HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH JEROME WILBUR, a Washington resident; JEREMIAH RAY MOON, a Washington resident; and ANGELA MARIE MONTEGUE, a Washington resident, individually and on behalf of all others similarly situated, Plaintiffs, v. CITY OF MOUNT VERNON, a Washington municipal corporation; and CITY OF BURLINGTON, a Washington municipal corporation, Defendants.	No. 2:11-cv-01100-RSL DEFENDANTS' OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION **NOTED: DECEMBER 2, 2011**

Sunlight is said to be the best disinfectant...

Brandeis, What Publicity Can Do, Harper's Weekly, Dec. 20, 1913 at 10.

I. INTRODUCTION

Plaintiffs—three individuals who are not even represented by the public defender—ask this Court to commandeer the Mount Vernon and Burlington municipal courts because of purported, "systemic deprivations of their Sixth Amendment rights." Plaintiffs, in essence, argue that the public defenders are *so* incompetent and *so* unethical that "extraordinary relief" is the *only* means of avoiding "irreparable harm." While their rhetoric and hearsay assumptions may have initial appeal, both come apart in the sunlight of

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moderate scrutiny. There are alternative grounds to deny this motion:

First, plaintiffs lack standing to seek the relief requested. They are not represented by the attorneys they complain of. Indeed, Moon and Montague are not charged at all; and Wilbur remains a fugitive. Article III requires that a party seeking an injunction show "imminent injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Here, the future injury alleged could only come about if: (1) the plaintiffs violate laws in the future[1]; (2) they are arrested and prosecuted; (3) Sybrandy and Witt are appointed to represent them; (4) plaintiffs' request for a substitute attorney is arbitrarily rejected[2]; (5) Sybrandy and Witt commit prejudicial malpractice because they are "busy" or "underpaid"[3]; (6) the judge and prosecutor stand by and ratify the conduct; and (7) the ineffective assistance is not remedied on appeal. Because this unlikely series of misfortunes does not support standing, the Court can safely end its analysis there.

Second, the "extraordinary relief' sought by plaintiffs is not granted where, as here, there is an "adequate remedy at law." Here, that remedy is as simple as asking for a new lawyer to substitute for Sybrandy or Witt. The record bears out the fact that substitute counsel is appointed as a matter of course when requested by an indigent defendant. Even plaintiffs' own witness, Tina Johnson, did this. And beyond that, there are post-trial motions, appeal, and civil suits. This, too, precludes a preliminary injunction.

Third, plaintiffs' factual argument is just plain wrong, as it is built upon little more than assumption and flawed inference. Plaintiffs, for example, rest their position on a misunderstanding of WSBA case load standards. They incorrectly count every single filing as "one case," thus ignoring permissible weighting of cases, defendants who fail to appear, those that the prosecutor immediately dismisses, and a variety of others. Plaintiffs then compound their error by accepting percentages from the "AVVO" website as indicative of

[1] Courts do not permit individuals to assume their own future criminality. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

[2] This would be unprecedented, as even plaintiffs acknowledge. *See Tina Johnson Decl.* ¶ 6. It would also be reversible error in this circuit.

[3] The Supreme Court found that it is reversible error to make such an "inference." *States v. Cronic*, 466 U.S. 648, 658 (1984).

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the public defender's workload. Based upon this incorrect foundation, plaintiffs jump to the equally incorrect conclusion that attorneys Sybrandy and Witt have "thousands" of cases each—which they have zero financial incentive to take on. Everybody with first-hand knowledge recognizes this to be untrue.

Fourth, plaintiffs are advocating standards which the Sixth Amendment neither requires, nor endorses. For instance, a large part of their argument pertains to where the public defender stands during a plea. This is not of constitutional dimension; indeed, it is theatrics. And to the extent that it is "regulated" at all, that regulation should come from the judge overseeing *that* courtroom. Similarly, the demeanor of the public defender is not regulated by the constitution—for good reason. There are several rational reasons that a competent defense attorney may be very firm, soft, or a combination thereof. As the Supreme Court acknowledges, "[t]here are countless ways to provide effective assistance in any given case." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Plaintiffs' attempt to impose *theirs* by judicial fiat should be rejected.

Fifth, the injunction standard is a *persuasion* standard. The respected attorneys who *do* have first-hand knowledge—Sybrandy, prosecutor Eason, and prosecutor Cammock—all cogently explain that the indigent defendants in the Cities receive some of the best legal representation available—which is consistent with the total absence of (1) bar complaints, (2) bar discipline, or (3) any record of inadequate representation challenges on appeal. In contrast, Moon and Montague have already perjured themselves *in this proceeding*. Wilbur would not even show up for his deposition. And all of the plaintiffs refused to discuss large portions of the facts based upon "relevance" and seemingly-random invocations of the Fifth Amendment. Their self-serving recitation is entitled to little weight, as are the consultants who relied upon it in forming opinions. Given the undisputed record, plaintiffs have minimal, if any, likelihood of success on the merits.

For the reasons set forth below, plaintiffs' motion should be denied.

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III. CLARIFICATION OF FACTUAL BACKGROUND

Contradictions do not exist. Whenever you think that you are facing a contradiction, check your premises. You will find that one of them is wrong.

Ayn Rand, *Atlas Shrugged* (1957).

A. Plaintiffs Misstate The Facts Based Upon Incorrect Assumptions, Unreliable Hearsay, And Outright Perjury

Plaintiffs, on the one hand, tell a story of absentee public defenders who give bad advice, refuse to try cases, and somehow accept "thousands" of representations with 35% of their time. But on the other hand, plaintiffs can point to no error committed by the public defender—ever—nor can they explain why Sybrandy and Witt maintain a sterling reputation with the local bar. As explained below, this contradiction does not exist. Plaintiffs' recitation of the events is simply, and provably, wrong.[4]

1. The Public Defenders Do Not Handle "Thousands" Of Cases Per Year

By way of preliminary observation, plaintiffs seem to believe that the public defenders handle "thousands" of cases in a given year. This is incorrect. It also runs contrary to plaintiffs' basic thesis about the financial-motivations of Sybrandy and Witt.

The public defenders' contract with the Cities of Mount Vernon and Burlington specifies a flat fee for a weighted caseload limit of 400 cases. *Declaration of Richard Sybrandy* ("*Sybrandy Decl.*") ¶ 18; *Declaration of Eric Stendal* ("*Stendal Decl.*") ¶ 28.[5] Sybrandy and Witt would have no financial incentive to take on cases beyond that. *Id.* After all, the cost of conflict counsel is borne by the Cities, not the public defenders. There

[4] For an objective outline of the criminal proceedings related to each plaintiff, the Cities refer the Court to their pending motions for summary judgment.

[5] Dkt. 60.

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would be no downside to diverting cases that could not be competently handled. *Id.*[6]

The apparent confusion rests in the way that plaintiffs have done their calculations. They made no effort to factor in the "weighting" that is explicit in the contract, and endorsed by the WSBA guidelines. *Marshall Decl.* Ex. 13 at 325.[7] In reality, if the public defender had a client charged with 6 crimes under three different case numbers out of one incident, it would obviously not be 6 cases—though plaintiffs treat it that way, thereby inflating the numbers. *Sybrandy Decl.* ¶ 18. The same is true of cases—such as Wilbur's—in which the criminal defendant repeatedly goes fugitive, before being arrested on a warrant, over and over. When the arrests and multiple charges are handled at the same time, it would likely constitute one case or less (depending on the charges). *Sybrandy Decl.* ¶ 20; *Stendal Decl.* ¶ 25-26.

