and vitiating any attendant claim of duress. *Kubosh v. Harris County*, 416 S.W.3d 483, 487 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

In the case of criminal court costs, much of the discussion above should illustrate the opportunities available to a defendant to protest costs and obtain a judicial determination of that complaint before execution on those costs occurs. If a defendant pays the costs without invoking the available avenues of judicial review, the voluntary payment rule could reasonably be applied.

Despite governmental immunity, it may be foreseeable that a defendant might challenge a cost as unlawful or unconstitutional by suing the clerk in his or her official capacity. Suits to require state officials to comply with statutory or constitutional provisions are not prohibited by governmental immunity, even if a declaration to that effect compels the payment of money. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009). These types of suits are referred to as *ultra vires* claims, and they require a claimant to complain not of a government officer's exercise of discretion, but rather that the officer acted without legal authority or failed to perform a purely ministerial act. *Id*. In an *ultra vires* suit, the governmental entity itself—as opposed to its officers in their official capacities[21]—remains immune from suit. *Id*. at 372-73. The rule concerning parties is no minor, optional guideline: such actions must be brought against the relevant government officials in their official capacities, rather than against the governmental entity itself. *Lowell v. City of Baytown*, 356 S.W.3d 499, 502 (Tex. 2009). Just as significantly, in an *ultra vires* suit, only prospective relief is available; retroactive relief dictated by a court is not. *Rolling Plains Groundwater Conservation Dist. v. City of Aspermont*, 353 S.W.3d 756, 760 (Tex. 2011). Thus, where a plaintiff sued a district attorney in an *ultra vires* suit seeking a declaration that certain acts and omissions committed during the plaintiff's criminal trial violated his constitutional rights, thereby voiding the conviction against him, the declaratory and injunctive relief sought was retrospective and, as such, was barred by immunity. *Smith v. DA Office for Wood County*, No. 03-13-00220-CV, 2014 Tex. App. LEXIS 11735, at *5-8 (Tex. App.—Austin Oct. 24, 2014, pet. denied) (mem. op.). Drawing from this reasoning, unless a defendant or inmate was to seek only to restrain the clerk from collecting some allegedly illegal or unconstitutional cost in the future—as opposed to seeking a declaration that a previously-assessed cost was unlawful—most imaginable *ultra vires* claims by those complaining about court costs are likely to be precluded by sovereign or governmental immunity.

Conceivably, a disgruntled defendant might choose to target the clerk, deputy or assistant who issued the bill of costs individually instead of suing the governmental entity served by the clerk. That strategy is likely to be similarly tenuous. As noted previously, imposition of discretionary costs properly occurs through judicial, not clerical, action. *See* Tex. Code Crim. Proc. Ann. art. 26.05(g) (West Supp. 2014); *see also Figueroa v. State*, 250 S.W.3d 490, 517 (Tex. App.—Austin 2008, pet. ref'd) (discretionary cost

[21] The *Heinrich* court recognized that a suit against a governmental official in his or her official capacity is, for all practical purposes, a suit against the government itself. 284 S.W.3d at 373. Because the court observed that the purpose of such a suit is not to exert control *over* the state, but rather to reassert the control *of* the state, this procedural anomaly was deemed necessary. *See id*. at 372-73.

provisions only become effective when defendant is actually ordered to pay attorney's fees), *cert. denied*, 555 U.S. 1185 (2009); *accord Wiley v. State*, 410 S.W.3d 313, 317 (Tex. Crim. App. 2013) (discussing trial court's authority to order defendant to pay attorney's fees).

Well-established law dictates that a disgruntled defendant's attempt to sue the judge for entering such an order would be barred by absolute judicial immunity. *See Mireles v. Waco*, 502 U.S. 9, 11 (1991). The policy reasons for judicial immunity also are implicated when a judge delegates or appoints another person to perform services for the court or when a person otherwise serves as an officer of the court. *Dallas County v. Halsey*, 87 S.W.3d 552, 554 (Tex. 2002). The person acting in such a capacity also enjoys absolute immunity, known as derived judicial immunity. *Id*. Similarly, the United State Court of Appeals for the Fifth Circuit has observed that court clerks "have absolute immunity from actions for damages arising from acts they are specifically required to do under court order or at a judge's direction." *Clay v. Allen*, 242 F.3d 679, 682 (5th Cir. 2001) (quoting *Tarter v. Hury*, 646 F.2d 1010, 1013 (5th Cir. 1981)). The court did note, however, that clerks enjoy only qualified immunity for those routine duties not explicitly commanded by a court decree or by the judge's instructions. *Id*.

In *Halsey*, the Texas Supreme Court considered a claim of derived judicial immunity by a court reporter in a suit alleging wrongful acts in the preparation of a record in a criminal case. The court reviewed the duties of a court reporter, noting that those duties require skill, but do not involve judicial decision-making. 87 S.W.3d at 557. Employing the "functional approach" utilized by federal courts reviewing claims of judicial immunity, the court concluded that a court reporter's preparation of a record did not involve the exercise of discretion and, therefore, her acts could not be construed as the functional equivalent of a judge. Accordingly, the court found, the court reporter was not protected by judicial immunity. *Id*.

