

INDIGENT DEFENSE IN UTAH JUSTICE COURTS: RIGHTS & RESPONSIBILITIES

Utah League of Cities and Towns Annual Convention
-September 2017-



Utah Indigent Defense
Commission

Utah Indigent Defense Commission

Senator Todd Weiler

Republican, District 23, Davis & Salt Lake Counties, Senator since 2012

Law and business degrees from [BYU](#). Former City Council Member.

Sponsor: SB155(16) & SB134(17) – created & expanded IDC scope

IDC Commissioner since 2016 -- recommended by Legislature



Utah Indigent Defense Commission

Ryan Loose

South Jordan City Attorney since 2015

12 years of experience in city government

Law and public administration degrees from [BYU](#)

IDC Commissioner since 7/2016 – one of two recommended by ULCT



Utah Indigent Defense Commission

Director, Joanna Landau

Hired by IDC October, 2016

Law Degree from the **University of Utah**

Former judicial law clerk and appellate attorney for Salt Lake Legal Defender

Assists the IDC in performing statutory duties, manages staff



**Why should I care about the
Utah Indigent Defense Commission?**

You should care about Utah's Indigent Defense Commission because . . .

- **Knowledge is power – avoid being sued!**

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- **No time like the present – don't be late!**

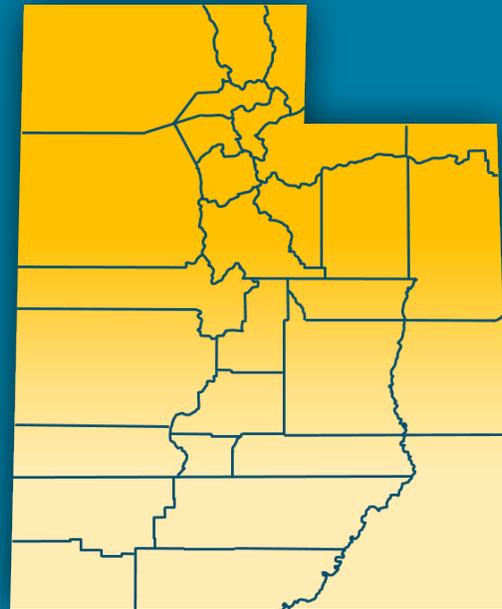
You should care about Utah's Indigent Defense Commission because . . .

- Knowledge is power – avoid being sued!**
- No time like the present – don't be late!**
- We're from the government and we're here to help – we have state money!**

Knowledge is power.

Why do we have the Utah Indigent Defense Commission?

Created in 2016, to “assist the state in meeting the state’s obligations for the provision of indigent defense services, consistent with the United States Constitution, the Utah Constitution, and the Utah Code.”



**What are
those
obligations?**

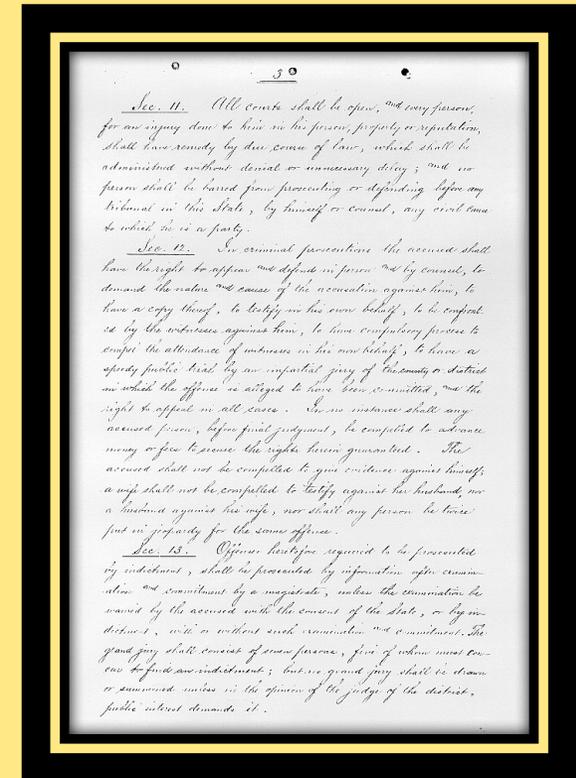
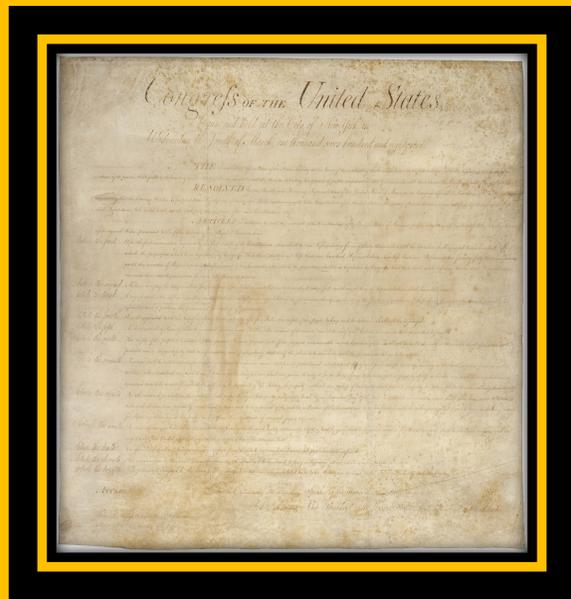
The Right to Counsel in Criminal Cases is Constitutional