Additionally, Sybrandy and Witt (quite ethically) do not count cases in which no real work was required. For instance, a probation violation that takes 15 minutes to competently handle would not be considered a "case." *Id.* Nor would a suspended license case that the prosecutor reduces to an infraction before the attorneys meet with the defendant be a "case." Nor would a shoplifting matter that is dismissed upon completion of four hours of community service be a "case." *Id.*; *see also Declaration of Prosecutor Craig Cammock* ("*Cammock Decl.*") ¶ 6; *Declaration of Prosecutor Patrick Eason* ("*Eason Decl.*") ¶ 4.[8] There is nothing in the guidelines that prohibits these eminently reasonable

[6] If the public defenders believed that they had exceeded the set number, they would cease work, consider the contract fulfilled, and approach the cities about re-negotiating or diverting their cases elsewhere. *Sybrandy Decl.* ¶ 18.

[7] Specifically, the WSBA standards permit the weighting based upon complexity, policies related to negotiation to non-criminal violations, and other administrative procedures. *Id.*

[8] In contrast, a "case" *would* be a DUI or domestic violence charge that necessitates witness interviews, motion, or trial setting.

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judgment calls. *Declaration of John Ladenburg* ("*Ladenburg Decl.*") ¶ 22-24.[9]

Thus, the numbers thrown around by plaintiffs have almost no grounding in reality. *See, e.g., Strait Decl.* ¶ (Sybrandy handled "1206 cases" and Witt handled "1136 cases"). They are inaccurate, as are the opinions that flow from them. Indeed, if Sybrandy and Witt were as unethical and financially-motived as plaintiffs insinuate, their decision *not* to artificially inflate their case load with "non-cases" would be counterintuitive.

2. Internet-Hearsay Does Not Accurately Summarize Sybrandy And Witt's Practice

Plaintiffs also derive a large part of their factual predicate from the AVVO website—which is not competent evidence. Indeed, it is not even true. *See* Dkt. 66 (*Supp. Cooley Decl.*) Yet plaintiffs—and their experts—rely heavily on AVVO to the point that it undergirds their entire position. *See Mot.* at 4 ("Richard Sybrandy and Morgan Witt serve as the Public Defender on a part-time basis only"); *Mot.* at 5 ("the part-time basis of Sybrandy and Witt limited them to an average of 34 minutes of attorney time per public defense case."); ("Witt's average of 1,150 misdemeanor cases (performed on a part-time basis)"). This, too, is an incorrect premise.[10] *Sybrandy Decl.* ¶ 1.

Plaintiffs also misstate the number of jury trials that occurred in the Cities. Again, based upon hearsay from a website, they assert that there were "no jury trials" in Burlington, and "two" in Mount Vernon (as opposed to 24 in Anacortes). Mot. at 13. This, too, is wrong. Craig Cammock, the prosecutor for both Anacortes *and* Burlington, explains that there were only two jury trials in Anacortes, *and two in Burlington* (as well as other bench trials). Dkt. 68 (*Cammock Decl.* ¶ 5-7). Both were tried by Sybrandy and Witt;

[9] Mr. Ladenburg is the former Pierce County Prosecutor, where he oversaw over 100 lawyers in the second largest office in the state. He was also the Pierce County Executive from 2000 to 2008, where he—among other things—oversaw the Department of Assigned Counsel.

[10] A few years ago, in a class action lawsuit against AVVO, this Court noted how "how ludicrous the rating of attorneys (and judges) has become..." *Browne v. Avvo, Inc., et al* Cause No. 07-0920 (Dec. 18, 2007) (Order at 6).

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private attorneys tried ***none***. *Id.*[11] The prosecutor for Mount Vernon, Pat Eason, likewise explains that there were five trials, four of which were handled by the public defender. Dkt. 67 (*Eason Decl.* ¶ 4). By percentages, this is the same as Skagit County. *Id.* ¶ 5.

3. Plaintiffs' Credibility In Leveling Their Accusations Is Questionable

This is ultimately a credibility case, in which the plaintiffs are making several claims that only they and the public defender would know the truth of. Accordingly, their veracity is critical and worth exploring.[12]

Moon supported this motion with a detailed declaration—which was in turn relied upon by all of plaintiffs' consultants. In it, Moon went to great lengths and into great detail about his negative experiences with the public defender following a DUI. Dkt. 47 (*Moon Decl.* ¶ 6-9). He swore under penalty of perjury that he was assigned Mr. Witt, given a "guarantee" by Mr. Witt, and ultimately misled about sentencing by Mr. Witt. Plaintiffs characterized this as a case study of the "dire consequences" of a representation by the Cities' public defenders. Mot. at 27-28. At his deposition, however, Moon was forced to admit that none of this was true. Moon was represented by a ***Skagit County*** public defender named ***Marc Fedorak***. Dkt. 111 (*Rosenberg Decl.* Ex. B (Dep. Tr. 37:7-38:1)). Witt was not involved.

But plaintiffs' lack of candor does not stop at the merits. Montague had no trouble lying in conjunction with matters as trivial as the location of her deposition. In support of a protective motion, dkt. 36, Montague submitted a sworn declaration stating that she had secured employment and coming to Seattle would be prejudicial. Dkt. 63. Like Moon, she later had to admit that this was a lie:

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[11] The lack of trials, as Cammock explains, is due to overcrowding in jail and a lack of resources on the part of *the prosecutor*. Accordingly, it is generally him—not Sybrandy or Witt—who dismisses the case or otherwise resolves it.

[12] *Falsus in uno, falsus in omnibus*. False in one respect, false in all.

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> Q. Okay. And you weren't working when you signed this [declaration], right?
>
> A. Correct.
>
> Q. You weren't working on a part-time or a full-time basis when you signed this document; is that correct?
>
> A. Correct....
>
> Q. On this declaration that you signed, you put the following statement: "I work on a part-time basis, and my income is limited." I'm asking you if that's a true statement or not.
>
> A. It's -- the statement is false.

Dkt. 111 (*Rosenberg Decl.* Ex. A (Montague Dep. Tr. 21:6-22:5)).[13]

Wilbur precipitously failed to show up to his scheduled deposition. *See infra.*

A full explanation of plaintiffs' conduct—supported by the objective court file—can be found in the Cities' pending motions for summary judgment. Dkt. No.'s 25, 27, 32.

4. None Of The Plaintiffs Are Presently Represented By Sybrandy Or Witt

None of the plaintiffs are currently represented by the attorneys they criticize. In June, plaintiff Moon requested and obtained a new attorney. Dkt. 30 (*Cooley Decl.* at 134-35). Montague also secured a new attorney. Dkt. 34 (*Cooley Decl.* at 169; 174). Neither of these individuals are even facing criminal charges in the Cities courts at this point.

Wilbur, for his part, is a fugitive (though he also secured new counsel before disappearing, *see* Dkt. 26 at 10-11). And while he has been repeatedly charged, Wilbur never respected the courts' authority enough to show for adjudication. Instead, he has consistently failed to appear until being arrested again. *See* Dkt. 25 (Mot. at 5-10). It is unclear where exactly Wilbur is right now.

[13] This is nothing new, however. Recently, in *State v. Montague, King County Cause*, Cause No. 11-1-00361-1, Montague pled guilty to making false statements.

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B. Sybandy And Witt Are More Effective Advocates Than Most Of The Privately-Retained Attorneys In The Area

Having responded to plaintiffs' brief somewhat directly, the Cities will not unpack their public defender system more broadly.

1. Plaintiffs Overlook The Role Of The Prosecutor In Unilaterally Reducing Charges And Dismissing Cases

Plaintiffs complain that there is not enough "litigating" in the Cities' municipal courts—and leap to the conclusion that it is because of Sybrandy and Witt's laziness or lack of ethics. They overlook the role of the prosecutor.

