

1 **PUBLIC PROSECUTOR MODIFICATIONS**

2 2022 GENERAL SESSION

3 STATE OF UTAH

4 **Chief Sponsor: Kay J. Christofferson**

5 Senate Sponsor: _____

7 **LONG TITLE**

8 **General Description:**

9 This bill modifies provisions related to public prosecutors.

10 **Highlighted Provisions:**

11 This bill:

- 12 ▶ modifies provisions related to a public prosecutor's pretrial duties;
- 13 ▶ modifies provisions related to when a public prosecutor may dismiss a case;
- 14 ▶ modifies provisions related to when a public prosecutor may charge an individual

15 with a classification of the offense at one degree lower than the classification that is
16 provided in statute;

- 17 ▶ creates and describes a pre-filing diversion program; and
- 18 ▶ makes technical changes.

19 **Money Appropriated in this Bill:**

20 None

21 **Other Special Clauses:**

22 None

23 **Utah Code Sections Affected:**

24 AMENDS:

25 **17-18a-402**, as enacted by Laws of Utah 2013, Chapter 237

26 **17-18a-605**, as enacted by Laws of Utah 2013, Chapter 237

27 **77-2-2**, as last amended by Laws of Utah 2021, Chapter 260



28 [77-2-2.3](#), as renumbered and amended by Laws of Utah 2021, Chapter 260
 29 [77-22b-1](#), as last amended by Laws of Utah 2013, First Special Session, Chapter 1
 30 [78A-7-105](#), as last amended by Laws of Utah 2020, Chapter 317

31 ENACTS:

32 [77-2-10](#), Utah Code Annotated 1953



34 *Be it enacted by the Legislature of the state of Utah:*

35 Section 1. Section **17-18a-402** is amended to read:

36 **17-18a-402. Pretrial responsibilities.**

37 (1) ~~(a)~~ A public prosecutor shall:

38 ~~(i)~~ (a) institute proceedings before the proper court:

39 ~~(A)~~ (i) for the arrest of a person charged with a public offense; or

40 ~~(B)~~ (ii) if the prosecutor has probable cause to believe that a public offense has been
 41 committed and a grand jury has been convened by a court;

42 ~~(ii)~~ (b) draw all indictments and information for offenses against:

43 ~~(A)~~ (i) the laws of the state occurring within the county; and

44 ~~(B)~~ (ii) the criminal ordinances of the county;

45 (c) file and present all indictments and information with the proper court in accordance
 46 with the offense classification provided in the relevant statute or ordinance:

47 (i) including any sentencing enhancement or other statutory enhancement; and

48 (ii) subject to the provisions of Sections [77-2-2.3](#) and [78A-7-105](#);

49 ~~(iii)~~ (d) cause all persons under indictment or informed against to be speedily
 50 arraigned for crimes charged; ~~and~~

51 ~~(iv)~~ (e) issue subpoenas for all witnesses for the state or for the county in the
 52 prosecution of a criminal ordinance~~[-];~~

53 (f) ensure that the constitutional and statutory rights of persons who suffer the
 54 consequences of another's criminal acts are protected; and

55 (g) impartially apply criminal statutes and ordinances to each person who is charged
 56 with a public offense without regard to race, color, sex, national origin, gender identity, sexual
 57 orientation, religion, age, or disability.

58 ~~(b)~~ (2) A public prosecutor described in Subsection ~~[(1)(a)(i)(B)]~~ (1)(a)(ii) shall:

59 [(i)] (a) assist and attend the deliberations of the grand jury; and
 60 [(ii)] (b) prepare all necessary indictments and arrange for the subpoena of witnesses to
 61 appear before the grand jury.

62 [(2)] (3) The public prosecutor may:

63 (a) examine as to the sufficiency of an appearance bond that may be tendered to the
 64 court; and

65 (b) upon a court order:

66 (i) institute proceedings for the recovery upon forfeiture of a bond running to the state
 67 or county; and

68 (ii) enforce the collection of a bond described in Subsection [(2)] (3)(b)(i).

69 [(3)] (4) The public prosecutor is authorized to grant transactional immunity to a
 70 witness for violation of a state statute or county criminal ordinance.

71 Section 2. Section **17-18a-605** is amended to read:

72 **17-18a-605. Prohibited acts.**

73 (1) Within the state, the attorney may not consult with or otherwise represent a person
 74 charged with a crime, misdemeanor, or breach of a criminal statute or ordinance.

75 (2) A public prosecutor may not prosecute or dismiss in the name of the state a case in
 76 which the public prosecutor has previously acted as legal counsel for the accused.

