THE 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 MONTAGUE, 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. C11-01100 RSL

PLAINTIFFS' REPLY RE: CROSS-MOTION FOR PRELIMINARY INJUNCTION

Note for Consideration: December 2, 2011

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Plaintiffs have shown that indigent individuals accused of crimes in the cities of Mount Vernon and Burlington ("the Cities") are being denied their Sixth Amendment right to counsel because of numerous flagrant deficiencies in the Cities' indigent defense system and that a preliminary injunction is necessary to prevent serious irreparable harm to the class members' fundamental right to counsel. At the end of the day, the injunctive relief Plaintiffs seek is only what is already required by the United States and Washington Constitutions and the Cities' own Public Defender Contract. Therefore, this motion should be granted.

II. FACTUAL BASIS FOR INJUNCTIVE RELIEF

The Cities fail to provide any evidence to contradict the following.

A. The Named Plaintiffs Had Standing at the Time the Class Action Complaint Was Filed and Continue to Have Matters Pending in the Municipal Courts of Mount Vernon and Burlington

The Cities maintain Plaintiffs are no longer involved in the public defense system of Mount Vernon and Burlington, stating "Moon and Montague are not charged at all; and Wilbur remains a fugitive." Dkt. # 115 at 2:3-4. The Cities' assertion is incorrect.

As Plaintiffs noted in a brief filed and served on the Cities more than 10 days ago, Plaintiff Wilbur is "in the custody of the Skagit County Jail and will remain there for a yet-to-be-determined time period." Dkt. # 93 at 5:13-15. Mr. Wilbur is being held on five separate cases pending in the Burlington Municipal Court, all of which are in pre-trial status. Decl. of J. Camille Fisher in Support of Plaintiffs' Reply Re: Cross-Motion for Preliminary Injunction ("Fisher Decl."), Ex. 6. His next court date is December 7, 2011. *Id.*

Plaintiff Moon likewise has at two cases pending in the Mount Vernon Municipal Court, both of which are in pretrial status. Fisher Decl., Ex. 7. He is also facing compliance review in two other Mount Vernon cases. *Id.*, Ex. 8. A hearing on all four cases is scheduled for December 27, 2011. *Id.*, Ex. 7.

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Finally, Plaintiff Montague is only in the second of five years of probation on charges filed in the Burlington Municipal Court. Fisher Decl., Ex. 9. Until May 24, 2015, Ms. Montague remains within the municipal court's jurisdiction, and the court has the power "summarily to revoke probation and impose sentence [a fine of $5,000 and jail term of 365 days] . . . or to take any action permitted by law, upon the failure of [Ms. Montague] to perform the terms or meet the conditions of [the court's] order." *Id*. Thus, all three Plaintiffs continue to have pending matters in the municipal courts of Mount Vernon and Burlington.

B. The Facts Demonstrate a Pattern of Systemic Constitutional Deprivations and Likelihood of Success on the Merits

Excessive Caseloads. It is undisputed that the Cities jointly contract with only two attorneys (Sybrandy and Witt) to provide public defense services to all indigent defendants charged with misdemeanors in Mount Vernon and Burlington. Dkt. # 57, Ex. 1. The Cities pay these attorneys a flat fee for their services, covering all legal, interpretation, and investigative services plus expert services not approved by a court. Yet, despite significant increases in caseloads, the compensation paid to Sybrandy and Witt has declined over the years. *Id*., Exs. 6 & 7. These factors combine to leave the public defenders too little time to assist their clients.

It is also undisputed that Sybrandy and Witt act as the Public Defender on a part-time basis only. Dkt. # 57, Exs. 2, 15, 16; *see also* Fisher Decl., Ex. 10. The Cities do not challenge the accuracy of this allegation, and in fact, have now presented two declarations from Sybrandy. He, however, is silent on this issue despite being in the best position to set the record straight.

Under applicable WSBA standards, an attorney who works as a public defender on a part-time basis must proportionately limit his public defense caseload by the percentage of time that he spends on private cases, but the Cities do not dispute that they fail to impose such a part-time limitation on caseloads in their pubic defense contract, which violates RCW 10.101.030 and relevant municipal codes. *See generally* Dkt. # 57, Exs. 1, 19; Mount Vernon Muni. Code 2.62.030.