United States Constitution Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

Utah Constitution Article I, § 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel.



The US Supreme Court says . . .

1963

Gideon v. Wainwright

States must ensure people accused of serious crimes (felonies), have defense counsel regardless of wealth.

1972

Argersinger v. Hamlin

The right to counsel applies when the underlying offense carries a possibility of incarceration.
Applies to felonies and misdemeanors.

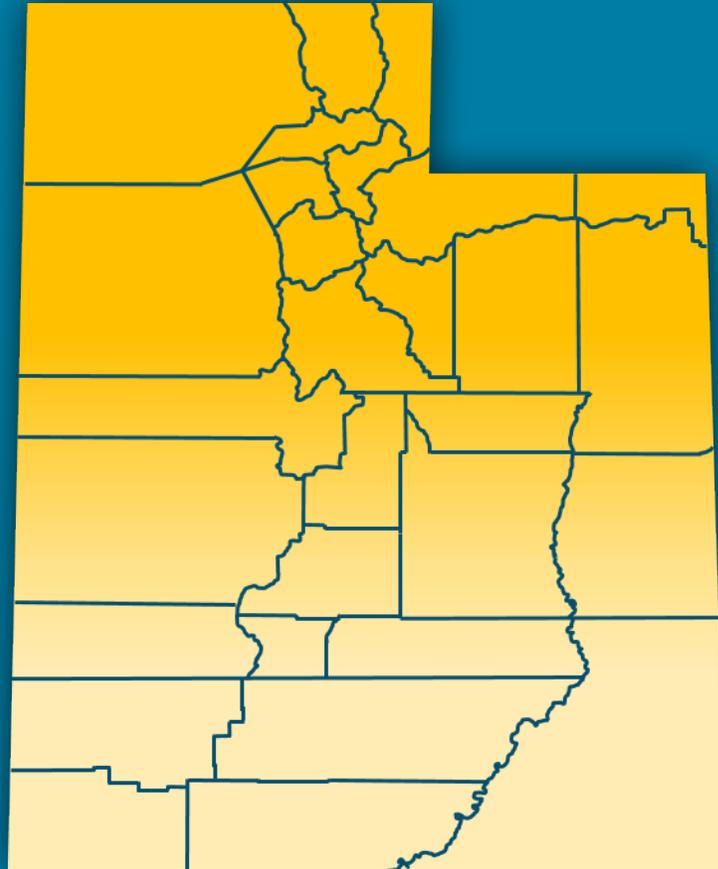
2002

Alabama v. Shelton

- Right to counsel triggered at ORIGINAL hearing.
- If underlying offense is a Class C Misd. or higher in Utah, but a suspended sentence applied, cannot later incarcerate for probation violation if not informed of right to counsel at original proceedings.

**We didn't go to law school for a reason,
just tell us what this means for
Utah cities and towns.**

**Utah Law Says: Everyone has the right to the
EFFECTIVE assistance of counsel.**



Local governments must provide the **EFFECTIVE** assistance of counsel.

**Local governments
must provide for
indigent defense
services.**

*Every **county, city, & town** shall provide for the legal defense of
an indigent defendant in criminal cases in the courts of the state.*

Utah Code § 77-32-301(1)

Local governments must provide the **EFFECTIVE** assistance of counsel.

