

THE UTAH INDIGENT DEFENSE ACT

**Dianne R. Orcutt, Deputy Utah County Attorney
Sponsored by the Government Law Section of the
Utah Bar**

WHAT DO WE MEAN WHEN WE SAY INDIGENT DEFENSE?

- Right to be represented by counsel

- Right to some defense resources

RIGHT TO COUNSEL

United States Constitution, Sixth Amendment

*In all criminal prosecutions, the accused shall enjoy the right to ...
have the assistance of counsel for his defense.*

- In *Gideon v. Wainwright*, the Supreme Court found that the Sixth Amendment right to counsel was a fundamental right. 372 U.S. 335, 339–45 (1963)
- This right was made applicable to the states through the Due Process Clause of the Fourteenth Amendment.

RIGHT TO COUNSEL

Powell v. Alabama (1932) 287 U.S. 45

- First case to articulate “counsel of choice”
- The right to assistance of counsel has a concomitant right – the right to a “fair opportunity to secure counsel of [one’s] own choice.”
- Prohibits the government from refusing a defendant the right to have a particular person to defend him or reasonable opportunity to obtain the services of such an attorney.”



RIGHT TO COUNSEL

***Wheat v. United States*, 486 U.S. 153 (1988)**

“The right to select and be represented by one’s preferred attorney is comprehended by the Sixth Amendment.”

“The essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by that lawyer whom he prefers.”

RIGHT TO COUNSEL

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006)

- “Right to be represented by an otherwise qualified attorney whom the defendant can afford to hire, or who is willing to represent the defendant even though he is without funds.”
- This right to is deprived when a “defendant is erroneously *prevented* from being represented by the lawyer he wants.” (emphasis added)



RIGHT TO COUNSEL

***Farretta v. California* (1975)**
422 U.S. 806

- Criminal defendants have a constitutional right to refuse counsel and represent themselves in state criminal proceedings
- Note: Fair trial considerations may outweigh right to represent self – standby counsel

I have a
Constitutional
right to
represent
myself.



And I have a
Constitutional
duty to advise you
that exercising
that right makes
you an idiot.



DEFENSE RESOURCES

***Griffin v. Illinois*, 351 U.S. 12 (1956)**

The State must, as a matter of equal protection, provide indigent prisoners with “the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners.”

DEFENSE RESOURCES

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

- Held: an indigent criminal defendant has a right to have the state provide a psychiatric evaluation to be used in the defendant's behalf if he needed it
- The question is one of “meaningful access to justice”
- A state must make certain that an indigent defendant has “access to the raw materials integral to the building of an effective defense.”



DEFENSE RESOURCES

“Our concern is that the defendant have access to [a competent psychiatrist] ...and as in the case of the provision of counsel we leave to the States the decision on how to implement that right.”

THE UTAH INDIGENT DEFENSE ACT

Utah
Code
77-32

INDIGENT DEFENSE ACT

What does the IDA provide?

Provides indigent defendants with a “legal defense,” which is defined as:

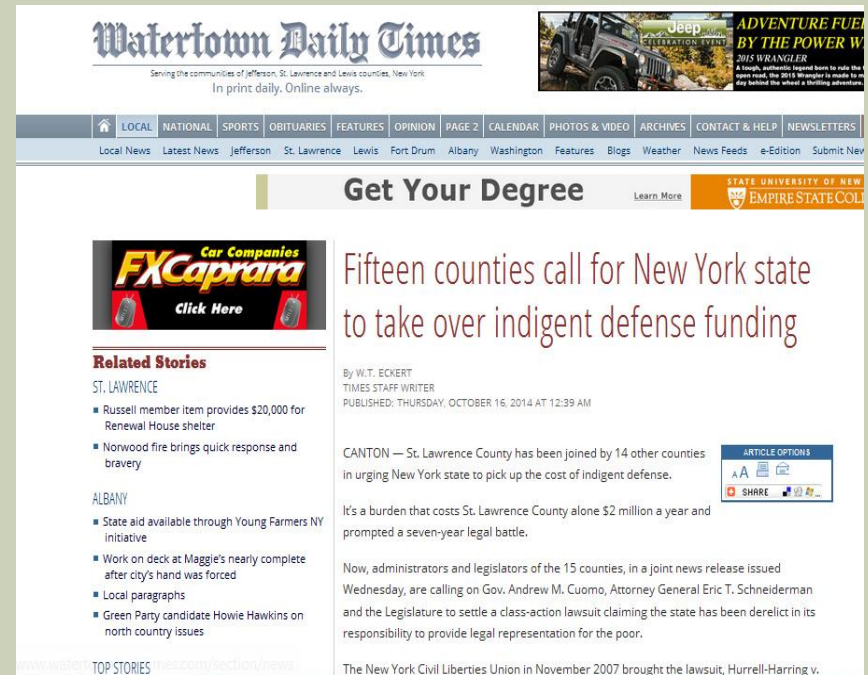
- provide defense counsel for each indigent who faces the potential deprivation of the indigent's liberty;
- afford timely representation by defense counsel;
- provide the defense resources necessary for a complete defense;
- assure undivided loyalty of defense counsel to the client;
- provide a first appeal of right; and
- prosecute other remedies before or after a conviction, considered by defense counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings.