As both prosecutors Cammock and Eason explain—in detail—it is in their interest to simply dismiss cases that they recognize to be questionable or problematic. Bringing cases to verdict is expensive and time-consuming—particularly for cash-strapped cities—and it would be a disservice to the public if cases went forward for the sake thereof. Instead, problems in cases (such as a bad search or a non-credible witness), are identified by the prosecutor early on and dismissed unilaterally. *Cammock Decl.* ¶ 6; *Eason Decl.* ¶ 10. This will, many times, occur before there is even an opportunity for the public defender to meet with the client. Other times, it will happen when the public defender gathers sufficient evidence to persuade the prosecutor that they would prevail at trial. *Sybrandy Decl.* ¶ 13.

As well, very simple charges make up a large percentage of the case load. *Eason Decl.* ¶ 4. Driving-on-a-suspended-license charges, for example, involve a one-paragraph police report and almost never any procedural issues. *Cammock Decl.* ¶ 12. They can be reviewed rapidly to determine whether there are any problems with the stop. If so, the case will likely be dismissed. If not, there is almost never any defense—but charge is reduced to an infraction almost as a matter of course, anyway. *Id.*; *see also Sybrandy Decl.* ¶ 7 ("I

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have never met a client who was not pleased with this outcome").[14]

By contrast, the harm of over-litigating a case on behalf of a defendant is very real. Tangibly, when the wrong cases are fought, it results in higher risk, longer incarceration, reduced bargaining leverage, and in many circumstances, a stiffer sentence.[15] Intangibly, this is a fight that defendants seldom want to have. Most simply want to resolve their criminal case as soon as possible. They do not want needless meetings, a long stressful trial, or a civics lesson. They want the matter over. *Sybrandy Decl.* ¶ 10; *Eason Decl.* ¶ 8; *Cammock Decl.* ¶ 13.

This is a reflection of, if anything, the limitations on the prosecutor—which uniformly redound to the benefit of the accused by resulting in sweetheart deals and dismissals. It is not borne of the public defenders' reluctance to go to trial or litigate—which is borne out by the fact that Sybrandy and Witt try more cases than any private attorney in the area. *See supra.*

2. Sybrandy And Witt Consistently Obtain Better Results Than Private Attorneys

Significantly, the *only* reference to an outcome-based problem was in the perjured declaration of plaintiff Moon. As he later admitted, he accused the wrong public defender from Skagit County. Dkt. 111 (*Rosenberg Decl.* Ex. B (Dep. Tr. 37:7-38:1)). The remainder of the grievances amount to process-based complaints—such as where the attorneys stand or how they address clients.

It is not surprising that plaintiffs are forced to make a case out of this, as Sybrandy and Witt are incredibly effective attorneys. Neither has any record of bar discipline or

[14] A competent defense attorney can literally handle thousands of these cases per year. *Cammock Decl.* ¶ 12.
[15] "If a minor offense is not quickly resolved, a defendant can literally spend days sitting in the courtroom over the course of multiple hearings. The loss of time, freedom and employment income to a defendant in such a case often greatly exceeds whatever penalty the defendant would have received if the case had been resolved quickly." *Cammock Decl.* ¶ 13.

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reversals on appeal or challenged pleas. Quite the opposite, those with first-hand knowledge agree that these attorneys routinely secure excellent outcomes for their indigent clients. *See Cammock Decl.* ¶ 15 ("If I were to be charged with a crime there is a small handful of local and out of area attorneys that I would consider to represent me. Both Mr. Sybrandy and Mr. Witt are in that group.").

This is so, for several reasons. First, Sybrandy and Witt are familiar with the area and witnesses. Consequently, their knowledge of witnesses—many of whom they have represented—along with the police, prosecutors, and judges. This amounts to a huge advantage over private counsel. *Sybrandy Decl.* ¶ 3-4; *Eason Decl.* ¶ 7. This is also a source of efficiency. Sybrandy and Witt will typically know when the prosecutor will have a witness-issue, leading to an early dismissal (where a private attorney would have had to expend considerable time investigating to learn the same thing). Next, the public defenders are familiar with the legal landscape. The same crimes are regularly prosecuted in the Cities' courts. Both Sybrandy and Witt know the case law, and do not miss issues in their cases. *Cammock Decl.* ¶ 15; *Ladenburg Decl.* ¶ 23 ("100 hours of the time of an experienced death penalty lawyer is worth a 1000 hours of time of a newly admitted lawyer."). Third, the public defenders are able to make representations about their cases that the prosecutors will credit, in lieu of putting them to proof at trial. *Sybrandy Decl.* ¶ 6. This is not necessarily true for private attorneys who have not yet established credibility.

On balance, the public defenders try more cases and secure better outcomes than privately-retained defense attorneys in the area. This is an undisputed fact—and one that would be impossible if Sybrandy and Witt were as incompetent and overworked as plaintiffs suggest.

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3. Gratuitous Meetings Do Not Always Make Practical Sense

To be clear, Sybrandy and Witt ***always*** advise clients of their right to trial, and take the time to answer questions about applicable rights. They also ***always*** ensure that the client knows and concurs to the goals of the representation. *Sybrandy Decl.* ¶ 11 (emphasis in original). They also ***do*** return calls and speak with their clients confidentially. *Id.* at ¶ 16-17. They will also meet with clients as many times as necessary to secure a just result.

However, there are circumstances where a rational defense attorney will not want to meet. Early on, for example, experience has shown that early meetings are not necessarily productive from an advocacy standpoint.[16] Hearing from the defendant before appropriate review of documents leaves the attorney unable to ask more intelligent, probing questions. This can leave a skewed picture of events and strategy, and even create a likelihood that "too much" will be said, which could preclude substantive defenses under the Rules of Professional Conduct. *Sybrandy Decl.* ¶ 10(c).[17]

Other clients simply do not want meetings or never show.[18] This comes up often—particularly, when the crime carries a very small penalty. Clients will often prefer that their public defender deal with it, rather than engaging in meetings. Other clients will want to take responsibility, and opt for early resolution. For various personal or moral reasons, they will choose not to raise substantive or procedural defenses. *Sybrandy Decl.* ¶ 14. The one-size-fits-all approach taken by plaintiffs—*e.g.*, "mandatory meetings"—is neither appropriate, nor helpful.

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[16] An early meeting may make the client "feel good," akin to meeting with a social worker or psychologist. But that is not necessarily the role of the public defender.

[17] If a defendant openly admits that he did what the police said he did, little more can be done substantively in the case. The RPC's provide that the attorney "shall not" suborn perjury. *Id.*

[18] This is amply illustrated by the near-impossible task of taking the depositions of the three plaintiffs in this case. *See* Dkt. No.'s 36, 39, 59, 64, 94, 95.

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C. The Cities' Municipal Courts Are Rife With Checks And Balances To Safeguard The Constitutional Rights Of The Accused

1. All Indigent Defendants Have Various Remedies At Law

Plaintiffs have—and frequently utilized—an adequate remedy at law to address their grievances. That is, they had no trouble "firing" their public defender and asking the court for a new one—who they believed to be more effective. *See* Dkt. 49 (*Johnson Decl.* ¶ 5).