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The right to counsel extends to:

All criminal, juvenile delinquency, abuse, neglect, and dependency proceedings, and certain private termination of parental rights proceedings.

Utah Code § 78A-6-1111

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Utah Code § 78A-6-1111

Effective Representation Required

When indigent defense service providers are court appointed, they “shall provide the legal defense services necessary for effective representation.”
Utah Code § 77-32-302(1)

**What is the
“effective assistance of counsel”?**

The US and Utah Supreme Courts say it is the right to the “EFFECTIVE assistance of counsel”

Strickland v. Washington **(1984)**

- ***Strickland Test Asks:*** *were lawyer’s actions objectively reasonable? If not, did they prejudice the outcome?*
If yes, court reverses criminal conviction.
- ***Examples:*** *Counsel failed to investigate or call expert, did not know the law, no advice on immigration consequences, etc.*

U.S. v. Cronic **(1984)**

- ***Cronic Test Asks:*** *were systemic factors present/absent such that attorney could not be effective, and there was no possibility of a fair trial?* *If yes, court will presume prejudice and reverse.*
- ***Examples:***
 - *Court never appointed counsel, counsel not at critical proceedings, counsel had insufficient time/experience or resources to be effective, or had conflicts of interest.*

Governments are responsible for ensuring the “EFFECTIVE assistance of counsel.”

Tucker v. Idaho

- Idaho Supreme Court -- sovereign immunity DOES NOT shield a state from liability for unconstitutional indigent defense. (Cronic)
- “The right to counsel is ‘made obligatory upon the *States* by the Fourteenth Amendment.’ *Gideon*, 372 U.S. at 342
- The State, therefore, has ultimate responsibility to ensure that the public defense system passes constitutional muster.
- While the provision of public defense has been delegated to Idaho’s forty-four counties . . . ‘the ultimate responsibility for fulfilling the . . . constitutional duty cannot be delegated.’”

Other ACLU Litigation in NY, PA, and UT...

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 43922

TRACY TUCKER, JASON SHARP, NAOMI MORLEY, JEREMY PAYNE, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

STATE OF IDAHO; C.L. “BUTCH” OTTER, in his official capacity as Governor of Idaho; HON. LINDA COPPLE TROUT, DARRELL G. BOLZ, SARA B. THOMAS, WILLIAM H. WELLMAN, KIMBER RICKS, SEN. CHUCK WINDER, and REP. CHRISTY PERRY, in their official capacities as members of the Idaho State Public Defense Commission,

Defendants-Respondents.

Boise, January 2017 Term

2017 Opinion No. 38

Filed: April 28, 2017

Stephen W. Kenyon, Clerk

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Samuel A. Hoagland, District Judge.

District court order dismissing class action complaint, affirmed in part, reversed in part and remanded.

American Civil Liberties Union of Idaho Foundation, Richard Alan Eppink, Boise, for appellants. Jason D. Williamson argued.

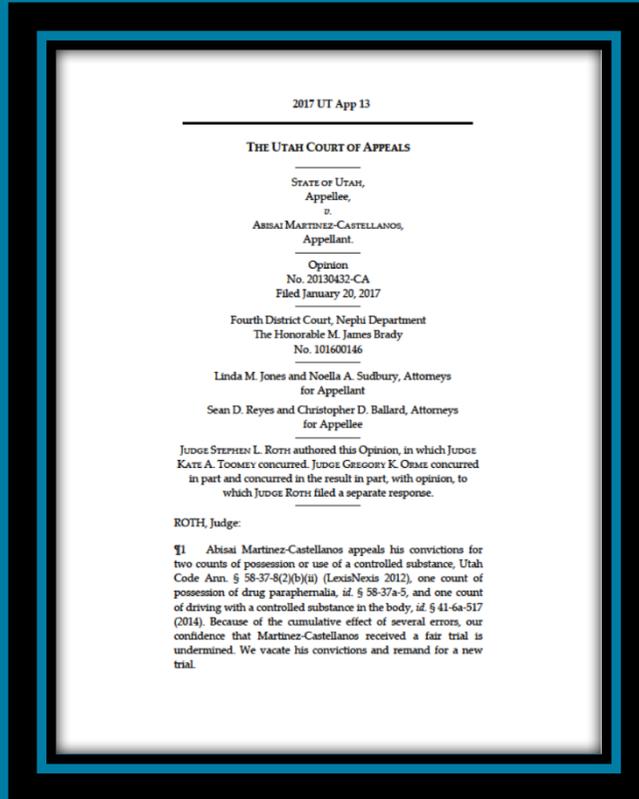
Hon. Lawrence G. Wasden, Idaho Attorney General, Boise, for respondents Governor C.L. “Butch” Otter, Trout, Bolz, Ricks, Winder and Perry. Michael S. Gilmore, Deputy Attorney General argued.

