

Contract for Indigent Capital Defense Counsel Service

THIS CONTRACT is made and entered into by and between the UTAH INDIGENT DEFENSE FUNDS BOARD, a board created by and acting under Sections §78B-22-501 through §78B-22-502, *Utah Code Ann.*, which shall be called the "BOARD" in this contract, and MARY C. CORPORON, and JONATHAN T NISH, who shall be jointly and individually called "DEFENDERS" in this contract. Collectively, they shall be referred to in this contract as "Parties".

This contract is based, in part, upon the following recitals:

- A. AARON MICHAEL VISSER, who shall be called "DEFENDANT" in this contract, was charged in an information, dated June 8, 2022, and filed in Criminal Case 221300367 in the Third Judicial District Court in and for Tooele County, Utah, with the commission of the criminal offense of, CRIMINAL HOMICIDE, AGGRAVATED MURDER, a FIRST DEGREE FELONY, a possible capital offense, in violation of §76-5-202(3), *Utah Code Ann.*
- B. Pursuant to the Indigent Defense Act, as set forth in Title 78B, Chapter 22, Utah Code Ann., the Court found, on June 13, 2022, DEFENDANT to be indigent and entitled to the assignment of defense counsel in this case pursuant to §78B-22 Part 2, *Utah Code Ann.*, at public expense.
- C. The Court has made findings that Mary C. Corporon is an attorney duly licensed to practice law in the State of Utah and is qualified under Rule 8(b), Utah Rules of Criminal Procedure, to be assigned as lead defense counsel for an indigent charged with an offense for which the punishment may be death and that he is proficient in the trial of capital cases.

- D. Mary C. Corporon as lead counsel, has signed and submitted to the BOARD a Request and Commitment Agreement: Trial Defense Counsel and sufficient documentation to verify that he is currently qualified under Rule 8(b), Utah Rules of Criminal Procedure, to be assigned as lead defense counsel for an indigent charged with an offense for which the punishment may be death and that he is proficient in the trial of capital cases.
- E. Mary C. Corporon, as lead counsel, has selected Jonathan T. Nish to be co-counsel in this case. The Court has made findings that Jonathan T. Nish is an attorney duly licensed to practice law in the State of Utah and is currently qualified under Rule 8(b), Utah Rules of Criminal Procedure, he is qualified to be assigned as defense co-counsel in a capital case.
- F. DEFENDERS are able and willing to undertake the assignment as defense counsel for and have no known conflicts of interest in representing DEFENDANT in this case.
- G. In contemplation of the assignment of the DEFENDERS to represent DEFENDANT in this case, DEFENDERS and the BOARD have negotiated a reasonable compensation for the services of DEFENDERS as indigent defense counsel, and it is the intent of the parties that the terms of those services and that compensation be set forth in this contract. Tooele County, which may hereinafter be referred to as COUNTY, approves the negotiated compensation and this contract as acknowledged in the County Acknowledgment and Approval which is attached to contract as Exhibit "A" and incorporated herein by reference.

Now therefore, in consideration of the mutual terms and conditions set forth in this contract, the parties hereto do hereby agree as follows:

1. Services

- A. DEFENDERS shall, as co-counsel, provide legal service and represent DEFENDANT in all phases and proceedings of the defense in Criminal Case No. 221300367 in the Third Judicial District Court in and for Tooele County, in which DEFENDANT is charged with the offense of criminal homicide, aggravated murder, a possible capital offense.

- B. DEFENDERS shall represent DEFENDANT in this case and provide and perform all necessary and appropriate defense legal services through:
 - (1) Any proceedings and trial, including any new trial granted by the trial court, all motion hearings, and any other proceedings which may be held in this case before the trial court; and
 - (2) Any post-trial proceedings before the trial court, including sentencing and any post-plea or post-trial motions filed by either DEFENDANT or the State.

- C. The services contemplated by this contract do not include any:
 - (1) Post-plea or post-trial appeals to an appellate court; or
 - (2) Proceedings before the trial court if the court has relieved counsel of the obligation to represent DEFENDANT.

- D. DEFENDERS shall perform the legal services required under this contract in a professional and ethical manner under the guidelines and standards set forth in the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, as long as the death penalty is sought, Utah Rules of Professional Conduct, and such other applicable law, rule, and case law governing the practice of law in the State of Utah together with such other regulations or statutory provisions to which the DEFENDERS may be subject as a result of federal law.

