

John P. Harrington (5242)  
Steven G. Jones (15063)  
**HOLLAND & HART LLP**  
222 S. Main Street, Suite 2200  
Salt Lake City, Utah 84101  
Telephone: (801) 799-5800  
Fax: (801) 799-5700  
[jharrington@hollandhart.com](mailto:jharrington@hollandhart.com)  
[sgjones@hollandhart.com](mailto:sgjones@hollandhart.com)

John Mejia (13965)  
Leah Farrell (13696)  
**AMERICAN CIVIL LIBERTIES UNION OF UTAH**  
355 North 300 West  
Salt Lake City, Utah 84103  
Telephone: (801) 521-9862  
Fax: (801) 532-2850  
[jmejia@acluutah.org](mailto:jmejia@acluutah.org)  
[lfarrell@acluutah.org](mailto:lfarrell@acluutah.org)

*Attorneys for Plaintiffs and Class Members*

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**THE THIRD JUDICIAL DISTRICT COURT**

**IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

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COLTON GUY REMICK; an individual;  
SKYLAR W. GARNER, an individual;  
BRYCE TUCKER LLOYD, an individual;  
ANTHONY MURDZAK, an individual;  
COLTER RICKS, an individual; BRANDON  
TIMMS, an individual; and JOHN DOES 1-  
100;

Plaintiffs,

vs.

STATE OF UTAH and SEAN D. REYES, in  
his capacity as Attorney General of the State  
of Utah,

Defendants.

**CLASS ACTION COMPLAINT FOR  
DECLARATORY RELIEF**

Case No. 160903921

Judge William K. Kendall

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Pursuant to §§ 78B-6-40, *et seq.*, UTAH CODE ANN., and Rule 57 of the Utah Rules of Civil Procedure, Plaintiffs, on behalf of themselves and all others similarly situated, by and through the undersigned counsel, upon knowledge with respect to their own acts and on information and belief as to other matters, hereby complain of Defendants and allege as follows:

### **INTRODUCTION**

1. Plaintiffs bring this civil rights class action to remedy Utah's failure to provide constitutionally adequate legal representation to indigent adults accused of crimes in Utah's District and Justice courts for which there is a possibility of incarceration. This failure deprives and threatens to deprive plaintiffs of rights guaranteed to them by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, § 12 of the Utah Constitution, and § 77-32-301, UTAH CODE ANN.

2. Plaintiffs seek a declaration from this Court that the indigent defense provided by the State of Utah, as authorized and operated by the State of Utah and Attorney General Reyes (collectively, "Defendants"), deprives Plaintiffs of their rights under the Sixth and Fourteenth Amendments to the United States Constitution. Plaintiffs also seek a declaration from this Court that the indigent defense system in the State of Utah, as operated by Defendants, violates Plaintiffs' rights under Article I, §§ 12 and 24 of the Utah Constitution (right to counsel and uniform operation of laws); and § 77-32-301, UTAH CODE ANN., the Utah Indigent Defense Act. Plaintiffs further seek injunctive relief to remedy the systemic failures that lead to this action.

3. The Sixth Amendment of the United States Constitution guarantees that a person accused of a crime has the right to assistance of counsel for his or her defense. This constitutional guarantee "cannot be satisfied by mere formal appointment." *United States v. Cronin*, 466 U.S. 648, 655 (1984) (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)).

Rather, the Sixth Amendment requires defense counsel to subject the prosecution's case to "the crucible of meaningful adversarial testing." *Id.* at 656. It is the State's duty to safeguard this right and ensure that people who face the threat of imprisonment receive competent assistance of counsel regardless of their income. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (sometimes referred to as "Gideon").

4. Article I, § 12 of the Utah Constitution (Rights of Accused Persons) guarantees that in all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel. Where a person is charged with an offense that may be punished by imprisonment, "the accused is entitled to the effective assistance of a competent member of [the] bar who is willing to identify with the interests of the defendant and present the available defenses." *State v. Wulffenstein*, 733 P.2d 120, 121 (Utah 1986); *State v. Gray*, 601 P.2d 918, 920 (Utah 1979).

5. Article I, Section 24 of the Utah Constitution (Uniform Operation of Laws) mandates that: "[a]ll laws of a general nature shall have uniform operations."

6. The Utah Indigent Defense Act requires that indigent defendants be provided: "timely representation by competent legal counsel," the "investigatory resources necessary for a complete defense," and "undivided loyalty of defense counsel." UTAH CODE ANN. § 77-32-301.

7. The State of Utah has the exclusive duty to provide indigent persons a constitutionally sufficient defense. *Gideon*, 372 U.S. at 342-43. The State of Utah has completely abdicated this duty.

8. Rather than provide indigent criminal defense itself, the State of Utah has statutorily delegated that duty to the counties and municipalities. UTAH CODE ANN. § 77-32-306.

While this delegation might be acceptable if the State of Utah were to provide the proper funding, logistical support, or oversight to the counties and municipalities, the State has done the exact opposite. In fact, the State of Utah presently provides absolutely no financial support to any of its 29 counties, nor to any of its over 100 municipalities. Utah is one of only two states in the nation to refuse to provide any such state funding or supervision. In essence, the State of Utah has not delegated its responsibilities, it has abnegated its responsibilities

9. In Utah, counties and municipalities provide criminal defense to indigent people as a contracted service. In general, this contracting involves counties and municipalities periodically seeking bids from private attorneys on contracts to provide all indigent defense for the county or municipality.

10. With neither guidance nor oversight from Defendants, these contracts are poorly structured, violate widely accepted American Bar Association standards, and lack any mechanism for identifying conflicts of interest. Almost without exception, the contracts provide a fixed flat fee for compensation, regardless of the number of cases the contract attorneys undertake. Also almost without exception, the compensation to public defenders is inadequate to reasonably compensate them, and is invariably lower than the compensation given to prosecutors, with nothing resembling parity between defense and prosecution.

11. Certain county contracts with public defenders require the attorneys to pay the costs of investigators, testing, and expert witnesses with no additional funding from the county, which disincentivizes attorneys from paying for such services out of their own pocket.

12. All counties require contract attorneys to pay for their own office expenses, overhead, and support staff. As a result, many, if not most, contract attorneys (save for two

contracted county legal defender offices) are forced to take on additional private cases for pay—a particularly dangerous practice absent any written guidelines or policies governing conflicts of interest and caseloads.

13. Counties have no written requirements, policies, or standards for evaluating potential conflicts. Counties keep no records of how many cases are assigned to their public defenders.

14. Defendants, like the counties and municipalities, have failed to implement any written policies and/or guidelines regarding the selection, required qualifications, or compensation of public defense counsel. Defendants do not supervise and evaluate public defense counsel. Defendants do not require or provide to public defense counsel continuing legal education specific to criminal defense issues. Defendants do not have guidelines governing the identification and reassignment of conflicts of interest or the appeal of reimbursement requests. Defendants do not monitor caseloads of public defenders. Defendants are unable to identify the public defenders who are providing indigent defense services. There is no central registry of public defenders, much less their individual caseloads.

15. Because of Defendants' lack of proper diligence, there is no practical way for an independent observer to efficiently determine crucial facts such as: the number of cases assigned to a particular public defender; the available resources for public defenders; or the number of trials or contested motions or hearings involving indigent defendants.

16. Without access to this type of data, there is no practical way for independent observers to determine whether the public defense in a county or municipality is living up to the key criteria for determining whether the indigent defense services are constitutionally adequate.

Such hallmarks include timely meetings with indigent clients (particularly those in custody), conducting discovery, calling expert witnesses, and vigorously contesting the criminal charges.

17. Because neither Defendants nor the counties or municipalities keep any records about the indigent defense system, there is no data-driven or statistical analysis of the Utah indigent defense system.

18. Defendants have been aware of the acute problems of Utah's indigent defense system for years.

19. First, the lack of funding or oversight is obvious on its face to Defendants. Defendants have long been aware that Utah is truly an outlier among the states in that it is nearly alone in providing no state funding or oversight whatsoever.

20. Moreover, despite the difficulty in data collection, over the last several years, several reports have been issued regarding Defendants' provision of indigent defense. Each has found a system in crisis.

21. For example, in 2011, the American Civil Liberties Union of Utah published its investigation of indigent defense entitled "*Failing Gideon: Utah's Flawed County-by-County Public Defender System*" ([www.acluutah.org/images/Failing\\_Gideon.pdf](http://www.acluutah.org/images/Failing_Gideon.pdf)) (last viewed on June 20, 2016).

22. In 2012, the Sixth Amendment Center was engaged by the Utah Judicial Council (through a grant from the U.S. Department of Justice) to conduct an assessment of Utah's indigent defense system. On October 26, 2015, the Sixth Amendment Center published its report entitled "*The Right to Counsel in Utah – An Assessment of Trial-Level Indigent Defense Services*" ([sixthamendment.org/what-we-do/our-current-projects/Utah-project-page/](http://sixthamendment.org/what-we-do/our-current-projects/Utah-project-page/)) (the "6AC

Report”) (sixthamendment.org/what-we-do/our-current-projects/Utah-project-page/) (last viewed on June 20, 2016).

23. On the same day, the Utah Judicial Council published its companion analysis entitled “*Report – Judicial Council Study Committee on the Representation of Indigent Criminal Defendants in Trial Courts*” which can be found at ([https://www.utcourts.gov/knowcts/adm/docs/Indigent\\_Defense\\_Committee\\_Report.pdf](https://www.utcourts.gov/knowcts/adm/docs/Indigent_Defense_Committee_Report.pdf)) (last viewed on June 20, 2016).

24. Each report speaks for itself as to the glaring deficiencies in the system.

25. As a direct result of Defendants’ actions and inactions, members of the Plaintiffs’ Class have suffered, and will continue to suffer, irreparable harm.

### **JURISDICTION AND VENUE**

26. This Court has subject matter jurisdiction over this action for declaratory and injunctive relief pursuant to UTAH CODE ANN. § 78A-5-102 (original jurisdiction), Utah. R. Civ. P. 57 (declaratory judgments), and UTAH CODE ANN. § 78B-6-401 (jurisdiction of declaratory judgment action).

27. This Court has personal jurisdiction over the Defendants under Utah. R. Civ. P. 17. Defendant Sean D. Reyes is a public official of the State of Utah who is sued in his official capacity in order to enforce the performance of his official duties, UTAH CODE ANN. § 67-5-1 (duties of the attorney general), and the State has consented to be sued for violations of its own Constitution. This Court has jurisdiction over this action under Utah Const. Art. VIII, § 5 and UTAH CODE ANN. § 78A-5-102(1) (jurisdiction of district court).

28. Venue is proper in this judicial district pursuant to UTAH CODE ANN. § 78B-3-302 because Defendants are found in the State of Utah and committed certain wrongs giving rise to this action within this judicial district.

