

The background of the slide features a large, faint, circular seal of the Utah Judicial Branch. The seal contains a shield with a scale of justice and a banner below it that reads "JUSTITIA OMNIBUS". The words "INDIGENT" and "COMMISSION" are visible on the left and right sides of the seal, respectively.

# UTAH JUSTICE COURTS & UTAH INDIGENT DEFENSE

# Utah Justice Courts are busy!

In FY20, 63,585 misdemeanor criminal cases filed in Justice Courts = 60% of Utah's total criminal cases



## General Information

- Any local gov't can establish a justice court.
- Utah has:
  - ~247 cities/towns & 29 counties
  - ~124 Justice Courts
  - 81 Justice Court Judges (+2 vacancies)
  - 25 local jails & 2 state prisons.

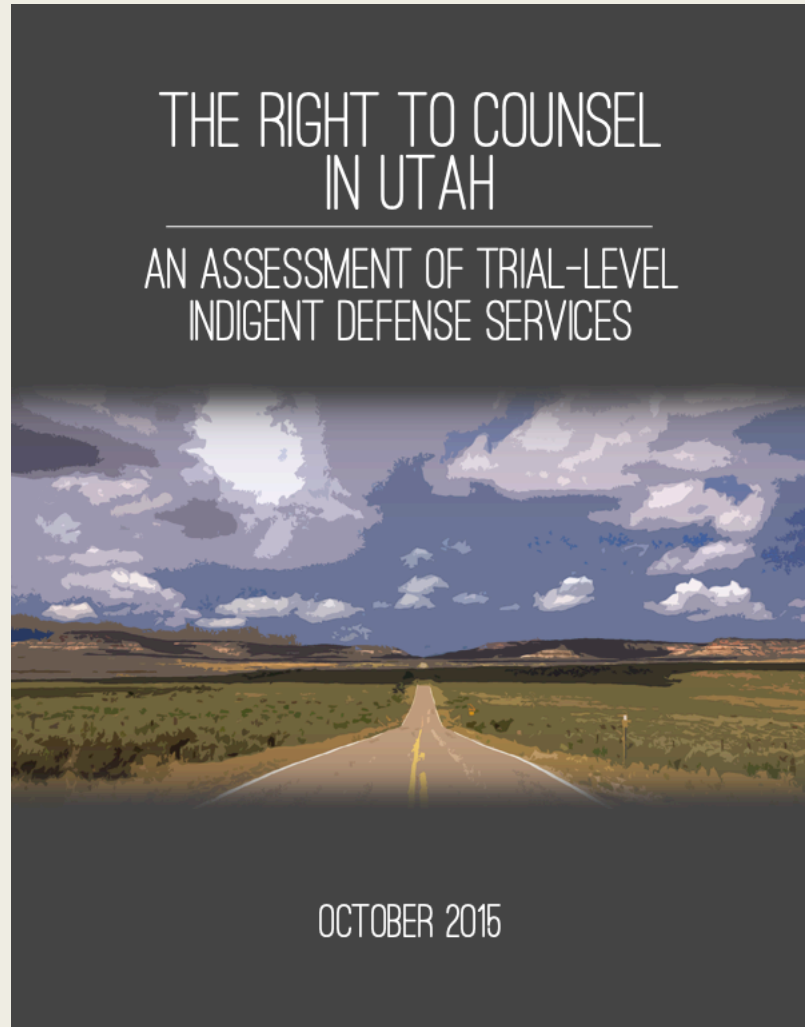
# The Right to Counsel Matters in Utah's Justice Courts



- The ~81 Justice Court Judges in Utah:
  - Are not all law-trained, some have only a high school diploma or the equivalent.
  - Can send people to jail in 63,585 criminal cases.
    - For class B misdemeanors--a jail term up to 6 months, & on a class C--up to 90 days.

The right to counsel exists in any case where there is any risk of a loss of liberty—all misdemeanors.

The right to counsel and indigent defense are critical to the functioning of Utah's Justice Courts.



Utah's trial courts do not uniformly provide counsel at all critical stages of criminal cases as required by the U.S. Supreme Court, with many defendants – particularly those facing misdemeanor charges in justice courts – never speaking to an attorney.

Those defendants that do receive representation too often receive an attorney operating under multiple financial (and other) conflicts of interest arising from unfair contractual arrangements that disincentivize zealous representation.