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The Cities fail to identify the number of indigent defense cases that the Public Defender has handled on a yearly basis. Despite the testimony from the Cities' prosecutors, the Mount Vernon contract manager, and Sybrandy, not one of these witnesses provides a specific caseload number. Instead, the Cities claim Plaintiffs are not properly counting the cases. This is not true.

The WSBA standards that are currently in place (and have been in place since 2007) define "a case" as "the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide representation." Dkt. # 57, Ex. 13 at 5. The yearly caseload counts set forth in Plaintiffs' motion—a combined total of 2,342 cases in 2009 and 2,128 cases in 2010—are based on the WSBA definition. *See id*., Exs. 11, 12.A, 12.B, 17. Plaintiffs counted the case numbers (unique filings) set forth in Sybrandy and Witt's own closed case reports to the Cities. *See id*. Remarkably, the number of cases that Plaintiffs counted for Sybrandy in 2010 (963) is substantially less than what Sybrandy himself counted (1,115) in his own monthly "summary" of "cases resolved/closed."[1]

The Cities' own current contract knowingly permits each public defense attorney to handle as many as 1,200 misdemeanor cases per year. *See* Dkt. # 57, Ex. 1 at 195, 197. Though the contract provides that each attorney "shall not exceed 400 caseload credits per year," the Cities allocate as little as "1/3" of a "case credit" to many misdemeanors. *Id*.

The Cities take issue with Plaintiffs' citation to a website in support of the part-time status of the Public Defender. But the accuracy of the website is irrelevant because Plaintiffs have uncovered documents drafted by Sybrandy and Witt that confirm they spend the majority of their time on private matters. In November 2008, for example, Sybrandy and Witt submitted a bid proposal including Sybrandy's resume in which he informed the Cities that he has an ongoing and extensive private practice. *See* Dkt. # 57, Ex. 2 at 52. Sybrandy listed his duties as:

[1] *See* Dkt. # 57, Ex. 17 at 381, 392, 398, 403, 410, 416, 423, 427, 433, 438, 445, 450, 457, 463, 469, 474, 478, 483, 487, 492, 494, 498. Like Sybrandy, Plaintiffs did not include matters that disappear due to a failure of the defendant to appear. *Id*., Exs. 11, 12.A, 12.B, 17.

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"Managing heavy domestic and criminal trial and motions practice ….." *Id*. In November 2009, Witt told his malpractice carrier that he spends only 40 percent of his time on "Criminal Law" (with no breakdown of private versus public defense work). Fisher Decl., Ex. 10.

Policy of Refusing to Engage in Confidential Client Communication, Known to the Cities. It is undisputed that the Public Defender fails to meet with indigent defendants outside of court.[2] The Cities and Public Defender do not deny that the Public Defender's office personnel have specifically stated the attorneys do not meet in private with indigent defendants. Dkt. # 50 ¶ 3; Dkt. # 49 ¶ 3; Dkt. # 57, Ex. 18.B.

All of the indigent defendant witnesses testify that interactions with the Public Defender are reduced to brief encounters in crowded courtrooms. *See, e.g.*, Dkt. # 57, Ex. 18.B ("The amount of time Mr. Sybrandy spent defending me, if you can call it that . . . was less than 3 minutes total on my case."); Dkt. # 57, Ex. 18.G (assigned attorney "spent no more than 5 minutes" with defendant before she made decision); Dkt. #48 ¶¶ 17-18 ("Mr. Sybrandy would not schedule an appointment to meet with me outside of the courtroom," and "when I saw him in court, I only got a minute or two of his attention"). The Cities do not rebut Plaintiffs' evidence. Established guidelines on public defense services require that public defenders make themselves available for confidential meetings with clients. Dkt. # 57, Ex. 27 at 3. While Sybrandy maintains his clients "almost never" want such meetings, the record before the Court demonstrates this is untrue. Dkt. # 120 ¶ 10(a); Dkt. # 57, Exs. 18, 22, 23; Dkt. # 51 ¶¶ 11-18, 28; Dkt. # 50 ¶ 3.

