

2009

Utah v. Jeffs : Brief of Appellee

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Lohra L. Miller; Donald H. Hansen; Craig J. Wangsgard; attorney for appellee.

David Drake; attorney for appellant.

Recommended Citation

Brief of Appellee, *Utah v. Jeffs*, No. 20090737.00 (Utah Supreme Court, 2009).

https://digitalcommons.law.byu.edu/byu_sc2/2962

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

Plaintiff

vs.

RANDY FETCH JEFFS,

Defendant/Appellant

SALT LAKE COUNTY

Intervenor/Appellee

Case No. 20090737-SC

APPELLEE'S BRIEF

INTERLOCUTORY APPEAL FROM THIRD DISTRICT COURT OF UTAH
HONORABLE WILLIAM W. BARRETT

LOHRA L. MILLER (#6420)
District Attorney for Salt Lake County
DONALD H. HANSEN (#1332)
CRAIG J. WANGSGARD (#6052)
Deputy District Attorneys
2001 South State Street, #S3600
Salt Lake City, UT 84190-1200
Telephone: (801) 468-3421
Attorneys for Intervenor/Appellee

DAVID DRAKE (#0911)
DAVID DRAKE, P.C.
6905 South 1300 East, #248
Midvale Utah 84047
Telephone: (801) 205-9049
Attorney for Defendant/Appellant

FILED
UTAH APPELLATE COURTS

OCT 27 2010

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

Plaintiff

vs.

RANDY FETCH JEFFS,

Defendant/Appellant

SALT LAKE COUNTY

Intervenor/Appellee

Case No. 20090737-SC

APPELLEE'S BRIEF

INTERLOCUTORY APPEAL FROM THIRD DISTRICT COURT OF UTAH
HONORABLE WILLIAM W. BARRETT

LOHRA L. MILLER (#6420)
District Attorney for Salt Lake County
DONALD H. HANSEN (#1332)
CRAIG J. WANGSGARD (#6052)
Deputy District Attorneys
2001 South State Street, #S3600
Salt Lake City, UT 84190-1200
Telephone: (801) 468-3421
Attorneys for Intervenor/Appellee

DAVID DRAKE (#0911)
DAVID DRAKE, P.C.
6905 South 1300 East, #248
Midvale Utah 84047
Telephone: (801) 205-9049
Attorney for Defendant/Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	I
JURISDICTION OF THE UTAH SUPREME COURT	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW.....	1
DETERMINATIVE STATUTES, RULES AND CONSTITUTIONAL PROVISIONS.....	2
STATEMENT OF THE CASE.....	3
1. Nature of the Case and Course of Proceedings Below.....	3
2. Statement of Facts.....	4
SUMMARY OF APPELLANT’S ARGUMENT.....	6
ARGUMENT	8
I. THE LDA IS THE “EXCLUSIVE SOURCE” FROM WHICH THE INDIGENT LEGAL DEFENSE, INCLUDING DEFENSE RESOURCES, MAY BE PROVIDED, UNLESS THE COURT, AFTER PROPER NOTICE AND HEARING, FINDS A “COMPELLING REASON” FOR THE APPOINTMENT OF A NONCONTRACTING ATTORNEY OR DEFENSE RESOURCE	8
II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THERE WAS NO “COMPELLING REASON” WHICH WOULD JUSTIFY AUTHORIZING OR DESIGNATING A NONCONTRACTING ATTORNEY OR DEFENSE RESOURCE	10
III. DEFENDANT’S RELIANCE ON THE <i>BURNS</i> CASE IS MISPLACED IN LIGHT OF SUBSEQUENT LEGISLATIVE CHANGES TO THE INDIGENT DEFENSE ACT	13
IV. THE ACT DOES NOT REQUIRE A DEFENDANT TO TERMINATE HIS PRIVATE COUNSEL IN ORDER TO SEEK COUNTY-PAID DEFENSE RESOURCES	17
V. JEFFS’ ARGUMENTS CONCERNING EQUAL PROTECTION AND THE CHILLING EFFECT ON <i>PRO BONO</i> REPRESENTATION ARE RAISED FOR THE FIRST TIME ON APPEAL	19
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:

<i>Gardiner v. York</i> , 2010 UT App 108, ¶18, 233 P.3d 500	n. 3
<i>State v. Barber</i> , 2009 UT App 91, 206 P.3d 1223	16, 17
<i>State v. Burns</i> , 2000 UT 56, 4 P.3d 795	7, 13, 14, 15, 16, 17
<i>State v. Levin</i> , 2006 UT 50, 144 P.3d 1096	1
<i>State v. Shaffer</i> , 2010 UT App 240, 239 P.3d 285, 288	20
<i>State v. Weaver</i> , 2005 UT 49, 122 P.3d 566	20