The challenge of providing effective representation for each client can be exacerbated by excessive caseloads that reduce the time a lawyer can spend on an individual case.

And these appointed attorneys generally lack appropriate independence from undue state and local government interference in securing the necessary resources to put the state's case to the test.

The primary cause for the institutionalization of these practices is the lack of accountability inherent in the system.

# Utah Indigent Defense Commission: Follow-Up Site Visit Report

**By Elizabeth Ling & Suvi Hynynen Lambson, Center for Court Innovation  
December 2019**

The Utah Indigent Defense Commission (UIDC) is one of 14 recipient agencies of the Bureau of Justice Assistance's (BJA) Sixth Amendment Initiative strategic planning training and technical assistance (TTA) services. This TTA is provided by the Center for Court Innovation (Center) and pairs experienced practitioners with researchers to help sites develop and implement an action plan to improve adherence to Sixth Amendment protections in their jurisdiction.

## CCI Follow-Up Report 2019

- Observations in Provo, Draper, Pleasant Grove, Clearfield, Alpine, & Salt Lake City Justice Courts.
- Observed some improvements in meeting 6<sup>th</sup> A obligations in these justice courts
- Concludes many of the constitutional concerns in 2015 reports persist:

Limited presence/access to defense attorneys at arraignment.

Prosecutors engage in plea negotiations with defendants who did not have an attorney.

Judges, not all law-trained, handle plea negotiations when neither a prosecutor or defense attorney was present in the courtroom.

Defendants were offered a plea before being offered an attorney or offered a choice between entering a plea that day or being appointed an attorney and returning to court on a later date.



**WHAT DO YOU KNOW  
ABOUT THE RIGHT TO  
COUNSEL IN ALL OF THESE  
CRIMINAL CASES?**

**WE HAVE A TEST**



**TODAY?**

DIYLOL.COM

# Who is eligible to be appointed counsel in Utah Justice Courts?

1. A person earning 151% of the Federal Poverty limit/year?
2. A person facing a Misdemeanor C traffic charge even if the judge pinky swears that jail will never ever ever be imposed?
3. Someone in court on an order to show cause for a criminal case?
4. All of the above?



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# How to Appoint Counsel in Utah Justice Courts

## Utah Code:

78B-22-201. Right to counsel.

78B-22-202. Determining indigency

78B-22-203. Order for indigent defense services (attorney & resources)

## Utah Court Rules:

**Rule 7. Right to counsel.** If the defendant is present at the initial appearance without counsel, the court must determine if the defendant is capable of retaining the services of an attorney within a reasonable time. If the court determines the defendant has such resources, the court must allow the defendant a reasonable time and opportunity to retain and consult with counsel. If the court determines the defendant is indigent, the court must appoint counsel pursuant to Rule 8, unless the defendant knowingly and intelligently waives the right to counsel.

**Rule 8. Right to counsel.** A defendant charged with a public offense has the right to self-representation, and if indigent, has the right to court-appointed counsel if the defendant faces any possibility of the deprivation of liberty.

Simultaneously wordy & don't say enough – they're being rewritten...

# **Wait, judges know all this?**

**Yes! And much more.**

**And you learned it in law school too!**

# 6<sup>th</sup> A Right to counsel (R2C)

1963

Gideon v.  
Wainwright

6thA R2C = *fundamental right, applies to state felonies*

1967

In re Gault

6<sup>th</sup>&14<sup>th</sup> R2C in juvenile delinquency proceedings

1972

Argersinger  
v. Hamlin

R2C Misdemeanors w/ imprisonment (not just fine)