77 ~~[(3) A public prosecutor may not after the filing of an indictment or information and~~
 78 ~~without the consent of the court:]~~

79 ~~[(a) compromise a prosecution; or]~~

80 ~~[(b) enter a plea of nolle prosequi.]~~

81 (3) A public prosecutor may not negligently or willfully disregard an enacted statute or
 82 ordinance, including any element or provision of a statute or ordinance, when presenting and
 83 filing an information charging an individual with an offense.

84 (4) After the filing of an indictment or information, a public prosecutor may not do the
 85 following without the consent of the court:

86 (a) compromise a prosecution;

87 (b) enter a plea of nolle prosequi; or

88 (c) dismiss a case without a significant and compelling evidentiary basis that shall be
 89 stated with particularity within a motion and may not be based on the number of cases being

90 prosecuted by the prosecutor or the court.

91 (5) A public prosecutor may only establish or oversee a pre-filing diversion program if
92 the pre-filing diversion program meets the requirements of Section 77-2-10.

93 (6) The violation of this section by a public prosecutor constitutes malfeasance in
94 office under Section 77-6-1 and may subject the public prosecutor to removal under Title 77,
95 Chapter 6, Removal by Judicial Proceedings.

96 Section 3. Section 77-2-2 is amended to read:

97 **77-2-2. Definitions.**

98 As used in this chapter:

99 (1) "Commencement of prosecution" means the filing of an information or an
100 indictment.

101 (2) "Diversion" means suspending criminal proceedings before conviction on the
102 condition that a defendant agree to:

- 103 (a) participate in a rehabilitation program;
- 104 (b) pay restitution to a victim; or
- 105 (c) fulfill some other condition.

106 (3) "Pre-filing diversion" means an agreement between a prosecuting attorney and an
107 individual:

108 (a) entered into before the individual is charged with a crime and before an information
109 is filed; and

110 (b) in which the individual is diverted from the traditional justice system and agrees to
111 participate in and successfully complete a program in accordance with Section 77-2-10.

112 [~~3~~] (4) "Restitution" means the same as that term is defined in Section 77-38b-102.

113 [~~4~~] (5) "Screening" means the process used by a prosecuting attorney to:

- 114 (a) terminate an investigative action;
- 115 (b) proceed with prosecution;
- 116 (c) move to dismiss a prosecution that has been commenced; or
- 117 (d) cause a prosecution to be diverted.

118 Section 4. Section 77-2-2.3 is amended to read:

119 **77-2-2.3. Reducing the level of an offense.**

120 (1) Notwithstanding any other provision of law, and subject to the provisions of this

121 section, a prosecuting attorney may:

122 (a) present and file an information charging an individual for an offense under
123 Subsections 76-3-103(1)(b) through (d), Subsection 76-3-103(2), or Section 76-3-104 with a
124 classification of the offense at one degree lower than the classification that is provided in
125 statute, including any sentencing or other statutory enhancement, if the prosecuting attorney
126 [~~believes~~] determines that the sentence would be disproportionate to the offense because [~~there~~
127 ~~are special circumstances relating to the offense~~] the individual suffers from an intellectual
128 disability or other mental illness, as those terms are defined in Section 76-2-305; or

129 (b) subject to the approval of the court, amend an information, as part of a plea
130 agreement, to charge an individual for an offense under Subsections 76-3-103(1)(b) through
131 (d), Subsection 76-3-103(2), or Section 76-3-104 with a classification of the offense at one
132 degree lower than the classification that is provided in statute.

133 (2) Subsection (1)(a) may not be used by a prosecuting attorney if the individual being
134 charged was under the influence of voluntarily consumed, injected, or ingested alcohol,
135 controlled substances, or volatile substances at the time of the alleged offense and the alcohol
136 or substance caused, triggered, or substantially contributed to the intellectual disability or other
137 mental illness of the individual.

138 (3) Subsection (1) may not be used:

139 (a) in conjunction with any other statute or county or municipal ordinance, to present
140 and file an information or to amend an information charging an individual with an offense two
141 or more degrees lower than the classification that is provided in statute, including any
142 sentencing or other statutory enhancement;

143 (b) if the individual is being charged with an offense under Title 76, Chapter 5, Part 4,
144 Sexual Offenses, or a violent felony as defined in Section 76-3-203.5; or

145 (c) if, at the time the offense was committed, the individual being charged:

146 (i) has a prior conviction for a violation of the same offense;

147 (ii) has a prior felony conviction for any offense;

148 (iii) is on parole or probation with the Department of Corrections or a similar entity in
149 any other state;

150 (iv) is on probation with a court or other private probation provider;

151 (v) is subject to requirements of a plea-in-abeyance; or

152 (vi) was previously incarcerated in a correctional facility as that terms is defined in
153 Section 76-8-311.3.