Statutes and Ordinances:

Utah Code Ann Sec. 77-32-101	6
Utah Code Ann Sec. 77-32-201 (2).....	18
Utah Code Ann., Section 77-32-201 (3)	p. 6, n. 2
Utah Code Ann Sec. 77-32-202 (1)	18
Utah Code Ann Sec. 77-32-301	6
Utah Code Ann Sec. 77-32-302 (2)(a)	18
Utah Code Ann Sec. 77-32-302 (2)(b).....	7, 8, 18
Utah Code Ann Sec. 77-32-302 (2)(e)	5, 8, 14
Utah Code Ann Sec. 77-32-302 (2)(f).....	9
Utah Code Ann Sec. 77-32-303	7, 9

Utah Code Ann Sec. 77-32-306(4)	6, 10, 18
Utah Code Ann Sec. 78A-3-102	1
Utah Code Ann Sec. 78B-1-151	9

JURISDICTION OF THE UTAH SUPREME COURT

Jurisdiction in this Court arises under Utah Code Ann. Sec. 78A-3-102(3)(h).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Appellee Salt Lake County (“County”) objects to the Statement of Issues offered by Defendant/Appellant Randy Fetch Jeffs (“Jeffs”). *See* Appellant’s Brief, pp. 1-4. The County sets forth the following statement of the sole issue before this court:

1. Did the trial court abuse its discretion in finding that Defendant had failed to demonstrate a “compelling reason” for the court to require payment of defense resources for Defendant by the County outside the County’s contract for legal defense services.

STANDARD OF REVIEW: Abuse of discretion. *See generally, State v. Levin*, 2006 UT 50, ¶ 24, 144 P.3d 1096 (“Discretion is broadest – and the standard of review is most deferential – when the application of a legal concept is highly fact dependant and variable.”)¹.

PRESERVATION OF THE ISSUE

See discussion of “compelling reason” issue, in County’s Opposition Memorandum to Defendant’s Motion (R. 149-154); in County’s Reply to Defendant’s “Supplemental” Memorandum (R. 245-249); and in the court’s Findings of Fact and Conclusions of Law (R. 281).

¹The County finds no Utah case authority on the standard of appellate review in the context of a claim for indigent defense funds where the “compelling reason” standard is at issue. However, the discussion in *State v. Levin* provides an analogous context.

**DETERMINATIVE STATUTES, RULES AND
CONSTITUTIONAL PROVISIONS**

Utah Code Ann., Sec. 77-32-101, *et. seq.*.

United States Constitution, Amend. V, VI and IVX

STATEMENT OF THE CASE

1. Nature of the Case and Course of Proceedings Below

NATURE OF THE CASE:

In the underlying criminal action, defendant/appellant Randy F. Jeffs (“Jeffs”) filed a motion asking the trial court to order Salt Lake County, in effect, to pay for Jeffs’ multiple anticipated expert witnesses, and private investigator(s) because Jeffs is indigent and needs the experts and investigator to mount an effective defense. Jeffs’ motion was fully briefed, and after a hearing on July 13, 2009, the trial court found that Jeffs was indigent, but that he failed to demonstrate a “compelling reason” why the court should require the County to pay for noncontracting defense resources as required by several sections of the Utah Indigent Defense Act. Thus, the court denied Defendant’s motion.

COURSE OF PROCEEDINGS BELOW:

Following the trial court’s denial of his motion, Jeffs sought and was granted leave by this court to file this interlocutory appeal on November 23, 2009 (R. 306). On July 22, 2010, Salt Lake County moved to intervene as the real party in interest in lieu of the State of Utah as the nominal plaintiff because the County has the sole potential liability to pay for the defense resources requested by Jeffs. The County’s intervention was allowed, and upon motion of the County, this appeal was consolidated on August 10, 2010 with two other pending interlocutory appeals raising similar issues under the Indigent Defense Act, *to-wit*: *State v. Antony Davis*, No. 20090816-SC, and *State v. Branson Parduhn*, No. 20090744-SC.

2. Statement of Facts

1. Jeffs was charged by information filed May 16, 2008 with four counts of Attempted Aggravated Murder (each a first degree felony), Attempted Unlawful Discharge of a Firearm, Domestic Violence in the Presence of a Child (third degree felony), Reckless Endangerment (class A misdemeanor), and Interfering with an Arrest (class B misdemeanor). [See Court Docket; R. 1-11].