## **PARTIES**

### **I. PLAINTIFFS**

29. Class-Action Representative Colton Guy Remick (“Remick”) is currently incarcerated in the Tooele County Detention Center in Tooele, Utah, with pending charges of possession of a forgery device (3rd Degree Felony), possession or use of a controlled substance (3rd Degree Felony), and use or possession of drug paraphernalia (Class B Misdemeanor). Despite being incarcerated since May 4, 2016, Remick has only spoken to his public defender once, at his initial appearance. When Remick met with his public defender, it was only for a short time and was in the presence of many other defendants, rather than in a confined, confidential location. Other defendants assigned to the same public defender were in a line waiting to meet with the public defender; because of the wait, some defendants were incited to accept a plea deal because, if a plea deal was rejected, defendant would have to go to the back of the line, and wait at least one more hour to again speak with the public defender.

30. Class-action representative Plaintiff Skylar W. Garner (“Garner”) is a 32 year old married man with two children under the age of five who is currently incarcerated in the Carbon County jail due to a violation of a No Contact order. Prior to his arrest, Garner held two jobs as a technician and maintenance specialist. Since his arrest, he has had very little contact with his public defender. The public defender has given Garner no discovery or police reports. His public defender has made no inquiry of Garner as to the facts surrounding the charge. He has spoken with his public defender for less than 5 minutes.



31. Class-Action Representative Bryce Tucker Lloyd (“Lloyd”) is currently incarcerated in the Tooele County Detention Center located in Tooele, Utah, with pending charges of burglary (2nd degree felony), unlawful acquisition, possession, or transfer of a card (3rd degree felony), possession or use of a controlled substance (3rd degree felony), unlawful use of a financial transaction (Class B misdemeanor), and use or possession of drug paraphernalia (Class B misdemeanor). When Lloyd met with his public defender at his initial appearance, it was only for a short time and was in the presence of several other defendants, rather than in a confined, confidential location. Lloyd’s public defender has been so habitually unresponsive to his inquiries that Lloyd has stopped attempting to contact him.

32. Class Action Representative Plaintiff Anthony Murdzak (“Murdzak”) is currently incarcerated in the Cache County Jail located in Logan, Utah, with pending charges of theft (3rd Degree Felony) and violation of firearm restrictions (Class A Misdemeanor). Murdzak was arrested on May 28, 2016, but not arraigned until June 7, 2016, ten days after his arrest, at which point he was appointed counsel. He did not meet with counsel prior to the arraignment and the only meeting he had with his defense counsel was during the arraignment. Murdzak received no charging sheet and was not aware of the charges against him and had no information as to why the firearm restriction charge had been made, as he had no firearm at the time of his arrest, nor was one found in the vehicle in which he was driving. Following the arraignment, Murdzak had not met with defense counsel, had received no discovery, was unaware of when he would next meet with his defense counsel or when a preliminary hearing was set for his case.

33. Class Action Representative Plaintiff Colter Ricks (“Ricks”) is currently incarcerated in the Cache County Jail located in Logan, Utah, with pending charges of failure to

stop (Class A Misdemeanor), possession of drug paraphernalia (Class A Misdemeanor) and possession of methamphetamine (3rd Degree Felony). Ricks was arrested on May 28, 2016. He was arraigned on May 31, 2016 via video conference. Mr. Ricks had no counsel at the time of his arraignment and during the arraignment, bail for a prior charge was revoked and bail for his current charges was denied. It was only after bail had been revoked on the prior charge and had been denied for the current charges that Ricks was appointed counsel. Despite having counsel appointed after the arraignment, Ricks has not met with defense counsel. Ricks' pre-trial hearing is set for June 27, by which point he will have spent a month in jail, having not met with a defense lawyer.

34. Class Action Representative Plaintiff Brandon Timms ("Timms") is currently incarcerated in the Cache County Jail located in Logan, Utah, with pending charges of theft (Class B Misdemeanor) and burglary (2nd Degree Felony). Timms was originally arrested in Salt Lake County, but was transported and incarcerated in the Cache County Jail because the offenses for which he was charged allegedly took place in Logan, Utah. While he was arrested on June 2, 2016, Timms was not arraigned until June 13, 2016, eleven days after his initial arrest and was not provided with counsel before his arraignment.

## **II. DEFENDANTS**

35. Defendant State of Utah ("State of Utah" or "Utah") is sued for violations of the Utah State Constitution. The State Capitol and center of State government are located in Salt Lake County.

36. Defendant Sean D. Reyes ("Defendant AG" or "Utah AG") is the elected Attorney General of Utah and is sued in his official capacity as the person in charge of enforcing laws of the State of Utah and the Utah and U.S. Constitutions. Pursuant to Article VII, § 16 of

the Constitution of Utah, the Attorney General “shall be the legal adviser of the State officers . . . and shall perform such other duties as provided by law.”

37. Under § 67-5-1(6), UTAH CODE ANN., the Utah Attorney General shall “exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of their offices, and from time to time require of them reports of the condition of public business entrusted to their charge.”

38. The Utah AG is a member of the executive branch of the Utah state government and is charged with the supervision of criminal prosecutions within Utah, including indigent adult defendants. The Utah AG has failed to supervise the prosecution of indigent defendants by ignoring the constitutional defects existing in the state indigent defense system which have been and continue to be readily apparent. The Utah AG has not required reports on the condition of “public business entrusted” to the district and county attorneys pertaining to the indigent defense system. The Utah AG has also failed to protect the constitutional rights of indigent persons charged with criminal wrongdoing in Utah.

39. The Utah AG maintains his principal office at the Office of the Attorney General, Utah State Capitol Complex, 350 North State Street, Suite 230, Salt Lake City, Utah 84114, which is located in Salt Lake City and within this judicial district.

### **CLASS ACTION ALLEGATIONS**

40. Plaintiffs incorporate by reference all previous and following allegations of this Complaint as if fully laid out here.

41. Plaintiffs Remick, Garner, Lloyd, Murdzak, Timms and Ricks bring this action pursuant to Utah R. Civ. P. 23(a), 23(b)(1), 23(b)(2) and 23(b)(3) on behalf of themselves and all others similarly situated.

42. The class represented by the named Plaintiffs (the “Class”) consists of all indigent persons who have been or will be charged with crimes for which incarceration is a possible consequence of a conviction.

43. As indigent persons unable to afford to hire counsel to defend them, class members are dependent upon Defendants to provide them with counsel and other associated services necessary for their defense.

44. Class members have been and are continuing to be harmed by the Defendants’ failure to fund, administer, or supervise Utah’s indigent criminal defense system as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, § 7 and 12 of the Utah Constitution, and as required under the Utah Indigent Defense Act (Utah Code Ann. § 77-32-101 *et. seq.*).

45. Certification of this action as a class action is appropriate under Utah R. Civ. P. 23(b) for the following reasons:

(a) Separate prosecution of these actions by individual class members would create a risk of differing and inconsistent adjudications, creating the possibility of establishing incompatible standards of conduct for Defendants with respect to members of the Class;

(b) The Class is so numerous and fluid as to make joinder of all members of the Class impracticable. At any point in time, hundreds of indigent persons with pending criminal charges punishable by imprisonment must rely on appointed defense counsel for legal representation;

(c) Defendants have acted or refused to act on grounds that are generally applicable to the Class, making declaratory relief with respect to the entire Class appropriate; and,

(d) Common questions of law, fact, and relief relating to and affecting the individual rights of class members predominate over any questions affecting individual class members.

46. Questions of law common to the class include, but are not limited to:

(a) Whether Defendants have a Constitutional duty under both the United States Constitution and the Utah Constitutions to provide counsel and related services to indigent persons charged with crimes for which incarceration is possible;

(b) The extent and nature of Defendants' Constitutional duties to provide oversight and supervision for appointed counsel and related defense services to the class members;

(c) Whether Defendants are in violation of their obligations under the Sixth and Fourteenth Amendments to the United States Constitution to ensure that defense counsel appointed for class members have the resources necessary to provide class members with constitutionally adequate representation;

(d) Whether Defendants are in violation of their obligations under Art. I, §§ 7 and 12 of the Utah Constitution to ensure that defense counsel appointed for class members have the resources necessary to provide class members with constitutionally adequate representation;

(e) Whether Defendants are in violation of their obligation under Utah Code Ann. § 77-32-101 *et. seq.* to ensure that indigent defense services provided by the State of Utah comport with the standards laid out in the Act; and

(f) Whether the State's delegation of the responsibility for indigent defense to the counties creates disparate access to the fundamental right to counsel in violation of both the Sixth Amendment and Fourteenth Amendments to the United States Constitution and Art. I, § 24 of the Utah Constitution, which states: "All laws of a general nature shall have uniform operations."

47. Questions of fact common to the class include, but are not limited to:

(a) Whether Defendants have failed to ensure that defense counsel appointed to represent class members have been provided with the resources necessary to adequately challenge the State's charges against the class members; and

(b) Whether, as a result of Defendants' actions and omissions, class members have been and are currently being harmed based on the inability of appointed defense counsel to provide them with constitutionally and statutorily adequate legal representation.

48. The claims of the named Plaintiffs are typical of the claims of the Class as a whole.

49. The claims of the named Plaintiffs arise from the same acts and/or omissions of Defendants, as do the claims of the members of the Class.

50. Class members have no significant interest in individual control of these claims that would make class action inappropriate.

51. The resolution of the claims presented by the Class is more likely to result in fair and efficient adjudication than other available methods.

52. Based on these facts, prosecution of this case as a class action is superior and preferable to the prosecution of myriad individual actions.

53. The individuals identified as named Plaintiffs will fairly and adequately protect the interests of the Class and will vigorously prosecute this suit on behalf of the Class. Plaintiffs and their legal counsel know of no conflicts of interest between the named Plaintiffs as representatives and class members concerning the relief sought in this complaint.

54. The named Plaintiffs are jointly represented by attorneys associated with the American Civil Liberties Union of Utah (“ACLU”) and the law firm of Holland & Hart LLP. The ACLU has extensive experience in successfully representing individuals and classes in similar actions. The attorneys for the named Plaintiffs are capable and experienced litigators, are attorneys of good reputation, and have successfully represented plaintiffs in state and federal courts in complex litigation. Plaintiffs’ attorneys have identified and thoroughly investigated all claims in this action, and have committed sufficient resources to represent the Class.

#### **FACTS ENTITLING CLASS-ACTION PLAINTIFFS TO RELIEF**

##### **I. DEFENDANTS HAVE FAILED TO PERFORM THEIR DUTY TO PROVIDE INDIGENT DEFENSE AFTER HAVING DELEGATED THE RESPONSIBILITY TO COUNTIES AND MUNICIPALITIES**

55. It is a core guarantee of the Sixth Amendment that every criminal defendant, regardless of economic means, has the right to counsel when facing incarceration. *Gideon*, 372 U.S. at 340-344 (holding that the right to counsel is “fundamental and essential to a fair trial”). This right is so fundamental that any impairment of the right erodes the principles of liberty and

justice that underpin all civil rights in criminal proceedings. The duty to provide criminal indigent defense is placed on the states. *Id.*, at 342.