- E. The DEFENDERS shall, with reasonable promptness, inform the BOARD of:

- (1) Any pending or possible conflicts of interest that may exist as a result of the proposed or current representation by either DEFENDER of DEFENDANT in the above-described criminal case and, if reasonably possible, obtain the appropriate and necessary waivers or releases from all concerned parties.
- (2) Any circumstances which are likely to reasonably necessitate the withdrawal of either DEFENDER; or
- (3) The intention of either DEFENDER to withdraw from representation of DEFENDANT.

2. Compensation

- A. The Board may authorize payment of attorney fees at a rate of \$200 per hour for Rule 8 qualified lead counsel and \$160 per hour for Rule 8 or non-Rule 8 qualified attorneys who serve in the capacity of second chair in the case up to a maximum of \$175,000 if the death penalty is sought by the prosecution, or, at a rate of \$188 per hour for lead counsel and \$140 per hour for second chair up to a maximum of \$85,000 if the death penalty is not sought by the prosecution or, if originally sought, the death penalty is withdrawn by the prosecution before the commencement of trial.
- B. The DEFENDERS shall be authorized to receive up to the following presumptive caps in accordance with the following schedule:
 - (1) If the death penalty is sought:
 - (a) Maximum of up to \$100,000 upon the completion or waiver of the preliminary hearing.
 - (b) Maximum of up to \$75,000 after completion or waiver of the preliminary hearing up to the conclusion of the trial by verdict and completion of penalty phase. For the purposes of this contract, the trial shall be deemed to commence upon the first witness being sworn.

- (2) If the death penalty is not sought or is withdrawn prior to trial:
 - (a) Maximum of up to \$40,000 upon completion or waiver of the preliminary hearing.
 - (b) Maximum of up to \$45,000 after completion or waiver of the preliminary hearing up to the conclusion of the trial by verdict and completion of the penalty phase.

The Board may authorize payments in excess of the maximum amounts only upon a showing of exceptional circumstances in accordance with paragraph 2C. In order to properly administer compensation, **Defenders** are required to notify the Board (through the Division of Finance) whether the death penalty is being sought, and if/when applicable, the date the death penalty is no longer being sought on the case.

- C. The Parties have agreed that the amounts and timing of compensation set forth in this contract are reasonable and adequate. The Parties further agree that the presumptive caps in paragraphs 2A and 2B shall be binding and shall operate to limit the timing and amount of total compensation paid to Defenders and that there shall be no right to receive additional compensation unless prior written approval is obtained from the Board. DEFENDERS may request that the Board exceed the maximum amounts listed in paragraph 2A and 2B based upon a showing of Exceptional Circumstance.

To establish exceptional circumstances, the DEFENDERS must demonstrate to the Board that compensation provided by paragraphs 2A and 2B is unreasonably inadequate in light of the length and complexity of the litigation which length and or complexity was not reasonably foreseeable at the time the Parties entered into this Contract. Exceptional circumstances are defined

as circumstances related to the case that were not reasonably foreseeable at the time the Parties entered into this Contract. The DEFENDERS shall be required to work within the presumptive caps in paragraphs 2A and 2B even if the total amount of work within the presumptive cap results in an hourly rate that is less than the hourly rate that is authorized by the Board in paragraph 2A of this Contract.

- (1) To request additional compensation, Defenders must as soon as is reasonably possible, submit a written request with sufficient and appropriate information and documentation to the BOARD to justify the requested additional fees
- (2) Defenders shall request that the trial court make ex parte findings regarding the length and complexity of the case and shall forward any determinations by trial court regarding that request.
- (3) The Board, in its complete discretion, shall determine whether the additional fees requested are reasonable in light of the circumstances and could not have been reasonably anticipated at the time this contract was approved and signed.
- (4) If the Board decides not to approve a request to exceed a presumptive cap based on a written request, Defenders shall be given an opportunity to present their reasoning to the Board and ask for a reconsideration of the decision. If Defenders choose to present their reasoning to the Board in person or by phone, they shall do so at their own expense, and such expenses shall not be billed to the Fund.
- (5) Defenders shall have no rights to claim additional recovery under this Agreement in the event the Board refuses to authorize additional compensation.

- D. The compensation to be paid shall be the sole consideration to be paid to the DEFENDERS by the BOARD for services under this contract, and includes all of the DEFENDERS' general office expenses, paralegal expenses, postage, preparation expenses, and other similar operating expenses, except as provided specifically otherwise in this contract. Time spent by an attorney, his/her clerical or other staff, or other legal team members regarding preparation, clarification or interpretation of billings or contracts is considered a general office expense and shall not be billed to the Fund. This includes time spent working with the Division of Finance or a board member on billing or contract issues.

- E. DEFENDERS shall submit fee statements jointly which sufficiently describe the services performed for which compensation is claimed and such other information as may be reasonably required by the BOARD in order to properly review, evaluate, and process the statement.