It is undisputed that Letty Alvarez, the director of the Skagit County Office of Assigned Counsel, informed city officials, municipal judges, and commissioners of complaints about the Public Defender's failure to communicate with and represent indigent defendants and that she

[2] Dkt. # 48 ¶¶ 16, 17, 20, 21, 24, 30; Fisher Decl., Ex. 2 at 234:7-18, 235:11-13, 237:3-24, 240:2-241:3; Dkt. # 46 ¶¶ 7, 10, 11, 14, 18, 19, 22; Dkt. # 47 ¶¶ 3, 11; Fisher Decl., Ex. 1 at 80:10-14; Dkt. # 51 ¶¶ 9-18, 28; Dkt. # 50 ¶ 3; Dkt. # 49 ¶ 3; Fisher Decl., Ex. 3 at 50:20-52:19, 78:1-7; Dkt. # 57, Exs. 18.A-18.C & 18.I.

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did so on numerous occasions. Fisher Decl., Ex. 4 at 17:21 – 18:12, 55:6-24, 64:6-12, 135:1 – 136:23, 152:16 – 154:22, 155:23 – 157:11. Ms. Alvarez regularly passed those complaints on to everyone she could tell, including Eric Stendal, the public defense contract manager for Mount Vernon. *Id*. Indeed, Ms. Alvarez regularly sent clients directly to Mr. Stendal's office so that they could tell him about their complaints in person. *Id*. at 89:12-22, 138:3-14. Nothing was done to address the issues raised by Ms. Alvarez. *Id*. at 156:23 – 157:11.

It is undisputed that the Public Defender rarely visits inmates at the Skagit County Jail—only five occasions in 2009 and six in 2010. Dkt. # 57, Ex. 30. In December 2008, Sybrandy told the contract manager for Burlington that "[i]t would be extraordinary for us to be directed to initiate contact with [indigent] defendants," including those in jail, whom he said should be contacted "on an as needed basis" only. *Id*., Ex. 37 at 750. There is extensive evidence of the Public Defenders' refusal to meet with or respond to incarcerated clients.[3] [4]

Policy and Practice of Failing to Providing Actual Assistance of Counsel. It is undisputed that the Public Defender has not conducted any investigations or hired any experts during the past two years. Dkt. # 57, Exs. 5, 15, 33, 34; Dkt. # 51 ¶ 14, Dkt. # 47 ¶¶ 6, 7, 11; Dkt. # 46 ¶ 23. Moreover, witnesses testify that the Public Defender does not even have a meaningful discussion of the facts with their clients.[5] It is also undisputed that the time records the attorneys submitted to the Cities show Sybrandy and Witt routinely report spending as little as 30 minutes per case. Dkt. # 57, Exs. 12, 17. "Adequate consultation between attorney and client is an essential element of competent representation of a criminal defendant." *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983). In this case, there is overwhelming evidence

[3] Dkt. # 48 ¶¶ 11-13, 33; Fisher Decl., Ex. 2 at 235:2-4; Dkt. # 46 ¶¶ 7, 16, 21; Dkt. # 47 ¶¶ 3, 10; Dkt. # 49 ¶ 3; Fisher Decl., Ex. 3 at 70:5-12; 71:14-18; Dkt. # 57, Exs. 23.B & 24. This fact is uncontroverted. Dkt. # 57, Ex. 29.

[4] For the entire year of 2010, Sybrandy and Witt made only six visits to the local jail, meeting with a total of seven clients. Dkt. # 57, Ex. 30. For 2009, Sybrandy and Witt made only five visits to the jail and met with eight clients. *Id*.

[5] Dkt. # 47 ¶¶ 6, 7, 11; Dkt. # 46 ¶ 23; Dkt. # 48 ¶ 35; Fisher Decl., Ex. 2 at 239:7-240:1; Dkt. # 51 ¶ 14; Dkt. # 50 ¶ 9.