When a defendant in the Cities' courts believes that he or she is receiving ineffective assistance from the public defender they can simply ask for a new one. *Ladenburg Decl.* ¶ 24. This request is made from time to time, and routinely granted without objection. *Cammock Decl.* ¶ 11; *Eason Decl.* ¶ 11. In fact, this is precisely what plaintiffs did—so they can hardly challenge the adequacy of the process. *See* Dkt. 30 (*Cooley Decl.* at 134-35) (Montague); Dkt. 34 (*Cooley Decl.* at 169; 174) (Moon); Dkt. 26 (*Cooley Decl.* at 10-11) (Wilbur)

But even if the criminal defendant goes to trial with an attorney she feels has been ineffective and is convicted, the court will inform her of her right to appeal the case or pursue post-trial relief. *Eason Decl.* ¶ 9. If the appealable issues involve the performance of the trial attorney, conflict counsel will always be appointed. *Id.*

2. The Prosecutor Ensures The Rights Of The Accused

The Cities' prosecutors are always sensitive to the rights of the accused. In one sense, this is a practical concern. A conviction could theoretically be challenged and overturned on appeal if the constitution is not safeguarded. But the more pressing concern is an ethical one. *Ladenburg Decl.* ¶ 25; *Eason Decl.* ¶ 11; *Cammock Decl.* ¶ 11. A prosecutor's ultimate goal is to achieve justice and obey the constitution. *Id.* Therefore, the prosecutor is duty-bound to act when he or she has reason to believe the defendant is receiving ineffective assistance of counsel. *Id.*

In the proper circumstances, the prosecutor may bring a motion to disqualify the ineffective attorney. *Id.* Failing that, they also have the discretion to refuse to go forward with a prosecution, continue proceedings, or otherwise advise the Cities of the problem. *Id.*

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There is no allegation or reason to believe that the local prosecutors in the Cities would fail to fulfill these ethical duties. This provides an additional safeguard for the rights of the accused.

3. The Judge Ensures The Rights Of The Accused

Finally, the most important bulwark against the power of the state is the Cities' judges.

The Cities' judges serve as yet another institutional safeguard for the constitutional rights of the accused. Washington judges, including part-time judges and court commissioners, are bound by the Canons of Judicial Conduct. *Application of the Code of Judicial Conduct*, I(A); II(A).

A judge that has knowledge of an attorney breaching the Rules of Professional Conduct should take appropriate action, including alerting the authority responsible for disciplining attorneys. CJC 2.15(B), (C). If they observed any ethical transgressions by public defenders, they would have the authority to discipline them. *Eason Decl.* ¶ 13-15. These judges are in the best position to determine constitutional compliance and address non-compliance with professional norms and address deviations as they come up. *Cammock Decl.* ¶ 15.

Again, plaintiffs present no evidence impugning the integrity or ability of the local judges. This is yet another constitutional safeguard.

D. Discovery And Procedural Posture

Discovery has been a virtual shell-game—likely because the evidence that the Cities have developed has been overwhelmingly favorable to them. *See generally*, Rosenberg Decl.

Early on, when plaintiffs indicated that they would be seeking preliminary injunctive relief, the Cities promptly scheduled depositions of the plaintiffs. Plaintiffs immediately stonewalled, and even filed a motion to preclude them—based upon broad,

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ambiguous "unavailability."[19] Initially, they attempted to ram their preliminary injunction motion through while refusing depositions. The Cities were forced to file a motion to stay the motion to ensure discovery.

Plaintiffs finally agreed to deposition dates, but then picked a fight over their location—suddenly insisting that it should occur in Mount Vernon.[20] While problematic, the Cities forewent the dispute and agreed to plaintiffs'' chosen location. Montague was deposed in Mount Vernon; Moon was deposed in Whatcom jail—where he had recently been incarcerated on a separate matter. Both plaintiffs refused to answer many questions based upon arbitrary invocations of the Fifth Amendment. They refused to discuss, among other things, current charges—thereby failing to substantiate Article III standing. *See id.* Ex. D-E.

Wilbur, for his part, did not show up to his deposition at all. Plaintiffs defended this, suggesting that "his testimony would have been consistent with his declaration." This is of course ironic, since the testimony given by Montague and Moon was anything but "consistent" with their declarations.

Written discovery was equally unfruitful. Plaintiffs allege—repeatedly—that the conduct of their public defender caused them to lose meaningful benefits, make uninformed decisions, and otherwise prejudice their position. The Cities inquired, but plaintiffs refused to answer because, they claimed it would require "expert opinions" (which they have would not disclose). Plaintiffs also interposed lengthy—and frivolous[21]—objections to the requests, and refused to clarify what was withheld. *Id.* Ex. A-C.

Plaintiffs nonetheless brought this motion despite—or perhaps because of—the minimal discovery allowed to date. Accordingly, the Cities are necessarily at a disadvantage. With further discovery, the Cities believe that they could establish additional

[19] None of the plaintiffs work, and they are represented by 10 attorneys. But surprisingly, none were available on the proposed dates.

[20] As noted above, plaintiffs submitted Montague's perjured declaration in support of this request.

[21] Plaintiffs, for example, repeatedly objected on "relevance" grounds.

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dishonesty on plaintiffs' part, a competent and meaningful representation by both Sybrandy and Witt, and alternative grounds to deny this motion.

Still, for the reasons set forth, the motion fails on this record in any event.

IV. LEGAL STANDARD

> ***Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is likely in the absence of an injunction... Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.***

Winter v. Natural Resources Defense Council, Inc., 555 U.S. 7, 20 (2008) (citing *Los Angeles v. Lyons*, 461 U. S. 95, 103 (1983)).

Plaintiffs' burden is higher than they suggest. As a threshold matter, they must prove the following: (1) that they are likely to succeed on the merits of this case; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; (4) and that an injunction is in the public interest. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (rejecting the Ninth Circuit's "possibility" of harm standard as too lenient).[22] Injunctive relief is an "extraordinary remedy" that may only be awarded upon a "clear showing that the plaintiff is entitled to such relief." *Id.* This showing requires substantial proof that is "much higher" than summary judgment. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).[23]

And here, the showing is ***even higher***. Plaintiffs' omit the fact that their proposed injunction is disfavored because it necessarily disturbs the status quo and requires

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[22] The Ninth Circuit has not completely abandoned its "sliding scale" approach, which provided "the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). However, because Plaintiffs cannot establish *any* of the required elements for a preliminary injunction, the "sliding scale" is not prominent here.

[23] *See Amoco Production Co.*, 480 U.S., at 546, n. 12 ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success").

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affirmative action on the part of the defendant. It is therefore subject to far greater scrutiny. *See Tom Doherty Assoc., Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, 32-33 (2d Cir. 1995) (noting the "heavy burden of persuasion"); *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (a mandatory injunction requiring a positive act is "particularly disfavored" and will not be granted unless extreme or very serious harm will result, not capable of compensation in damages, if the injunction is not issued); *see also Martin v. International Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984) ("courts should be extremely cautious about issuing a preliminary injunction" that goes beyond the status quo).

As illustrated below, plaintiffs fall well short of establishing an entitlement to the extraordinary and disfavored relief they seek.

V. AUTHORITY

Rather than taking the time to discern the truthfulness of their allegations, plaintiffs precipitously filed this lawsuit based upon a misunderstanding of case load limits, applicable law, and the injunction standard. Then, compounding their error, they—and their experts—relied upon pure inaccuracy in forming opinions.

This motion should be denied.

A. Plaintiffs Lack Standing To Pursue This Lawsuit And Relief

Under Article III, standing requires "imminent harm." Plaintiffs must make an "individualized showing that there is a very significant possibility that future harm will ensue" to establish standing, *Lee v. Oregon*, 107 F.3d 1382, 1388-89 (9th Cir. 1997), which is an indispensable part of the case, and must be established by evidence appropriate for every stage of the litigation. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Here, it is undisputed that plaintiffs face no pending criminal charges in the Cities' municipal courts.[24] So their theory is, in essence, that they *will* engage in future criminal

[24] To the extent that they do, they refused to talk about it in deposition—invoking the Fifth Amendment dozens of times. They should not be permitted to take a contrary position now. *See Baxter v. Palmigiano*, 425 U.S. 308, 316-18 (1976) (the protection against inferences drawn from silence does *not* extend to the civil

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conduct—at some undetermined point in the future—and thereafter, will be represented by lawyers who *will* commit malpractice—because they are too "busy" and/or "underpaid" to do a competent job. These are unlawful assumptions.