2. On May 20, 2008, at Jeffs' initial appearance, the Court found Jeffs indigent and appointed the Salt Lake Legal Defenders Association ("LDA") to represent Jeffs. [Docket; R. 13-14].

3. On May 28, 2008, Jeffs' LDA attorney moved to withdraw as counsel, and on July 8, 2008 private counsel David Drake entered his appearance as Jeffs' new counsel. [Docket; R. 37; R. 50-52].

4. On February 9, 2009, Mr. Drake filed a "Motion to Declare Defendant Indigent and to Provide Investigator and Expert Witness at State Expense" ("Defendant's Motion") [Docket; R. 143-145].

5. On February 19, 2009, the County filed its Opposition Memorandum regarding Defendant's Motion. [Docket; R. 146-174].

6. On April 3, 2009, Defendant filed a "Reply to State's Response re Indigency." [Docket; R. 181-190].

7. On May 29, 2009, Defendant filed a document entitled “Correction to Prosecutor’s Statement Concerning Whether State v. Burns is Still Good Law.” [Docket; R. 197-216].

8. On June 15, 2009, Defendant filed a “Supplement to Motion to Declare Defendant Indigent and to Provide an Investigator and Expert at State Expenses.” [Docket; R. 219-243].

9. On June 25, 2009, the County filed its Reply Memorandum regarding Defendant’s “Supplement.” [Docket; R. 244-273].

10. On July 13, 2009, the court conducted a hearing on Defendant’s Motion. [Docket; R. 276].

11. On August 21, 2009, the court entered written Findings of Fact and Conclusions of Law regarding Defendant’s Motion which, among other things, found that: (a) Defendant was indigent; (b) Defendant paid Mr. Drake \$28,000.00 to represent him in this matter; (c) the Salt Lake Legal Defenders Association (the “LDA”) was available to represent Defendant and had no conflict; and (d) that LDA had the needed expertise and defense resources to provide Defendant an effective defense. The court concluded that although Defendant was indigent, he had not demonstrated a “compelling reason” to appoint a noncontracting attorney or defense resource as required by Utah Code Ann., Sec. 77-32-302(2)(e). [Docket; R. 280-283].

12. On November 23, 2009, Jeffs was granted permission by the Utah Supreme Court to bring this interlocutory appeal. [R. 306].

13. Salt Lake County, pursuant to its statutory responsibility to provide for the legal defense of indigents, including defense resources and counsel, has contracted with the LDA. Under the terms of the LDA Agreement for Services (the “LDA Agreement” [*q.v.*, R. 156-174]), which was in effect at all times relevant to this matter, the LDA has the responsibility to provide legal representation and counsel, and to contract with investigators and other resources necessary for a complete defense, according to the standards set forth in Utah Code Ann., Section 77-32-301 [*id.*, ¶2.A. (R. 158-159)]. The LDA Agreement provides that LDA is paid a sum inclusive of all “professional fees and expenses that may be incurred by [LDA]” in performing its services [*id.*, ¶ 1. B. (R. 158)]. The LDA is a well qualified firm that has provided quality legal services to indigent defendants for many years.

SUMMARY OF THE COUNTY’S ARGUMENT

In accordance with the Utah Indigent Defense Act (the “Act”), Utah Code Ann., Section 77-32-101, *et. seq.*, Salt Lake County contracts with the Salt Lake Legal Defenders Association (“LDA”) to provide for the legal defense of indigent defendants, including “defense resources”² and counsel. Accordingly, under Section 77-32-306(4) of the Act, LDA is the “exclusive source” from which indigent legal defense, including indigent defense resources, may be provided in this case, unless the Court finds a “compelling reason” to authorize or designate a noncontracting attorney or defense resource for the indigent defendant.

² The Act defines a “defense resource” as: “a competent investigator, expert witness, or other appropriate means necessary for an effective defense of an indigent, but does not include legal counsel.” Utah Code Ann., Section 77-32-201 (3).

Assuming that the Defendant is indigent under the procedures and criteria set forth in Section 77-32-202 of the Act, the trial court did not abuse its discretion in concluding that there is no “compelling reason” which would justify the Court to authorize or designate a non-contracting attorney or defense resource for the defense in this case, pursuant to the provisions of Sections 77-32-302(2)(b) and (e), 77-32-303 and 77-32-306(4) of the Act.