Cantrill, Skinner, Lewis, Casey & Sorensen, LLP, Boise, for respondents Thomas and Wellman. Daniel J. Skinner argued.

BURDICK, Chief Justice.

Tracy Tucker, Jason Sharp, Naomi Morley, and Jeremy Payne, on behalf of themselves and all other similarly situated (Appellants), bring this appeal from the Ada County District

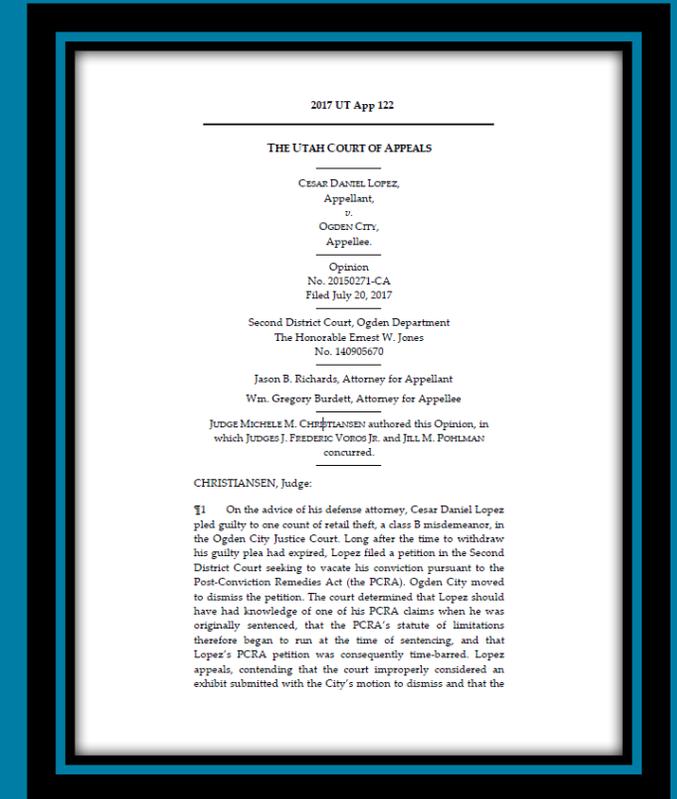
Utah courts reverse criminal convictions when public defenders are ineffective.