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that the Public Defender not only fails to initiate meetings with indigent defendants, but repeatedly and blatantly ignores messages and countless attempts at contact by those defendants and their family members.[6] Witnesses testify that they are not able to obtain advice or counsel from the public defenders.[7]

It is the client who should be able to make an informed decision regarding a plan of action, particularly as to critical decisions such as whether to plead guilty. *See Maynor v. Green*, 547 F. Supp. 264, 267 (S.D. Ga. 1982); *see also* Dkt. # 55 ¶ 17; Dkt. # 54 ¶ 19. Here, instead, the Public Defender is telling indigent defendants what to do, and in many cases this command is to plead guilty.[8]

In addition to having a well-known and proven practice of not meeting with clients outside of court, it is undisputed that Sybrandy and Witt regularly fail to advocate on behalf of or even stand next to indigent defendants who are appearing before and speaking to the judge, thereby depriving the defendants of the "assistance" of counsel during their court hearings. *See* Dkt. # 51 ¶¶ 19, 24-26; Dkt. #48 ¶¶ 36-38; Fisher Decl., Ex. 2 at 163:6-12; Dkt. # 49 ¶¶ 8-10; Fisher Decl., Ex. 3 at 64:8-17; Dkt. # 50 ¶¶ 10-11; Dkt. # 52 ¶ 7. Jaretta Osborne testified that the Public Defender failed to stand next to or advocate on behalf of a defendant who was in particular need of attorney assistance—her developmentally disabled son—each time he appeared before the judge. Dkt. # 51 ¶¶ 19, 24-26.

The Cities' Failure to Monitor or Address Deficiencies in Their Public Defense System. It is undisputed that the Cities do not supervise, monitor, or evaluate the Public Defender. *See* Dkt. # 45 at 14-16. This is a violation of RCW 10.101.030 and municipal codes. *See id*. It is also undisputed that despite numerous complaints, the Cities voted unanimously in

[6] Dkt. # 46 ¶¶ 7, 11, 13, 18, 19, 21; Dkt. # 47 ¶¶ 3, 10, 11; Dkt. # 48 ¶¶ 11, 12, 13, 16, 17, 24, 33; Dkt. # 51 ¶¶ 11, 13, 16, 18; Dkt. # 49 ¶¶ 3, 6.

[7] *See, e.g.*, Dkt. # 48 ¶ 18; Dkt. # 47 ¶¶ 8-9; Fisher Decl., Ex. 1 at 30:3-25; Dkt. # 49 ¶ 9; Fisher Decl., Ex. 3 at 71:14-72:10, 74:1-16; Dkt. # 51 ¶ 23; Dkt. # 57, Ex. 18.H.

[8] Dkt. # 46 ¶ 9; Dkt. # 47 ¶ 5; Fisher Decl., Ex. 1 at 29:11-13; Dkt. # 50 ¶ 8; Dkt. # 57, Exs. 18.A, 18.F, 18.I.

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December 2010 to maintain the contract with Sybrandy and Witt. Dkt. # 57, Exs. 1, 38. The Cities do not dispute being legally obligated to supervise, monitor, and evaluate the Public Defender. RCW 10.101.030; *see also* Mount Vernon Muni. Code 2.62.080; Dkt. # 57, Ex. 19. There is no dispute that the Cities' own contract with the Public Defender required numerous right to counsel obligations to be met, but the Cities had a policy and practice of knowing the obligations were not being met and failed to take any action. *See* Dkt. # 57, Ex. 1 § 2C, 2F, 2G, 4A.1, 4B.1, 4F.1, 4F.4, 5A.4. Though they have included these provisions in their contract with the Public Defender, the Cities are fully aware that the Public Defender fails to comply with them. Dkt. # 57, Exs. 11, 12, 17, 18, 23, 29, 31, 39; *see also* Section II.C, *supra*. In fact, the Public Defender explicitly told the Cities that in writing. Dkt. # 57, Ex. 37.

