

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Rules

BILL: SB 752

INTRODUCER: Senator Gruters

SUBJECT: Public Defender Duties

DATE: March 16, 2021

REVISED: _____

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. <u>Ravelo</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2. <u>Erickson</u>	<u>Jones</u>	<u>CJ</u>	Favorable
3. <u>Ravelo</u>	<u>Phelps</u>	<u>RC</u>	Pre-meeting

I. Summary:

SB 752 clarifies that a court may not appoint a public defender as co-counsel on a case where the defendant is also represented by private counsel. However, the bill does not prohibit the appointment of a public defender in situations where a defendant is no longer represented by private counsel.

The bill takes effect July 1, 2021.

II. Present Situation:

Every person has the right to legal representation in a criminal proceeding. While a person may hire a private attorney, the Due Process Clause of the 14th Amendment to the United States Constitution requires the appointment of an attorney for those who otherwise cannot afford legal representation in a criminal proceeding where a loss of liberty, such as jail, is at stake.¹ In Florida, indigent criminal defendants may be appointed legal representation from the Public Defender, the Regional Conflict Counsel, or a private court-appointed attorney. Generally, the courts appoint the public defender to represent an indigent defendant, but may appoint the Regional Conflict Counsel or a private court-appointed attorney if the Public Defender or Regional Conflict Counsel has a conflict of interest.²

The Public Defender is a constitutional officer elected in each judicial circuit to represent the indigent in criminal proceedings.³ Each public defender appoints assistant public defenders to assist in these duties and may only represent indigent clients upon appointment from a court

¹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“[I]n our adversary system of criminal justice, any person ... who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”).

² Sections 27.511(5) and 27.40(1) and (2)(a), F.S.

³ FLA. CONST. art. V, s. 18.

order. The courts are prohibited from appointing a public defender to someone who is not indigent, even on a temporary basis.⁴ A public defender may represent any person who is determined to be indigent and is:

- Under arrest for, or charged with, a felony;
- Under arrest for, or charged with:
 - A misdemeanor;
 - A violation of ch. 316, F.S., punishable by imprisonment;
 - Criminal contempt; or
 - A violation of a special law or county or municipal ordinance ancillary to a state charge, or if not ancillary to a state charge, only if the public defender contracts with the county or municipality to provide representation pursuant to ss. 27.54 and 125.69, F.S.;
- Alleged to be a delinquent child pursuant to a petition filed before a circuit court;
- The subject of a petition to be involuntarily placed as a mentally ill person under part I of ch. 394, F.S. (Baker Act), involuntarily placed as a sexually violent predator under part V of ch. 394, F.S. (Jimmy Ryce Act), or involuntarily admitted to residential services as a person with developmental disabilities under ch. 393, F.S.;
- Convicted and sentenced to death, for purposes of handling an appeal to the Supreme Court; or
- Appealing any other civil or criminal matter previously listed.⁵

The clerk of the court is responsible for determining indigent status of someone seeking to be represented by the Public Defender.⁶ Indigent status can be based on either a taxable income equal to or below 200 percent of the federal poverty guidelines,⁷ or on the utilization of any form of TANF, poverty related veteran's benefits, or SSI benefits.⁸ There is a presumption that the applicant is not indigent if the applicant owns, or has equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property having a net equity value of \$2,500 or more, excluding the value of the person's homestead and one vehicle having a net value not exceeding \$5,000.⁹

A person seeking the appointment of the public defender based on the inability to afford private counsel must complete an application of indigent status with the clerk of the court. The person must provide the following information:

- Net income, consisting of total salary and wages, minus deductions required by law, including court-ordered support payments.
- Other income, including, but not limited to, social security benefits, union funds, veterans' benefits, workers' compensation, other regular support from absent family members, public

⁴ Section 27.51(2), F.S.

⁵ Sections 27.51(1), 394.4598(1), and s. 394.916, F.S.

⁶ Section 27.52(2), F.S.

⁷ Based on the 2021 guidelines, an applicant under this scenario would qualify if his or her income were equal to or below \$25,760 (200% of \$12,880) for a single person household, adding \$9,080 for each additional person in the household. U.S. Dept. of Health and Human Service, *HHS Poverty Guidelines for 2021*, <https://aspe.hhs.gov/poverty-guidelines> (last visited March 3, 2021).

⁸ Section 27.52(2)(a), F.S. "TANF" is the Temporary Assistance for Needy Families Program. "SSI" is the Supplemental Security Income program.

⁹ Section 27.52(2)(a)1., F.S.

or private employee pensions, reemployment assistance or unemployment compensation, dividends, interest, rent, trusts, and gifts.