56. The State of Utah has delegated its Sixth Amendment responsibility to the counties and municipal legislative bodies, UTAH CODE ANN. § 77-32-306.

**A. Failure to Supervise and Oversee Utah’s Indigent Defense System**

57. After delegating its Sixth Amendment responsibilities, Defendants have done nothing to ensure that the indigent defense system in Utah and the provision of indigent defense by the counties and municipalities is of a quality that meets constitutional standards.

58. As the principals responsible for indigent defense, Defendants have allowed their agents (i.e., the counties and municipalities) to operate without any accountability or governance as to the essential elements of a criminal defense system for indigent persons. Defendants leave each county and municipality to its own devices in providing indigent defense with no obligation to report on those activities to Defendants.

59. Defendants have failed to require their agents to report on the indigent defense the agents provide. As a direct and proximate result, Defendants cannot determine if Utah’s indigent defense system meets constitutional standards, particularly with respect to the caseload placed on public defenders.

60. By purposefully failing to require their agents to report or document their activities regarding indigent criminal defense, Defendants have breached their obligation to administer the indigent defense system and uphold the dictates of *Gideon* and its progeny.

61. Defendants have recently highlighted their total lack of supervision of the Utah indigent defense system by the Utah Legislature’s adoption of Senate Bill 155 (“SB 115”) which



was signed by Governor Herbert on March 22, 2016, and which became effective on May 10, 2016.

62. SB 115 creates and describes the duties of the Utah Indigent Defense Commission (“UID Commission”). § 77-32-804, UTAH CODE ANN. Among other things, SB 155 allows, but does not require, the UID Commission to maintain “oversight to collect data, audit attorney performance, establish standards and enforce the principles listed above.” § 77-32-804(1)(a)(vii), UTAH CODE ANN.

63. SB 115 also instructs the UID Commission to “develop and adopt *guiding* principles,” for indigent defense systems, § 77-32-804(1)(a)(i) (emphasis added), and to “develop and oversee the establishment of *advisory* caseload principles” § 77-32-804(1)(b) (emphasis added.)

64. SB 155 does not require counties and municipalities to follow any “guiding principles” or “advisory caseload principles,” which the UID Commission will set at some point in the future.

65. Rather, counties and municipalities will decide whether to undertake various steps to potentially qualify for grant money from the UID Commission, including passing a resolution adopting UID Commission standards, submitting a certified copy of that resolution, submitting a grant application, and making additional expenditures of their own, unless they can show certain conditions are met. *See* §§ 77-32-806 & 807.

66. The only consequences a county or municipality faces for not meeting or adopting UID Commission standards is potentially losing grant money, § 77-32-806(2), or potentially being ineligible for grant money, § 77-32-807(5).

67. As of the date of this Complaint, the UID Commission has not commenced collecting data pertaining to the Utah indigent defense system or fulfilled any of the other statutory directives given to the UID Commission.

68. Upon information and belief, the collection of data and auditing of public defender performance is months or years away from completion. Also upon information and belief, the UID Commission is months or years away from issuing any advisory guidelines about indigent defense provision for counties or municipalities.

69. In the meantime, Plaintiffs and the class members continue to face actual and constructive denials of their constitutional rights by Defendants. The actions of the Utah Legislature are totally inadequate to address the problems.

70. Defendants' present refusal to monitor the indigent defense systems in any county or municipality constitutes a willful disregard of the State of Utah's constitutional obligations. Defendants' delegation of their constitutional duties to counties and municipalities does not relieve them of their constitutional duties.

71. Likewise, the public defenders contracted by the counties and municipalities are not to blame for the systemic problems they and their clients face every day as a result Defendants' complete failure to fund or oversee indigent defense.

72. The fact that Defendants cannot ascertain the status of indigent criminal defense is not a viable defense to the claims brought before this Court. The ultimate responsibility lies with the Defendants, not the counties and municipalities.

73. Furthermore, Defendant Utah AG has the statutory authority to require the district and county attorneys to report on the conditions of the indigent criminal defense system, § 67-5-1(6), UTAH CODE ANN., but has failed to request or obtain such reports.

**B. Defendants' Knowledge of Constitutional Deficiencies**

74. Although Defendants have attempted to keep themselves ignorant of the operation of criminal justice in Utah state courts by failing to supervise the state public defender system, the Defendants have known about the systemic deficiencies for many years.

75. First, it has been a continuing, conscious choice by Defendants to neither fund nor oversee the system at all. Defendants have known for years that Utah is nearly alone in refusing to provide any state resources of any kind to assist the counties and municipalities in providing this constitutionally mandated service.

76. In 2011, the American Civil Liberties Union of Utah published "*Failing Gideon – Utah's Flawed County-by-County Public Defender System*" ("*Failing Gideon*").

77. A second investigative report was published in 2015 by the Study Committee on the Representation of Indigent Criminal Defendants in Trial Court (the "Study Committee"). The Study Committee was formed in 2011 and is part of the Utah Judicial Council which is the policy-making body for the judicial branch as authorized by the Utah State Constitution, UTAH CODE ANN. § 78A-2-104(4). The Utah Judicial Council is responsible for the promulgation of uniform rules and standards to ensure the proper administration of the courts in Utah, as required by Article VIII, § 12 of the Utah Constitution.

78. The Study Committee was asked "to assess the provision of indigent criminal defense services at the trial level in Utah courts and to identify any concerns and make appropriate recommendations for improvement" (<https://www.utcourts.gov/knowcts/adm/>).

79. The Study Committee engaged the Sixth Amendment Center (a non-profit Massachusetts entity) to perform a study of Utah’s indigent defense systems. In October, 2015, the Sixth Amendment Center published its 6AC Report. Simultaneously, the Study Committee published its own report (“Study Committee Report”).

80. The Study Committee Report cited three major structural issues affecting indigent criminal defense:

A. The lack of State oversight of the county and municipal indigent defense systems;

B. Contracting “conventions,” such as all-inclusive, flat-fee contracts, which create systemic disincentives pitting an attorney’s financial interests against the best interest of a client; and

C. Justice courts in which high volume caseloads and lack of uniformity compromise constitutional requirements for adequate defense of indigent defendants.

81. The 6AC Report is subdivided into two categories: (1) actual denial of counsel; and (2) constructive denial of counsel.

82. With respect to the actual denial of counsel, the 6AC Report cited, *inter alia*; (1) failure to appoint counsel at the early critical stages of a criminal prosecution; (2) accepting a waiver of the right to counsel without a colloquy between judge and defendant to ascertain if the waiver was knowingly, voluntarily and intelligently made; (3) pleas accepted without counsel; and (4) interference of prosecutors and judges in plea negotiation with respect to persons unrepresented by counsel.

83. The 6AC Report focused extensively on the constructive denial of counsel to indigent persons, including: (1) the lack of accountability for indigent defense on the part of Defendant State of Utah, the counties and municipalities; (2) the structure of indigent defense, particularly in Justice Courts; (3) the role of county prosecutors in the selection, evaluation and retention of public defenders; (4) financial conflicts created through flat-fee contracting and funding of investigative and trial related expenses; and (5) workloads of public defenders, including time for contesting the prosecution’s case.

84. The deficiencies of the Utah indigent defense system have persisted for many years without any substantive efforts by Defendants to redress those constitutional defects.

**C. Standards for Constitutionally Sufficient Defense**

85. There is a national consensus and strong legal precedent on what constitutes constitutionally adequate indigent defense—both at the systemic level and at the level of individual defense providers.

86. In *United States v. Cronin*, 466 U.S. 648, 659 (1984), the United States Supreme Court recognized that the Sixth Amendment is violated when a criminal defendant is constructively denied counsel.

87. Constructive denial of counsel occurs when, among other things, an indigent defendant is denied assistance of counsel at a critical stage of the proceedings, when defense counsel utterly fails to investigate the underlying facts of a case, or when defense counsel fails to subject the prosecution’s case to meaningful adversarial testing, or represents conflicting interests.

88. The American Bar Association (“ABA”) approved the *Ten Principles of a Public Defense Delivery System* (the “Ten Principles”), which establish the fundamental criteria

necessary—at the systemic level—to provide effective, efficient, and conflict-free legal representation to its clients. The Ten Principles reflect a national consensus regarding the prerequisites for constitutionally adequate indigent defense reached by representatives from each of the fifty states, the civil bar, and all segments of the criminal justice system—including judges, prosecutors, private defense counsel, public defenders, court personnel, and academics active in criminal justice.

89. The Ten Principles state that to have constitutionally adequate indigent defense: (a) defense counsel should be an equal partner in the justice system, with the same resources as prosecuting attorneys; (b) only qualified counsel should represent indigent defendants; (c) clients should be appropriately screened for eligibility for public defense services; (d) defense counsel should receive the training necessary to perform competently; (e) there should be attorney performance standards and adequate supervision and oversight to ensure compliance with those standards; (f) workloads should be monitored; and (g) indigent defense systems should be independent from undue political influence, to ensure that counsel are free to make decisions necessary to meaningfully advocate for their clients.

90. The ABA and the National Legal Aid and Defender Association (“NLADA”) have also promulgated performance standards for constitutionally adequate indigent defense counsel with respect to individual providers. Those standards dictate that indigent defense counsel: (a) have adequate knowledge of the relevant areas of law; (b) act with reasonable diligence and promptness, avoiding unnecessary delay in the disposition of cases; (c) provide representation at every critical stage of their client’s proceedings; (d) conduct reasonable factual and legal pre-trial investigations into the charges against their clients, pursue available formal

and informal discovery procedures and use appropriate and necessary experts; and (e) consult with their clients in order to elicit relevant information about the case, to inform clients of their rights, and to enable clients to make informed decisions about the direction of their cases.

91. Attached as Appendix 1 to the Study Committee Report is a white paper authored by Hon. Derek P. Pullan of the Fourth Judicial District Court entitled “THE CONSTITUTIONAL RIGHT TO COUNSEL – EVALUATING THE HEALTH OF UTAH’S INDIGENT DEFENSE SYSTEM” (“Pullan Report”). Judge Pullan articulated seven factors to be used in assessing the health of Utah’s public defense system:

- A. Independent representation, which includes the exclusion of county attorneys and judges from hiring and supervising public defenders;
- B. Representation without conflicts of interest, which encompasses systemic conflicts of interest arising from the contract terms of engagement, the manner of selection, funding and payment of defense counsel;
- C. Representation without interference, such as not providing a private place for attorney-client confidential communications;
- D. Representation at all critical stages, which includes custodial interrogations, lineups, initial appearances, bail hearings, preliminary examination, arraignment, plea bargaining, sentencing and the first appeal of right;
- E. Representation that ensures meaningful adversarial testing of the State’s evidence, which includes qualified counsel (ability, training and experience), access to defense resources (e.g., investigators, expert witnesses and scientific or medical testing) and reasonable caseload standards;

- F. Fair compensation and proper incentives; and
- G. Case specific and systemic quality control, including minimum performance standards and collection of meaningful data.