First, plaintiffs are not entitled to presume their own future criminal conduct. A speculative fear that one will disobey the law and be arrested does not constitute a live "case or controversy"—even if accompanied by an allegation that it will keep happening. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). In *O'Shea*, a class action, the plaintiffs claimed they were subjected to discriminatory enforcement of the criminal law. *O'Shea v. Littleton*, 414 U.S. 488 (1974). The Supreme Court dismissed for a lack of standing. *Id.* at 493. In doing so, it pointed out that the prospect of future injury rested entirely "on the likelihood that [plaintiffs] will again be arrested for and charged with violations of the criminal law and will again be subjected to bond proceedings, trial, or sentencing before petitioners." *Id.* The most that could be said for standing was that "*if* [plaintiffs] proceed to violate an unchallenged law and *if* they are charged, held to answer, and tried in any proceedings before petitioners, they will be subjected to the discriminatory practices..." *Id.* at 497. Plaintiffs stand on the same untenable ground.

Thus far, plaintiffs have justified their "standing" with two principle arguments, both of which are wrong. First, they claim that they had standing when the filed, and that should be good enough. This ignores *Lujan*, and the Court previous Order rejecting this reasoning. Dkt. 44 (Order at 3) (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103 n.5 (1998)); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (standing must exist at all of the successive stages).

Second, plaintiffs argue that the "capable of repetition but evading review" doctrine applies. It does not. This doctrine is intended for "exceptional circumstances," *Lyons*, 461 U.S. at 109, and requires: "(1) the challenged action [is] in its duration too short to be fully

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arena); *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806-07 (1999) (noting the sham affidavit rule) (collecting cases).

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litigated prior to its cessation or expiration, and (2) ***there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.***" *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (emphasis added). In *Weinstein*, the Supreme Court rejected a prospective challenge to a parole system, made by a plaintiff who was no longer subject to parole. Citing *O'Shea*, the Supreme Court rejected the claim as moot, explaining there is ***no*** "reasonable expectation" that the proponent of the challenge would be on parole in the future. *Id.* at 149. The same is true of Wilbur, Moon, and Montague.

And even if the Court were to ignore this precedent and assume future lawlessness on the part of plaintiffs, they are not permitted to presume future malpractice on the part of the public defenders. In *United States v. Cronic*, 466 U.S. 648, 658 (1984), the Supreme Court unanimously found reversible error when a circuit court took such an "inferential approach" to the ineffective assistance analysis.[25]

This makes sense as a practical matter. Licensed, bar-certified attorneys are presumed competent to do their job. "Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment." *Connick v. Thompson*, ___ U.S. ___, 131 S.Ct. 1350, 1369 (2011). The lawyer's training "is what differentiates attorneys from average public employees." *Id.* Public defenders are no different. They are presumptively capable of providing the "guiding hand" that the defendant needs. *See, e.g., Michel v. Louisiana*, 350 U.S. 91, 100-101 (1955).

Beyond that, the prosecutor would have to abdicate his responsibilities, as well. Both Craig Cammock and Pat Eason, as the prosecutors in Burlington and Mount Vernon, have a special obligation to protect the rights of the accused. They are codified in the Rules of Professional Responsibility:

The prosecutor in a criminal case shall:

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[25] A criminal defense attorney, whether appointed or retained, has a duty to zealously and diligently defend his or her client. *In re Disciplinary Proceeding Against Michels*, 150 Wn.2d 159, 168-9, 75 P.3d 950 (2003).

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(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

RPC 3.8; *see also* Standard 3-1.2(c), American Bar Association Standards for Criminal Justice (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict.").

Washington enforces this rule. In the context of misconduct, the Supreme Court has repeatedly rejected the notion that the prosecutor is nothing more than a partisan:

> Language which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is ***a quasi-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice.*** If he lays aside the impartiality that should characterize his official action to become a heated partisan, and by vituperation of the prisoner and appeals to prejudice seeks to procure a conviction at all hazards, he ceases to properly represent the public interest, which demands no victim, and asks no conviction through the aid of passion, sympathy or resentment.

State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956) (citing *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899)) (emphasis added); *see also State v. Montgomery*, 56 Wn. 443, 447-48, 105 P. 1035 (1909) ("devotion to duty" is not measured by the victims).

Both of the prosecutors embrace these duties. *See Cammock Decl.* ¶ 11 ("If it were my impression that Mr. Sybrandy and Mr. Witt's clients were not getting fair representation, I would certainly put the brakes on the prosecution. My role, as a prosecutor, is to pursue a just result; Washington's Rules of Professional Conduct demand such a result, and Comment 1 to RPC 3.8 clearly establishes the prosecutor's role as a "minister of justice.""); *Eason Decl.* ¶ 11 ("If I believed that defense counsel was rendering ineffective assistance, I would have no problem intervening and/or objecting. I view my role as one in which I secure the right outcome, not mindlessly obtain convictions."). If

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indigent defenders were systematically being railroaded by incompetent lawyers, the prosecutor would be duty-bound to halt the process.

The Judge would be as well. Judges have an independent duty to the accused to "see that justice is carried out." *In re Disciplinary Proceeding Against Michels,* 150 Wn.2d 159, 168-9, 75 P.3d 950 (2003). *Id.* All courts must provide equal justice, regardless of size and situation, and short cuts in due process will not be tolerated. *In re Disciplinary Proceeding Against Hammermaster*, 139 Wn.2d 211, 985 P.2d 924 (1999).

The judge is required to raise issue if a lawyer's conduct "raises a substantial question regarding… honesty, trustworthiness, or fitness." CJC 2.15(B). And more importantly, under the State Constitution, the judge must swear to "support the Constitution of the United States and the Constitution of the State of Washington." WA Const. Art. IV, Sect. 28. To the extent that constitutional violations are "rampant," they are empowered—and required—to fix the process.[26]

Finally, ignoring the above obligations of the plaintiffs (to obey the law), the public defenders (to act competently), the prosecutors (to do justice), and the judge (to ensure due process), there are *still* be a plethora of steps that would have to occur to culminate in "harm." They would include, (1) a substitution of counsel would have to be denied, contrary to past practice and Ninth Circuit precedent[27]; (2) Sybrandy or Witt would have to refuse to withdraw and violate the RPC's[28]; (3) the malpractice would have to be prejudicial to result in actual harm for purposes of standing and the Sixth Amendment[29]; and (4) all post-trial remedies would have to fail.

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[26] A judge's duty is to be faithful to the law and maintain judicial and professional competence. *In re Disciplinary Proceeding Against Michels*, 150 Wn.2d 159, 169, 75 P.3d 950 (2003). It is ultimately the duty of the judge to make sure the guilty plea forms are correct, in order to ensure each defendant is aware of his or her rights and that these rights are protected. *Id.* at 170. "Central to our system is the belief that judges will respect and honor their office and the laws they are sworn to protect." *Id.* at 174.

[27] *See Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970), (reversible error if the court does not take the time to "conduct such necessary inquiry as might have eased [the defendant]'s dissatisfaction, distrust, and concern."); *see also United States v. D'Amore*, 56 F.3d 1202, 1204 (9th Cir. 1995) ("Absent such a compelling purpose… it is a violation of the Sixth Amendment to deny a motion to substitute counsel and an error that must be reversed, regardless of whether prejudice results.").

[28] *Ladenburg Decl.* ¶ 16-20.

[29] *States v. Cronic*, 466 U.S. 648, 658 (1984) ("the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.")

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This unlikely—and largely illegal—series of events does not constitute an "imminent harm." Plaintiffs' claims fail on that basis.

B. The Presence Of Several Adequate Remedies At Law Precludes Injunctive Relief

As discussed above, the criminal adjudication process is one lengthy remedy at law—beginning at the first step. Indeed, this is illustrated by the cases relied upon by plaintiffs. Their opening salvo quotes from *In re Michels*, but fails to account for the next few lines:

> Disregarding our most basic and important principles weakens the legal system as a whole. In light of this, we again find it necessary to reiterate that this court will not tolerate shortcuts to due process...This court has the authority to see that justice is achieved in all courts in this state. When justice fails at any level, it is our duty to remedy the situation in the most appropriate manner.