*Utah v. Hales,
2007 UT 14*

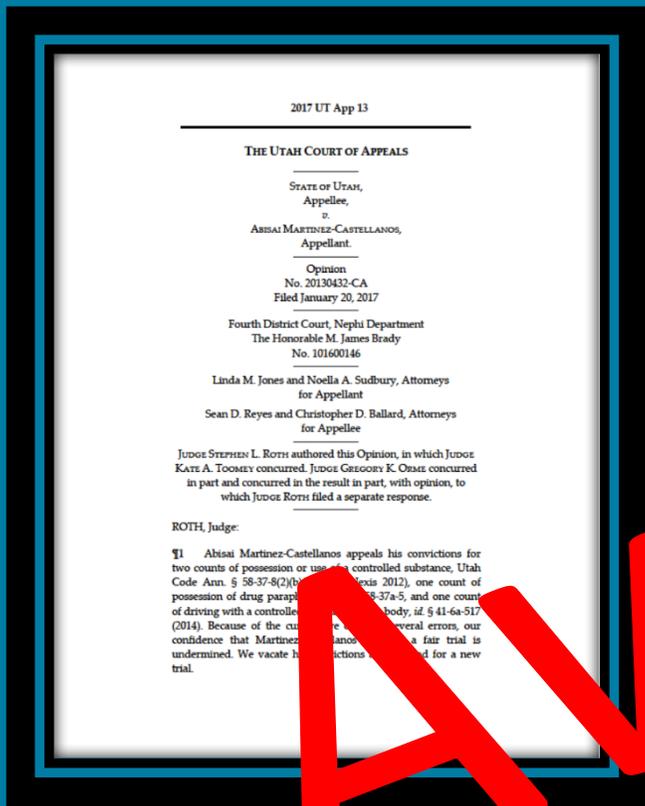


*Utah v. Martinez-Castellanos,
2017 UT App 13*

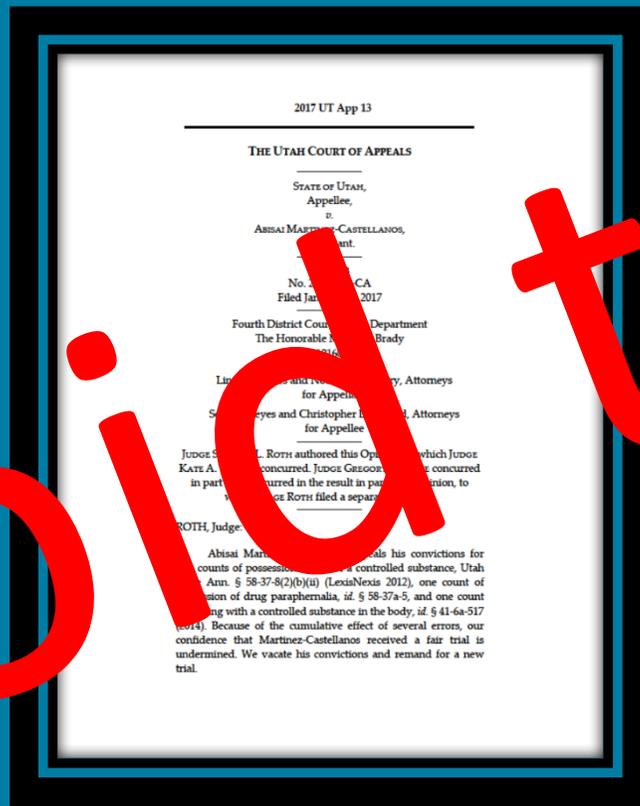


*Lopez v. Ogden City,
2017 UT App 122*

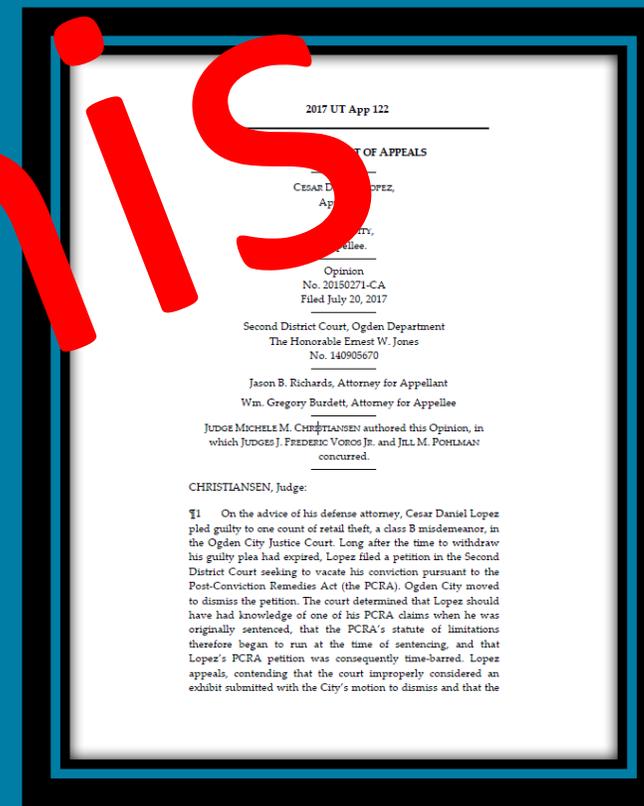
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*Lopez v. Ogden City,
2017 UT App 122*

avoid this

Eek!

**Ryan, please tell us what this
means for our cities!**

No time like the present.

**If your city prosecutes cases,
do not neglect indigent defense.**

Utah's Cities and Towns

- 158 cities and towns prosecuted at least one Class C Misdemeanor FY16.
- 118 Justice Courts
- 59,931 criminal cases filed by cities and towns in FY16
- Cities paid indigent defense providers more than \$3 million in FY16.
- Many cities are contracting with the same indigent defense providers.
- Many cities and towns have NO written contracts for indigent defense.

Make sure defense attorneys can provide the effective assistance of counsel.