1981

Lassiter

R2C Parents in state-initiated child welfare cases

1985

Evitts v.  
Lucey

R2C on Appeal

2002

Alabama  
v.  
Shelton

R2C in Misdemeanors with suspended jail sentence

2016

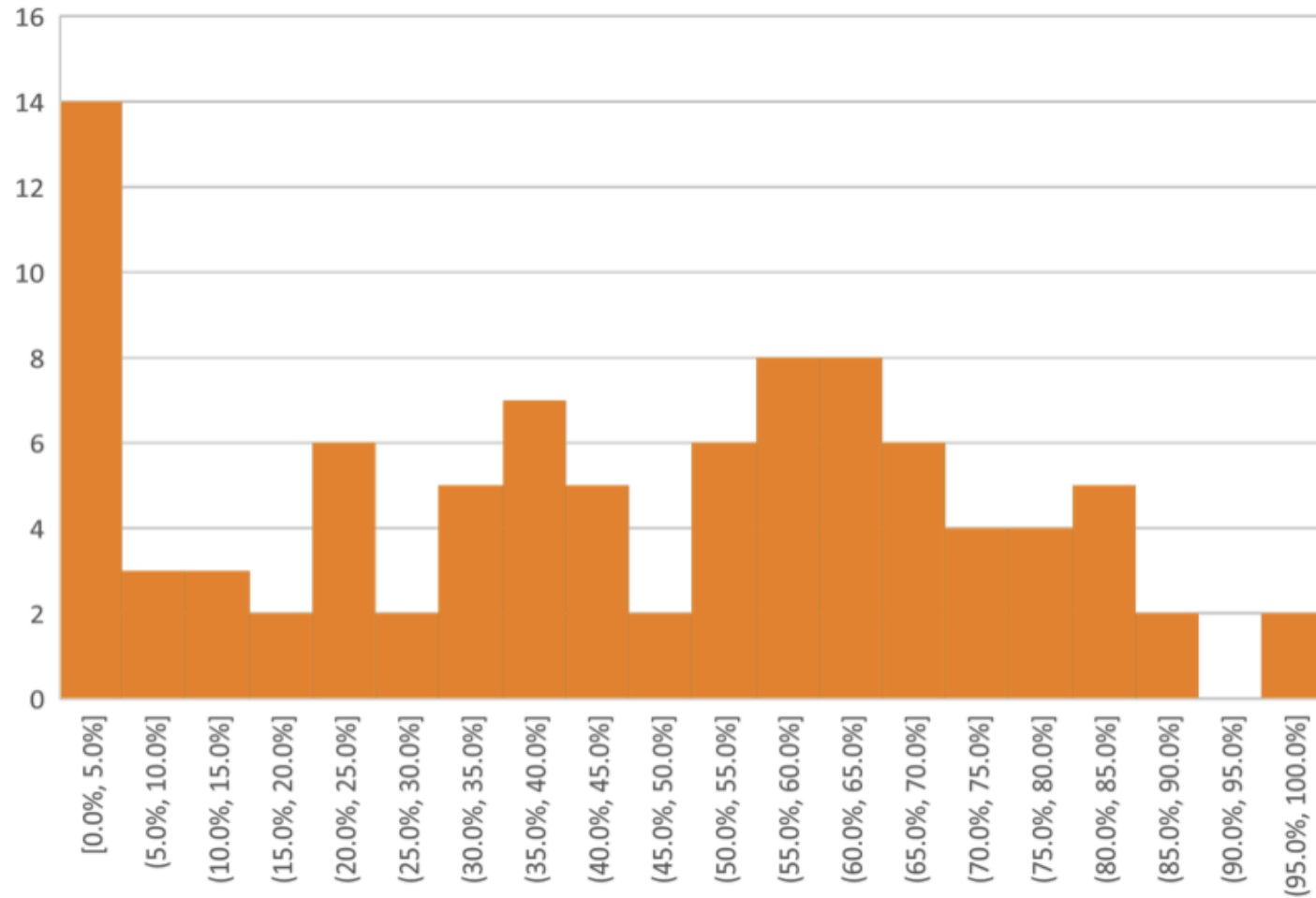
EKS/KAS

Utah SCT – R2C Parents in private termination cases

**So, the laws are clear  
... right?**

**Then why are there so  
many inconsistencies in  
justice courts?**

# Like Appointment Rates . . .



City Justice  
Court  
Indigent  
Appointment  
Rates

## Counsel at First Appearance is inconsistent in Utah Justice Courts

The Supreme Court in Rothgery v Gillespie County, Texas, 554 US 191 (2008), made clear that the right to counsel attaches at arraignment. The Court stated “that the right to counsel guaranteed by the Sixth Amendment applies at first appearance before a judge at which a defendant is told of the formal accusations against him and restrictions are imposed on his liberty.”

Rule 11. (a) Right to Counsel. Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

## Waiver of Counsel is not always made appropriately in Justice Courts.

State v. Frampton, 737 P.2d 183, 187 (UT SCT)

“It has long been settled that the right to assistance of counsel is personal in nature and may be waived by a competent accused if the waiver is "knowingly and intelligently" made. Such waiver must of course be voluntary. . . . [I]t is the trial court's duty to determine if this waiver is a voluntary one which is knowingly and competently made.