Further, Defendant’s reliance on the case of *State v. Burns*, 4 P.3d 795, 2000 UT 56 (Utah 2000) is misplaced, because in 2001 the Utah Legislature, seeking expressly to overturn the decision in *Burns*, enacted revisions to the Indigent Defense Act, which now prohibit the court from appointing a noncontracting defense resource, either under the Act or under Rule 15 of the Utah Rules of Criminal Procedure, unless the court: (1) conducts a hearing with proper notice, and (2) makes a finding that there is a “compelling reason” to authorize or designate a noncontracting defense resource for the indigent defendant. Utah Code Ann., Section 77-32-303.

ARGUMENT

I

THE LDA IS THE “EXCLUSIVE SOURCE” FROM WHICH THE INDIGENT LEGAL DEFENSE, INCLUDING DEFENSE RESOURCES, MAY BE PROVIDED, UNLESS THE COURT, AFTER PROPER NOTICE AND HEARING, FINDS A “COMPELLING REASON” FOR THE APPOINTMENT OF A NONCONTRACTING ATTORNEY OR DEFENSE RESOURCE

The Act provides a comprehensive scheme governing not only the procedures and standards for the determination of the indigence of a criminal defendant, but also the procedures and standards for the Court to appoint counsel and provide for indigent defense resources.

Section 77-32-302(2)(b) of the Act establishes the following rule:

“If the county or municipality responsible to provide for the legal defense of an indigent, including defense resources and counsel, has arranged by contract to provide those services through a legal aid association, and the court has received notice or a copy of the contract, the court shall assign the legal aid association named in the contract to defend the indigent and provide defense resources.” (Emphasis added).

Although this appointment to defend and “provide defense resources” appears to be mandatory, there is a limited exception to the rule set forth in Section 77-32-302(2)(e):

“If the court considers the assignment of a noncontracting attorney or defense resource to provide legal services to an indigent defendant despite the existence of an indigent legal services contract and the court has a copy or notice of the contract, before the court may make the assignment, it shall:

- (I) set the matter for a hearing;
- (ii) give proper notice of the hearing to the attorney of the responsible county or municipality; and
- (iii) make findings that there is a compelling reason to appoint a noncontracting attorney or defense resource.” (Emphasis added).

The Act then goes to make it clear that

“[t]he indigent’s preference for other counsel or defense resources may not be considered a compelling reason justifying the appointment of a noncontracting attorney or defense resource.” (Emphasis added).

Utah Code Ann., Section 77-32-302(2)(f). The Act, at Section 77-32-201(2), defines the phrase “compelling reason” as follows:

“‘Compelling reason’ may include the following circumstances:

- (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 defense resources is insufficient or lacks expertise to provide a complete defense.”

The Act again clarifies the procedure and standard for appointment of a “noncontracting” counsel or defense resource in Section 77-32-303:

“If a county or municipality has contracted for, or otherwise made arrangements for, the legal defense of indigents, ... the court may not appointment a noncontracting attorney or resource either under this part, Section 78B-1-151, or Rule 15, Utah Rules of Criminal Procedure, ... unless the court:

- (1) conducts a hearing with proper notice to the responsible entity to consider the authorization or designation of a noncontract attorney or resource; and
- (2) makes a finding that there is a compelling reason to authorize or designate a noncontracting attorney or resource for the indigent defendant.” (Emphasis added).

Thus, Section 77-32-303 makes specific reference to Rule 15, Utah Rules of Criminal Procedure (expert witnesses) and Section 78B-1-151 (expenses for expert witnesses) and makes both provisions subject to the Act’s “compelling reason” standard.

Once again, in Section 77-32-306(4), the Act specifies the procedure and standard for appointment of noncontracting counsel or resources:

“When a county or municipality has ... created a legal defender’s office as provided [herein] to provide the legal counsel and defense resources required by this chapter, the contracted legal aid association or attorneys ... and the county legal defender’s office are the exclusive source from which the legal defense may be provides, unless the court finds a compelling reason for the appointment of noncontracting attorneys and defense resources, in which case the judge shall state the compelling reason on the record.” (Emphasis added).

II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT THERE WAS NO “COMPELLING REASON” WHICH WOULD JUSTIFY AUTHORIZING OR DESIGNATING A NONCONTRACTING ATTORNEY OR DEFENSE RESOURCE

In order for a trial court to go outside of the LDA contract to authorize and designate a noncontracting defense resource in this case, the defense must provide a “compelling reason” sufficient to allow the Court to make findings on the record. The Defendant’s Motion failed to demonstrate any “compelling reason” for the court to stray for the County’s contract with LDA. The three circumstances set forth in Section 77-32-201(2), defining a “compelling reason,” while not exclusive³, each clearly do not apply here.