With those principles as backdrop, an appellate court in a post-*Halsey* decision has observed that "[t]he extension of a judge's absolute immunity to court personnel who do not exercise a discretionary function comparable to that of a judge is most compelling when the lawsuit challenges conduct specifically directed by the judge, and not simply the manner in which the judge's directive was carried out." *Telkamp v. Stein Mart, Inc.*, No. 05-05-01408-CV, 2006 Tex. App. LEXIS 7259, at *17-18 (Tex. App.—Dallas Aug. 17, 2006, pet. denied) (mem. op.). Inclusion of an item of cost ordered imposed by a judge within a legally-required record of costs would seem to fit within this rubric. A clerk who carries out a directive of the court tends to land within the role of an "arm of the court" protected by derived judicial immunity. *See Kastner v. Lawrence*, No. 01-01-00291-CV, 2012 Tex. App. LEXIS 9619, at *9-10 (Tex. App.—Houston [1st Dist.] Nov. 21, 2012, no pet.) (citing *City of Houston v. Swindall*, 960 S.W.2d 413, 417 (Tex. App.—Houston [1st Dist.] 1998, no pet.)). So, when a court clerk is sued for actions taken in her role as clerk of the court, derived judicial immunity is generally proper. *See Albert v. Adelstein*, No. 02-13-00073-CV, 2013 Tex. App. LEXIS 9909, at *6-7 (Tex. App.—Fort Worth Aug. 8, 2013, no pet.) (mem. op.). Ultimately, then, a successful individual-capacity claim against a court clerk attempting to collect costs will need to point to variance from the court's directive, rather than compliance with it.

IV. CIVIL COURT COSTS

Costs in a civil suit are similar to criminal costs in some respects, but significantly different in others. An initial—and significant—difference from criminal costs is the role of the parties in keeping track of the costs that ultimately may be imposed. Under the Code of Criminal Procedure, that obligation falls squarely upon the clerk of the court. In criminal cases, each clerk of a court must keep a fee record which contains a statement of each fee or item of cost charged for a serviced rendered in the criminal case, the number and style of the action or proceeding, and the name of the officer or person who is entitled to receive the fee. Tex. Code Crim. Proc. Ann. art. 103.009(a) (West 2006). A statement of an item of cost in a fee record is prima facie evidence of the correctness of the statement. *Id.* at (c). On the other hand, in a civil case, "[e]ach party to a suit shall be responsible for accurately recording all costs and fees incurred during the course of a lawsuit, if the judgment is to provide for the adjudication of such costs." Tex. Civ. Prac. & Rem. Code Ann. § 31.007(a) (West 2015). If each party is to bear its own costs, no such record need be presented (or, presumably, made). *See id*.

The principle underlying an award of costs in a civil action is "to ensure that the prevailing party is freed of the burden of court costs and that the losing party pays those costs." *Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 378 (Tex. 2001). To that end, the Rules of Civil Procedure provide that the "successful party to a suit shall recover of his adversary all costs incurred therein, except where otherwise provided." Tex. R. Civ. P. 131. Like most general rules, this one has exceptions. Most prominently, the court, "for good cause, to be stated on the record," may adjudge the costs otherwise than as provided by law or the Rules of Civil Procedure. Tex. R. Civ. P. 141. The other significant limitation on the general rule is the authorization for indigent parties to proceed without payment of costs, as provided in Tex. R. Civ. P. 145. With this in mind, and as a measure of

insurance that costs for services of court officers are paid, a court clerk must require that the plaintiff pay the fees for services rendered before issuing any process unless filing is requested under the *in forma pauperis* rule found in Rule 145. Tex. R. Civ. P. 142.

While costs may be included in the comprehensive recovery determined in a judgment, they are not an affirmative defense or claim that must be affirmatively raised at trial. *Arreaga v. Bexar County Sheriff's Dept.*, 90 S.W.3d 899, 903 (Tex. App.—San Antonio 2002, no pet.). But, while they may not need to be precisely pleaded, they must be authorized. The basic scheme of costs that may be included in an order or judgment includes:

(1) fees of the clerk and service fees due the county;
(2) fees of the court reporter for the original and stenographic transcripts necessarily obtained for use in the suit;
(3) masters, interpreters, and guardians ad litem appointed pursuant to these rules and state statutes; and
(4) such other costs and fees as may be permitted by these rules and state statutes.

Tex. Civ. Prac. & Rem. Code Ann. § 31.007(b) (West 2015). So it is that Texas statutes and case law define which items the court may include as taxable costs. *May v. Ticor Title Ins.*, 422 S.W.3d 93, 106 (Tex. App.—Houston [14th Dist.] 2014, pet. denied). Whether a particular expense is recoverable under statute or rule as a court cost is a question of law, which is reviewed de novo. *Gumpert v. ABF Freight Sys.*, 312 S.W.3d 237, 239 (Tex. App.—Dallas 2010, no pet.).

Within this framework, the term "costs" has a particular meaning. "Costs," when used in legal proceedings, refer not just to any expense, but to those paid to courts or their officers. *In re Nalle Plastics Family L.P.*, 406 S.W.3d 168, 175 (Tex. 2013) (orig. proceeding). As such, the term "costs" is generally understood to mean the fees or compensation fixed by law collectible by the officers of court, witnesses and such like items. *Id*. The term usually encompasses fees and charges set and required by law to be paid to the courts or some of their officers, such as filing and service fees. *Pilgrim's Pride Corp. v. Burnett*, No. 12-10-00037-CV, 2012 Tex. App. LEXIS 964, at *45-46 (Tex. App.—Tyler Feb. 3, 2012, no pet.); *City of Houston v. Maguire Oil Co.*, 342 S.W.3d 726, 747 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). To fall within the scope of the Rules of Civil Procedure authorizing recovery of costs, a cost is an item within the clerk's bill of costs. *Sterling Bank v. Willard M, L.L.C.*, 221 S.W.3d 121, 125 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Since filing fees are recognized as among the prime examples of costs, they comprise a useful starting point for figuring the compendium of costs in a particular case. Like their criminal counterparts, the statutorily-authorized filing fees in a civil case have been compiled into schedules for fees in district and county courts by the Office of Court Administration. The schedules for district court filing fees may be accessed at:

http://www.txcourts.gov/media/662558/dc-civfilfees010114.pdf and

http://www.txcourts.gov/media/662559/dc-civsuitsactions010114.pdf. For county-level courts, the schedules of fees may be accessed at:

http://www.txcourts.gov/media/960221/CC-Civ-Fil-Fees-010114-.pdf and

http://www.txcourts.gov/media/960224/CC-Civ-Suits-Actions-010114-.pdf. It should be noted that these schedules delineate statutorily-authorized fees to be collected by court clerks. Other costs as recorded and presented by the parties under section 31.007(a) of the Civil Practice and Remedies Code would be additional. Also pertinent is the fact that the specific amounts of a number of the enumerated items of cost are to be determined on a local basis by the commissioners court of the county in which the proceeding is pending. *See, e.g., Burgess v. Denton County*, 359 S.W.3d 351, 359 (Tex. App.—Fort Worth 2012, no pet.); *Ranger Ins. Co. v. State*, 312 S.W.3d 266, 271 (Tex. App.—Dallas 2010, no pet.); *Dallas County v. Sweitzer*, 881 S.W.2d 757, 767 (Tex. App.—Dallas 1994, writ denied).

A. The Decision on Costs

The mater of awarding costs is left largely to the trial court's discretion. *Griffin v. Carson*, No. 01-08-00340-CV, 2009 Tex. App. LEXIS 3843, at *16 (Tex. App.—Houston [1st Dist.] May 28, 2009, pet. denied) (mem. op.). But that discretion is not boundless. As noted above, the general rule in Texas is that a successful party is entitled to recover its costs from its adversary. *CPM Trust v. City of Plano*, No. 05-14-00104-CV, 2015 Tex. App. LEXIS 3393, at *30 (Tex. App.—Dallas Apr. 7, 2015, no pet. h.); *Gumpert*, 312 S.W.3d at 239. Because Rule 131 requires the trial court to order that the winning party recover its costs from the losing party, taxing costs against a successful party general contravenes Rule 131. *Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 376 (Tex. 2001). In order to vary from the general tenet of Rule 131, the court must find good cause and state that cause on the record. *Id.*; *see also* Tex. R. Civ. P. 141. Phrased a bit differently, the trial court may not assess costs, other than as provided by Rule 131, unless good cause is shown. *Griffin v. Carson*, No. 01-08-00340-CV, 2009 Tex. App. LEXIS 3843, at *17-18 (Tex. App.—Houston [1st Dist.] May 28, 2009, pet. denied) (mem. op.).

As Rule 131 operates, a substantial question in its application is who may properly be considered a "successful party" entitled to recover costs. Generally, a "successful party" is one who obtains a judgment of a competent court vindicating a civil right or claim. *Dallas City Homes, Inc. v. Dallas County*, No. 05-13-00033-CV, 2014 Tex. App. LEXIS 5248, at *13 (Tex. App.—Dallas May 14, 2014, no pet.); *Newton v. Calhoun*, 203 S.W.3d 382, 385 (Tex. App.—El Paso 2006, no pet.). As its broad language should suggest, the term is not limited to winning plaintiffs. A defendant who obtains a take-nothing judgment is considered a "successful party" under Rule 131. *Karnei v. Camacho*, No. 13-11-0148-CV, 2012 Tex. App. LEXIS 708, at *12 (Tex. App.—Corpus Christi Jan. 26, 2012, pet. denied) (mem. op.).

Success doesn't always guarantee recovery, however. Rule 141 allows the court to award costs other than as contemplated by Rule 131 "for good cause, to be stated on the record". Tex. R. Civ. P. 141. Perusal of the case law applying Rule 141 reveals that it almost appears to be clarified more in breaches than in compliance. So, while fairness may be good cause, the record must substantiate the connection. Consequently, grounds of perceived fairness, without more, are insufficient to constitute good cause to split costs between the losing and prevailing parties. *Roberts v. Williamson*, 111 S.W.3d 113, 124 (Tex. 2003). Likewise, a trial court's stated desire to avoid causing the losing party emotional harm is not, as a matter of law, good cause. *Furr's Supermarkets, Inc. v. Bethune*, 53 S.W.3d 375, 377 (Tex. 2001). Neither is the party's inability to pay court costs sufficient "good cause," given that if financial inability to pay was "good cause," then, contrary to Rule 131, the winner—not the loser—of a lawsuit would often be in a better position to pay the costs. *Id*. at 378. While rejecting the proffered bases for good cause in *Bethune*, however, the court did affirmatively observe that "good cause" typically means that the prevailing party unnecessarily prolonged the proceedings, unreasonably increased costs or otherwise did something that should be penalized. *Bethune*, 53 S.W.3d at 377. Logically, too, complete failure to state a basis for a finding of good cause on the record will fail to invoke Rule 141's authority to deviate from the general requirements of Rule 131. *See Dallas City Homes, Inc. v. Dallas County*, No. 05-13-00033-CV, 2014 Tex. App. LEXIS 5248, at *12 (Tex. App.—Dallas May 14, 2014, no pet.). Conversely, in a case involving direct claims and counterclaims, and where the parties each were found to have succeeded on some of their respective claims and counterclaims, the trial court acted within its proper discretion to award costs of court against the parties incurring the same. *Jackson Law Office v. Chappell*, 37 S.W.3d 15, 28 (Tex. App.—Tyler 2000, pet. denied).