- **Contracts help with accountability, good government practices, risk management**
- **Ensure attorneys are qualified, experienced, and/or supervised.**
- **Defense attorneys must be free from government interference.**
 - *No repercussions (from judge or city) for taking appropriate cases to trial*
- **Contracts should not create financial disincentives.**
 - *Earning enough not to have to take on too many cases*
 - *Don't have to hire counsel for conflicts out of an already limited budget.*
 - *Resources to independently investigate prosecution's case.*
- **Contracts should make defense attorneys accountable for their representation.**
 - *Responsive to clients, investigating cases a.s.a.p., reporting to city about representation: cases, outcomes, investigations, subcontractors.*

Questions to ask about your city or town's public defenders.

- Who is handling your indigent defense representation?**
 - How many other cities or counties do your attorneys contract with?
 - Are they subcontracting services to other attorneys? Who are those attorneys?

- Does your city have a written contract for indigent defense services?**

- Does your contract ensure:**
 - Your public defender is meeting with clients early?
 - There is a mechanism for screening for conflicts?
 - Your public defender is adequately investigating cases?
 - Do you have a separate written contract(s) for conflict counsel?
 - Do you set aside funds for experts and investigative costs?
 - Does your contractor report on what they're doing?
 - Track appointed cases in your justice courts!

**Senator Weiler,
where is the state in all of this?
My city doesn't want to be sued!**

**We're from the government and
we're here to help – we have state money!**

The IDC was created after years of studying Utah's indigent defense systems

2008

Judicial Council Appellate Study Committee

2008

ACLU Investigation

2016

S.B. 155 Passed

2016

ACLU Sues State

2017

S.B. 134 Passed

1994

UT Supreme Court Appellate Task Force Report

2011

Judicial Council Appellate Study Committee Report

2011

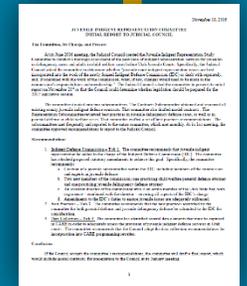
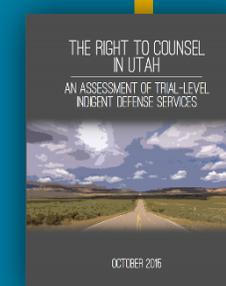
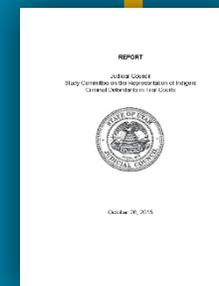
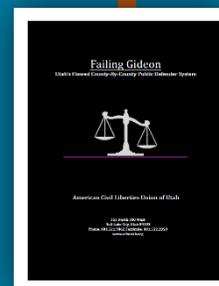
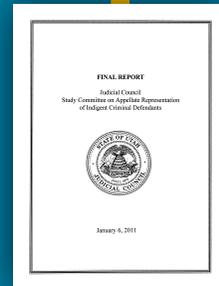
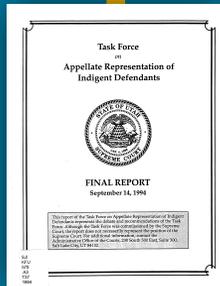
ACLU "Failing Gideon" Report

2015

Judicial Council Trial Court Study Committee & Sixth Amendment Center Study Reports

2016

Juvenile Indigent Representation Committee (JIRC)



**The Utah Indigent Defense Commission
was created to help local governments with
their indigent defense responsibilities in
justice, district, juvenile, and appellate courts.**

Some of the IDC's Statutory Duties:

- “Identify and **collect data** necessary to provide reports regarding the provision of indigent defense services by each indigent defense system.”
- “Encourage and aid in the **regionalization** of indigent defense systems in the state.”
- “Establish procedures to **allow indigent defense systems to apply for state funding and award grants from state appropriations.**”

IDC Grant Priorities

Grants that:

- **Develop/supplement managed indigent defense programs to ensure quality representation, such as managed assigned counsel programs and public defender offices;**
- **Coordinate between counties/cities for regional indigent defense services;**
- **Applications with a financial match above system's indigent defense spending;**
- **Programs serving rural areas and smaller systems; and**
- **Programs measuring the quality of representation.**