³

This section provides that “‘Compelling reason’ may include the following circumstances: (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 defense resources is insufficient or lacks expertise to provide a complete defense.” (Emphasis added). Thus, a “compelling reason” is not necessarily limited to the three circumstances described in the Act. However, the general term “compelling reason” must have some relationship to the three illustrative circumstances provided by the Act. Under the legal doctrine of *ejusdem generis*, “in order to give meaning to the general term, the general term is understood as restricted to include things of the same kind, class, character, or nature as those specifically enumerated, unless there is something to show a contrary intent.” *See, e.g., Gardiner v. York*, 2010 UT App 108,

A. Conflict of Interest. In applying these enumerated statutory circumstances to the present case, Defendant has not alleged that the LDA has a conflict of interest. Even if the LDA did have a conflict, it should be noted that the LDA Agreement provides that it is the responsibility of the LDA to hire and pay for conflict counsel and defense resources in cases where the LDA has a conflict of interest which would prevent the LDA from representing a defendant. Accordingly, a conflict of interest is not a “compelling reason” in this case which would justify going outside of the contract.

B. Insufficient Expertise of Contracting Attorney. With regard to the second circumstance relating to insufficient expertise of the contracting attorney, there is no allegation that the LDA does not have sufficient expertise to provide an effective defense in this case. Defendant has retained his own private counsel based upon his own choice and personal preference, but has not alleged that the LDA lacks sufficient expertise to provide an effective defense of the Defendant.

C. Insufficient Defense Resource. With regard to the third circumstance relating to the insufficiency of the defense resource or the defense resource’s lack of expertise to provide a complete defense, there should be little question that the LDA is well qualified to provide quality legal defense resources to indigent defendants and has the resources and

¶18, 233 P.3d 500, 508-509 (citations omitted). Thus, although a “compelling reason” is not limited solely to the three enumerated circumstances, it should be read to only include other circumstances “of the same kind, class, character, or nature as those specifically enumerated” in the statutory examples.

expertise to contract with qualified investigators, forensic professionals and other expert witnesses and resources necessary for a complete defense.

Salt Lake County currently expends approximately \$11,000,000.00 yearly (*see* R. 156-174) for defense counsel and defense resources provided through the LDA. Additional expenditures for “compelling reasons” are rarely warranted when these resources are already available through the publicly-funded LDA. In other words, because the County has already paid the LDA under the LDA Agreement to provide all required legal services and resources for indigent defense, any order requiring payment to private counsel for defense resources outside of the contract results in the County paying twice for the same thing. With that in mind, the Act repeatedly requires that a court only depart from using LDA as the “exclusive source” for defense counsel and resources in the most exceptional circumstances.

Here, Jeffs offers no argument or authority suggesting that the trial court abused its discretion in refusing to find a “compelling reason” to go outside the LDA Agreement to authorize special defense resources. Instead, Jeffs simply argues – absent any supporting authority – that because he has a right to the defense counsel of his choice, the Act’s “compelling reason” standard is irrelevant. As much as Jeffs would want to minimize the significance of the compelling-reason standard, it is actually at the core of this controversy. Jeffs has made no showing that the trial court misinterpreted or misapplied the compelling-reason standard as a matter of law, nor has he even argued that the court abused its discretion in declining to find a compelling reason in this case. Hence, the conclusion of the trial court should be affirmed.

III

DEFENDANT'S RELIANCE ON THE *BURNS* CASE IS MISPLACED IN LIGHT OF SUBSEQUENT LEGISLATIVE CHANGES TO THE INDIGENT DEFENSE ACT

Jeffs argues that *State v. Burns*, 4 P.3d 795, 2000 UT 56, a case decided in 2000 under the 1997 version of the Indigent Defense Act, rather than the current version applicable in this case, and is of questionable validity under the current Act as amended by the Utah Legislature in 2001 and 2006 directly in response to the *Burns* decision, applies notwithstanding the subsequent legislative revisions.

In *Burns*, the defendant's father paid for a private attorney but could not afford a expert medical witness. The private attorney petitioned the trial court to appoint publicly-funded expert witnesses. The court did not address the defendant's indigence, but denied the requested expert assistance, stating its policy that defendants can only receive state-funded expert assistance if they were represented by LDA counsel. *Id.*, 2000 UT 56 at ¶¶7, 8. On appeal, the defendant argued that in requiring her to utilize an LDA attorney or forfeit her right to indigent defense benefits such as expert witness fees, the trial court denied her federal and state constitutional rights, and violated the Act. *Id.*, ¶13.

