

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 Judiciary

BILL: SB 752

INTRODUCER: Senator Gruters

SUBJECT: Public Defender Duties

DATE: March 1, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Ravelo</u>	<u>Cibula</u>	<u>JU</u>	Favorable
2.	<u> </u>	<u> </u>	<u>CJ</u>	<u> </u>
3.	<u> </u>	<u> </u>	<u>RC</u>	<u> </u>

I. Summary:

SB 752 clarifies that a court may not appoint a public defender as a co-counsel on a case where the defendant is also represented by private counsel. The bill, however, 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 during 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

¹ *Argersinger v. Hamlin*, 407 U.S. 25, 37-38 (1972) (quoting *Stevenson v. Holzman*, 458 P.2d 414, 418 (Or. 1969) *See also 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 Section 27.511(5), F.S. and s. 27.40(1) and (2)(a), F.S.

³ FLA. CONST. art. V, s. 18.

assist in these duties and may only represent indigent clients upon appointment from a court order. The courts are prohibited from appointing a public defender to someone who is not indigent.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 chapter 316 punishable by imprisonment,
 - Criminal contempt, or
 - A special law or county or municipal ordinance,
- Alleged to be a delinquent child,
- The subject of a petition to be involuntarily placed as a mentally ill person under part I of chapter 394 (Baker Act), involuntarily placed as a sexually violent predator under part V of chapter 394 (Jimmy Ryce Act), or involuntarily admitted to residential services as a person with developmental disabilities under chapter 393, or
- Appealing any 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. 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 \$5,000.⁸

Appointment of Public Defender as Co-Counsel

Current Florida law or rule of procedure does not expressly authorize the appointment of a public defender as co-counsel for a case in which a defendant has obtained a private attorney. In a recent case, the Public Defender of the 13th Judicial Circuit was appointed as co-counsel for Michael Keetley, a defendant facing the death penalty. In this specific case, Keetley met the indigent status requirement, but he retained a private attorney. Keetley's private attorney successfully argued for the appointment of a public defender as co-counsel after noting the complexity of the case and the possibility of the case being re-litigated due to an inadequate defense.^{9,10} On appeal, an appellate court refused to issue a ruling on the merits of the case because the public defender failed to establish the prerequisites to invoking the appellate court's

⁴ Section 27.40, F.S.

⁵ Section 27.51(1), s. 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 Feb. 24, 2021).

⁸ Section 27.52(2)(a)(1) F.S.

⁹ *Holt for Thirteenth Judicial Circuit, Hillsborough County v. Keetley*, 250 So. 3d 206, 208 (Fla. 2d DCA 2018).

¹⁰ *Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 952 (2003) https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.pdf (last visited Feb. 25, 2021).

certiorari jurisdiction.¹¹ Despite this case, a separate appellate court ruled that a public defender cannot be appointed as co-counsel in a case where a defendant has already retained private counsel.¹²

III. Effect of Proposed Changes:

The bill will prevent a judge from appointing the Public Defender in cases where the defendant is already represented by a private defense counsel.

The bill has an effective date of July 1, 2021.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

¹¹ *Keetley*, 250 So. 3d at 210.

¹² One 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. *Behr v. Gardner*, 442 So. 2d 980, 982 (Fla. 1st DCA 1983) (on motion for rehearing).

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.¹³ 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, 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.

B. Amendments:

None.

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

¹³ Section 27.52(5)(f), F.S.