Notably, the inclusion of specific items taxed as costs is a ministerial duty performed by the clerk of the court. *Newton v. Calhoun*, 203 S.W.3d 382, 385 (Tex. App.—El Paso 2006, no pet.). This is so because Rule 622 requires the clerk of the trial court in every case in which a final judgment has been rendered to tax the costs and issue execution to enforce the judgment and collect such costs. Tex. R. Civ. P. 622; *see also* Tex. R. Civ. P. 149; *accord Newton v. Calhoun*, 203 S.W.3d 382, 385 (Tex. App.—El Paso 2006, no pet.). Yet, this obligation does not give rise to a general ground of complaint concerning failure to pay costs. The Rules of Civil Procedure specify that, "if any party responsible for costs fails or refuses to pay the same within ten days after demand for payment, the clerk or justice of the peace may make certified copy of the bill of costs then due, and place the same in the hands of the sheriff or constable for collection." Tex. R. Civ. P. 129. Applying the letter of this rule, the Austin Court of Appeals found that a litigant who had obtained an agreed judgment which did not award him costs was not entitled to enforce his adversary's unsatisfied obligation to pay costs to the clerk. *See Retzlaff v. Mendieta-Morales*, No. 03-01-00096-CV, 2001 Tex. App. LEXIS 6298, at *4-5 (Tex. App.—Austin Sept. 13, 2001, no pet.) (not designated for publication). Of course, one may imagine that, had the judgment awarded costs, the result might have been different.

Another limitation on the trial court's discretionary authority lurks in the distinction between the allocation of costs and the assessment of costs. *See Sterling Bank v. Willard M, L.L.C.*, 221 S.W.3d 121, 125 (Tex. App.—Houston [1st Dist.] 2006, no pet.). There is a difference between deciding which costs to assess or tax, and—separately—deciding who shall pay and in what proportion or amount (i.e., adjudging or allocating those costs). *Pilgrim's Pride Corp. v. Burnett*, No. 12-10-00037-CV, 2012 Tex. App. LEXIS 964, at *47-48 (Tex. App.—Tyler Feb. 3, 2012, no pet.). Rule 141 authorizes a trial court to adjudge costs against a part other than the prevailing party if it has good cause to do so. *Gumpert v. ABF Freight Sys.*, 312 S.W.3d 237, 242 (Tex. App.—Dallas 2010, no pet.). That allocation of costs is reviewable for abuse of discretion. *Hatfield v. Solomon*, 316 S.W.3d 50, 66-67 (Tex. App.—Houston [14th Dist.] 2010, no pet.). But the power to allocate costs does not encompass the power to tax as costs items that are not allowed as taxable court costs by statute or rule. *May v. Ticor Title Ins.*, 422 S.W.3 93, 106 (Tex. App.—Houston [14th Dist.] 2014, pet. denied); *accord Gumpert*, 312 S.W.3d at 242.

Just as there are certain costs that may not properly be assessed, there are certain litigants against whom they may not properly be assessed. Perhaps no other group is more familiar to the courts in this respect than the indigent. The governing rule provides

that a "party who is unable to afford costs" is defined as a person who is presently receiving a governmental entitlement based on indigency or any other person who has no ability to pay costs. Tex. R. Civ. P. 145(a). The basic test for determining entitlement to proceed in forma pauperis is whether the preponderance of the evidence shows that the party would be unable to pay the costs of his suit if he wanted to and made a good faith effort to do so. *Griffin Indus. v. Thirteenth Court of Appeals*, 934 S.W.3d 349, 351 (Tex. 1996) (orig. proceeding). To access the courts without payment of fees or costs, the fundamental requirement is that the applicant must declare to the court, by affidavit, an inability to pay any, or the ability to pay only some, of the costs. *See Higgins v. Randall County Sheriff's Office*, 257 S.W.3d 684, 686 (Tex. 2008); *cf*. Tex. R. Civ. P. 145(b). In *Higgins*, the Texas Supreme Court noted that the financial information required to be provided to assert indigence on appeal is "virtually the same" as required by Rule 145. *Id*. at 687. Consequently, the information it prescribed for an appellate court's consideration of an indigence claim bears consideration in a trial court. That information includes:

(1) the nature and amount of the party's current employment income, government-entitlement income, and other income;
(2) the income of the party's spouse and whether that income is available to the party;
(3) real and personal property the party owns;
(4) cash the party holds and amounts on deposit that the party may withdraw;
(5) the party's other assets;
(6) the number and relationship of any dependents;
(7) the nature and amount of the party's debts;
(8) the nature and amount of the party's monthly expenses;
(9) the party's ability to obtain a loan for court costs;
(10) whether an attorney is providing free legal services to the party without a contingent fee; and
(11) whether an attorney has agreed to pay or advance court costs. *Id*. (citing Tex. R. App. P. 20.1(b)). A trial court may consider whether the litigant is dependent upon public charity afforded through various welfare programs, the litigant's credit rating, the value of the litigant's claim and whether it could afford the basis for security of a loan, the litigant's employment history, that the litigant cannot secure a bona fide loan to pay the costs, and the fee agreement between an attorney and an indigent client. *Baughman v, Baughman*, 65 S.W.3d 309, 315-16 (Tex. App.—Waco 2001, pet. denied). Consideration of the litigant's employment history is of significant relevance, since voluntary unemployment does not make a litigant indigent. *Id*. at 316. While permitting indigent litigants to access the courts without cost may serve the concept that "courts should be open to all, including those who cannot afford the cost of admission," *Higgins v. Randall County Sheriff's Office*, 257 S.W.3d 684, 686 (Tex. 2008), it may subject those litigants to procedural pitfalls which their paying counterparts may not experience. For instance, inmates who proceed without cost payment under chapter 14 of the Civil Practice and Remedies Code[22] may be subject to summary dismissal of their action for frivolousness or for failure to provide information about their previous lawsuits and, in that may trigger authorization for a clerk to refuse to file future lawsuits they may seek to press. *See, e.g.*, *In re Simmonds*, 271 S.W.3d 874, 881-83 (Tex. App.—Waco 2008, orig. proceeding). An inmate who has funds in an inmate account may be considered to not be indigent. *See Skinner v. Tex. Dep't of Crim. Justice,* No. 12-13-00123-CV, 2013 Tex. App. LEXIS 11209, at *6-7 (Tex. App.—Tyler Aug. 30, 2013, pet. denied) (mem. op.) (inmate whose trust account statement showed balance of $8.31, average monthly deposits of $65.83 and deposits of $215.00 in three-month period before filing suit falsely alleged indigency).

If a party is not an inmate, but proceeds by filing a Rule 145 affidavit, the party is subject to chapter 13 of the Civil Practice and Remedies Code. *Lynch v. Jack in the Box*, No. 03-06-00444-CV, 2007 Tex. App. LEXIS 6349, at *3 (Tex. App.—Austin Aug. 9, 2007, no pet.). The purpose of chapter 13 is to prevent abusive litigation by litgants who lack an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuit." *Id*. at *5. To that end, a party who does not pay costs may not escape dismissal merely

[22] That an inmate may be proceeding without payment of costs does not mean his or her lawsuit is governed by the general *in forma pauperis* provisions of chapter 13 of the Civil Practice and Remedies Code. See Tex. Civ. Prac. & Rem. Code Ann. §1 13.004 (Vernon 2015). Indigent inmate litigation is subject to and controlled by chapter 14, not chapter 13. *See Nabelek v. Aldrich*, 157 S.W.3d 84, 885 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

because of technical deficiencies in his or her Rule 145 affidavit. *Id*.

More generally, too, a litigant's attempt to proceed without payment of costs under Rule 145 is subject to contest by the defendant or the court clerk unless the affidavit is accompanied by an IOLTA certificate which explains that the party is represented by an attorney who is providing free legal services without contingency because of the party's indigence and the attorney is providing services either directly or by referral from a program funded by the IOLTA program. See Tex. R. Civ. P. 145(c), (d); *In the Interest of Velez-Uresti*, 361 S.W.3d 200, 203 (Tex. App.—El Paso 2012, pet. denied). If the challenge is successful, the Rules of Civil Procedure do not contemplate the sequential or successive filing of affidavits of indigence. *Velez-Uresti*, 361 S.W.3d at 206. Because there is no rule-imposed deadline for filing a contest, it may be filed up until the date of the next regularly scheduled hearing following filing of the Rule 145 affidavit. *Id*.; *accord* Tex. R. Civ. P. 145(d) ("If the court finds at the first regular hearing in the course of the action that the party (other than a party receiving a governmental entitlement based on indigency) is able to afford costs, the party must pay the costs of the action.").

It is not only the indigent who may be exempted from costs. Uniformly, exemptions from cost are explicitly provided by statute. For instance, Title IV-D agencies (generally, the Attorney General) are exempted from paying appellate filing fees. *Office of the Att'y Gen. of Tex. v. Lee*, 92 S.W.3d 526, 528-29 (Tex. 2002). Taxing units generally are statutorily exempt under the Tax Code from court costs in a suit to collect delinquent taxes, regardless of whether they win or lose. *See* Tex. Tax Code § 33.49(a) (West 2015); *City of Wichita Falls v. ITT Commercial Fin. Corp.*, 835 S.W.2d 65, 66 (Tex. 1992). Also significant in light of the number of military veterans re-entering the workforce is the fact that a person making a claim based on the right to re-employment with a state employer following military service is exempt from court costs under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4323(h)(1), and section 613.023 of the Texas Government Code. *McIntosh v. Partridge*, 426 S.W.3d 201, 204 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

B. When Costs Aren't "Costs"

Returning to the idea that a court lacks authority to tax as costs those items that aren't properly categorized as such by statute or rule,[23] it may be useful to consider typically recurring charges that have been disallowed under this standard. For present purposes, the concept of costs does not include anything other than what it ordinarily means: court costs. *In re Nalle Plastics Family L.P.*, 406 S.W.3d 168, 175 (Tex. 2013) (orig. proceeding). In keeping with this stricture, the general rule in Texas is that expenses incurred in prosecuting or defending a suit are not recoverable as costs unless recovery for those items is expressly provided for by statute, rule, or under principles of equity. *CPM Trust v. City of Plano*, No. 05-14-00104-CV, 2015 Tex. App. LEXIS 3393, at *30 (Tex. App.—Dallas Apr. 7, 2015, no pet. h.); *Gumpert*, 312 S.W.3d at 239, *Allen v. Crabtree*, 936 S.W.2d 6, 8 (Tex. App.—Texarkana 1996, no writ).