In re Michels, 150 Wn.2d at 173-4. It is the job and duty of all of the parties in court to ensure that the constitutional rights of the accused remain intact.[30]

First and foremost, it is ***undisputed*** that indigent defendants can simply request a substitution of counsel if they do not like or agree with Sybrandy or Witt. This is granted as a matter of course. Plaintiffs not only fail to contest this, they illustrate it:

> I told the judge that I didn't believe Mr. Witt could represent me because he was intoxicated, and the judge continued the hearing. Later I wrote the judge a letter saying the same thing, and the judge wrote me back and said I would get a new attorney. Glen Hoff was appointed to represent me.

Dkt. 49 (*Johnson Decl.* ¶ 5). All three of the plaintiffs secured conflict counsel as well. Dkt. 30 (*Cooley Decl.* at 134-35) (Montague); Dkt. 34 (*Cooley Decl.* at 169; 174) (Moon);

[30] This applies to errors at all phases of the criminal proceedings, including the investigation, advice, plea agreements, trial practice, and sentencing. *See, e.g., Moore v. Czerniak*, 574 F.3d 1092 (9th Cir. 2009) (guilty plea following inadequate investigation), *cert. granted*, 130 S.Ct. 1882 (2010); *Tovar Mendoza v. Hatch*, 620 F.3d 1261 (10th Cir. 2010) (failure to adequately advise defendant of sentencing consequences following guilty plea); *Bauder v. Dept. of Corrections*, 619 F.3d 1272 (11th Cir. 2010) (failure to advise a defendant of exposure to sexually violent predator proceedings); *Satterlee v. Wolfenbarger*, 453 F.3d 362 (6th Cir. 2006) (failure to advise defendant of plea offer). This is commonly done in a post-trial hearing, avoiding even the necessity of an appeal.

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Dkt. 26 (*Cooley Decl.* at 10-11) (Wilbur). This is consistent with the undisputed record. No prosecutor or judge has ever objected to a reasonable substitution. *See Cammock Decl.* ¶ 11; *Eason Decl.* ¶ 11.

It is also consistent with settled law. In *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970), a criminal defendant became embroiled in a conflict with his attorney prior to trial, and requested that the court appoint him a new one. *Id.* at 1170. The state trial court summarily denied the request. *Id.* On appeal, the Ninth Circuit held that this violated the Sixth Amendment. Id. The trial court must take the time to "conduct such necessary inquiry as might have eased [the defendant]'s dissatisfaction, distrust, and concern." *Id.*; *see also United States v. D'Amore*, 56 F.3d 1202, 1204 (9th Cir. 1995) ("Absent such a compelling purpose... it is a violation of the Sixth Amendment to deny a motion to substitute counsel and an error that must be reversed, regardless of whether prejudice results.").

There is no allegation that the local judges are violating precedent. In fact, plaintiffs and their witnesses prove that they are not. This, as a matter of law and practicality, forecloses the need for the "extraordinary relief" of an injunction. *See Munaf v. Green*, 553 U.S. 674, 689-90 (2008).

Beyond that, harm complained of can also be ameliorated by the prosecutor or judge upon request. And if the harm were prejudicial—which plaintiffs cannot establish has ever happened—they would be entitled to reversal on post-trial motions or appeal. *Strickland v. Washington*, 466 U.S. 668 (1984).

Given these ongoing, *mandatory* remedies already built into the system, this is precisely the wrong case for prospective relief. *See Northern California Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306 (1984) (a party seeking a federal injunction must demonstrate that it ***does not*** have an adequate remedy at law); Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2942 (2010) ("[T]he main prerequisite to obtaining injunctive relief is a finding that plaintiff is being threatened by some injury for which he has no adequate legal remedy.").

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C. The Record Does Not Permit A Finding On *Any* Of The Predicate Elements Of A Preliminary Injunction

"An injunction is frequently termed 'the strong arm of equity'" and "should not be lightly indulged in, but should be used sparingly and only in a clear and plain case." 42 Am.Jur.2d INJUNCTIONS § 2, at 728 (1969) (emphasis added); *see also Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (extraordinary exercise of the court's equitable powers). For the reasons that follow, plaintiffs cannot show any of the required elements.

1. Likelihood Of Success On The Merits

a. The Facts Do Not Support Plaintiffs

A preliminary injunction may be denied on the sole ground that the plaintiff has failed to raise even "serious questions" going to the merits. *See Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2009). If the Court so concludes, it need not address the other preliminary injunction factors. *See Advertise.com, Inc. v. AOL Advertising, Inc.*, 616 F.3d 974, 982 (9th Cir. 2010).

One question in this case is whether the Court will adopt plaintiffs' version of events, as opposed to the Cities. Plaintiffs have an established track record of lying—both in their day-to-day conduct and these proceedings. In painting their picture, they rely upon self-serving recitations—most of which have since been debunked—and provably inaccurate hearsay from the internet. Plaintiffs misread the Cities' public defender contract, misunderstand (non-binding) case load standards, and rely upon the AVVO website for their facts. Plaintiffs' version of events, moreover, does not square with the public defenders' track record of excellent results and the total absence of any bar discipline or ineffective assistance claims. Plaintiffs argue that, under *Gideon*, their circumstances amount to *per se*, systemic prejudice—such that litigating the effect of their attorneys' conduct is unjustified. *Id.* at 658-59.[31] This could not be more wrong. The undisputed

[31] Those situations include the failure to conduct cross-examination, *Davis v. Alaska*, 415 U.S. 308 (1974), or the accused being entirely denied appointed counsel at a critical state of his or her trial. For instance, in *Powell v. Alabama*, 287 U.S. 45 (1932), the Supreme Court held that there was no need to inquire into actual prejudice where the trial court appointed the entire bar as counsel. *But see Avery v. Alabama*, 308 U.S. 444 (1940) (counsel in capital case appointed three days before trial not denial of counsel).

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record is that nobody has ever suffered an adverse *result* due to the Cities' public defenders.

Indeed, those with first-hand—non-hearsay—knowledge heartily endorse the work of attorneys Sybrandy and Witt. They are always conversant in the facts of their cases, they *have* clearly read the materials and talked to witnesses, and try more cases than the private defense bar in the area. *See, e.g., Eason Decl.* ¶ 7. To the extent that most cases are resolved short of trial, it is more a function of jail-crowding and prosecutorial discretion than anything else.

Plaintiffs will not prevail on the facts in this case.

b. The Law Does Not Support Plaintiffs

Furthermore, even assuming *arguendo* that plaintiffs' version of the facts held water, it would not have legal import in any event. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984). Here, at most, plaintiffs allege several instances where their feelings were hurt, where they wanted meetings but did not get them, or where Sybrandy treated them somewhat abruptly. These are not systemic deprivations of the constitution; they are customer service complaints.

A finding of ineffective assistance of counsel must be supported by a determination that trial counsel made specified errors that prejudiced the defense. *United States v. Cronic*, 466 U.S. 648, 650 (1984). As a matter of law, this must be grounded in the trial court record; it may not be based upon an "inference" from "the circumstances." *Id.* It is well-established that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Id.* at 658. Public defenders, like all lawyers, are presumed competent, and thus the burden rests on the accused to demonstrate a prejudicial violation.