- F. The DEFENDERS shall submit billing statements detailing the hours worked and describing the work performed. The billing records shall be submitted to the Court/Board and are to be sealed and not made available to the agencies prosecuting the defendant. Billings shall be made in 1/10th hour increments. The fee statements shall be submitted at the stages of the proceedings as set forth in the foregoing Sub-paragraph B., however, monthly progress billings are required. If billings have gone beyond a presumptive cap, they still need to be submitted monthly. The Board has the right to decide not to pay charges that are three months old or older that have not been previously submitted.

- G. In the event the DEFENDERS, jointly or severally, receive payment from another source as payment of fees in the representation of DEFENDANT in this case, the DEFENDERS shall reimburse the BOARD for any consideration paid under this contract to the extent of such payments.

- H. In the event lead counsel is dismissed or withdraws from representation of DEFENDANT in this case whether temporarily or for limited purposes or permanently, because of any pending, possible, or actual conflicts of interest, and new lead counsel is appointed, the new lead counsel may, with the approval of the trial court:
 - (1) Select the appointment of new co-counsel, in which case, the new co-counsel will be compensated pursuant to agreement with the Board or subject to the limitations set forth in paragraph 2A.
 - (2) Agree to the continuation of the current co-counsel.

- I. If a new lead counsel selects the appointment of new co-counsel pursuant to Subsection H(1), the current co-counsel shall be compensated for services as provided above before the approval of withdrawal is entered by the trial court.

3. Reimbursement of Expenses

- A. Subject to the provisions of this paragraph and Paragraph 4 of this contract, the BOARD shall reimburse the DEFENDERS for the reasonable and necessary costs of defense, including reasonable and necessary defense expenses for:
 - (1) When the death penalty is sought:
 - (a) Mitigation Specialist and Mitigation Investigator fees: \$100 per hour plus reasonable expenses not to exceed \$80,000.
 - (i) Maximum of up to \$30,000 upon completion or waiver of the preliminary hearing.

- (ii) Maximum of up to \$20,000 after completion or waiver of the preliminary hearing up to trial.
 - (iii) Maximum of up to \$30,000 from the beginning of trial through completion of the penalty phase.
 - (b) Investigator fees: \$80 per hour plus reasonable expenses not to exceed \$60,000.
 - (i) Maximum of up to \$20,000 upon completion or waiver of the preliminary hearing.
 - (ii) Maximum of up to \$20,000 after completion or waiver of the preliminary hearing up to trial.
 - (iii) Maximum of up to \$20,000 from the beginning of trial through completion of the penalty phase.
- (2) When the death penalty is not sought or is withdrawn prior to trial:
 - (a) Mitigation Specialist and Mitigation Investigator fees: \$100 per hour plus reasonable expenses not to exceed \$30,000.
 - (b) Investigator Fees: \$80 per hour plus reasonable expenses not to exceed \$10,000. Investigator fees may be paid to the mitigation investigator.
- (3) Transcription fees;
- (4) Witness costs;
- (5) Expert witness fees;
- (6) Fees for mental and physical examinations and costs associated therewith;
- (7) Defense counsel travel costs, at state rates and in accordance with state rules and policies;
- (8) Costs for major voluminous copying of documents by an outside provider; and
- (9) Internal copies, or copies not made by an outside provider, will be reimbursed at 10 cents per copy.

- B. For the purposes of this contract, with the exception of the Subsections 3A.(1), 3A.(2), and 3A.(9), the above expenses shall be deemed to be extraordinary expenses and must have prior Court approval if the expense is \$750 or more. The caps stated in Subsection (A) are presumptive and any amounts in excess must have prior court approval. The necessity and reasonableness of these and any other extraordinary expenses shall be determined and approved by the Court before the expenses are incurred and before a statement for reimbursement for those extraordinary expenses may be submitted to the Board.
- C. The Parties have agreed that the reimbursement amounts provided by paragraphs 3A and 3B are reasonable and adequate. The Parties further agree that the limitations in those paragraphs shall be binding and shall operate to limit the timing and amount of reimbursement of expenses.

DEFENDERS shall submit their statements for expense reimbursements, including those extraordinary expenses approved by the Court, to the BOARD together with supporting documentation and such statements shall be processed with reasonable diligence in accordance with the fiscal procedures of the State of Utah.

- D. Travel is not considered necessary and reasonable when the purpose of the travel can reasonably be accomplished in another way, such as by telephone, email, video communication such as Skype, or other correspondence.
- E. In the event the DEFENDERS, or either of them, receive payment from another source as reimbursement for defense costs in the representation of DEFENDANT in this case, the DEFENDERS shall reimburse the BOARD for

any reimbursements paid under this contract to the extent of such payments.