INDIGENT DEFENSE ACT

How does the IDA provide these services?

Through local government!

The State has delegated to cities, towns, and counties, the obligation to provide indigent defense services.



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Fifteen counties call for New York state to take over indigent defense funding

By W.T. ECKERT
TIMES STAFF WRITER
PUBLISHED: THURSDAY, OCTOBER 16, 2014 AT 12:39 AM

CANTON — St. Lawrence County has been joined by 14 other counties in urging New York state to pick up the cost of indigent defense.

It's a burden that costs St. Lawrence County alone \$2 million a year and prompted a seven-year legal battle.

Now, administrators and legislators of the 15 counties, in a joint news release issued Wednesday, are calling on Gov. Andrew M. Cuomo, Attorney General Eric T. Schneiderman and the Legislature to settle a class-action lawsuit claiming the state has been derelict in its responsibility to provide legal representation for the poor.

The New York Civil Liberties Union in November 2007 brought the lawsuit, *Hurrell-Harrington v.*

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INDIGENT DEFENSE ACT

A HISTORY

- *State v. Burns*, [2000 UT 56](#)
 - The IDA requires local governments to provide indigent defendants with funding for necessary defense resources, even when represented by private counsel.
 - IDA did not “mandate the packaging of indigent assistance” with public representation.
- Legislative changes: 2001
 - “when a county or municipality has contracted ... to provide the legal counsel and defense resources required by this chapter” the provider is the “exclusive source from which the legal defense may be provided,” unless there is a showing of a “compelling reason” to secure a defense resource from another source.
- *State v. Parduhn*, [2011 UT 55](#)
 - The plain language of the amended Act requires local government to provide an indigent defendant with funding for necessary defense resources even when the defendant is represented by private counsel.
 - Justice Lee, dissenting: The amendments “foreclose the a la carte requisitioning of defense resources by defendants who retain private counsel.”

INDIGENT DEFENSE ACT

■ Legislative changes: 2011

- “if a county or municipality has contracted or otherwise provided for a defense services provider, the court *may not* order under this part ... and the county or municipality *may not* provide defense resources for a defendant who has retained private counsel.” Utah Code Ann. 77-32-303(2) (emphasis added)
- This is subject to certain, limited exceptions.
- Text of the entire Indigent Defense Act, [here](#).

■ Current Litigation (*State v. Earl*)

- Which version of the IDA applies and when?
- Is the current IDA constitutional? Can the state bundle these rights?
 - Sixth Amendment: Right to counsel of choice
 - Fourteenth Amendment: Equal Protection

INDIGENT DEFENSE ACT

77-32-301. Minimum standards for defense of an indigent.

(1) *Each county, city, and town shall provide for the legal defense of an indigent in criminal cases in the courts and various administrative bodies of the state in accordance with legal defense standards as defined in Subsection 77-32-208(8).*

(2) (a) *A county or municipality which contracts with a defense services provider shall provide that all legal defense elements be included as a single package of legal defense services made available to indigents, except as provided in Sections 77-32-302 and 77-32-303.*

(b) *When needed to avoid a conflict of interest between:*

(i) trial counsel and counsel on appeal, a defense services provider contract shall also provide for separate trial and appellate counsel; and

(ii) counsel for co-defendants, a defense services provider contract shall also provide for separate trial counsel.