Plaintiffs attempt to evade this well-established standard—which turn on results, not process—because they admittedly cannot meet it. So they rely upon un-reviewed state

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court decisions and vacated extra-circuit opinions. In *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992), for example, a panel in the Eleventh Circuit initially ignored *Strickland*—on a Rule 12(b)(6) record, before *Twombly*—before vacating its opinion. *Best v. Grant County*, No. 04-2-00189-0 (Wash. Super. Ct. Oct. 14, 2005), which is also liberally quoted, is a state trial court order—never subject to review. *Hurrell-Harring v. New York*, 15 N.Y.3d 8, is the most recent case cited. There, the New York Court of Appeals endorsed a class action supported by over 60 prosecutors and the New York Bar Association. This was a political compromise, not federal precedent.[32] In short, the general rule controls; not its inapposite, non-binding exceptions.[33]

Under *Strickland*, Plaintiffs must show their public defenders' deficient performance actually prejudiced their defense; the errors must have been so serious as to deprive the defendant of a fair trial. *Strickland*, 466 U.S., at 687. This standard, the Cities would submit, is the correct one for several reasons.

First, plaintiffs' standard encourages—if not, requires—federal courts to commandeer and micromanage individual state court representations. This demeans the profession. Licensed attorneys should be permitted to determine how best to handle a representation. They are in the best position to do so—certainly, a better position that plaintiffs' attorneys and consultants. To the extent that they fall below the acceptable range of conduct, it should be for the local judge and appellate to address. Directing the decision to *a different judge*, on a hearsay-record, is both ineffective and over-reaching.[34]

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[32] Plaintiffs also suggest that "commentators" support their position. For this proposition, they rely upon an article written by ACLU attorney, Emily Chiang. http://www.law.utah.edu/faculty/faculty-profile/?id=emily-chiang (last visited October 21, 2011). Citation to colleagues in the same firm is not "commentator agreement."

[33] Of note, many other courts have come to opposite conclusions and affirmed *Strickland's* applicability. *See, e.g., Platt v. State of Indiana*, 663 N.E.2d 357, 363 (Ind. Ct. App. 1996) (dismissing the case because it "was not ripe for review because a violation of the right to counsel... will arise only after a defendant has shown he was prejudiced by an unfair trial"); *Kennedy v. Carlson*, 544 N.W.2d 1, 8 (Minn. 1996) (rejecting claim of prospective harm due to "underfunded" public defender because claims were too "speculative and hypothetical to support jurisdiction"); *Machado v. Leahy*, 17 Mass. L. Rep. 26 (Mass. Super. Cit. 2004) (disallowing class theory as too vague and raising separation of powers concerns).

[34] The Cities acknowledge that there could be times when a federal court must step in. But it should do so based upon *Strickland*, when the lower court has demonstrably failed and defendants are being tangibly harmed.

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Second, a standard divorced from the outcome is necessarily vague—particularly in a profession where there is so much reasonable discretion and such a diversity of cases. As even the Supreme Court pointed out, "[t]here are countless ways to provide effective assistance in any given case." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). This case illustrates the point. In the name of the constitution, plaintiffs would have this Court dictate where a trained. licensed attorney must stand at certain points of the proceeding. They would have this Court dictate the number of meetings—irrespective of what clients may want or need. They would have this Court dictate mandatory "office hours." All of this is without precedent, likely because of its inherent absurdity.

Third, analyzing an inadequate representation claim, untethered from effectiveness, is unworkable. By definition, there is no harm involved. Thus, the dispute turns on "subjective satisfaction," which is not a uniform standard. As Mr. Sybrandy explains:

> Because my client base is diverse, I exercise discretion in how I interact with indigent defendants. With some individuals (such as sociopathic veterans of the system), I am very firm and direct – if I am not, they will ignore my advice and pursue a self-destructive course. With others, particularly those with mental health issues, or first time defendants, I need to be gentler and overtly compassionate to understand their unique needs. When necessary, I spend a lot time meeting with my clients, and will meet with them several times when needed – and even sometimes when not needed. Other representations can be accomplished without significant face-to-face contact. Often a defendant simply wants a phone call to know what their "deal" is going to be. These are determinations I make depending on the unique facts and circumstances of each representation.

Sybrandy Decl. ¶ 22; *Strickland*, 466 U.S. at 691 ("the reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). Similarly, as discussed above, it has been *less* effective to meet with clients before review of the charges and report. Yet plaintiffs would mandate this, to the detriment of indigent defendants. This is not only unhelpful as a standard, it is harmful.

In addition to being the *only* standard applied in the federal courts, *Strickland* is the better standard. Accordingly, the question is whether plaintiffs have made the necessary

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showing of prejudicial harm. They have not. In fact, the only *attempt* to cite an "outcome" was perjury, offered by plaintiff Moon about the wrong public defender. The remainder of the complaints relate to the number of meetings and the attorneys' demeanor. These are manifestly discretionary determinations, based upon the unique facts of each case.

The fact that judgment-calls are made in diverse representations does not inure to a constitutional violation. Plaintiffs' subjective disagreements with a process—that culminated in a successful outcome—does not establish likely success on the merits.

2. Irreparable Harm

It is true that "an alleged constitutional infringement will ***often*** alone constitute irreparable harm." *Associated General Contractors v. Coalition For Economic Equity*, 950 F.2d, 1401, 1412 (9th Cir. 1991) (emphasis added). But this is not categorical, likely for circumstances like these. Two observations are worth making.

First, it is not even clear that plaintiffs have alleged an actual constitutional violation. That is their label, to be sure. But, in substance, the accusation is more akin to violations of WSBA standards.[35] These are not interchangeable with the Sixth Amendment. Though such promulgations may be "helpful guides" in determining professional reasonableness, they are not conclusive. This is precisely what the Supreme Court emphasized:

> When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts.

Nix v. Whiteside, 475 U.S. 157, 165 (1986).

This is particularly true when, as here, the standards in question are not yet adopted. For example, "caseload limits" are still being considered by the Washington Supreme Court—and recently deferred to 2012 for further comment and analysis. Two years ago, in

[35] This is factually disputed, of course.

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Bobby v. Van Hook, 130 S. Ct. 13 (2009), Supreme Court reversed the Sixth Circuit when it found ineffective assistance based upon standards that post-dated the representation. In doing so, the Supreme Court cautioned against over-reliance on such promulgations:

> While States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.

Id. at 17 (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)). *See also Nix*, 475 U.S. at 165 ("a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards"); *Strickland*, 466 U.S. 668 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel... Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.").[36]

Thus, violations of (future) promulgations do not constitute a constitutional violation. It therefore stands to reason that the "presumed" harm of such a violation does not necessarily exist here.

Second, as discussed at length above, we *know* that there is no harm. While harm is presumed when the harm is constitutional, it is not conclusive. *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 484-85 (1st Cir. 2009) ("it cannot be said that violations of plaintiffs' rights to due process and equal protection automatically result in irreparable harm"). As here, plaintiffs point to no harm that occurred in the past—apart from subjective dissatisfaction with the process. Nor can they point to harm that will come about

[36] The theory advanced by plaintiff here reaches much further than *Van Hook* ever did. There, the standards applied by the Sixth Circuit were actually promulgated at some point in time. Here, by contrast, case load limits and practitioner percentages are still hotly debated in the Washington Supreme Court committees. And there is *no* promulgated standard calling for a "soft demeanor" or "standing next to one's client" at given times. While these may be—according to plaintiffs—"best practices," that is not the standard. All organizations can theoretically be improved. Corporations can become more efficient; schools more effective; and coffee shops friendlier. Public defense is no different—it can always implement better training or hire more seasoned attorneys. But that is simply not the constitutional standard: "the Sixth Amendment does not guarantee... any criminal defendant the assistance of Perry Mason." *Miranda v. Clark County*, 279 F.3d 1102 (9th Cir. 2002).

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in the future. As a matter of law and practical reality, the absence of an injunction will not harm any of the plaintiffs. Moon and Montague are not facing charges at all. Wilbur has gone AWOL—and even if found, has secured a substitute public defender (and is already protected by the various remedies built into the system).[37]

A finding of "irreparable harm" cannot be made.