In making this determination, the defendant ‘should be made aware of the dangers and disadvantages of, self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.’ ’ Generally, this information can only be elicited after penetrating questioning by the trial court. Therefore, a colloquy on the record between the court and the accused is the preferred method of ascertaining the validity of a waiver because it insures that defendants understand the risks of self-representation. Moreover, it is the most efficient means by which appeals may be limited.”

### Justice Court

[SLCo / Justice Court / Court Forms](#)

### Court Forms

[Waiver of Constitutional Rights](#) 

[Affidavit of Impecuniosity](#) 

[Waiver for the Right to Counsel](#) 



[Click here to waive your rights!](#)



# Can we talk about recoupment?

## What is Recoupment?

Recoupment is the practice of charging an INDIGENT individual for using an appointed defense attorney, to which they are entitled to at government expense.

Recoupment practices are inconsistent across the state, especially in justice courts.

### Utah Code § 77-32a-107 & 108.

“Costs shall be limited to expenses specially incurred by the state or any political subdivision in investigating, searching for, apprehending, and prosecuting the defendant, **including attorney fees of counsel assigned to represent the defendant**, and investigators’ fees.”

"The court may not include in the judgment a sentence that a defendant pay costs unless the defendant is or will be able to pay them."

### Fuller v. Oregon, 417 U.S. 40, 45 (1974) -- Recoupment ok, if:

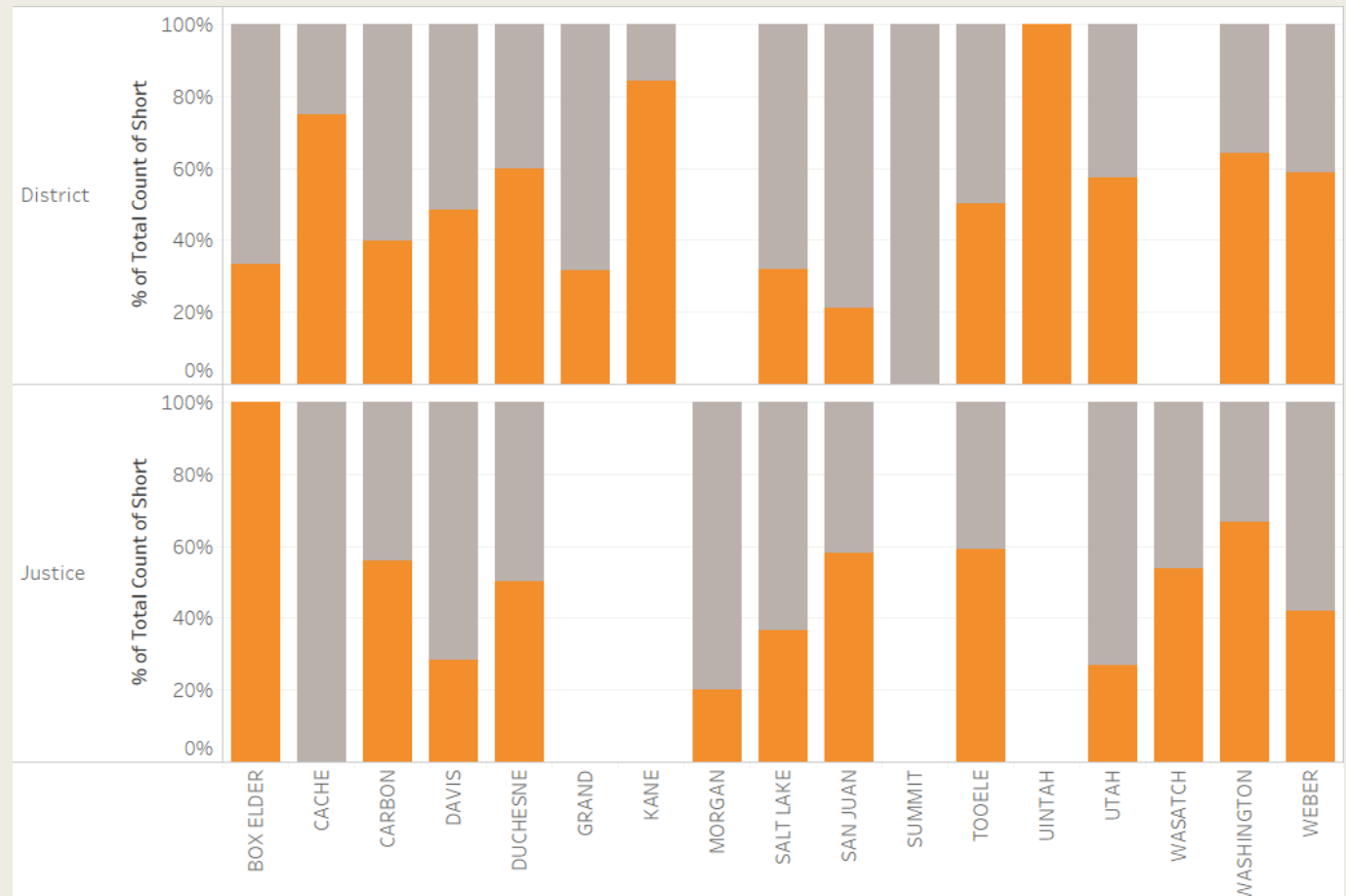
1. May Only Be Ordered After Conviction. A person who is “acquitted” or “whose trials end[s] in mistrial or dismissal,” or whose conviction is “overturned upon appeal” cannot be required to pay.
2. Ability to pay. Courts can only require a convicted individual to pay recoupment if s/he has the ability to pay (after being found indigent and convicted of a crime).
3. Can't be coercive. No – “You’ll owe a fee if you ask for counsel.”
4. Remit. Defendants must be able to petition court at any time to remit recoupment fees, if it will cause “manifest hardship on the defendant or his immediate family.”
5. Contempt. Defendant cannot “be held in contempt for failure to repay” if he did not intentionally refuse to pay or if he made a good faith effort to pay.