IDC Grant to Juab County

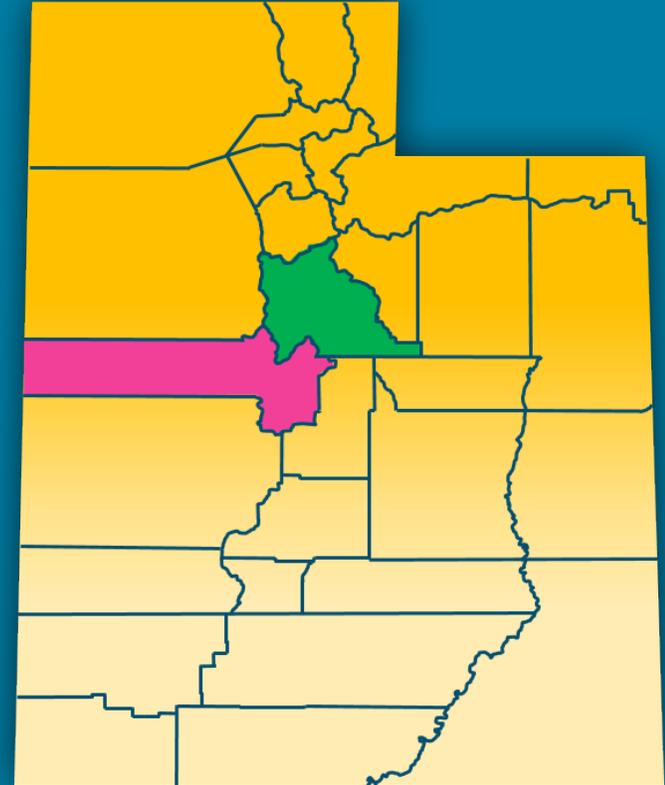
Regionalizing indigent defense services by contracting w/ independent (501(c)3) UT County Public Defender Office to oversee attorneys providing effective representation in Juab County Courts.

Grant Achieved: Reporting, regionalization, effective representation

Juab Indigent Defense Budget (2017): \$140,200

IDC Grant (2017): \$182,000 supplemental

- **Increased** number, quality, training, experience, specialization, & accountability of attorneys in Juab County Courts (\$152,000)
- **Increased Resources:** Investigators, experts, appeals (\$30,000)
- **Results:** system-wide reform



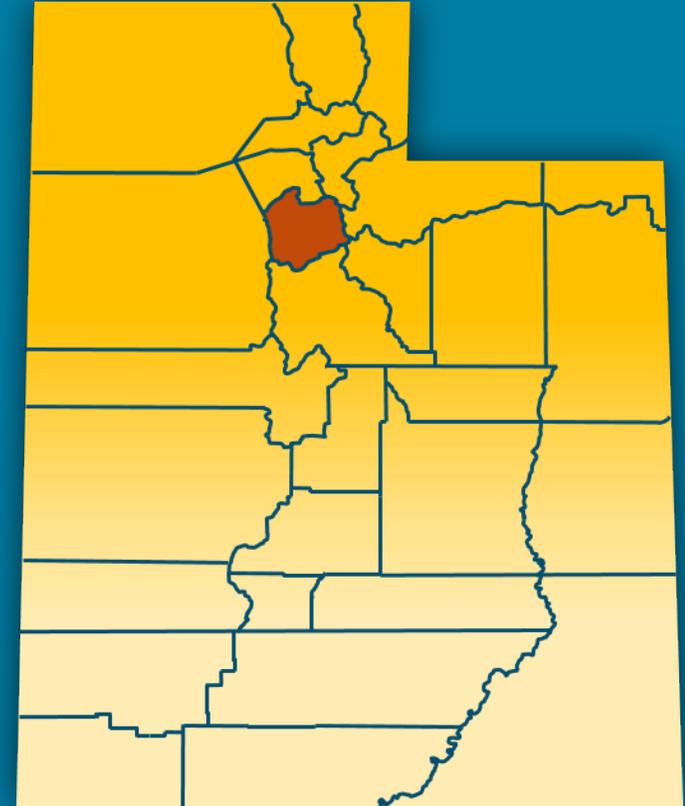
IDC Grant to Salt Lake County

Grant Achieved: Constitutionally effective representation to the people arrested related to Operation Rio Grande

SLCO Indigent Defense Budget (2017): \$18 million...

IDC Grant (2017): ~\$370,000 over 2 years

- **Increased** number of attorneys and therefore their caseloads in cases connected with ORG.





Utah Indigent Defense Commission

Any Questions?

Contact the IDC Staff:

Director, Joanna Landau

Jlandau@utah.gov

Direct: 801-209-5440

<https://justice.utah.gov/indigent-defense.html>