4. Statements or Requests for Payment or Reimbursement

- A. DEFENDERS shall submit to the BOARD statements or requests for payment or reimbursement jointly which sufficiently describe the services performed for which compensation is claimed and such other information as may be reasonably required by the BOARD in order to properly review, evaluate, and process the request. Before making payment, the Board may request additional supporting documentation. The Board may withhold payment for any item in a statement or request when such item is not accompanied by supporting documentation, such as a paid invoice, or such item conflicts with the provisions of this contract pending resolution of the amount requested.

- B. Fee statements shall be submitted at the times described in the foregoing Paragraph 2.F.

- C. The BOARD shall process any payment requests submitted by DEFENDERS under this contract with reasonable diligence and in accordance with the fiscal procedures of the State.

5. Non-Funding Clause as to Board

Because the sole source of funding for the BOARD for the purposes of this contract is the Indigent Aggravated Defense Trust Fund in accordance with §78B-22-703, *Utah Code Ann.*, which is derived from revenues from participating counties and the State of Utah, the liability and responsibility of the BOARD to pay compensation and reimbursement of expenses to the DEFENDERS under this contract is limited to the amount of funds available to the BOARD in the Indigent Aggravated Murder Defense Trust Fund.

6. Independent Co-Counsel

DEFENDERS are, individually and jointly, obligated by this contract to provide the legal defense services set forth in this contract. In the event of the inability or unwillingness of either DEFENDER to represent or continue to represent DEFENDANT, or the dismissal or withdrawal of either DEFENDER, the remaining DEFENDER shall nonetheless continue to represent DEFENDANT above as though the dismissal or withdrawal of co-counsel had not occurred.

7. Withdrawal or Dismissal of Counsel

- A. In the event of the inability of either DEFENDER to represent DEFENDANT in this case or in the event of court-approved dismissal or withdrawal of either DEFENDER as defense counsel, the DEFENDER who is dismissed or withdraws shall be entitled to compensation to the date of that dismissal or withdrawal.
- B. Neither such withdrawal or dismissal nor the appointment of a substitute legal counsel for the DEFENDER who has withdrawn or been dismissed will alter the obligations and entitlements, including compensation, of the remaining DEFENDER or the obligation of the BOARD to pay compensation to the remaining DEFENDER under the terms of this contract.
- C. An amendment to this contract shall be entered regarding the substitute legal counsel who shall be entitled to compensation only for services rendered from the time of appointment.
- D. Should one or both DEFENDERS withdraw from the case for reasons other than an ethical conflict, and the BOARD reasonably incurs costs because of that withdrawal, DEFENDER shall be responsible to reimburse the BOARD for these costs.

8. **Qualifications**

The DEFENDERS shall, as may be requested by the BOARD, provide sufficient documentation to verify that Mary C. Corporon, and as necessary Jonathan T. Nish, are and remain currently qualified under Rule 8(b), Utah Rules of Criminal Procedure, to be assigned and continue to serve as defense counsel for an indigent charged with an offense for which the punishment may be death and that the DEFENDERS remain attorneys in good standing with the Utah State Bar and licensed to practice law in the State of Utah. The DEFENDERS shall have an ongoing duty to report to the BOARD if either defense counsel is no longer qualified, for whatever reason, to continue to represent DEFENDANT in the case.

9. **Independent Contractors**

DEFENDERS are independent contractors providing professional legal services and are not employees of the State of Utah or the COUNTY or agents of the Indigent Defense Fund or Board and are therefore not entitled to any of the benefits of employment by those entities such as, but not limited to, retirement, health, or Workers Compensation coverage.

10. **Insurance**

- A. The DEFENDERS shall maintain such insurance as will cover DEFENDERS from any and all claims for malpractice, property damages, injuries, or death made by any person that may arise from the performance of this contract. DEFENDERS shall provide the BOARD with appropriate current certificates of insurance as evidence of that coverage upon the execution of this contract.

- B. The minimum coverage shall be One Hundred Thousand Dollars (\$100,000.00) per claim and Three Hundred Thousand Dollars (\$300,000.00) per year.

11. **Entire Agreement**

This contract sets forth the complete agreement between the parties and may be modified only by a subsequent written instrument approved and signed by both parties.

12. **Default**

In the event of a default in the performance of this contract, the defaulting party shall reimburse the other party for all reasonable attorney's fees and costs incurred in the enforcement of this contract.