- Courts in 17 counties collect recoupment fees.
- Sometimes judges order it, some prosecutors & defenders ask for it, and some judges refuse to order it.
- 41% of recoupment fees imposed are not actually paid in full.
- All recouped fees go into the general fund of the local entity that has the court.

Median Recoupment Amount (FY19)

	District	Justice
BOX ELDER	\$300	\$150
CACHE	\$350	\$113
CARBON	\$250	\$200
DAVIS	\$175	\$100
DUCHESNE	\$500	\$100
GRAND	\$250	
KANE	\$500	
MORGAN		\$100
SALT LAKE	\$100	\$150
SAN JUAN	\$250	\$250
SUMMIT	\$225	
TOOELE	\$175	\$200
UINTAH	\$250	
UTAH	\$150	\$75
WASATCH		\$150
WASHINGTON	\$100	\$221
WEBER	\$250	\$50

Proportion of Recoupment Fees Not Fully Paid (FY 2019)



# Who controls indigent defense in Utah's justice courts?

## Justice Courts

- Scheduling hearings \*arraignments\*.
- Advising individuals about 6<sup>th</sup> A rights.
- Determining indigency/appointing counsel.
- Determine whether waivers of counsel and pleas are knowing and voluntary when no lawyer is present, or only prosecutor.
- Imposing (and how much) recoupment of public defender costs.
- Advising convicted individuals of the right to appeal.

\*Court reforms are important to improving indigent defense services

## Local Governments

- Adequately paying indigent defense providers & prosecutors to attend court.
- Independent hiring of defense providers.
- Independent oversight of defense providers.
- Appropriately contracting with defense providers and ensuring workload controls.
- Applying for Indigent Defense Commission grants/reporting to IDC (3 cities/18 counties).
- Compliance with Utah law regarding the provision of indigent defense (§78B-22)

## Justice Court Reforms to Improve Indigent Defense

- **CAFA.** Counsel at first appearances. Judges must appoint counsel at arraignments & try very hard NOT to allow pleas without the advice of counsel. Yes this will be less efficient, and the constitution will thank you.
- **Recertification.** Improve the recertification process so that the courts help to provide an actual check on the overall consistency of indigent defense services in justice courts.
- **Uniform Forms.** Court forms on the appointment of counsel colloquy, waiver of counsel, entry of a plea.
- **Recoupment.** A uniform statement on whether, when, how, and how much justice courts can or should recoup funding for their cities and counties for indigent defense expenses.