92. The State of Utah passed the Indigent Defense Act of 1965 (the “Act”). The Act has been amended and is currently set forth in §§ 77-32-101 *et seq.*, UTAH CODE ANN. The legal defense standards for Utah’s public defender are defined in § 77-32-201(8), UTAH CODE ANN.:

- A. Provide defense counsel for each indigent who faces the potential deprivation of the indigent’s liberty;
- B. Afford timely representation by defense counsel;
- C. Provide the defense resources necessary for a complete defense;
- D. Assure undivided loyalty of defense counsel to the client;
- E. Provide a first appeal of right; and
- F. Prosecute other remedies before or after a conviction, considered by defense counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings.

93. Defendants have failed to meet or maintain the statutory mandates of the Act as further described below. Furthermore, Defendants have failed to fulfill the constitutional standards articulated in the Ten Principles, by the NLADA and in the Pullan Report.

94. Among other things, Defendants have allowed a system to develop in which counties and municipalities are not providing timely and competent legal counsel, are denying public defenders investigatory resources necessary for a complete defense, and creating



conditions making it practically impossible for public counsel to provide undivided loyalty to their clients.

95. The substandard performance of the indigent criminal defense system is on-going and continuous, thereby damaging the constitutional rights of Plaintiffs, and those similarly situated.

## **II. THE CONSTITUTIONAL DEFICIENCIES OF THE UTAH INDIGENT DEFENSE SYSTEM ARE OPEN AND NOTORIOUS**

### **A. Defendants Exercise No Administrative Oversight Over the Indigent Defense System.**

96. Defendants are not taking any steps to ensure that their agents are living up to the minimum constitutional and statutory requirements of indigent defense.

97. Notwithstanding the generalized responsibilities Defendant Utah AG has over Defendant's provision of indigent defense, Utah presently has no statewide entity or official with the unambiguous mandate to ensure Defendants' compliance with their constitutional obligations on an ongoing basis.

98. Utah has no official or entity empowered to take any binding, remedial actions to fix the counties' and municipalities' failure to comply.

99. Defendants do not supervise the provision of indigent defense services in misdemeanor and felony criminal actions in any of Utah's twenty-nine counties.

100. Defendants have not implemented any safeguards to ensure that counties comply with the Act and with national performance standards.

101. National standards require ongoing training, professional development, and continuing legal education. Indigent defense counsel must acquire and maintain lawyering skills,

as well as keep current with new developments in the complex and rapidly changing field of criminal law.

102. Defendants do not provide resources for attorney training, nor require attorney performance evaluations. Defendants do not oversee workload limits. As a result, only two of Utah's twenty-nine counties (i.e., Salt Lake and Utah counties) have implemented a formal training program for indigent defense counsel at the insistence and direction of the legal defender associations in those two counties.

103. Most counties rely on private low-bid contracts without any investigation into the qualifications of the applicants. Lacking formal orientation, newly hired attorneys have no opportunity to acquire and maintain the skills and legal knowledge necessary to put the prosecution's case to the crucible of adversarial testing. Counties do not provide or fund training programs for contracted attorneys to hone their skills and remain knowledgeable of significant changes in the law.

104. The very recently formed UIC Commission, by its nature, has no power at all to take any binding action to bring any county or municipality failing to provide adequate defense into compliance. The UIC Commission is advisory in nature, and counties and municipalities have no obligation to follow any of its guidelines.

105. By contrast, Defendants, through the Utah Prosecution Council ("UPC") provide numerous opportunities for ongoing education and training for county prosecutors. Counties often pay for prosecutors' training and memberships in statewide associations for prosecutors and other professional associations.

106. National standards further mandate that indigent defense programs subject their attorneys to systematic supervision and evaluation based on publicized practice standards. Utah has no statewide supervision or evaluation policies. Defendants keep no records, documents, files, or written protocol of any kind to monitor the indigent defense system. Defendants have no system in place to ensure that counties set practice standards or methods of evaluation, supervision, and monitoring to ensure the adequate assistance of indigent defense counsel.

107. The lack of basic supervision results in inevitably hampering the quality of representation across the state. While every county and municipality suffers from its own systemic issues, there are some counties and municipalities where there are more and more acute problems.

108. The lack of supervision also results in counties attempting to save money by relying on overworked, underpaid, inexperienced, untrained, understaffed and often conflicted counsel.

109. Most Utah counties award indigent defense contracts based on the lowest cost possible, without regard to constitutional adequacy. Under such contracts, defenders are left to police their own caseloads and report when they become too burdensome. The potential for recriminations and reprisals (e.g., terminating or not renewing a public defender contract) if public defenders complain about excessive caseloads militates against public defenders making any objection to caseloads and lack of resources.

**B. Defendants Do Not Consistently Provide Legal Counsel to Indigent Defendants at All Critical Stages of the Criminal Prosecution.**

110. The constructive denial of legal counsel to indigent defendants commences at the hiring of public defenders. From stem to stern, the hiring and supervision of public defenders is defective *ab initio*.

111. With limited exceptions, Utah counties have coalesced around two models. In Salt Lake and Utah counties, the county commissioners have engaged by contract a single, not-for-profit provider of legal defense to indigents.

112. Outside of those two counties, and in every municipality, the counties and municipalities contract with private attorneys to provide services in either the District and Justice courts, or both.

113. The counties' and municipalities' selection of private attorneys for indigent defense contracts is fraught with inherent defects. The governmental bodies awarding contracts to the public defenders consist of elected officials who are usually not law trained. They do not have backgrounds in legal matters and are not acquainted with the skills and experience level the public defenders should have.

114. Moreover, because the cost of the indigent defense system is borne by each of the separate counties and municipalities' and their general tax funds, the officials are motivated to keep the costs as low as possible without regard to the constitutional sufficiency of the defense system.

115. Because of this lack of law training, the officials often turn to the county or city attorneys for advice and guidance in selecting the private attorneys to be hired for indigent

defense. In effect, the prosecutors are involved in hiring their opposing counsel, which constitutes a self-evident conflict of interest.

116. The contracts used by nearly all counties and municipalities are annual, flat-fee arrangements. Under such contracts, the private attorney and the county or municipality negotiate a set price for all services on a yearly basis. Such contracts make no accommodation for an increase in the number of cases assigned to the public defender or the complexity of any particular case.

117. In most counties, there is no prohibition against public defenders having private clients while fulfilling the flat-fee annual contract with the county. In those instances, the public defender is conflicted by the duty to the private clients (who usually will pay more money on an hourly or project basis than the public defender contract) and the contractual duty to represent indigent defendants.

118. Under the flat-fee annual contract, the public defender will not be paid any more or less for the number or complexity of cases; whereas his/her annual income can be increased by dedicating more time and energy into private practice.

119. Because of the structure of the contractual commitment, the average public defender is economically motivated to do as little as possible regarding the indigent defendants and to increase his/her productivity with respect to private clients. From the inception of the contract, the contracts create a conflict, which compromises the defense of people unable to pay for an attorney.

120. By way of illustration, not limitation, attached hereto as Exhibit 1 is a copy of the Request for Qualification for Kane County Public Defender Services (“Kane County RFQ”) to

which was attached the Public Defender Agreement—Trial Services—March 1, 2016 – February 28, 2018 (“Kane County PD Contract”). Responses to the Kane County RFQ were due on March 2, 2016. The Kane County PD Contract embodies the same systemic problems that plague all flat-rate annual contracts. The annual flat-rate is \$60,844.10. *See* Scope of Work in Kane County RFQ and ¶ 5.1 of the Kane County PD Contract.

121. Before the Kane County public defender may use an expert witness, the trial court must approve the expert witness fees—a requirement that the county prosecutors do not have to comply with. This places a burden on the public defenders, particularly when the motion to approve the payment of expert witnesses fees will require the disclosure of discovery and trial strategy – something that prosecutors don’t have to do. Furthermore, the public defender must “use his best efforts to minimize the cost and expenses.” Kane County PD Contract at ¶ 3.9. Extraordinary unforeseen expenses may be requested from the non-lawyer county commissioners. Kane County PD Contract at ¶ 5.3. Private practice is not prohibited. Kane County PD Contract at ¶ 7.9.

122. The Kane County PD Contract demonstrates that various Utah counties continue to use contracts with built-in conflicts.

123. Beginning in October 2015, legal counsel for Plaintiffs issued a series of document requests to all Utah county commissions and District Courts under the auspices of the Government Records Access and Management Act, §§ 63G-2-101, *et seq.*, UTAH CODE ANN. (“GRAMA”).

124. All county Commissions were asked to produce copies of records pertaining to the indigent defense system in each county, including copies of any public defender contracts and minutes of any county commission meetings pertaining to indigent defense.

125. Like the Kane County PD Contract, county commissions have used the flat-rate annual contract format to provide indigent legal services. In addition to the intrinsic flaws contained in the Kane County PD Contract, other flat-rate contracts require that the public defender pay for expert witness fees, testing and investigative research out of their own pocket, with no additional monies from the county.

126. Stunningly, certain counties require public defenders to pay for substitute counsel in the event the public defender is conflicted out of representation, which dampens the willingness of public defenders to acknowledge conflicts.

127. County commission minutes and related documents produced in response to the GRAMA requests do not show any public defenders having requested or being granted additional monies for extraordinary expenses by the county commissioners.

128. In the cases where the public defender must pay for expert witness fees, testing and investigations, there are no produced documents showing expenditures in excess of the yearly flat-rate.

129. Defendants have provided no directives, oversight or supervision with respect to the types of contracts utilized by Utah counties with public defenders. Defendants have allowed such contracts to continue and to proliferate. Defendants have no means of requiring that public defender contracts or other arrangements conform with the Utah Constitution, statutes and case law, including the recently enacted UID Commission.

130. Failure to govern the indigent defense systems of the Utah counties, particularly the way in which public defenders are chosen and compensated, constitutes a breach of Defendants' constitutional responsibilities to indigent criminal defendants and a violation of the federal and state constitutions, statutes and attendant case law. Plaintiffs suffer harm as public defenders routinely represent conflicting interests.

131. Over and beyond the actual contracts, Defendants have failed to regulate and supervise the selection of public defenders. Defendants provide no mechanism to ensure indigent defense providers are qualified for the job. Most contracts have no written job qualifications other than a prerequisite in the contract that counsel be members of the Utah State Bar Association in good standing.

132. Given the lack of hiring criteria, there is no way of telling whether indigent defense counsel have the requisite ability, training, experience and adequate knowledge of relevant areas of the law to match the complexity of their caseloads.

133. Most counties rely on private low-bid contracts without any investigation into the qualifications of the applicants. Lacking formal orientation, newly hired attorneys often have no opportunity to acquire and maintain the skills and legal knowledge necessary to put the prosecution's case to the meaningful crucible of adversarial testing.

134. The collateral effects of a guilty plea or conviction are complex and intricate in today's interconnected legal system. For example, a guilty plea or verdict may have adverse consequences on the indigent defendant's eligibility for public housing, and if a landlord conducts a background check, private housing. 42 U.S.C. § 13661(c) gives public housing authorities the power to deny people Section 8 (42 U.S.C. § 1437(f)) rental housing assistance



based on criminal activity. Criminal convictions also have effects on immigration status, student loan eligibility, and many other issues.