This court held that “the only requirements for receiving public assistance for expert witnesses are proof of necessity and establishment of indigence.” *Id.*, ¶32. “[Defendant] was entitled to a hearing for a determination of whether she was indigent without the condition that she accept LDA counsel” (*id.*) and “was entitled to a hearing for a determination of whether she was indigent regardless of who was paying her attorney fees”

(*id.*, ¶38). The court also concluded that Rule 15(a) of the Utah Rules of Criminal Procedure does not require a defendant to be represented by LDA in order to qualify for expert assistance. *Id.*, ¶31.

The Utah Legislature sought to overturn *Burns* by enacting Senate Bill 154 in 2001. SB 154 revised the standards of the Act to require that a court not appoint a noncontracting defense resource unless the court first conducts a hearing and makes a finding that there is a “compelling reason” to authorize or designate a noncontracting defense resource for the indigent defendant. In amending the Act, the Utah Senate and House of Representatives recognized a policy of limiting the fees a County should pay while still providing indigent defendants with “good, qualified experts.”⁴ The 1997 version of the Act, in effect when the *Burns* case was decided, only required the Court to “make findings that there is a compelling reason to appoint a noncontracting attorney,” but made no mention of “defense resources.” This prior language was the law under which the Utah Supreme Court made its *Burns* ruling.

With SB 154, the Legislature amended the Act in 2001 to include “or defense resource,” which now provides as follows:

“If the court considers the assignment of a noncontracting attorney or defense resource to provide legal services to an indigent defendant despite the existence of an indigent legal services contract and the court has a copy or notice of the contract, before the court may make the assignment it shall . . .

⁴

See, e.g., Senate Floor Debate Audio Recording for Senate Bill 154 on 2/12/2001 and 2/13/2001 and House Floor Debate Audio Recording for Senate Bill 154 on 2/26/2001. Available at: http://www.image.le.state.ut.us/imaging/bill.asp?_method=_EM__onclientevent&pcount=2&p0=Button1&p1=onclick.

make findings that there is a compelling reason to appoint a noncontracting attorney or defense resource.” See, § 77-32-302(2)(e) (additional language underlined).⁵

The Utah State Legislature specifically intended to overrule this court’s holding in *Burns*.⁶ In the House Floor Debate held on February 26, 2001 Representative Curtis said that:

“Senate Bill 154 deals with a recent Supreme Court decision that allows defendants to utilize publicly funded expert witnesses and investigators even though the defendant may be financially able to retain private counsel.” See House Floor Debate Audio Recording (2/26/2001), *supra* fn. 4.

Representative Curtis was referring to *Burns*. A copy of the *Burns* decision is in the SB 154 Bill file and labeled as “research.”⁷

The amended version of the Indigent Defense Act, which now extends the requirement that the Court find a compelling reason prior to appointing a noncontracting defense resource, was clearly intended to overrule *Burns*.

Through somewhat obscure logic, Jeffs argues that *Burns* decision survived passage of SB 154. The bottom line is that the 2001 amendment of the Act made both legal counsel and defense resources subject to the “compelling reason” standard.

Jeffs also argues, however, that the “compelling reason” test is inapplicable regardless of *Burns* because the County’s contract for legal services with LDA has no

⁵ The Act was amended again in 2006. This exact quoted language is found in § 77-32-302(2)(e) of the 2006 version.

⁶ Senate and House Floor Debates Audio Recordings, *supra* note 2.

⁷ Available at: <http://www.image.le.state.ut.us/imaging/Viewer.asp?Image=8>.

provision for expert assistance, and the “compelling reason” test of Section 303 of the Act only comes into play where a “county has contracted specifically for defense resources” Appellant’s Brief, p. 20. This contention is simply factually false. The LDA Agreement with Salt Lake County expressly provides that LDA is paid a specified sum inclusive of all “professional fees and expenses that may be incurred by [LDA]” in performing its services [see LDA Agreement, ¶ 1. B. (R. 158)]. By its plain language, the Agreement requires that LDA pay all required “professional fees and expenses” out of the gross payment it receives from the County.

In short, under the 2001 amendment, the Act requires that the “compelling reason” test be applied to requests for defense resources, as well as defense counsel. Jeffs ultimately makes no argument, and cites no authority, suggesting that the trial court abused its discretion in refusing to find a compelling reason it to require the County to pay for noncontracting defense resources.

Jeffs also argues that *Burns* was “reaffirmed” by the recent *State v. Barber*, 2009 UT App 91, 206 P.3d 1223. In *Barber*, a defendant charged with child abuse was initially represented by the LDA, later retaining private counsel. A month later, after LDA had withdrawn, private counsel sought to withdraw and the defendant desired to be reappointed to LDA. The court refused to allow private counsel to withdraw and the case went to trial month later. The defendant argued on appeal the court violated his 6th Amendment rights by not allowing him, in effect, to dismiss his private attorney and return to the LDA. See *Barber*, 2009 UT App 91 at ¶¶12-17.