A prime example of such incidental expenses are the costs of experts, which are not recoverable as costs. *Griffin v. Carson*, No. 01-08-00340-CV, 2009 Tex. App. LEXIS 3843, at *19 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (mem. op.); *Richards v. Mena*, 907 S.W.2d 566, 571 (Tex. App.—Corpus Christi 1995, writ dism'd). Expenses such as photocopies, travel, long distance, postage and messenger service charges make up the overhead of a law practice which are considered in setting hourly billing rates and reasonable attorney's fees. *Flint & Assocs. v. Intercontinental Pipe & Steel, Inc.*, 739 S.W.2d 622, 626-27 (Tex. App.—Dallas 1987, writ denied). Subsumed expenses of that type then become subject to the broader rule that attorney's fees generally are not taxable costs. *See In re Nalle Family Plastics, L.L.C.*, 406 S.W.3d 168, 175-176 (Tex. 2013) (orig. proceeding); *see also RSS Rail Signal Sys. Corp. v. Carter Stafford Arnett Hamada & Mockler, PLLC*, No. 08-12-00333-CV, 2014 Tex. App. LEXIS 11290, at *13-14 (Tex. App.—El Paso Oct. 10, 2014, no pet.) (distinguishing between receiver's fees, which are taxable as costs, and attorney's fees, which are not). Costs of hiring a private investigator to locate and serve required court documents on a party are not recoverable as costs. *Ex parte Williams*, 866 S.W.2d 751, 753 (Tex. App.—Houston [1st Dist. 1993, no writ). Premiums charged by a bonding company in order to obtain a supersedeas bond are similarly non-recoverable as costs. *Hammonds v. Hammonds*, 158 Tex. 516, 313 S.W.2d 603, 605 (1958). Other expenses that have been disallowed under this rubric include: traveling expenses; delivery services, such as Federal Express; binding of briefs; office air conditioning on weekends; secretarial overtime; and fees of an expert surveyor and the cost of certified copies of deeds. *Allen v. Crabtree*, 936 S.W.2d 6, 8 n. 2 (Tex. App.—Texarkana 1996, no writ) (collecting cases). In addition, the Rules themselves provide that, "[n]o fee for a copy of any paper not required by law or the Rules of Civil Procedure may be taxed in the bill of costs." Tex. R. Civ. P. 140.

[23] *May v. Ticor Title Ins.*, 422 S.W.3d 93, 106 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

In contrast, the expense of taking depositions is a recoverable court cost. *Dallas County v. Crestview Corners Car Wash*, 370 S.W.3d 25, 31 (Tex. App.—Dallas 2012, pet. denied); *see also Wallace v. Briggs*, 162 Tex. 485, 348 S.W.2d 523, 527 (1961, orig. proceeding) (expense of taking depositions is item of court costs). Fees of a mediator are also taxable as costs, even if the parties voluntarily attend mediation instead of being ordered to do so by the court. *See Hameed Agencies (pvt) Ltd. v. J.C. Penney Purchasing Corp.*, No. 11-05-00140-CV, 2007 Tex. App. LEXIS 942, at *26-28 (Tex. App.—Eastland Feb. 8, 2007, pet. denied) (mem. op.). And, while expert fees generally are not allowable as costs in civil cases, costs may be determined beyond the strictures of the general rule in Family Code cases, and particularly in suits affecting the parent-child relationship. *See Diaz v. Diaz*, 350 S.W.3d 251, 256-57 (Tex. App.—San Antonio 2011, pet. denied) (allowing recovery as cost of fee for expert retained to value business in divorce proceeding).

C. Other Challenges to Costs

Beyond complaints that a particular cost was improperly allocated or assessed without authorization, costs occasionally are attacked on more unconventional grounds. Historically, the most successful of these approaches has been to claim that a statute authorizing a cost violates the Open Courts provision of the Texas Constitution, article I, section 13. That particular section states, in pertinent part:

> All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.

Tex. Const., art. I, § 13. The Open Courts provision specifically guarantees all litigants the right to redress their grievances or, to use "a popular and correct phrase, the right to their day in court." *LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986). This concern fits within one of three identified areas of guarantee under the provision: (1) courts must actually be operating and available; (2) the Legislature cannot impede access to the courts through unreasonable financial barriers; and (3) meaningful remedies must be afforded, "so that the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress." *Trinity River Auth. v. URS Consultants*, 889 S.W.2d 259, 261 (Tex. 1994) (quoting *Tex. Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 448 (Tex. 1993)).

Under the Open Courts provision, the legislature's actual purpose in enacting a law must be balanced against the law's interference with the individual's right of access to the courts, with the government bearing the burden of showing that the legislative purposes outweighs the interference with the individual's right of access. *LeCroy v. Hanlon*, 713 S.W.2d 335, 341 (Tex. 1986). Applying the provision, the Texas Supreme Court has held that a filing fee which goes to the government's general revenue fund and can be used for programs besides the judiciary amounts to a general revenue tax on the right to litigate and, as such, is unconstitutional. *LeCroy*, 713 S.W.2d at 342. The court recognized that filing fees and court costs are usually constitutional, and that charging litigants that are able to pay a reasonable fee for judicial support services does not violate the Open Courts provision. *Id*. But it emphatically stated that a filing fee which goes to non-court-related purposes, regardless of size, is unconstitutional. *Id*. Applying *LeCroy*, the Dallas Court of Appeals invalidated a statute requiring Dallas County to deposit court reporter fees in its general fund, as well as its practice of depositing the sheriff's fee in its general fund because the funds could then be used for programs other than the judiciary. *Dallas County v. Sweitzer*, 881 S.W.2d 757, 765-66 (Tex. App.—Dallas 1994, writ denied). Under the same constitutional provision, the Texas Supreme Court invalidated a statute that prohibited declaratory relief in tax challenge cases unless and until fees were paid. *R Communications v. Sharp*, 875 S.W.2d 314, 317-18 (Tex. 1994). Similarly, the high court struck down a statutory and regulatory scheme that forfeited the right to judicial review in environmental enforcement cases if payment of penalties was not made or security provided within a 30-day period. *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 449-50 (Tex. 1993).