135. Effective criminal representation means being able to advise clients about these collateral effects. In other states, there is a state requirement for public defenders to be aware of such consequences. For example, in New Mexico, public defenders are expected to know what the consequences of a guilty plea might be on the immigration status of an indigent defendant.

136. On the other hand, Utah has no such requirement for its public defenders. In Utah, for example, there is no means of determining if the public defenders are knowledgeable about the intersection of criminal and immigration law. *See* 8 U.S.C. § 1227(a)(2) (crimes of “moral turpitude” or involving controlled substances shall serve as a basis for deportation of aliens) and the Criminal Alien Program (CAP) which provides the US. Immigration and Customs Enforcement (ICE) agency support in the biometric and biographic identification, arrest, and removal of priority aliens who are incarcerated with federal, state and local prisons and jails.

137. As the parties ultimately responsible for the indigent defense systems, Defendants have abnegated their responsibilities by not instituting standards by which public defenders are hired and perform on the job.

138. With the exception of Salt Lake County and Utah County, which cover training expenses, counties do not pay for any training and continuing legal education for public defenders and Defendants do not provide any funding to cover such costs. Indigent defense counsel must pay for all training and continuing legal education (“CLE”) out of pocket. Defendants take no steps to ensure indigent defense counsel actually receive applicable training and ongoing legal education.

139. By contrast, several counties directly fund training for prosecutors, and pay for memberships in professional associations such as the UPC and the Statewide Association of Prosecutors, which provide training and continuing legal education.

140. Defendants contribute nothing to CLE for the attorneys representing indigent defendants. Although the Utah State Bar requires continuing legal education of all licensed attorneys, public defenders can satisfy these requirements by pursuing instruction in unrelated practice areas. There is no requirement that public defenders keep abreast of developments in criminal law or report their CLE to an authority charged with overseeing performance.

### **C. Caseloads and Availability of Public Defenders**

141. Defendants do not monitor, limit or otherwise provide supervision and oversight of public defense counsel workloads. Defendant's failure to provide supervision and guidance has resulted in unmanageably large workloads for indigent defense counsel.

142. Workload affects the productivity and effectiveness of indigent defense counsel more than any other variable. The National Advisory Commission on Criminal Justice Standards and Goals created by the United States Department of Justice stated in 1973 that a single, full-time indigent defense counsel can reasonably be expected to handle no more than 150 felonies per year; or 400 misdemeanors per year; or 200 juvenile delinquency cases per year. The national standards published in 1973 may now be too high in light of the complexity of criminal defense and the need for scientific testing (e.g., DNA) and detailed investigations, which did not exist in 1973 but which are standard procedures in 2016.

143. As alleged above, Defendants do not collect meaningful data regarding the indigent defense system and the caseloads placed on public defenders. Defendants cannot

determine the effectiveness of indigent defense counsel if Defendants do not know who handles public defense cases from one county and municipality to the next.

144. Quite simply, Defendants do not know who the public defenders are, much less what the caseload is for a particular public defender. This is particularly true because defenders sometimes hold contracts for various types of services within one county or city and/or with various counties and cities and/or have private clients in addition to their contract or contracts.

145. Defendants have not set workload limits and do not require the counties to do so. A review of the sparse data available reveals that in many counties, indigent defense counsel maintain felony caseloads as high as 250 to 300 cases, almost twice the ABA recommended maximum of 150, not counting any juvenile representation they may undertake.

146. Many attorneys carry private caseloads in addition to the cases assigned by the county in order to supplement their income. Caseloads for indigent defense are often so high that attorneys spend no more than a few minutes with a client prior to court proceedings.

147. Because of the excessive caseloads, public defenders are forced into the “meet and plead” syndrome where they meet their indigent client a few minutes before entry of a plea agreement. The excessive caseloads impede counsel’s ability to provide constitutionally and statutorily adequate legal representation. In some isolated rural counties, caseloads may not be as pressing an issue as the other consequences of a defective indigent defense system.

#### **D. Funding and Resources for Indigent Defense**

148. Each county and municipality is responsible for funding its own indigent defense services. Defendants do not provide any funding whatsoever for indigent defense.

149. Utah ranks 48th out of the 50 states in per capita spending for indigent defendants, spending \$5.22 (the national average is \$11.86), with some counties spending as little as \$1.87 per person per year.

150. In contrast to the paltry sums spent on indigent defense, Defendants provide county prosecutors with myriad resources, which increases the disparity between prosecutors and defenders and decreases the defenders' ability to subject the prosecutor's case to the crucible of adversarial testing. For example, the state-funded UPC, which focuses on providing legal training to prosecutors, has a substantial annual budget. The Utah Prosecutorial Assistants Association, which received \$12,000 from the UPC, provides prosecutorial assistants with legal training. Additionally, the Statewide Association of Prosecutors, funded by dues paid by counties, advances legislation to benefit prosecutors. Finally, because prosecutors are county employees, they receive state benefits, including health insurance and retirement plans, for both them and their staff.

151. By contrast, public defenders must hire staff, pay for overhead, and cover the costs of benefits on their own.

152. Public defense contracts awarded in most counties do not provide additional funds to hire private investigators or experts. Rather, public defenders must cover the cost of such investigations out of their own funds or make a special request for additional funding from the county or municipality. The practical reality is that public defenders rarely hire investigators.

153. In contrast, prosecutors have immediate access to the State of Utah Crime Laboratory and the various services it offers, including scientific consulting, law enforcement

training, crime scene response, laboratory testing services,<sup>1</sup> and courtroom testimony. The Bureau of Forensic Services is located within the Utah Department of Public Safety. None of those services, however, are freely available to public defenders and their clients.

154. In many counties, indigent defense attorneys must appeal to county officials (who are usually not law trained) to have investigators, experts, and other expenses approved and paid. In cases where the county commissioners must approve extraordinary expenses requested by the public defender before such expenditures can be made, the county commissioners' lack of criminal law expertise prevents them from understanding the necessity of such expenses. For example, a county commissioner without legal training cannot be expected to know when DNA testing is an absolute necessity for the adequate defense of a particular indigent defendant.

155. Requiring public defenders to justify such expenses to non-lawyers is another deterrent to adequate, constitutional defense. As a result, public defenders lack real independence from prosecutorial and judicial influence, which is critical to our adversarial system.

156. The lack of funding and oversight on the part of Defendants has also resulted in counties and municipalities failing to provide private spaces in the courthouses for public defenders to meet with their clients.

157. There are very few court facilities that have dedicated spaces in which public defenders can have confidential conversations with their attorneys. Most indigent defendants first meet and then converse with their assigned public defender in the courtroom or the hallways

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<sup>1</sup> Laboratory testing services offered to prosecutors consist of biology screening, DNA, combined DNA index system input/management, controlled substances (including suspected clandestine labs), fire debris, paint, general trace and unknown substances, latent prints, footwear/tire track, automated fingerprint identification system, bloodstain pattern analysis, firearms, toolmarks, serial number restoration, distance determination and shooting scene reconstruction. *See* [forensicservices.utah.gov](http://forensicservices.utah.gov).

outside the courtrooms. There is no physical barrier or door protecting the attorney-client privileged discussions from other people in attendance.

158. For in-custody indigent defendants, conversations with the assigned public defenders often take place in group holding cells where the defendants are not assured that their statements to counsel will not be overheard by other prisoners and jail personnel.

159. As a result, the confidence and trust of the indigent defendants in their public defenders are severely eroded by lack of physical space.

160. In Utah, indigent defendants may be ordered to repay the county “costs” if convicted of a crime, § 77-32a-1, UTAH CODE ANN. Costs are defined by statute to include “attorney fees of counsel assigned to represent the defendant.” § 77-32-2, UTAH CODE ANN.

161. In contrast to the *Miranda* advisory that an attorney will be appointed if the accused cannot afford an attorney, indigent defendants are not regularly advised that a guilty plea may entail more than just a fine.

162. If recoupment is ordered and the defendant does not pay the attorney fees, the county or municipal court may move for an order to show cause why the indigent defendant’s default should not be treated as contempt of court and may “order him committed until the costs or a specified part thereof, are paid.” UTAH CODE ANN. § 77-32a-8.

163. As a result, indigent defendants are denied public defender services because they must ultimately pay for these services if they are convicted. Recoupment of fees has a chilling effect on the right to counsel.

164. Counties usually charge indigent defendants a flat fee for the public defense services they receive, without regard to the length or complexity of their cases, the quality of the defense services, or their ability to pay without substantial hardship.

165. Typically, indigent defendants are charged \$500 for a felony conviction and \$250 for a misdemeanor conviction. These flat fees apply even if the public defender in question did not incur that amount in costs or attorney time.

166. County and municipal courts make no attempt to ascertain whether indigent clients can pay the recoupment fees without substantial hardship and routinely assess the fees despite the fact that these indigent clients have already filled out forms with their financial information to indicate they qualify for free assistance of counsel.

167. Many of the counties' contracts with public defenders require the attorney to provide information to the county prosecutors as to their clients' ability to pay the recoupment costs. This requirement is contrary to the UTAH RULES OF PROFESSIONAL CONDUCT which demand that the attorney's allegiance be only to the client.

#### **E. Disparity in Compensation**

168. The comparison of annual contract fees paid to public defenders with the salaries of prosecutors reveals a great disparity between the compensation paid to public defenders that paid to prosecutors.

169. A side-by-side comparison underreports the true disparity because counties also pay for the prosecution team's retirement, health and dental insurance, office expenses and supplies, training and travel, service fees, fleet vehicles, severance benefits, worker's compensation insurance, phone charges, equipment and computer maintenance, risk management

and malpractice insurance, legal subscriptions, professional association dues, disability insurance, car allowances and cell phones.

170. Contract defenders receive no such support or benefits from Defendants. As a result, many public defenders are forced to supplement their incomes through private practices and/or additional indigent defense contracts in surrounding counties.

**F. Availability of Public Defenders and Quality of Representation**

171. The lack of resources, excessive caseloads, and latent conflicts contained in the county public defender contracts are some of the root causes of public defenders' inability to provide adequate time for their clients.

172. As a result of crushing workloads, public defenders do not have sufficient time to meet and confer with their clients throughout the critical stages of the criminal proceedings.

173. When assigning a public defender, judges or court personnel routinely inform public defenders of the name and contact information for the attorney, sometimes with the admonition that contacting the public defender will be difficult. In most instances, the public defender does not meet or converse with the defendant until a court hearing.

174. Without adequate client contact, defense counsel cannot and do not adequately argue against pretrial incarceration or the imposition of bail.

175. There is no time to ascertain what contacts the defendant has with the community, job status, or family commitment, and therefore the public defender does not have the necessary information to seek no bail, reduced bail, or prevent pre-trial incarceration.