The Utah Court of Appeals held that if substitute retained counsel is willing and ethically available to assume representation, and the substitution would not unreasonably delay the proceedings, “the defendant’s choice of retained counsel must be respected.” *Id.*, ¶45. Even where a request is made *untimely* to dismiss private retained counsel in favor of a public defender, the request should be granted upon a showing of good cause. *Id.*, fn. 15.

In this context, *Barber* only refers once to *Burns*, noting in dicta, “Utah law guarantees indigent defendants ‘public assistance for expert witnesses’ irrespective of whether they are represented by the LDA or private counsel” (citing *Burns*). The *Barber* court failed to address, however, the effect on this principle of the subsequent amendment of the Act. In any case, *Barber* does not change the plain meaning of the amended language of the Act, which is to make requests for both noncontracting legal counsel and noncontracting defense resources subject to the “compelling reason” test. Thus, *Barber* is of no aid to Jeffs.

IV

THE ACT DOES NOT REQUIRE A DEFENDANT TO TERMINATE HIS PRIVATE COUNSEL IN ORDER TO SEEK COUNTY-PAID DEFENSE RESOURCES

Jeffs repeatedly characterizes the County’s position as requiring an indigent defendant represented by retained counsel to “fire” his attorney of choice and accept representation by LDA in order obtain County-paid defense resources⁸. This misstates the County’s position.

⁸*See, e.g.*, Appellant’s Brief, p. 8: “The [County’s] argument [is] that in order to qualify for defense resources, defendant must be represented by the LDA and has no choice of counsel” *See also id.*, p. 19: “[It is] Salt Lake County’s claim that Jeffs must be represented by LDA in order to receive [County-paid] defense resources”

The Act establishes a procedure, as well as the applicable standards, for seeking an order requiring County payment for noncontracting defense resources. Upon a defendant's request for appointed defense counsel or resources, a trial court's first step is to determine whether the defendant is indigent. Section 77-32-202(1) provides that the threshold "determination of indigency or continuing indigency may be made by the court at any stage of the proceedings." Section 77-32-202(4) then states that "[u]pon making a finding of indigence, the court shall enter findings on the record and enter an order assigning defense counsel to represent the defendant in the case." (Emphasis added).

As discussed above, the "defense counsel" referenced in subsection (4) must be the county's legal defender's office, if the county has established such an office⁹. This mandate is repeated in Section 77-32-306(4)¹⁰ which provides that such office shall be the "exclusive source from which the legal defense may be provided," but creates an exception to this

⁹Section 77-32-302(2)(a): "If a county responsible for providing indigent legal defense, including defense resources and counsel, has established a county legal defender's office ... the court shall assign to the county legal defender's office the responsibility to defend indigent defendants within the county and provide defense resources." Similarly, Section 77-32-302(2)(b) provides: "If a county responsible for providing indigent legal defense, including defense resources and counsel, has arranged by contract to provide those services through a legal aid association, ... the court shall assign the legal aid association named in the contract to defend indigent defendants within the county and provide defense resources."

¹⁰ Section 77-32-306(4): "When a county or municipality has ... created a legal defender's office as provided [herein] to provide the legal counsel and defense resources required by this chapter, the contracted legal aid association or attorneys ... and the county legal defender's office are the exclusive source from which the legal defense may be provided, unless the court finds a compelling reason for the appointment of noncontracting attorneys and defense resources, in which case the judge shall state the compelling reason on the record." (Emphasis added).

general “exclusive source” rule where the court finds a “compelling reason for the appointment of noncontracting attorneys and defense resources.”

Where no “compelling reason” is offered by a defendant or found by the court, nothing in the Act requires that an indigent defendant who has privately-retained counsel must terminate that relationship. The Act merely requires appointment of defense counsel upon a finding of indigency, and does not address how that appointment will affect the defendant’s relationship with his retained counsel. The Act leaves the management of the indigent’s legal defense to the indigent, his appointed counsel and his retained counsel, not to the court. Whatever issues this situation may pose to the management of the indigent’s defense, it is nonetheless fallacious to argue that the Act requires an indigent defendant to “fire” his private counsel.