What may be gleaned from these authorities is that a fee or cost collected in judicial proceedings may not be used to fund non-judicial programs or purposes. At the same time, if the fee or fund in question is deposited in the governmental entity's general fund, the likelihood of it being seen as an unconstitutional general revenue tax on the right to litigate increases dramatically. And, as may be intuitive, any fee or cost that erects an absolute bar to access to the courts is suspect from the inception.

A fee or cost for which no service is provided generally will be invalid. *See Sweitzer*, 881 S.W.2d at 766 (where evidence did not show sheriff provided service to support sheriff's fee, fee was unauthorized). Similarly, a court cost deposit may be required, but only against a party and only in an amount sufficient to pay the accrued costs. *See* Tex. R. Civ. P. 146; *In re Green Oaks Hosp. Subsidiary, L.P.*, No. 05-07-01764-CV, 2008 Tex. App. LEXIS 2905, at *2 (Tex. App.—Dallas Apr. 23, 2008, orig. proceeding). Consequently, a standing order requiring private mental health facilities to pay a court cost deposit of an amount significantly greater than the ordinary filing fees in an

involuntary commitment proceeding was unauthorized. *Id*.

All the same, attacking a cost or fee is not as simple as storming off to the courthouse and filing a lawsuit wherever it may land. As an initial matter, a party seeking to correct the ministerial act of the court in tabulating costs can do so by filing a motion to re-tax costs. *Newton v. Calhoun*, 203 S.W.3d 382, 386 (Tex. App.—El Paso 2006, no pet.). If the trial court complaint about a fee or cost is unsuccessful, appellate success will depend on bringing forward a sufficient record to support the challenge since the appellate court will presume that any missing record contains sufficient evidence to support the trial court's judgment for court costs and fees. *Rogers v. Fort Bend Indep. Sch. Dist.*, No. 14-10-0968-CV, 2011 Tex. App. LEXIS 5222, at *4-5 (Tex. App.—Houston [14th Dist.] July 12, 2011, no pet.) (mem. op.). It is true that, if a constitutional challenge to a cost or fee statute is successful, the available and proper remedy is an injunction to prevent collection of the fee. *Sweitzer*, 881 S.W.2d at 769. This will also generally be the case if the fee or cost assessed is inconsistent with its statutory authorization. *See Burgess v. Denton County*, 359 S.W.3d 351, 359 (Tex. App.—Fort Worth 2012, no pet.) (where record demonstrated commissioners court did not act to set certified mail service fee as required by statute, party attacking fee showed probable right to recovery to support temporary injunction). If an attack within these parameters is to be made after the costs have been assessed, however, it must be done in the proper forum. Under section 65.023(b) of the Civil Practice and Remedies Code, which is mandatory, the trial court that renders a judgment assessing costs is the only court that may enjoin its execution or regulate the judgment's processes even if plenary power is absent. *See Wilder v. Campbell*, 430 S.W.3d 474, 479 (Tex. App.—Fort Worth 2014, pet. filed) (holding courts other than those issuing judgments for costs lacked jurisdiction to enjoin court from collecting assessed costs from indigent litigants against whom costs were assessed).

D. The Immunity Problem

Where a governmental entity is a party to litigation and costs may be at issue, the issue and scope of immunity arises. Here, it should be recalled that sovereign immunity protects the State and its agencies from suit unless the State consents by waiving immunity. *Tex. Adjutant Gen.'s Office v. Ngakoue*, 408 S.W.3d 350, 353 (Tex. 2013). Political subdivisions of the State, too, are protected from lawsuits for damages by governmental immunity. *Rolling Plains Groundwater Conservation Dist. v. City of Aspermont*, 353 S.W.3d 756, 759 (Tex. 2011); *Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009). Sovereign and governmental immunity encompass both immunity from liability, which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether. *Lubbock County Water Control & Improvement Dist. v. Church & Akin, L.L.C.*, 442 S.W.3d 297, 300 (Tex. 2014); *accord Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 696 (Tex. 2002). Immunity from suit deprives the courts of jurisdiction and thus completely bars a plaintiff's claim. *Id*.; *accord Tomball Reg'l Hosp*., 283 S.W.3d at 842 (immunity from suit is jurisdictional and bars suit).

Because the decision to require the public to bear the costs and consequences of a particular governmental action requires balancing numerous policy considerations, courts have consistently deferred to the Legislature, as the public's elected representative body, to decide whether and when to waive the government's immunity. *Church & Akin*, 442 S.W>3d at 300-01. When the Legislature makes the policy decision to enact a statute that waives governmental immunity, it can do so "only by clear and unambiguous language." *Id*. (quoting *Tooke v. City of Mexia*, 197 S.W.3d 325, 328-29 (Tex. 2006). In fact, the Legislature has imposed this requirement of clear and unambiguous language upon itself. *See* Tex. Gov't Code Ann. § 311.034 (West 2013) ("a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language."). In the present context, the question becomes whether and when a governmental entity may be subject to an imposition of costs. That question generally will entail statutory construction considerations.