154 ~~[(2)]~~ (4) A court may:

155 (a) enter a judgment of conviction for an offense filed under Subsection (1) at one
156 degree lower than classified in statute; and

157 (b) impose a sentence for the offense filed under Subsection (1) at one degree lower
158 than classified in statute.

159 ~~[(3)]~~ (5) A conviction of an offense at one degree lower than classified in statute under
160 Subsection ~~[(2)]~~ (4) does not affect the requirements for registration of the offense under Title
161 77, Chapter 41, Sex and Kidnap Offender Registry, or Title 77, Chapter 43, Child Abuse
162 Offender Registry, if the elements of the offense for which the defendant is convicted are the
163 same as the elements of an offense described in Section 77-41-102 or 77-43-102.

164 ~~[(4)]~~ (6) This section does not preclude an individual from obtaining and being granted
165 an expungement for the individual's record in accordance with Title 77, Chapter 40, Utah
166 Expungement Act.

167 Section 5. Section 77-2-10 is enacted to read:

168 **77-2-10. Pre-filing diversion.**

169 (1) As used in this section:

170 (a) "Prosecuting entity" means:

171 (i) the attorney general's office;

172 (ii) a county or district attorney's office; or

173 (iii) a city attorney's office.

174 (b) "Program" means a pre-filing diversion program as described in this section.

175 (2) A prosecuting entity may establish a pre-filing diversion program by partnering
176 with a provider that:

177 (a) is a licensed private probation provider under Title 58, Chapter 50, Private
178 Probation Provider Licensing Act; and

179 (b) has at least two full-time employees who are licensed under one or more of the
180 following:

181 (i) Title 58, Chapter 42a, Occupational Therapy Practice Act;

182 (ii) Title 58, Chapter 60, Part 2, Social Worker Licensing Act;

- 183 (iii) Title 58, Chapter 60, Part 4, Clinical Mental Health Counselor Licensing Act;
184 (iv) Title 58, Chapter 60, Part 5, Substance Use Disorder Counselor Act;
185 (v) Title 58, Chapter 61, Psychologist Licensing Act; and
186 (vi) Title 58, Chapter 78, Vocational Rehabilitation Counselors Licensing Act.
187 (3) Before implementing a pre-filing diversion program, a prosecuting entity that is a
188 county or district attorney's office or that is a city attorney's office shall ensure that the program
189 and the provider are approved by:
190 (a) the prosecuting entity's local health department;
191 (b) the prosecuting entity's county sheriff;
192 (c) the chief executive officer of each local police department located within the
193 jurisdiction of the prosecuting entity; and
194 (d) the director of the public defender organization that operates within the jurisdiction
195 of the prosecuting entity.
196 (4) Before an attorney of a prosecuting entity may invite an individual to participate in
197 a pre-filing diversion program, the attorney shall:
198 (a) review the factual basis and statutory elements of the alleged criminal offense and
199 comply with the Rules of Professional Conduct, Rule 3.8; and
200 (b) obtain the written approval to invite the individual to participate in the program
201 from each individual or entity that suffered injury as a result of the alleged criminal offense.
202 (5) A prosecuting entity may not invite an individual to participate in a pre-filing
203 diversion program unless the individual agrees in writing to pay, before the end of the program
204 contract period, full restitution to each person or entity that suffered injury as a result of the
205 alleged criminal offense.
206 (6) After determining that an individual qualifies for participation in a pre-filing
207 diversion program, a prosecuting entity shall serve, in the same manner as described in Utah
208 Rules of Civil Procedure, Rule (4)(d), an invitation to participate in the program, which
209 invitation shall include:
210 (a) a declaration and explanation of the individual's rights;
211 (b) the time constraints for acceptance; and
212 (c) directions on how to contact the prosecuting entity and the program provider.
213 (7) An individual may not be admitted into a pre-filing diversion program without

214 entering into a written contract with the program provider and the prosecuting entity, which
215 contract clearly states:

216 (a) all duties and obligations of the individual and the program provider;

217 (b) the cost and fee requirements of the program;

218 (c) the duration of the program, which shall be at least eight months and no more than
219 two years; and

220 (d) the individual's duty to pay any restitution within the program contract period.

221 (8) After the written contract described in Subsection (7) is completed, the prosecuting
222 entity may not maintain or exert any control over the pre-filing diversion program, the program
223 provider, or the participating individual, except that the program provider shall provide a report
224 to the prosecuting entity that the participant has:

225 (a) failed to comply with program requirements; or

226 (b) completed the program successfully.