176. Because their counsel fail to advocate effectively against detention or the imposition of bail, people are routinely detained unnecessarily or for prolonged periods of time before trial.



177. Unless Defendants take affirmative steps to ensure that public defenders have manageable caseloads, indigent defendants will continue to have limited or no contact with their legal counsel at critical stages of the proceedings.

178. Also as a result of overly burdensome caseloads created and sustained by Defendants' actions, many public defenders do not conduct appropriate discovery or make appropriate pre-trial motions. Likewise, many public defenders rarely make discovery motions or challenge the sufficiency of the documents they are permitted to review. Motions to suppress evidence in Utah Justice Courts are virtually unheard of.

179. Because of the Defendants' failure to assemble pertinent data on the indigent defense system in Utah, it is impracticable to determine on a county-wide basis the number of discovery motions, motion to suppress, and actual trials conducted by public defenders. Sampling of dockets in various counties reveals very few instances where there is a record of public defenders contesting the merits of the prosecution's case.

180. Many members of the Plaintiff class have been detained unnecessarily or for prolonged periods of time before trial. Many public defenders rarely seek reductions in bail, even for clients who pose no flight risk. Many times indigent defense counsel fails to appear at court proceedings, resulting in frequent rescheduling and postponements.

181. Many class members are compelled to take inappropriate pleas, often to the highest charge, even when they have meritorious defenses.

182. Many public defenders routinely encourage their clients to plead guilty without a proper factual basis for guilt, without even a cursory investigation into potentially meritorious

defenses, in the absence of any physical evidence, and without the presence of a complaining witness.

183. Fearful that their attorneys will not adequately prepare for trial, Plaintiffs forgo their right to trial, pleading guilty to crimes they did not commit or to charges more severe than the facts of their cases warrant.

184. Many public defenders in Utah routinely fail to review presentence reports with clients prior to the day of sentencing. Likewise, many public defenders do not conduct independent mitigation investigations or pre-sentence reports for their clients, leaving the state's report as the primary document relied upon by the court in sentencing.

185. These failures are to be expected because public defenders have so little time and resources (e.g., no investigators) to marshal an adequate defense.

186. The hallmarks of a vigorous defense on behalf of indigent criminal defendants are missing, which leads to the conclusion that the Utah system of indigent defense has failed to put the prosecution to the "crucible of meaningful adversarial testing." The net effect of inadequate resources, lack of oversight and excessive caseloads is that indigent defense counsel more routinely expend their energy pressuring defendants to accept the prosecution's plea offers.

187. Plaintiffs and members of the plaintiff class have suffered irreparable harm or are at imminent risk of suffering such harm because Defendants have failed to supervise and monitor the indigent defense system for which they are responsible. There is no adequate remedy at law to address these deficiencies or the consequential deprivation of adequate counsel.

188. As a direct result of the Defendants' lack of supervision and oversight, individual counties and municipalities in the State of Utah have failed to supervise, monitor and adequately

fund the indigent criminal defense system within the individual counties and municipalities. Because of the lack of oversight and accountability on the part of Defendants and the counties, public defenders are not selected and engaged in a consistent manner with the best interests of the indigent defendants in mind (e.g., flat-fee annual contracts), are not adequately trained during the course of their engagement, are not given performance evaluations, are overworked, understaffed, and without sufficient time to investigate the charges, are unable to provide legal representation at all critical stages of the proceedings, unable to contest pre-trial bail hearings, cannot provide independent legal advice with respect to plea arrangements, unable to contest the charges leveled against their client, are prevented from trying cases with adequate investigation and discovery, lack sufficient time to provide legal counsel necessary to evaluate criminal charges and plea arrangements, cannot provide indigent defendants with alternative sentencing options, and otherwise prevented from fulfilling the constitutional defense of indigent defendants.

189. As a direct result of the unconstitutional indigent criminal defense system which Defendants have allowed to persist in the State of Utah, Plaintiffs and class members are harmed in a multitude of ways every day, including: spending more time in pre-trial detention; being subject to excessive bail; accepting plea agreements about which they are ill-informed and have no understanding of collateral effects (e.g., immigration); agreeing to plea agreements that are excessively punitive (increased fines and recoupment of attorney fees) and entail longer sentences; being unaware of sentencing alternatives; and generally being denied the constitutionally mandated procedures that ensure a fair and just defense to criminal charges. The

deprivation of constitutional rights and the resulting harm visited upon Plaintiffs and class members continue unabated as of the date of this Complaint.

**FIRST CAUSE OF ACTION**

**SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S.  
CONSTITUTION AND 42 U.S.C. § 1983  
(Right to Counsel)**

190. Plaintiffs re-allege and incorporate by reference all allegations from previous paragraphs of this Complaint.

191. Defendants are obliged to provide resources to indigent defense counsel, so that they may offer constitutionally adequate defense services to Plaintiff Class members.

192. Defendants fail to provide sufficient supervisions and oversight to ensure constitutionally adequate counsel for Plaintiffs and class members. Instead, Defendants rely on individual counties to provide indigent defense services.

193. Defendants fail to provide adequate oversight to ensure constitutionally adequate defense services for indigent defendants charged of crimes in their jurisdiction.

194. As a result of Defendants' failure to provide counties with adequate guidelines and resources to guarantee adequate defense, Utah's indigent defense system is underfunded, poorly and unevenly administered, and does not provide mandated constitutional protections to many indigent defendants.

195. As a result of Utah's deficient indigent defense system, indigent defense counsel in most counties are unable to provide constitutionally-adequate legal representation, and Plaintiffs are harmed.

196. Defendants' failure to exercise the oversight needed for constitutionally adequate indigent defense during criminal proceedings violates Plaintiffs' rights under the Sixth and

Fourteenth Amendments to the United States Constitution, including, but not limited to, their right to effective assistance of counsel. This constitutional violation provides Plaintiffs with the right to obtain declaratory relief and attorney's fees, pursuant to 42 U.S.C. § 1983.

## **SECOND CAUSE OF ACTION**

### **FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND 42 U.S.C. § 1983 (Due Process)**

197. Plaintiffs re-allege and incorporate by reference all allegations from previous paragraphs of this Complaint.

198. Defendants are obliged to provide tools to indigent defense counsel so they may offer constitutionally adequate defense services to Plaintiffs and class members.

199. Defendants fail to provide adequate oversight to ensure constitutionally sufficient counsel for Plaintiffs and class members. Instead, Defendants rely on individual counties to provide indigent defense services.

200. Due to the lack of oversight and supervision on the part of Defendants, Utah counties fail to provide adequate funding and oversight to ensure constitutionally adequate defense services for indigent defendants charged with crimes in their jurisdiction.

201. As a result of Defendants' failure to provide the counties with adequate guidelines and resources to guarantee adequate defense, Utah's indigent defense system is underfunded, poorly and unevenly administered, and does not provide mandated constitutional protections to many indigent defendants.

202. As a result of Defendant's deficient indigent defense system, indigent defense counsel in most counties are unable to provide constitutionally adequate legal representation, and Plaintiffs are harmed.

203. Defendants' failure to exercise the oversight needed for constitutionally adequate indigent defense during criminal proceedings violates Plaintiffs' rights under the Fourteenth Amendment to the United States Constitution, including, but not limited to, their right to due process. This constitutional violation provides Plaintiffs with the right to obtain declaratory relief and attorney's fees, pursuant to 42 U.S.C. § 1983.

### **THIRD CAUSE OF ACTION**

#### **ART I, § 12 OF THE UTAH CONSTITUTION (Right to Counsel)**

204. Plaintiffs re-allege and incorporate by reference all allegations from previous paragraphs of this Complaint.

205. Defendants are obliged to provide resources to indigent defense counsel so they may offer constitutionally adequate defense services to Plaintiffs and class members.

206. Defendants fail to provide adequate oversight to ensure constitutionally sufficient counsel for Plaintiffs and class members. Instead, Defendants rely on individual counties to provide indigent defense services for indigent defendants charged of crimes in their jurisdiction.

207. Defendants fail to provide oversight to ensure constitutionally adequate defense services. As a result of Defendant's failure to provide Utah counties with adequate guidelines and resources to guarantee adequate defense, Utah's indigent defense system is underfunded, poorly and unevenly administered, and does not provide mandated constitutional protections to many indigent defendants.

208. Defendants' failure to provide Plaintiffs and class members with adequate legal representation violates Plaintiffs' and class members' rights under Utah Const. Art. I, § 12, including, but not limited to, their rights to effective assistance of counsel. This constitutional

violation provides Plaintiffs with the right to obtain declaratory relief and attorney's fees, pursuant to 42 U.S.C. § 1983.

#### **FOURTH CAUSE OF ACTION**

##### **ART 1 § 7 OF THE UTAH CONSTITUTION (Due Process)**

209. Plaintiffs re-allege and incorporate by reference all allegations from previous paragraphs of this Complaint.

210. The State of Utah is obliged to provide resources to indigent defense counsel so they may offer constitutionally adequate defense services to Plaintiffs and class members.

211. Defendants fail to provide adequate oversight to ensure constitutionally adequate counsel for Plaintiffs and class members. Instead, Defendants rely on individual counties to provide indigent defense services.

212. Due to the lack of supervision and oversight on the part of Defendants, Utah counties fail to provide adequate funding and oversight to ensure constitutionally adequate defense services for indigent defendants charged of crimes in their jurisdiction.

213. As a result of Defendants' failure to provide the counties with adequate guidelines and resources to guarantee adequate defense, Utah's indigent defense system is underfunded, poorly and unevenly administered, and does not provide mandated constitutional protections to many indigent defendants.

214. As a result of Utah's deficient indigent defense system, indigent defense counsel in most counties are unable to provide constitutionally adequate legal representation, and Plaintiffs are harmed.

215. Defendants' failure to provide Plaintiffs and class members with adequate legal representation violates Plaintiffs' and class members' rights under Utah Const. Art. I, § 7, including, but not limited to, their rights to due process. This constitutional violation provides Plaintiffs with the right to obtain declaratory and injunctive relief and attorney's fees, pursuant to 42 U.S.C. § 1983.

### **FIFTH CAUSE OF ACTION**

#### **SECTION 77-32-301 UTAH CODE ANN. (Minimum Standards of Indigent Defense)**

216. Plaintiffs re-allege and incorporate by reference all allegations from previous paragraphs of this Complaint.

217. The Utah Indigent Defense Act, § 77-32-301 UTAH CODE ANN., provides minimum standards for the defense of indigent defendants. The Act requires counties and municipalities to provide competent and timely legal counsel. This includes, among other things: the investigatory resources adequate for a good defense,<sup>2</sup> undivided loyalty of the defense counsel to the client,<sup>3</sup> and continuous representation by the appointed attorney throughout all stages of the prosecution.<sup>4</sup>

218. Defendants fail to provide adequate funding and oversight to ensure all indigent defendants timely receive competent counsel.

