

INDIGENT DEFENSE AMENDMENTS

2023 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Ryan D. Wilcox

Senate Sponsor: Todd D. Weiler

LONG TITLE

General Description:

This bill amends provisions related to indigent defense.

Highlighted Provisions:

This bill:

- ▶ clarifies when a court may order indigent defense services and resources;
- ▶ amends provisions related to the Indigent Aggravated Murder Defense Fund; and
- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

AMENDS:

78B-22-203, as last amended by Laws of Utah 2022, Chapter 281

78B-22-302, as enacted by Laws of Utah 2019, Chapter 326

78B-22-701, as last amended by Laws of Utah 2022, Chapters 281, 451

78B-22-702, as renumbered and amended by Laws of Utah 2019, Chapter 326

78B-22-703, as renumbered and amended by Laws of Utah 2019, Chapter 326

78B-22-704, as renumbered and amended by Laws of Utah 2019, Chapter 326

ENACTS:



28 [78B-22-705](#), Utah Code Annotated 1953

29

30 *Be it enacted by the Legislature of the state of Utah:*

31 Section 1. Section **78B-22-203** is amended to read:

32 **78B-22-203. Order for indigent defense services.**

33 (1) (a) A court shall appoint an indigent defense service provider who is employed by
34 an indigent defense system or who has a contract with an indigent defense system to provide
35 indigent defense services for an individual over whom the court has jurisdiction if:

- 36 (i) the individual is an indigent individual; and
- 37 (ii) the individual does not have private counsel.

38 (b) An indigent defense service provider appointed by the court under Subsection
39 (1)(a) shall provide indigent defense services for the indigent individual in all court
40 proceedings in the matter for which the indigent defense service provider is appointed.

41 (2) (a) Notwithstanding Subsection (1), the court may order that indigent defense
42 services be provided by an indigent defense service provider who does not have a contract with
43 an indigent defense system if the court finds by clear and convincing evidence that:

- 44 (i) all the contracted indigent defense service providers:
 - 45 (A) have a conflict of interest; or
 - 46 (B) do not have sufficient expertise to provide indigent defense services for the
- 47 indigent individual; or
- 48 (ii) the indigent defense system does not have a contract with an indigent defense
49 service provider for indigent defense services.

50 (b) A court may not order indigent defense services under Subsection (2)(a) unless the
51 court conducts a hearing with proper notice to the indigent defense system by sending notice of
52 the hearing to the county clerk or municipal recorder.

53 (3) (a) A court may order reasonable indigent defense resources for an individual who
54 has retained private counsel only if the court finds by clear and convincing evidence that:

- 55 (i) the individual is an indigent individual;
- 56 (ii) the individual would be prejudiced by the substitution of a contracted indigent
57 defense service provider and the prejudice cannot be remedied;
- 58 (iii) at the time that private counsel was retained, the individual:

- 59 (A) entered into a written contract with private counsel; and
- 60 (B) had the ability to pay for indigent defense resources, but no longer has the ability to
- 61 pay for the indigent defense resources in addition to the cost of private counsel;
- 62 (iv) there has been an unforeseen change in circumstances that requires indigent
- 63 defense resources beyond the individual's ability to pay; and
- 64 (v) any representation under this Subsection (3)(a) is made in good faith and is not
- 65 calculated to allow the individual or retained private counsel to avoid the requirements of this
- 66 section.

67 (b) A court may not order indigent defense resources under Subsection (3)(a) until the

68 court conducts a hearing with proper notice to the indigent defense system by sending notice of

69 the hearing to the county clerk or municipal recorder.

70 (c) At the hearing, the court shall conduct an in camera review of:

- 71 (i) the private counsel contract;
- 72 (ii) the costs or anticipated costs of the indigent defense resources; and
- 73 (iii) other relevant records.

74 (4) A court may only order the representation of an indigent individual by an indigent

75 defense service provider in accordance with this section.

76 (5) A court may not order indigent defense resources be provided to an indigent

77 individual, except as provided in:

- 78 (a) Subsection (3); or
- 79 (b) Section [78B-22-705](#).