227 (9) Except for the information that is to be reported to a prosecuting entity as described
228 in Subsection (8), a program provider is subject to all laws pertaining to client or patient
229 confidentiality.

230 (10) If an individual successfully completes a pre-filing diversion program, the
231 individual is not subject to prosecution for the offense involved.

232 (11) (a) If an individual fails to enter into a written contract within 15 days after the
233 day on which the individual is served an invitation to participate in a pre-filing diversion
234 program, or if an individual fails to comply with program requirements as shown by a report
235 described in Subsection (8), the prosecuting entity shall file an information charging the
236 individual with the applicable criminal offense as classified in statute, including any sentencing
237 or other statutory enhancement within 15 days after the day on which the prosecuting entity
238 becomes aware of the failure.

239 (b) Failure of a prosecuting attorney to comply with the provisions of Subsection (6) is
240 an affirmative defense to a prosecution resulting from a violation of this Subsection (11).

241 (12) A prosecuting entity and a program provider may not use public funds to establish,
242 operate, or manage a pre-filing diversion program.

243 (13) An individual may not participate in a pre-filing diversion program if the
244 individual:

- 245 (a) has a prior conviction for the violation or attempted violation of the same offense;
- 246 (b) has a prior felony conviction for any offense;
- 247 (c) was on parole or probation with the Department of Corrections or a similar entity in
- 248 any other state;
- 249 (d) was on probation with a court or private probation provider;
- 250 (e) was a subject to requirements of a plea in abeyance for any offense;
- 251 (f) has two or more misdemeanor convictions for any offense;
- 252 (g) has a prior conviction for any offense involving violence;
- 253 (h) was incarcerated in any correctional facility as defined in Section [76-8-311.3](#); or
- 254 (i) previously participated in a pre-filing diversion program and did not complete the
- 255 requirements of the program.

256 (14) A prosecuting entity may not invite an individual to participate in a pre-filing
257 diversion program for the following offenses:

- 258 (a) an offense that is classified as a felony in statute, including any sentencing or other
- 259 statutory enhancement;
- 260 (b) an offense involving or against a person under 18 years old;
- 261 (c) an offense described in Title 76, Chapter 5, Offenses Against the Person;
- 262 (d) an offense involving a weapon under Section [76-3-203.2](#) or Title 76, Chapter 10,
- 263 Part 5, Weapons;
- 264 (e) a domestic violence offense as defined in Section [77-36-1](#); and
- 265 (f) an offense that is classified as an infraction in statute.

266 Section 6. Section **77-22b-1** is amended to read:

267 **77-22b-1. Immunity granted to witness.**

268 (1) (a) A witness who refuses, or is likely to refuse, on the basis of the witness's
269 privilege against self-incrimination to testify or provide evidence or information in a criminal
270 investigation, including a grand jury investigation or prosecution of a criminal case, or in aid of
271 an investigation or inquiry being conducted by a government agency or commission, or by
272 either house of the Legislature, a joint committee of the two houses, or a committee or
273 subcommittee of either house, may be compelled to testify or provide evidence or information
274 by any of the following, after being granted use immunity with regards to the compelled
275 testimony or production of evidence or information:

276 (i) the attorney general or any assistant attorney general authorized by the attorney
277 general;

278 (ii) a district attorney or any deputy district attorney authorized by a district attorney;

279 (iii) in a county not within a prosecution district, a county attorney or any deputy
280 county attorney authorized by a county attorney;

281 (iv) a special counsel for the grand jury;

282 (v) a prosecutor pro tempore appointed under the Utah Constitution, Article VIII, Sec.
283 16; or

284 (vi) legislative general counsel in the case of testimony pursuant to subpoena before:

285 (A) the Legislature;

286 (B) either house of the Legislature; or

287 (C) a committee of the Legislature, including a joint committee, a committee of either
288 house, a subcommittee, or a special investigative committee.

289 (b) If any prosecutor authorized under Subsection (1)(a) intends to compel a witness to
290 testify or provide evidence or information under a grant of use immunity, the prosecutor shall
291 notify the witness by written notice. The notice shall include the information contained in
292 Subsection (2) and advise the witness that the witness may not refuse to testify or provide
293 evidence or information on the basis of the witness's privilege against self-incrimination. The
294 notice need not be in writing when the grant of use immunity occurs on the record in the course
295 of a preliminary hearing, grand jury proceeding, or trial.