219. Defendants fail to provide adequate investigative resources for indigent defendants.

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<sup>2</sup> Utah Code Ann. § 77 32 301 (3)

<sup>3</sup> Utah Code Ann. § 77 32 301 (4)

<sup>4</sup> Utah Code Ann. § 77 32 304 (1)(a)



220. Defendants fail to provide undivided loyalty to their indigent clients by failing to recognize and address conflicts of interest.

221. Utah counties fail to provide uniform representation at all stages of the proceeding. Indigent defendants are often represented by more than one attorney, and are often left unrepresented during crucial stages of their prosecution.

222. Defendants' failure to provide Plaintiffs and class members with adequate legal representation violates Plaintiff's and class members' rights under § 77-32-301, UTAH CODE ANN including, but not limited to, their rights to effective assistance of counsel.

223. Under Utah law, a private cause of action may exist for violations of a state law; therefore, Plaintiffs and class members are entitled to declaratory relief.

### **RELIEF REQUESTED**

WHEREFORE, Plaintiffs and class members respectfully request that this Court:

1. Assert jurisdiction over this action;
2. Order that Plaintiffs may maintain this action as a class action pursuant to Rule 23 of the Utah Rules of Civil Procedure;
3. Declare unconstitutional and unlawful:
  - (a) Defendants' violation of Plaintiffs' rights, including their right to effective assistance of counsel, under the Sixth and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. § 1983;
  - (b) Defendants' violation of Plaintiffs' and class members' rights, including their right to due process guaranteed by the Fourteenth Amendment to the United States Constitution, and under 42 U.S.C. § 1983;

(c) Defendants' violation of Plaintiffs' rights, including their right to effective assistance of counsel, under Article I, § 12 of the Utah Constitution;

(d) Defendants' violation of Plaintiffs' rights, including their right to due process, under Article I, § 7 of the Utah Constitution;

(e) Defendants' violation of Plaintiffs' and class members' rights under § 77-32-301, UTAH CODE ANN. and the objectives of the Utah Indigent Defense Act; and

(f) Enjoin Defendants from their ongoing violations.

4. To the extent necessary, grant supplemental relief pursuant to § 78B-6-406 UTAH CODE ANN. and such other remedies as provided in §§ 78B-6-401, *et seq.* UTAH CODE ANN.;

5. Award to Plaintiffs and class members the reasonable costs and expenses incurred in the prosecution of this action, including attorneys' fees and costs pursuant to 42 U.S.C. § 1983; and

6. Grant such other declaratory and equitable relief as the Court deems appropriate to protect Plaintiffs from further harm by Defendants.

DATED this 21st day of June, 2016.

HOLLAND & HART LLP

/s/ John P. Harrington

John P. Harrington  
Steven G. Jones

AMERICAN CIVIL LIBERTIES UNION OF UTAH  
John Mejia  
Leah Farrell  
*Attorneys for Plaintiffs and Class Members*

# **KANE COUNTY REQUEST FOR QUALIFICATIONS FOR KANE COUNTY PUBLIC DEFENDER SERVICES**

## **Kane County Public Defender Contract (Justice, Juvenile, and District Courts) Kane County Conflict Public Defender Approved Attorney List and Kane County Public Defender Appellate Counsel Services**

### **Introduction**

Kane County is soliciting qualified attorneys to apply for Kane County Public Defender Services. Kane County is soliciting qualifications for three areas: 1) Public Defender Contract for Justice, Juvenile and District Courts; 2) Attorneys to fill the Approved Attorney List for Conflict Public Defender Services when the chosen public defender has a conflict of interest; and 3) Appellate Public Defender Services for all first appeals of right. Applicants may apply for one or more of the three areas. The right is reserved by Kane County to reject any and all proposals.

### **Scope of Work**

**Kane County Public Defender Contract:** Kane County is accepting applications from qualified applicants to provide public defender services for two years in accordance with the terms of the attached Public Defender Agreement at the rate of \$60,844.10 per year.

**Kane County Conflict Public Defender Approved Attorney List:** Kane County is accepting applications for individuals who desire to be listed and appointed as a conflict public defender on a case-by-case and rotational basis for cases where the Kane County Public Defender has a conflict of interest. Cases are paid at the rate of \$750 per case for felony and class A misdemeanor cases and \$500 per case for all other misdemeanor cases. Approved attorneys will be contacted by the Court Clerk when appointed on a case and shall comply with the substantive terms of representation as outlined in the attached Public Defender Agreement.

**Kane County Appellate Counsel Contract:** Kane County is accepting applications for individuals who desire to provide public defender services in all first appeals of right at the rate of \$1250 per case and in accordance with the substantive terms of representation as outlined in the attached Public Defender Agreement.

### **Proposal Requirements**

Kane County will review each of the submitted applications and select an applicant based on the following information. The application should include the following items:

1. Letter of Interest. Include the Applicant's name and business location, a statement summarizing the experience of the applicant, and a statement clarifying which of the three areas of Public Defender Services for which the applicant desires to be considered.
2. Background. The education, qualifications, and experience of the Applicant. A resume is preferred.
3. References. The Applicant must provide a list of references that includes contact information.
4. Other Associated Attorneys. If the Applicant works as part of a law firm the application must also include the names and resumes of other attorneys in the firm that may potentially provide services or assist in providing services.

### **Submittal Instructions**

Applications will be received at the Kane County Clerk's Office 76 North Main St., Kanab, Utah 84741 until 5:00 p.m. on Wednesday, March 2<sup>nd</sup>, 2016. Hard copies are acceptable but an electronic version of the application is preferred and can be emailed to [clerkkj@kane.utah.gov](mailto:clerkkj@kane.utah.gov). Correspondence, questions and/or clarifications of the application procedure should be directed to: Karla Johnson Kane County Clerk, 76 North Main, Kanab, UT 84741, (435) 644-2458 [clerkkj@kane.utah.gov](mailto:clerkkj@kane.utah.gov).

### **Selection Criteria**

Applicants will be selected based upon qualifications, experience, and ability to comply with the County's obligation to provide a constitutionally adequate defense.

### **Selection Process**

Completed applications must be received by 5:00 p.m. on Wednesday, March 2<sup>nd</sup>, 2016. The Kane County Commission will review the applications and may request interviews of qualified applicants on March 14<sup>th</sup>, 2016 (anticipated date). Applicants will be selected and notified of the award within one to two weeks, but likely within the first week. The awarded applicants will be contacted to enter into a contract for services. If the awarded proposal does not enter into a formal contract the next best applicant will be contacted. It is anticipated that services will begin April or May 1<sup>st</sup>, 2016.

**PUBLIC DEFENDER AGREEMENT**  
**TRIAL SERVICES**

**March 1, 2016 - February 28, 2018**

This agreement made and executed by and between Kane County, a body corporate and politic of the State of Utah, hereinafter referred to as “County,” and \_\_\_\_\_, hereinafter referred to as “Attorney”.

**WITNESSETH**

WHEREAS, pursuant to Utah Code Ann. §77-32-101 *et. seq.* (1953 as amended), the County is obligated to provide for the defense of an indigent adult and juvenile in criminal cases in the courts; and

WHEREAS, the County may fulfill the statutory obligation through the appointment of qualified legal counsel who may provide the indigent legal services required by Utah Code Ann. §77-32-301 and §77-32-304; and

WHEREAS, Attorney is a qualified and competent attorney, licensed to practice law in the State of Utah and is willing to enter into this agreement with the County and is willing and desirous to perform the necessary legal services for indigent juvenile and adult defendants;

NOW THEREFORE, for and in consideration of the mutual promises and covenants contained herein, it is hereby agreed between the parties as follows:

Section 1. REPRESENTATION

- 1.1 Utah Code Ann. §77-32-301 requires Counties “[t]o provide counsel for each indigent who faces the substantial probability of the deprivation of the indigent’s liberty.”
- 1.2 Pursuant to statutory directive, Attorney shall provide competent legal counsel in criminal matters for persons charged with criminal acts in the Justice, District or Juvenile Courts of Kane County (hereinafter “indigent defendant(s)”) except as specifically excluded by Section 6 and Section 7.1 below. These criminal matters may include any misdemeanors and any felony up to and including first degree felonies.
- 1.3 Attorney shall cooperate with the courts to obtain an affidavit from the individual defendant averring his/her inability to pay for private counsel. The affidavit shall comply with the requirements of Utah Code Ann. §77-32-202. Attorney agrees not to act in a case until the court has issued its order of appointment. Attorney further agrees to promptly notify the court of any changes with regard to the

indigent status of a defendant, which changes would affect the qualifying of the defendant for court-appointed counsel. Attorney also agrees to assist the courts and the County Attorney's Office in providing information necessary to recover costs pursuant to Utah Code Ann. §77-32-202(6).

## Section 2. QUALIFICATIONS

- 2.1 By his signature below, Attorney certifies that he is a member in good standing of the Utah Bar and that he is competent in the criminal practice of law. Attorney further certifies that he shall at all times during the period of this contract, maintain his status as a member in good standing of the Utah Bar.
- 2.2 Attorney certifies that he is a citizen of the United States or permanent resident alien.
- 2.3 Attorney shall maintain a bona fide office in the County at which to conduct business which shall be made known to the clients served under this agreement.
- 2.4 Attorney Agrees to abide by all federal state and local laws, to abide by the Canons of Ethics adopted by the Utah Bar Association and to be bound by the Rules of Civility adopted by the Utah Supreme Court.
- 2.5 Attorney agrees that he is not currently, nor shall be, party to any litigation which would place his licensing or standing with the Utah Bar in jeopardy.
- 2.6 Attorney shall, during the period of this Agreement, maintain professional malpractice insurance and provide to the County, evidence of the insurance. Additionally, Attorney agrees to hold the County harmless from all damages, loss or injury it may suffer or be held liable for as a result of the conduct of Attorney or as a result of this Agreement.
- 2.7 In the event of any change of address, on-going conflict of interest, conflicting litigation or inability to practice law, the Attorney shall promptly notify the County in writing of such change of status.
- 2.8 Attorney shall keep abreast of all current legal trends and to that end shall maintain sufficient continuing professional education credits during the period of this agreement. To further encourage the continuing education of Attorney, the County shall pay tuition costs annually for one (1) criminal law continuing legal education seminar or up to eight (8) hours of criminal law related continuing legal education presented by Utah's Criminal Defense Association, Utah Prosecution Council, or other equivalent approved entity during the period of this agreement.

## Section 3 BASE DUTIES OF ATTORNEY

In exchange for the base compensation described in Section 5.1 below, Attorney agrees

to provide the following base duties in his representation of indigent defendants.