80 [~~(4) Except as provided in this section, a court may not order indigent defense~~

81 ~~services.]~~

82 Section 2. Section **78B-22-302** is amended to read:

83 **78B-22-302. Compensation for indigent defense services.**

84 (1) An indigent defense system shall fund indigent defense services ordered by a court

85 [in accordance with] under Section [78B-22-203](#).

86 (2) An indigent defense system shall ensure that there are adequate funds for indigent

87 defense resources when a court orders indigent defense services under Section [78B-22-203](#).

88 Section 3. Section **78B-22-701** is amended to read:

89 **78B-22-701. Establishment of Indigent Aggravated Murder Defense Fund -- Use**

90 **of fund -- Compensation for indigent legal defense from fund.**

91 (1) [~~For purposes of this part~~] As used in this part, "fund" means the Indigent
92 Aggravated Murder Defense Fund.

93 (2) (a) There is established a custodial fund known as the "Indigent Aggravated Murder
94 Defense Fund."

95 (b) The Division of Finance shall disburse money from the fund at the direction of the
96 board and subject to this chapter.

97 (3) The fund consists of:

98 (a) money received from participating counties as provided in Sections [78B-22-702](#)
99 and [78B-22-703](#);

100 (b) appropriations made to the fund by the Legislature as provided in Section
101 [78B-22-703](#); and

102 (c) interest and earnings from the investment of fund money.

103 (4) The state treasurer shall invest fund money with the earnings and interest accruing
104 to the fund.

105 (5) The fund shall be used to assist participating counties with [~~financial resources~~]
106 expenses for indigent defense services, as provided in Subsection (6), to fulfill [~~their~~] the
107 constitutional and statutory mandates for the provision of constitutionally effective defense for
108 indigent individuals prosecuted for the violation of state laws in cases involving aggravated
109 murder.

110 (6) Money allocated to or deposited in [~~this~~] the fund [~~shall be~~] is used only:

111 (a) to reimburse participating counties for [~~expenditures made for an attorney~~
112 appointed to represent] expenses incurred for indigent defense services provided to an indigent
113 individual, other than a state inmate in a state prison, who is prosecuted for aggravated murder
114 in a participating county; and

115 (b) for administrative costs pursuant to Section [78B-22-501](#).

116 Section 4. Section **78B-22-702** is amended to read:

117 **78B-22-702. County participation.**

118 (1) (a) A county may participate in the fund subject to the provisions of this chapter.

119 (b) A county that does not participate in the fund, or is not current in the county's
120 assessments for the fund, is ineligible to receive money from the fund.

121 ~~[(b)]~~ (c) The board may revoke a county's participation in the fund if the county fails to
122 pay the county's assessments when due.

123 (2) To participate in the fund, the legislative body of a county shall:

124 (a) adopt a resolution approving participation in the fund and committing that county to
125 fulfill the assessment requirements as set forth in Subsection (3) and Section 78B-22-703; and

126 (b) submit a certified copy of that resolution together with an application to the board.

127 (3) By January 15 of each year, a participating county shall contribute to the fund an
128 amount computed in accordance with Section 78B-22-703.

129 (4) A participating county may withdraw from participation in the fund upon:

130 (a) adoption by the county's legislative body of a resolution to withdraw; and

131 (b) notice to the board by January 1 of the year before withdrawal.

132 (5) A county withdrawing from participation in the fund, or whose participation in the
133 fund has been revoked for failure to pay the county's assessments when due, shall forfeit the
134 right to:

135 (a) any previously [~~payed~~] paid assessment;

136 (b) relief from the county's obligation to pay [~~its~~] the county's assessment during the
137 period of [~~its~~] the county's participation in the fund; and

138 (c) any benefit from the fund, including reimbursement of costs that accrued after the
139 last day of the period for which the county has paid [~~its~~] the county's assessment.

140 Section 5. Section 78B-22-703 is amended to read:

141 **78B-22-703. County and state obligations.**

142 (1) (a) Except as provided in Subsection (1)(b), a participating county shall pay into the
143 fund annually an amount calculated by multiplying the average of the percent of [~~its~~] the
144 county's population to the total population of all participating counties and of the percent [~~its~~]
145 of the county's taxable value of the locally and centrally assessed property located within that
146 county to the total taxable value of the locally and centrally assessed property to all
147 participating counties by the total fund assessment for that year to be paid by all participating
148 counties as is determined by the board to be sufficient such that it is unlikely that a deficit will
149 occur in the fund in any calendar year.