V

JEFFS’ ARGUMENTS CONCERNING EQUAL PROTECTION AND THE CHILLING EFFECT ON PROP BONO REPRESENTATION ARE RAISED FOR THE FIRST TIME ON APPEAL

In his opening brief, Jeffs asserts two arguments never raised before the trial court. First, Jeffs argues that to distinguish between the treatment of an indigent defendant appointed to LDA and an indigent defendant represented by retained counsel in terms of eligibility for public-funded defense resources violates that latter group’s equal protection rights. See Appellant’s Brief, pp. 13-16. Secondly, Jeffs argues that making such a distinction will unintentionally chill the desire and willingness of *pro bono* attorneys to accept criminal defense matters in which defense resources may be necessary. *Id.*, 23-24.

Unfortunately, the trial court did not address these arguments because it never had the opportunity to do so. Even though Jeffs filed four separate written submissions in support of Defendant's Motion¹¹, neither of these arguments was raised in the trial court.

An issue may be raised on appeal for the first time in only three circumstances: (1) where the issue manifests "plain error," *i.e.*, and error that should have been obvious to the trial court and was harmful to the a party raising it on appeal; (2) in "exceptional circumstances," and (3) where a criminal appellant received ineffective assistance of counsel. *See State v. Shaffer*, 2010 UT App 240, ¶10, 239 P.3d 285, 288 (citing *State v. Weaver*, 2005 UT 49, ¶18, 122 P.3d 566). None of these exceptions applies in this case. Therefore, these two arguments raised for the first time here should be rejected.

CONCLUSION

The Utah Indigent Defense Act governs the procedures and standards applicable to the determination of indigence, and also the procedures and standards for appointment of defense counsel and defense resources. Salt Lake County has contracted with the Salt Lake Legal Defender Association to provide for the legal defense of indigent defendants, including defense resources and counsel. Accordingly, under Section 77-32-306(4) of the Act, LDA is the "exclusive source" from which indigent legal defense, including indigent defense resources, may be provided in this case, unless, after proper notice and a hearing, the court finds a "compelling reason" to authorize or designate a noncontracting attorney or defense resource for the indigent defendant. In the absence of such evidentiary showing and resulting finding of a "compelling reason" by the Court, the County is not authorized to use

¹¹ See Statement of Facts, ¶¶ 4, 6, 7 and 8.

taxpayer funds for such purpose and any payment by the County for such purpose would be unlawful.

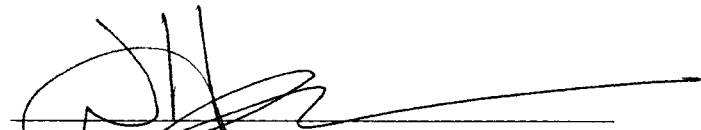
While the trial court in this case determined the defendant to be indigent, it declined to find a compelling reason to order County payment of noncontracting defense resources. Under the Act, the “compelling reason” inquiry is left to the sound discretion of the trial court upon notice and hearing. The issue, then, is whether the trial court here abused its discretion in declining to find such a compelling reason. Jeffs’ opening brief fails to address this pivotal issue.

Finally, Jeffs’ arguments concerning equal protection and the chilling effect on *pro bono* representation are raised for the first time on appeal and, therefore, this court should decline to address them.

Accordingly, the interlocutory order of the district court denying Defendant’s motion should be affirmed.

DATED this 27 day of October, 2010.

LOHRA L. MILLER, District Attorney
SALT LAKE COUNTY
DISTRICT ATTORNEY’S OFFICE


DONALD H. HANSEN
CRAIG J. WANGSGARD
Deputy District Attorneys
Civil/Litigation Division

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 27 day of October, 2010, I caused two (2) true and correct copies of the foregoing Appellee's Brief to be mailed, postage prepaid, to each of the following:

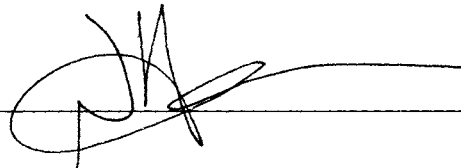
David O. Drake, Esq.
Attorney at Law
6905 South 1300 East, #248
Midvale, Utah 84047
Attorney for Defendant Jeffs

Laura Dupaix
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, Sixth Floor
Salt Lake City UT 84114-0854
Attorney for State of Utah

Patrick L. Anderson
Joan Watt
Salt Lake Legal Defenders Association
424 East 500 South #300
Salt Lake City, Utah 84111

William K. McGuire, Esq.
David County Attorneys Office
800 West State Street
Farmington UT 84025
Attorney for Amicus Utah Association of Counties

By



A handwritten signature in black ink, appearing to be 'W. McGuire', is written over a horizontal line that extends to the right.