(c) *If a county or municipality contracts to provide all legal defense elements as a single package, a defendant may not receive funding for defense resources unless represented by publicly funded counsel or as provided in Subsection 77-32-303(2).*

■ **Defense Service Provider**

- A legal aid association, legal defender's office, regional legal defense association, law firm, attorney, or attorneys contracting with a county or municipality to provide legal defense and includes any combination of counties or municipalities to provide regional legal defense.

■ **Defense Resources**

- A competent investigator, expert witness, scientific or medical testing, or other appropriate means necessary, for an effective defense of an indigent, but does not include legal counsel.

■ **Indigent**

- One who does not have sufficient income, assets, credit, or other means to provide for the payment of legal counsel and all other necessary expenses of representation without depriving that person or the family of that person of food, shelter, clothing, and other necessities; OR (ii) has an income level at or below 150% of the United States poverty level

■ **Legal Defense (see earlier slide)**

■ **Compelling Reason**

- One or more of the following circumstances relating to the contracting attorney: (a) a conflict of interest; (b) the contracting attorney does not have sufficient expertise to provide an effective defense of the indigent; or (c) the legal defense is insufficient or lacks expertise to provide a complete defense.

IMPORTANT DEFINITIONS

INDIGENT DEFENSE ACT

Agreements with Defense Services Providers

- “The ASSOCIATION agrees to be the exclusive indigent defense service provider for the COUNTY, to assume all responsibilities thereof, to be the exclusive source of legal defense for indigent persons in Utah County, and to provide legal advice, representation, and defense resources as provided by § 77-32-201(8), Utah Code, at all stages of the proceedings, upon appointment”



INDIGENT DEFENSE ACT

Responding to motions for public funds of an indigent represented by private counsel.

1. Motion to Intervene

e.g. Utah County is the legal entity which has the statutory responsibility to provide for the defense of indigent defendants, pursuant to the Indigent Defense Act, UTAH CODE ANN. §§ 77-32-101 to -704 (2013). The County is represented herein by the Civil Division of the County Attorney's Office, appearing and intervening herein solely for the purpose of responding to Defendant's Motion, and not for the prosecution of the underlying criminal action.

2. Memorandum in Response to Motion for Public Funds

Apply [§77-32-303](#) the standard for court to appoint noncontracting attorney or order the provision of defense resources

(1) If a county or municipality has contracted or otherwise provided for a defense services provider, **the court may not appoint a noncontracting attorney ... , unless** the court:

(a) conducts a hearing ... and

(b) makes a finding that there is a **compelling reason** to authorize or designate a noncontracting attorney for the indigent defendant.

(2) Except as provided in Subsection (3), if a county or municipality has contracted or otherwise provided for a defense services provider, the court may not order ... and the county or municipality may not provide defense resources for a defendant who has retained private counsel.

(3) The court may order, and the county or municipality may provide, defense resources to a defendant represented by private counsel **only if**:

(a) the court conducts a hearing ...;

(b) the court conducts an **in camera review of the defense contract**, a full accounting of the defense retainer, anticipated costs of defense resources and other relevant defense records and finds by **clear and convincing evidence** all of the following:

(i) the defendant would be **prejudiced by the substitution** of a contracted defense services provider and any **prejudice cannot be remedied by a continuance or other alternative means**;

(ii) at the time of retention of private counsel, the defendant and attorney entered into a written contract which provided that **the defendant had the means** to pay for fees and defense resources;

(iii) there has been an **unforeseen change in circumstances** which requires defense resources beyond the defendant's ability to pay; and

(iv) all of the above representations are made in **good faith** and are not calculated to allow the defendant or defense attorney to avoid the requirements of this section.

(4) The court may not order the defense services provider to act as co-counsel with a privately retained legal counsel as a means of circumventing the requirements of this section

SECTION 303

Standard for
court to
appoint
noncontracting
attorney or
order the
provision of
defense
resources --
Hearing.

WHAT NEXT?

How should/will the Court decide *Earl*?

- Which version of the IDA should apply and when?
- Is the current IDA constitutional? Does the statute impermissibly burden or prevent Defendant from hiring counsel of choice?
 - Sixth Amendment: Right to counsel of choice
 - Fourteenth Amendment: Equal Protection



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