- 3.1 Pursuant to Utah Code Ann. §77-32-301, Attorney shall, subject to the exclusions of Section 6 and Section 7.1 below, provide competent and timely representation and counsel for each indigent defendant who has been charged by the Kane County Attorney's Office with violations of Utah law or County Ordinance in proceedings before the Justice, District and Juvenile Courts of Kane County and who faces the substantial probability of the deprivation of liberty as outlined in Section 1 above.
- 3.2 It is understood and agreed that accessibility to indigent defendants is an integral consideration in the making of this agreement and therefore the Attorney agrees to be available and accessible to indigent clients reasonably in advance of any hearing or trial. Attorney also agrees to make reasonable efforts to visit indigent defendants who are incarcerated in the Kane County Jail, admitted to a hospital or otherwise confined at the earliest possible moment; to return telephone calls as soon as reasonably possible and to otherwise be reasonably accessible to all indigent defendants.
- 3.3 Attorney shall, subject to the exclusions of Section 6 and Section 7.1 below, provide legal representation to indigent defendants in all matters involving criminal charges and for which Kane County is obligated by statute to provide legal services. The representation shall include conferring with clients, attending all matters before the court including scheduling conferences, all hearings and trials, and all other matters required to ensure adequate representation including, but not limited to probation revocation hearings and restitution hearings.
- 3.4 In the event of a scheduling conflict, Attorney must make his best effort to ensure that the representation under this contract is the first priority in scheduling. In the event Attorney requires that a matter assigned to him be temporarily reassigned on the basis of a scheduling conflict, the Attorney shall use only those attorneys currently practicing within the same law firm who have similar qualifications.
- 3.5 Attorney is responsible to always appear for his assigned indigent defendants whenever and wherever Court is held on their cases, including when those appearances are in Justice, District and/or Juvenile Court.
- 3.6 Attorney agrees to maintain adequate and proper records of the representation for each assigned indigent defendant.
- 3.7 Attorney agrees to provide to the legislative body or its designee, a bi-annual report of the number and types of cases or matters handled specifying the types and classes of offenses, courts, particular clients, non-jury trials, jury trials, hearings other than trials, plea-negotiated settlements and/or such other factors or statistical information as may be reasonably requested by the County that do not violate attorney client privilege. Attorney further agrees to undergo annually a

performance evaluation before the legislative body or designee to consider compliance with the terms of this agreement, including review of all bi-annual reports considering dispositions on each assigned indigent defendant, continuing legal education and training requirements together with review of qualitative input from the Judiciary and the County Attorney's Office.

- 3.8 Representation of indigent defendants shall be up to and including the filing of the first notice of appeal (*see* Section 4 below).
- 3.9 It is agreed between the parties that the County will bear the reasonable and necessary cost of investigators, laboratory costs, transcripts and defense witness fees, including expert witnesses called on behalf of indigent clients. Further, the County will bear the reasonable travel costs of Attorney, if any is required outside of Kane County in conjunction with their representation. It is agreed by the parties that prior to Attorney incurring expert witness fees on behalf of a client, the amount of the fee and the expert used will be approved by the court having jurisdiction of the case. The Attorney hereby agrees to use his best efforts to minimize the cost and expenses and shall make application for the approval of expenses in the form of a written motion the trial judge, specifying the reasons for the expense. Payment for any expense incurred by the Attorney and not previously approved by the Court or in excess of that approved by the Court, shall be the sole responsibility of the Attorney.
- 3.10 Except as provided herein, Attorney will bear all other expenses in providing the services contemplated herein, including, but not limited to, transportation to, from and within Kane County, office, telephone, postage, copying and secretarial costs.

Section 4 SPECIAL DUTIES OF ATTORNEY – RIGHT OF APPEAL

- 4.1 In addition to the base legal services described in Section 3 above, Attorney shall file a notice of appeal to the Utah Court of Appeals and/or the Utah Supreme Court with a copy sent to Appellant Counsel designated by County within ten (10) days of a conviction or final judgment against client upon consultation with and direction of his/her client based on a good faith belief the claims, defenses, or other legal contentions are warranted by existing law, or by a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law.
- 4.2 Immediately upon filing a notice of appeal, but not later than ten (10) calendar days thereafter, Attorney shall contact Appellant Counsel designated by County to transition and turn over all relevant records within Attorney's possession or control as necessary in the interests of justice and as requested by Appellate Counsel.

Section 5 PAYMENT



- 5.1 In exchange for the services rendered in Section 3 above (Base Duties), County shall pay to Attorney the sum of \_\_\_\_\_ annually. Said sum shall be paid in equal monthly installments delivered by the 15th of each month in which a payment is due.
- 5.2 It is specifically understood that Attorney will accept no other payment for work provided under this agreement, other than that compensation provided in the agreement under this Section. In the event a court orders repayment from any defendant for attorney fees and costs, all such repayment shall belong to the County.
- 5.3 Upon a showing of critical need, Attorney may request additional funding for extraordinary unforeseen expenses which may arise during the term of this agreement. A critical need for extraordinary unforeseen expenses shall be construed in favor of the accused and shall be determined weighing the nature, scope and materiality of the need in light of County resources and the County's constitutional duty to provide adequate defense resources for each indigent who faces the substantial probability of the deprivation of the indigent's liberty.

Section 6 EXCLUSIONS.

- 6.1 Attorney shall not be required to represent any indigent defendant charged with a capital felony matter.
- 6.2 Attorney shall not be required to represent any indigent defendant charged with violations of municipal law or any civil matter or any juvenile matter except those involving charges of delinquency.

Section 7 OTHER PROVISIONS

- 7.1 Conflicts of Interest. Attorney agrees to use his best efforts to avoid any conflicts of interest which would divide loyalty of defense counsel to the client. The parties recognize, however, that certain cases may arise where conflicts are of sufficient magnitude that Attorney cannot represent the indigent defendant.
- 7.1.1 In the event of a conflict of interest or other permanent reassignment, Attorney shall first give notice to the Court verbally or in writing of the need and/or purpose of reassignment with a copy to the County Attorney. If the conflict is approved by the Court, the Court Clerk shall notify an attorney on the approved conflict counsel list of Kane County.
- 7.1.2 In the event Attorney is disqualified from representing an indigent defendant after appointment, for any reason involving the misconduct of the Attorney or the filing of litigation in which Attorney is a party by any or all of the courts in which services are provided under this agreement or by the Utah State Bar, then Attorney shall be responsible for costs incurred by the County in provided substitute counsel for indigent

defendants.

- 7.2 Assignability of Agreement. This agreement is personal in nature and is not assignable to any person not a party to the agreement without the express written consent of the County.
- 7.3 Independent Contractor. It is understood by the parties that the Contractor is an independent contractor and not an agent, representative, or employee of the County nor is this contract intended to create such a relationship. It is further understood by the parties that all compensation provided hereunder shall not include deductions for FICA, Federal and State income tax and shall not include retirement benefits, health benefits, holiday pay leave or any other fringe benefit of the County.
- 7.4 Duration. This contract shall be of two (2) years in duration commencing on April 1, 2016 and ending on March 31, 2018.
- 7.5 Renewal. This contract may be renewed for an additional one (1) year term, not to exceed February 28, 2019, upon written agreement by both parties.
- 7.6 Termination. This agreement may be terminated upon the following events:
- 7.6.1 Breach. In the event that either party hereto shall deem the other to be in breach of any provision hereof, the party claiming the existence of the breach on the other's part shall notify the other in writing of such breach. The breaching party shall have fifteen (15) days in which to commence all actions necessary to cure the breach and shall notify the complaining party in writing of the actions taken to cure the breach. In the event the actions reasonably necessary to cure the breach are not commenced in a timely manner, the complaining party may terminate this agreement.
- 7.6.2 Voluntary Termination. Either party may terminate this agreement upon the delivery of written notice to the other party ninety (90) days prior to the termination.
- 7.6.3 Misconduct. In the event any disciplinary action is taken by the Utah State Bar against the Attorney, this contract may be immediately terminated without notice.
- 7.7 Notice. Any notice required by this agreement shall be given in writing addressed to the following unless otherwise designated in writing.

**FOR THE COUNTY:**  
Kane County Commission  
76 North Main  
Kanab, Ut 84741

**FOR THE ATTORNEY:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- 7.8 Transition. In the event this agreement is terminated under the provisions of Sections 7.6 above or is not renewed under the provisions of Section 7.5 above:
  - 7.8.1 Attorney agrees to complete those existing cases where it is not feasible for Attorney to withdraw. Compensation for such cases shall be the then prevailing rate being paid to attorneys who handle conflict-of-interest cases, reduced by the proportional amount of work already completed.
  - 7.8.1 The Attorney agrees to cooperate with his successors including the filing of all necessary pleadings for withdrawal and to deliver all applicable files, information and materials to the successor.
  - 7.8.2 In the event the Attorney is not permitted to withdraw from the representation in any matter by the court, the County agrees to compensate the Attorney for base services under Section 3 above, at the prevailing rate being paid to attorneys who handle conflict-of-interest cases.
- 7.9 Private practice. Nothing in this agreement shall prohibit Attorney from representing private clients so long as the representation of private clients does not interfere with or create a conflict of interest in the representation of indigent defendants.
- 7.10 Governing law. This agreement shall be governed by the laws of the State of Utah.
- 7.11 Non-funding clause. It is understood by the parties that as a governmental entity, the County funding for this agreement is subject to the funds being appropriated by the legislative body. In the event no funds or insufficient funds are appropriated and budgeted in the fiscal year(s) of this agreement, this agreement shall terminate and become null and void on the last day of the fiscal year for which funds were budgeted and appropriated, or in the event of a reduction in appropriations, on the last day before the reduction becomes effective. Said termination shall not be construed as a breach or default under this agreement and said termination shall be without penalty, additional payments, or other expense to the County of any kind whatsoever, and no right of action for damages or other relief shall accrue to the benefit of Attorney.
- 7.12 Discrimination. Attorney assures that he will comply with the Americans with

Disabilities Act (ADA), and Title VI of the Civil Rights Act of 1964 and that no person shall, on the grounds of race, creed, color, sex, sexual orientation, marital status, disability, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under this agreement.

- 7.13 Drug Court. As part of this agreement, the Public Defender shall also provide limited representation for all clients accepted into the Kane County Drug Court Program in order to ensure that the clients' legal rights are protected. The Public Defender shall advise Drug Court clients of their legal options, program conditions, and possible sentencing outcomes. Public Defender representation shall commence upon notice to the Public Defender from the Sixth Judicial District Court that an individual is scheduled for a Drug Court Review hearing, and representation shall continue until a client is graduated from, or terminated from, the Drug Court Program. The Public Defender shall attend Drug Court staffing sessions and court sessions, provide input and recommendations on clients' progress and advancement, and shall be available through all phases of the program to advise participants on Drug Court rules, sanctions, legal consequences and penalties, and possible mitigation of charges.
- 7.14 Entire Agreement. The parties agree that this Agreement constitutes their entire Agreement and any changes or modifications must be agreed to in writing by both parties and approved by the County Legislative Body in a public meeting.

In witness whereof, the parties have executed this contract the day and year written below:

FOR THE COUNTY:

FOR THE ATTORNEY:

\_\_\_\_\_  
Dirk Clayson, Commission Chair

\_\_\_\_\_

DATED: \_\_\_\_\_

DATED: \_\_\_\_\_

Approved as to form:

\_\_\_\_\_  
Robert Van Dyke  
Kane County Attorney