MEMORANDUM

Date: **August 5, 2020**
To: **Davis County Budget Committee**
From: **Todd Utzinger**
RE: **Appellate Attorney Funding**

Summary: I am requesting approval for an additional budgetary line item to retain counsel on an hourly basis for appellate services.

For at least the past 15 years, Davis County has managed to provide appellate counsel for indigent clients almost exclusively through the services of attorney Scott Wiggins with only modest, annual increases to the amount of his base contract. While the number of appeals handled by Mr. Wiggins fluctuates, the general trend has been an increase in both the number and complexity of cases. In the last three years legislative changes to the Indigent Defense Act as well as court procedures have resulted in an increase in the number and types of cases for which courts have required Davis County to provide appointed counsel at the trial court level. As was anticipated, that increase in caseload at the trial court level is now having a ripple effect at the appellate level. A recent change in policy at the Utah Court of Appeals will likely require appointed counsel in even more appeals.

Within the last month or so the Utah Court of Appeals determined as an internal policy to appoint counsel for all indigent criminal defendants not only for their direct appeals but for appeals from post-conviction matters as well. Appointed counsel has always been provided to indigent defendants for their first appeal of right. In post-conviction cases, however, trial courts have rarely appointed counsel. Instead, courts only appointed counsel where it appeared the defendant had a meritorious claim and the assistance of counsel would help assure the case was adequately presented. In the event of an appeal, appellate courts would temporarily send the case back to the trial court to determine whether appellate counsel should be appointed. Again, trial courts rarely appointed counsel for such appeals.

With its recent change in "internal" policy, the Court of Appeals has supplanted the old procedure that rarely resulted in the appointment of appellate counsel with an automatic appointment of counsel. About two weeks ago, for instance, the Court of Appeals appointed Mr. Wiggins to handle an appeal in a post-conviction case where the jury's guilty verdict was entered in 1991. It also sent a different post-conviction case back to the trial court for appointment of counsel. In that case the defendant requested appointed counsel but claimed Mr. Wiggins had a conflict of interest because Mr. Wiggins represented defendant on his original appeal that the Court of Appeals already rejected. If the court accepts defendant's argument or just wants to "play it safe" by appointing conflict counsel, Davis County will have to contract with another attorney to handle the appeal. Similarly, Davis County recently had to retain conflict appellate counsel in an appeal from a parental rights termination case because both parents desired an appeal and Mr. Wiggins could only represent one of the parents. Until the

legislature changed the applicable statutes three years ago, it's possible that neither parent would have been entitled to appointed counsel.

Mr. Wiggins already has a heavy caseload; any increase in his workload could compromise his ability to adequately represent clients as required under the state and federal constitutions. Moreover, post-conviction claims are typically filed after defendants have lost their direct appeal of right. In cases where Mr. Wiggins served as the original appellate counsel, defendants will almost certainly argue they are entitled to a different attorney for their post-conviction claims. In order to avoid even the appearance of a conflict, Mr. Wiggins and I suspect courts will appoint new counsel.

Proposal: In order to assure that the quality of appointed appellate counsel does not suffer either because of an unduly heavy workload or the appearance of conflicted appellate counsel, I propose the allocation of additional funding as a line item to hire attorneys on a case-by-case basis as needed with set hourly rates and funding caps commensurate with the nature and complexity of the appeal.

Costs of the proposal: The exact cost of these additional legal defender services is difficult to estimate because it is contingent upon the number and nature of appeals that require appointed counsel as determined by Utah's appellate courts. Based on current information, it appears the increased workload could be on par with Mr. Wiggins' present workload. If so, the cost of providing legal defender services in addition to those provided by Mr. Wiggins would likely be approximately $60,000.00. Certain out-of-pocket expenses, such as the costs of transcripts, will be incurred regardless of whether this proposal is approved.

Benefits of the proposal: Implementation of this proposal would help maintain a more manageable workload for Mr. Wiggins in keeping with constitutional standards. It would also maximize our ability to hire conflict counsel on an as needed basis and allow the county to track those expenditures to gauge future needs. Adoption of the line item would also allow Davis County to utilize the services of multiple appellate attorneys instead of committing resources to just one attorney under a service contract akin to the County's contract with Mr. Wiggins. If the amount of additional legal defender services is not as great as now seems likely, reliance upon hourly rate agreements on a case-by-case basis will enable the County to minimize expenditures compared to the cost of an additional, individual contract.

I am happy to answer any questions you might have and appreciate you consideration of this proposal. Please feel free to contact me with any questions.