296 (2) Testimony, evidence, or information compelled under Subsection (1) may not be
297 used against the witness in any criminal or quasi-criminal case, nor any information directly or
298 indirectly derived from this testimony, evidence, or information, unless the testimony,
299 evidence, or information is volunteered by the witness or is otherwise not responsive to a
300 question. Immunity does not extend to prosecution or punishment for perjury or to giving a
301 false statement in connection with any testimony.

302 (3) If a witness is granted immunity under Subsection (1) and is later prosecuted for an
303 offense that was part of the transaction or events about which the witness was compelled to
304 testify or produce evidence or information under a grant of immunity, the burden is on the
305 prosecution to show by a preponderance of the evidence that no use or derivative use was made
306 of the compelled testimony, evidence, or information in the subsequent case against the

307 witness, and to show that any proffered evidence was derived from sources totally independent
 308 of the compelled testimony, evidence, or information. The remedy for not establishing that any
 309 proffered evidence was derived from sources totally independent of the compelled testimony,
 310 evidence, or information is suppression of that evidence only.

311 (4) Nothing in this section prohibits or limits prosecutorial authority granted in Section
 312 [77-22-4.5](#).

313 (5) A county attorney within a prosecution district shall have the authority to grant
 314 immunity only as provided in Subsection [17-18a-402](#)~~(3)~~(4).

315 (6) For purposes of this section, "quasi-criminal" means only those proceedings that are
 316 determined by a court to be so far criminal in their nature that a defendant has a constitutional
 317 right against self-incrimination.

318 Section 7. Section **78A-7-105** is amended to read:

319 **78A-7-105. Territorial jurisdiction -- Voting.**

320 (1) (a) The territorial jurisdiction of county justice courts extends to the limits of the
 321 precinct for which the justice court is created and includes all cities or towns within the
 322 precinct, other than cities where a municipal justice court exists.

323 (b) ~~[A]~~ Subject to the provisions of this Subsection (1), a county or district attorney
 324 may file a class B ~~[or C]~~ misdemeanor offense in a county justice court, regardless of where the
 325 act occurred, if:

326 (i) the same offense could have been filed as a class A misdemeanor in district court;

327 (ii) statute provides that an attempt to commit the offense described in Subsection

328 (1)(b)(i) is a class B ~~[or class C]~~ misdemeanor; and

329 (iii) the case was submitted to the county or district attorney's office for prosecution.

330 (c) Subsection (1)(b) may not be used by a county or district attorney:

331 (i) in conjunction with any other statute or county or municipal ordinance to present
 332 and file an information charging an individual with an offense two or more degrees lower than
 333 the classification that is provided in statute, including any sentencing or statutory enhancement,
 334 or county or municipal ordinance;

335 (ii) if the individual is being charged with an offense under Title 76, Chapter 5, Part 4,
 336 Sexual Offenses; or

337 (iii) if, at the time the offense was committed, the individual being charged:

- 338 (A) has a prior conviction for a violation of the same offense;
- 339 (B) has a prior felony conviction for any offense;
- 340 (C) is on parole or probation with the Department of Corrections or a similar entity in
- 341 any other state;
- 342 (D) is on probation with a court or other private probation provider;
- 343 (E) is subject to requirements of a plea-in-abeyance; or
- 344 (F) was previously incarcerated in a correctional facility as that term is defined in
- 345 Section 76-8-311.3.

346 [~~C~~] (d) Notwithstanding Subsection (1)(a), the territorial jurisdiction of a county
347 justice court extends to the place where the act, filed as a class B [~~C~~] misdemeanor under
348 Subsection (1)(b), occurred.

349 (2) The territorial jurisdiction of municipal justice courts extends to the corporate
350 limits of the municipality in which the justice court is created.

351 (3) Justice court judges have the same authority regarding matters within their
352 jurisdiction as judges of courts of record.

353 (4) A justice court may issue all extraordinary writs and other writs as necessary to
354 carry into effect its orders, judgments, and decrees.

355 (5) (a) Except as provided in this Subsection (5), a judgment rendered in a justice court
356 does not create a lien upon any real property of the judgment debtor unless the judgment or
357 abstract of the judgment:

358 (i) is recorded in the office of the county recorder of the county in which the real
359 property of the judgment debtor is located; and

360 (ii) contains the information identifying the judgment debtor in the judgment or
361 abstract of judgment as required in Subsection 78B-5-201(4)(b) or as a separate information
362 statement of the judgment creditor as required in Subsection 78B-5-201(5).

363 (b) The lien runs for eight years from the date the judgment was entered in the district
364 court under Section 78B-5-202 unless the judgment is earlier satisfied.

365 (c) State agencies are exempt from the recording requirement of Subsection (5)(a).