3. The Equities

Balances of equities are pertinent in assessing the propriety of preliminary injunctive relief. *Romero-Barcelo*, 456 U.S., at 312. "[E]quity aids the vigilant, not those who slumber on their rights, or *Vigilantibus non dormintibus, aequitas subvenit*..." John Norton Pomeroy, I *A Treatise on Equity Jurisprudence*, § 364 (2d ed. 1899).

a. Honesty And Unclean Hands

The equities, here, do not favor plaintiffs. All of the plaintiffs repeatedly went fugitive in lieu of adjudication. *See* Dkt. No.'s 25, 27, 32. They lied, when they should have told the truth—in both their ordinary dealings and their dealings with this Court. They stonewalled and fought discovery every step of the way—when a truly injured party would want to tell their story. Plaintiffs even purloined the confidential communications of other jail inmates to bolster their case. *See* Dkt. No.'s 87-90.

The doctrine of "unclean hands" gives courts discretion to refuse aid to claimants who do not come with "clean hands." *See Precision Instrument Mfg. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945). In effect, it "closes the doors of a court of equity to one tainted with the inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir. 1985). This merely requires that those seeking the court's protection act "fairly and without fraud or deceit as to the

[37] Unlike the criminal defendants in *Lavallee v. Justices In Hampden Superior Court*, 812 N.E.2d 895, 442 Mass. 228 , 229-30 (2004), cited by plaintiffs, they are *not* being held in lieu of bail or under preventive detention without counsel. Plaintiffs' cases in the Cities' courts are over and thus they cannot avail themselves to prospective relief. *See United States v. Gray*, 565 F.2d 881, 887 (5th Cir. 1978) (court rejecting speculating claims in ineffective assistance of counsel case and refusing to accept challenge based on "what might have been if.").

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controversy in issue." *Id.* (citation omitted); *see also Adler v. Federal Republic of Nigeria*, 219 F.3d 869, 876-77 (9th Cir. 2000).

The conclusion that plaintiffs played fairly and by the rules, with respect to "the controversy at issue," is not tenable. They repeatedly disregarded the jurisdiction of the very court they now propose to "fix." Relief should be disallowed now based upon unclean hands and the fugitive disentitlement doctrine.[38] At a minimum, plaintiffs' conduct belies a finding of equitable favor.

b. Judicial Estoppel

Plaintiffs also attempt to "take back" what they certified under oath to obtain a beneficial plea. For example, in pleading guilty, Montague swore:

> • I understand and acknowledge I have the following rights…to have a lawyer represent me at all hearing [and] to have a lawyer appointed at public expense if I cannot afford one….
>
> • I also acknowledge and waive my right to: (a) testify; (b) a speedy trial; (c) call witnesses; (d) present evidence or a defense: (e) a jury…..

She told the judge she "sincerely believed" that she was guilty of the crime of DUI. She acknowledged that if she did not meet the strict terms of the deferred prosecution, she would be found guilty without a trial. The court was induced to accept her plea. Now she would attack it and distance herself from the prior sworn testimony that she spoke to counsel and knew her rights.

This doublespeak is precisely what judicial estoppel prevents. Judicial estoppel disallows the use of inconsistent assertions that would otherwise permit a litigant to obtain an "unfair advantage," at the expense of the judiciary. *Arizona v. Shamrock Foods Co.*, 729

[38] For over 100 years, the Supreme Court has spoken to this very issue—in the "fugitive from justice doctrine"—when parties demand court resources, while simultaneously ignoring court authority. *See Smith v. United States*, 94 U.S. 97, 97 (1876) ("If we affirm the judgment, [the defendant] is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case."); *Allen v. Georgia*, 166 U.S. 138, 141 (1897) ("[i]t is much more becoming to its dignity that the court should prescribe the conditions upon which an escaped convict should be permitted to appear and prosecute his writ, than that the latter should dictate the terms upon which he will consent to surrender himself to its custody"); *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970) (escape "disentitles the defendant to call upon the resources of the Court for determination of his claims").

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F.2d 1208, 1215 (9th Cir.1984) (quoting *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3rd Cir.1953)). In essence it stops parties from playing "fast and loose with the courts" by asserting inconsistent positions. *See e.g., id.*; *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598-99 (6th Cir.1982). In determining whether to apply judicial estoppel, a court considers:

> (1) whether the party's later position is inconsistent with its initial position;
>
> (2) whether the party successfully persuaded the court to accept its earlier position; and
>
> (3) whether the party would derive an unfair advantage or impose an unfair detriment on opposing party if not estopped

Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 782-83 (9th Cir. 2001) (citing *New Hampshire v. Maine*, 532 U.S. 742 (2001)).

It is difficult to understand how a party that swore one thing, only to disavow it when convenient, can make an equitable showing of any kind. The balance tips in favor of the Cities—which have been consistently on the receiving end of this conduct.

4. Public Interest

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Romero-Barcelo*, 456 U.S. at 312. The public interest analysis for the issuance of a preliminary injunction asks the Court to consider whether there exists some critical public interest that would be injured by the grant of preliminary relief. *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1114-15 (9th Cir. 2010) (internal quotations omitted). Here, there is.

The public does not benefit from a one-size-fits-all model of representation, which is precisely what plaintiffs are requesting. *See Strickland*, 466 U.S., at 689 ("There are countless ways to provide effective assistance in any given case."). Nor does the public benefit from a burdensome mandatory injunction, predicated upon unlikely future events.

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See, e.g., *O'Shea*, 414 U.S., at 500 (rejecting challenge to state criminal justice system "aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials").

Specific government guidelines for representation are not appropriate. *Strickland*, 466 U.S., at 688; *Cammock Decl.* ¶ 13. The proper measure of attorney performance is simply reasonableness. *Id.* While plaintiffs have their opinions, they do not support an injunction mandating one version of a "good" representation. *Id.* at 688 ("These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance."). Indeed, the mechanical rules suggested in plaintiffs' proposed order would necessarily interfere with the constitutionally protected independence of counsel and restrict the independence of the public defender in decision-making. *Id.*, at 688-89; *Ladenburg Decl.* ¶ 10-15.

Nor would it be in the public's interest for this Court to undermine the independence of the Cities' judges. They should be afforded independent authority of their courtrooms, subject to appellate guidance.

VI. MOTION TO STRIKE

For the reasons identified in its prior motions, the Cities respectfully move to strike the following material:

- All confidential communications improperly obtained from Skagit County, and used by plaintiffs. *See* Dkt. No.'s 87-90.
- The declaration of plaintiff Wilbur, who failed to comply with discovery—thereby insulating his testimony from any meaningful scrutiny. *See* Dkt. No.'s 78-79.
- All of the consultant opinions that relied upon either of the above categories of evidence, namely, Mr. Strait, Mr. Boerner, and Ms. Jackson.
- The categories of hearsay evidence cited in the City's reply brief in support of summary judgment. *See* Dkt. 65 (Reply at 4-7).

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VII. CONCLUSION

Gideon's promise is fulfilled in Mount Vernon and Burlington by a dedicated group of public defenders, administrators, judges, and prosecutors. Plaintiffs have not approached their heavy burden, and accordingly, the Cities respectfully request that this Court enter their proposed order denying this motion—a copy of which accompanies this memorandum.

DATED this 28th day of November, 2011.

KEATING, BUCKLIN & McCORMACK, INC., P.S.

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DECLARATION OF SERVICE

The undersigned, hereby declares under penalty of perjury of the laws of the State of Washington that she is of legal age and not a party to this action; that on the 28th day of November, 2011, she caused a true and accurate copy of the foregoing *Defendants Opposition to Motion for Preliminary Injunction* and *Declarations of Cammock, Eason, Ladenburg, Rosenberg, Sybrandy* to be served on the following individuals listed below via the Federal ECF system:

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DATED this 28th day of November, 2011, at Seattle, Washington.

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