Where the governmental entity is a defendant in a suit, the central question is whether immunity has been waived. This is so because immunity, unless waived, deprives the trial court of jurisdiction in the suit. *Harris County Hosp. Dist. v. Tomball Reg'l Hosp.*, 283 S.W.3d 838, 842 (Tex. 2009). Thus, where a governmental entity validly asserts that it is immune from a pending claim, any court decision regarding that claim is advisory to the extent it addresses issues other than immunity, and the Texas Constitution does not afford courts jurisdiction to make advisory decisions or issue advisory opinions. *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 95 (Tex. 2002). Assessment of costs against an immune entity, then, would be jurisdictionally barred. But there are an array of statutes that waive immunity, and those waivers may include authority to impose costs against governmental entities.

For example, under chapter 104 of the Civil Practice and Remedies Code, the unconstitutional conduct of State officials may result in imposition of costs against the State. *Tex. State Employees Union v. Tex. Dep't of Mental Health & Mental Retardation*,

746 S.W.2d 203, 207 (Tex. 1987). Perhaps most significantly, the Texas Supreme Court has interpreted the Texas Uniform Declaratory Judgments Act ("DJA") to waive immunity from suits against governmental defendants to construe or challenge their legislative pronouncements. *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994). Accordingly, the DJA waives immunity from suit for court costs sought in such proceedings. *Id.*; *MHCB (USA) Leasing & Fin. Corp. v. Galveston Cent. Appraisal Dist.*, 249 S.W.3d 68, 87 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). Other frequently-invoked waivers of immunity may be found in the Texas Tort Claims Act, *see* Tex. Civ. Prac. & Rem. Code Ann. § 101.025(a) (West 2011), and the Whistleblower Act, *see* Tex. Gov't Code Ann. § 554.0035 (West 2012). Such waivers may result in assessment of court costs. *See, e.g., San Antonio Hous. Auth. v. Underwood*, 782 S.W.2d 25, 27-28 (Tex. App.—San Antonio 1989, no writ) (court cost assessment against governmental entity in Tort Claims Act case proper under Rules 131 and 141); *cf.* Tex. Gov't Code Ann. § 554.003(a)(3) (West 2012) (providing entitlement to sue governmental employer for, *inter alia*, court costs). Of course, Rules of Civil Procedure 131 and 141 are in play, so awards of costs remain within the discretion of the trial court to the extent it complies with those rules. *See Hill v. Leon County*, No. 10-07-00301-CV, 2008 Tex. App. LEXIS 9206, at *6-8 (Tex. App.—Waco Dec. 10, 2008, no pet.) (mem. op.).

Different considerations apply when the governmental entity is the plaintiff in litigation. Generally, when a governmental entity enters the court as a litigant, it places itself on the same basis as any other litigant. *In Interest of R.M.H.*, 843 S.W.2d 740, 742 (Tex. App.—Corpus Christi 1992, no writ). So, ordinarily and in the absence of a statute exempting a governmental unit from the payment of court costs, it is just as liable as any other litigant. *In Interest of R.M.H.*, 843 S.W.2d 740, 742 (Tex. App.—Corpus Christi 1992, no writ). This is consistent with the broader principle that, if a governmental entity interjects itself into or chooses to engage in litigation to assert affirmative claims for monetary relief, the entity presumably will have made a decision to expend resources to pay litigation costs. *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006). Based on that rationale, as well as considerations of fairness, where a governmental entity has joined into the litigation process by asserting its own affirmative claims for monetary relief, that entity waives immunity from claims against it that are connected to, germane to, and defensive to the claims asserted by the entity. *See id.* at 377. Notably, however, the governmental entity continues to have immunity from affirmative damage claims against it for monetary relief exceeding amounts necessary to offset the entity's claims. *Id.* These limitations are significant. To illustrate, a purely defensive request for attorneys' fees is not one in which the *Reata* rule of immunity waiver applies. *See City of Dallas v. VRC LLC*, 260 S.W.3d 60, 64 (Tex. App.—Dallas 2008, no pet.). But where a city sought affirmative relief in a consolidated suit in which it also asserted defensive entitlement to attorney's fees, immunity was waived under *Reata* with respect to the affirmative claims for relief. *City of McKinney v. Hank's Rest. Group, L.P.*, 412 S.W.3d 102, 119 (Tex. App.—Dallas 2013, no pet.). So, to the extent a claim for costs is connected to, germane to and defensive to claims for relief asserted by a governmental entity, it appears that immunity will be considered waived for the costs claim.

A final note should also be considered. The fact that a statute may impose an obligation on a governmental entity to pay costs when other sources are unavailable (for instance, by virtue of those sources' inability to pay) does not overcome immunity in the absence of an express statutory waiver of immunity. *See Kaufman County v. Combs*, 393 S.W.3d 336, 343 (Tex. App.—Dallas 2012, pet. denied) (county's obligation under Probate Code to pay costs of guardianship when guardianship estate is insufficient to pay costs did not waive immunity for substantial attorney's fee and cost claim). Moreover, where the costs already have accrued, the prospective relief limitation on ultra vires claims will prevent that avenue for overcoming immunity from applying. *Combs*, 393 S.W.3d at 343-44. As a result, if a governmental entity's general "safety net" statutory obligation to pay costs is relied upon to support a particular claim for costs, the claimant will need to point to a clear and unambiguous waiver of immunity within that statute. *See* Tex. Gov't Code Ann. § 331.034 (West 2013).