13. **Notice**

All notices to be given under this contract shall be delivered to the parties as follows:

A. Notice shall be given to the DEFENDERS at:

Mary C. Corporon Telephone: 801-323-5000
257 East 200 South, Suite 1100
Salt Lake City, UT 84111

Jonathan T. Nish Telephone: 801-323-5000
257 East 200 South, Suite 1100
Salt Lake City, UT 84111

B. Notice shall be given to the BOARD at:

Indigent Defense Funds Board
c/o Janica Gines, Director Telephone: 801-957-7727
Division of Finance
Taylorsville State Office Building
4315 S. 2700 W, Floor 3

Taylorsville, UT 84129-2128
jmgines@utah.gov

Mailing Address
Division of Finance
PO Box 141031
Salt Lake City, UT 84114-1031

14. Non-Assignment

The DEFENDERS may not assign this contract or their performance under it, in whole or in part, without the prior written approval of the BOARD, which shall not be unreasonably withheld in the event that the BOARD terminates this contract because of non-funding.

15. Termination

- A. The DEFENDERS may terminate this contract by giving written notice to the BOARD 30 days in advance of the termination, except that in the event of either non-funding or a conflict of interest the termination may take effect immediately. It is understood that the termination of this contract is not the same as withdrawal of representation of DEFENDANT. In order to withdraw their representation of DEFENDANT, the DEFENDERS acknowledge that the approval of the court must first be obtained.

- B. The BOARD, upon reasonable notice, may terminate this contract in whole or in part in the event that the BOARD no longer has a statutory obligation to provide legal services to DEFENDANT, e.g., if DEFENDANT is determined to no longer be indigent.

- C. The BOARD may terminate this contract at any time upon verification that the DEFENDERS are no longer attorneys duly licensed to practice law in the State of Utah or that Mary C. Corporon is not or is no longer qualified under Rule 8, Utah Rules of Criminal Procedure, to be assigned as lead defense counsel for an indigent charged with an offense for which the punishment may be death.
- D. The Board may terminate this contract at any time in the event that DEFENDERS commit any ethical violation or for any other factor which may prevent DEFENDERS from fairly, efficiently and effectively providing representation to the DEFENDANT.

16. Records and Reports

- A. The DEFENDERS shall maintain such records and accounts as may be deemed reasonable and necessary by the BOARD to assure a proper accounting for all compensation and reimbursements paid to the DEFENDERS under this contract. The DEFENDERS shall, upon request, make those records available to the BOARD for audit purposes and shall maintain those records for a period of 3 years or such other longer period as may be required by law after the expiration of this contract.
- B. The DEFENDERS shall submit to the BOARD a report each month during the term of this contract informing the BOARD of the status of the criminal proceedings.

IN WITNESS WHEREOF this contract has been signed in triplicate by the parties, each of which shall be deemed an original, on this 28 day of July, 2022.

DEFENDERS:


INDIGENT DEFENSE FUNDS BOARD



Mary C. Corporon



Neal Hamilton, Chairman



Jonathan T. Nish

Exhibit A

County Acknowledgment and Approval

Tooele County acknowledges and approves the foregoing Contract of Indigent Defense Counsel Services which has been negotiated and executed by the Indigent Defense Funds Board for the following criminal case:

Defendant: Aaron Michael Visser

Criminal Charge: Count 1, Criminal Homicide, Aggravated

Case No.: 221300367

Defenders: Mary C. Corporon
Jonathan T. Nish

Date: August 8, 2022.

Tooele COUNTY

By: James A. Welch
James A. Welch, Tooele County Manager

APPROVED AS TO FORM:

Scott A. Broadhead

Scott A. Broadhead
Tooele County Attorney



Tooele County Council
Agenda Item Summary

Department Making Request:

Attorney

Meeting Date:

August 19, 2022

Mark Options That Apply:

Grant
1 time

Contract
1 yr. or less
Exp date: _____

Purchase

Grant
With County Match

Contract
More than 1 yr.
Exp date: None

Budget Impact:

In Budget

Over Budget

Amount of Contract, Service, Grant: \$ None

Item Title: Indigent Capital Defense Counsel for Aaron Visser (Indigent Def. Funds Board)

Please answer the who? what? when? why?

This contract with the Utah Indigent Defense Funds Board is to appoint defense attorneys to Aaron Michael Visser, an indigent defendant who has been charged with homicide. There is no financial obligation to the County with this contract. The County makes an annual payment to the Indigent Capital Defense Trust Fund, along with other participating counties and the State, so indigent defendants can be appointed specialized defense attorneys in cases involving aggravated murder. The annual payment is made whether or not our county has any qualifying cases.

List who needs copies when approved: Rebecca Poulsen, County Attorney's Office