150 (b) The fund minimum [~~shall be~~] is equal to or greater than 50 cents per person of all
151 counties participating.

152 (c) The amount paid by a participating county [~~pursuant to~~] under this Subsection (1)
153 [~~shall be~~] is the total county obligation for payment of costs [~~pursuant to~~] in accordance with
154 Section 78B-22-701.

155 (2) (a) A county that elects to initiate participation in the fund, or reestablish
156 participation in the fund after participation was terminated, is required to make an equity
157 payment in addition to the assessment required by Subsection (1).

158 (b) The equity payment [~~shall be~~] is determined by the board and represent what the
159 county's equity in the fund would be if the county had made assessments into the fund for each
160 of the previous two years.

161 (3) If the fund balance after contribution by the state and participating counties is
162 insufficient to replenish the fund annually to at least \$250,000, the board by a majority vote
163 may terminate the fund.

164 (4) If the fund is terminated, the remaining money shall continue to be administered
165 and disbursed in accordance with the provision of this chapter until exhausted, at which time
166 the fund shall cease to exist.

167 (5) (a) If the fund runs a deficit during any calendar year, the state is responsible for the
168 deficit.

169 (b) In the calendar year following a deficit year, the board shall increase the assessment
170 required by Subsection (1) by an amount at least equal to the deficit of the previous year, which
171 combined amount becomes the base assessment until another deficit year occurs.

172 (6) In a calendar year in which the fund runs a deficit, or is projected to run a deficit,
173 the board shall request a supplemental appropriation to pay for the deficit from the Legislature
174 in the following general session.

175 (7) The state shall pay any or all of the reasonable and necessary money for the deficit
176 into the fund.

177 Section 6. Section **78B-22-704** is amended to read:

178 **78B-22-704. Application and qualification for fund money.**

179 (1) A participating county may apply to the board for benefits from the fund if that
180 county has incurred, or reasonably anticipates incurring, expenses [~~in the defense of~~] for
181 indigent defense services provided to an indigent individual for an offense involving
182 aggravated murder.

183 (2) An application may not be made nor benefits provided from the fund for a case
184 filed before September 1, 1998.

185 (3) [~~H~~] Except as provided in Subsection (4), if the application of a participating
186 county is approved by the board, the board shall negotiate, enter into, and administer a contract
187 [with counsel for the indigent individual and costs incurred for the defense of that indigent
188 individual, including fees for counsel and reimbursement for indigent defense services incurred
189 by an indigent defense service provider] for the cost of indigent defense services with an
190 attorney or entity appointed to represent an indigent individual for an offense involving
191 aggravated murder.

192 (4) The board shall pay an indigent defense service provider for indigent defense
193 resources approved by a court under Section [78B-22-705](#).

194 [~~4~~] (5) A nonparticipating county is responsible for paying for indigent defense
195 services in the nonparticipating county and is not eligible for any legislative relief.

196 Section 7. Section **78B-22-705** is enacted to read:

197 **78B-22-705. Extraordinary expense -- Motion.**

198 (1) (a) In representing an indigent individual for an offense involving aggravated
199 murder, an indigent defense service provider may file an ex parte motion with the court for an
200 order for the payment of indigent defense resources not covered by the contract between the
201 indigent defense service provider and the board under Subsection [78B-22-704](#)(3).

202 (b) An indigent defense service provider shall file an ex parte motion under Subsection
203 (2)(a) before the cost is incurred.

204 (2) Upon an ex parte motion under Subsection (1), the court shall conduct an in camera
205 review of:

206 (a) the indigent defense service provider's contract with the board;

207 (b) the anticipated cost of the indigent defense resources for which the indigent service
208 provider seeks approval; and

209 (c) any other relevant record.

210 (3) A court may order the board to pay for indigent defense resources sought by the
211 indigent defense service provider.