- Assets, including, but not limited to, cash, savings accounts, bank accounts, stocks, bonds, certificates of deposit, equity in real estate, and equity in a boat or a motor vehicle or in other tangible property.
- All liabilities and debts.
- The amount of any bail paid for the applicant's release from incarceration and the source of the funds.¹⁰

Indigent for Costs

A court may declare a person who is represented by a private attorney but who is also eligible to be represented by the public defender to be indigent for costs.¹¹ If the court determines a person is indigent for costs, the person is eligible to have the State pay for certain due process services that are necessary to prepare a legal defense, such as the costs of transcribing depositions, witnesses, mental health professionals, travel expenses, and legal research.¹² The Justice Administrative Commission (JAC) pays for the costs for these services.¹³

Appointment of the Public Defender as Co-Counsel

On December 16, 2010, in Hillsborough County (13th Judicial Circuit), Michael Keetley was indicted on two counts of first degree murder and four counts of attempted first degree murder, and the State filed a notice of intent to seek the death penalty in 2011.¹⁴ Keetley was represented by a series of private attorneys, beginning on December 16, 2010, when a private attorney filed a notice of appearance on Keetley's behalf.¹⁵ In October 2014, one of Keetley's private attorneys moved to have Keetley declared indigent for costs. At that point, Keetley's parents, who had paid for the private attorneys, had incurred approximately \$200,000 in fees for their services. The trial court granted the motion.¹⁶

On April 14, 2017, the trial court granted a motion for Keetley's private attorney to appoint penalty-phase counsel and appointed the Public Defender to serve as co-counsel.¹⁷ Although the Public Defender did not file a response to the motion, the JAC appeared at the hearing telephonically and objected that it did not have statutory authority to pay for court-appointed

¹⁰ Section 27.52(1)(a), F.S.

¹¹ Section 27.52(5), F.S.

¹² Sections 27.52(5), 29.006, and 29.007, F.S.

¹³ Section 27.52(5)(f), F.S. The JAC provides administrative and financial services on behalf of the offices of the State Attorney, Public Defender, Criminal Conflict and Civil Regional Counsel, Capital Collateral and Regional Counsel, the Guardian Ad Litem Program, private attorneys who have been appointed to represent indigent persons, and expenses for persons who have been determined to be indigent for costs. Section 43.16, F.S.

¹⁴ *Holt for Thirteenth Judicial Circuit, Hillsborough County v. Keetley*, 250 So.3d 206 (Fla. 2d DCA 2018).

¹⁵ *Id.* at 207-209.

¹⁶ *Id.* at 207.

¹⁷ *Id.* at 208. This was a renewed motion. In a previous motion for appointment of penalty-phase counsel, which was denied, Keetley's private attorney had requested co-counsel "on the grounds that it is 'standard practice in death penalty cases, for a defendant to be represented by at least two lawyers' and that she did not feel that she could 'prepare for both first phase motions and trial and competently and effectively prepare motions, conduct hearings and arguments on the penalty phase issues.'" *Id.*

counsel. The JAC’s objection was noted by the trial court in its order. Subsequently, “the Public Defender moved for reconsideration, arguing, in sum, ‘There is no provision in Florida law that allows the appointment of the Office of the Public Defender when a defendant has retained counsel.’ At the hearing—at which an attorney from the Office of the Public Defender did appear—the trial court orally denied the motion for reconsideration. No written order was rendered.”¹⁸ Thereafter, the Public Defender filed a petition for a writ of certiorari but the appellate court refused to issue a ruling on the merits of the case because the Public Defender failed to establish the prerequisites to invoke the appellate court’s certiorari jurisdiction.¹⁹

In 1983, the First District Court of Appeal held that a public defender cannot be appointed as co-counsel in a case where a defendant has already retained private counsel.²⁰

III. Effect of Proposed Changes:

The bill amends s. 27.52, F.S., to clarify that a court may not appoint a public defender as co-counsel on a case where the defendant is also represented by private counsel. However, the bill does not prohibit the appointment of a public defender in situations where a defendant is no longer represented by private counsel.

The bill takes effect July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by article VII, section 18 of the State Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

¹⁸ *Id.* at 209.

¹⁹ *Id.* at 209-210.

²⁰ In *Behr v. Gardner*, 442 So. 2d 980, 982 (Fla. 1st DCA 1983) (on motion for rehearing), the court found that the appointment of a public defender “is to ensure that indigent defendants are afforded the opportunity for representation by counsel [T]his purpose is not furthered by appointing the public defender to represent a defendant who, although indigent, is already represented by a privately retained attorney.”

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The bill will prevent a court from appointing the public defender as a co-counsel to a case where the defendant has retained a private defense counsel. Although this situation appears to have rarely occurred, the bill will prevent the resources of public defenders from being used in cases where the defendant is represented by a private defense counsel.

A defendant who retains a private defense counsel may still be declared indigent for costs and eligible to have the state pay for certain due process services that are necessary to prepare a legal defense, such as the costs of transcribing depositions, witnesses, mental health professionals, travel expenses, and legal research.²¹ Thus, services that could have been provided by the public defender as co-counsel may still otherwise be provided with state funds.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 27.51 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

²¹ Section 27.52(5)(f), F.S.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