C. Undisputed Expert Opinions That Systemic Constitutional Violations Are Occurring

Plaintiffs' expert witnesses uniformly conclude that the right to counsel under the United States and Washington State Constitutions is being violated by the Cities' systemic failures, and none of the Cities' declarations refute that with any evidence. Boerner Decl. ¶¶ 16-17; Strait Decl. ¶¶19-25, 27; Jackson Decl. ¶¶ 7-17. In particular, Sybrandy has refused to produce any documents confirming whether his assertions are true, thus failing to refute Plaintiffs' experts.

D. The Cities' Misrepresentations Are Inconsequential to Granting Injunctive Relief

1. There Are No Adequate Remedies (Outside of This Lawsuit) for the Cities' Systemic Deprivations of the Constitutional Right to Counsel

The Cities claim that indigent defendants have three ways to adequately remedy deprivations of the right to counsel. The first is to have conflict counsel appointed; the second is to hope the prosecutor will intervene; and the third is to hope that the judge will intervene. The record demonstrates that none of these purported methods are practical or effective.

As noted above, the Public Defender handled 2,342 cases in 2009 and 2,128 cases in 2010. *See* Dkt. # 57, Exs. 11, 12.A, 12.B, 17. Under the Cities' contract, there is only one

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conflict attorney (Glen Hoff), and he cannot step in to provide representation to as many as 2,000 or more indigent defendants per year. Dkt. # 57, Ex. 1. Furthermore, the Cities' own records show that the appointment of conflict counsel is a rarity. Fisher Decl., Ex. 11. In 2010, the Cities paid a total of $797.50 to Mr. Hoff for his conflict work, which (at $55/hour) equals less than 15 hours of work. *See id*. In 2009, the total amount was only $82.50 or 1.5 hours of work. *See id*. Between 2002 and 2008, it appears that conflict counsel was not appointed in any matter. *See id*. This is not surprising, given that indigent defendants are not likely to know that they have such a right or how to pursue it. *See, e.g.*, Fisher Decl., Ex. 2 at 92:25 – 94:6. The few indigent defendants who tried to obtain new counsel faced obstacles in doing so; Mr. Moon states that his girlfriend "went through the same exact thing with Sybrandy and the judge wouldn't fire him . . . wouldn't do it." *Id*., Ex. 1 at 102:8 – 103:6.

The Cities fail to note that the Plaintiffs did not obtain substitute counsel until after a class action was filed. At that point, Plaintiffs had no choice but to obtain conflict counsel in light of the allegations being made against their public defenders.

As for the prosecutors and judges, the Constitution does not allow them to provide legal advice and advocate on behalf of indigent defendants. At his deposition, experienced Skagit County attorney Roy Howson explained why the right to representation is so important for indigent defendants, including the right to representation at hearings:

> [Indigent defendants] need very close representation. They're often frightened. They don't know what . . . they're doing or what's going to happen to them. And what they are looking for probably more than anything else in the world is that representative, the person who is going to stand between them and those who are trying to deprive them of their liberty . . . .

Fisher Decl., Ex. 5 at 14:21 – 15:5, 23:3-19. Mr. Howson also explained the lack of representation he has seen and continues to see on a regular basis with Sybrandy and Witt, including as recently as two weeks ago:

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> What I saw as a problem is that [representation] does not seem to have been occurring. So it's not a matter of standing up. It was a matter that at a time which appeared to me that defendants were in extreme . . . circumstances, before a court perhaps for the first time, very little ability to understand what was going on, there was no lawyer standing with them, speaking for them, advising them of how to do things, letting them know what's going on and what's likely to happen. And it was obvious and I believe is obvious to anybody to this day who walks into the municipal court and sees what's happening. I did not believe that was appropriate, and I still do not believe it's appropriate.

Fisher Decl., Ex. 5 at 15:5-17, 37:23 – 38:25, 39:4-22.

2. The Named Plaintiffs Have Testified Truthfully in This Litigation

The Cities accusations that Plaintiffs Moon and Montague are not being truthful in their declarations are false. Mr. Moon's declaration describes certain interactions he had with Witt while Witt was representing him. Dkt. # 47 ¶¶ 2-9. At his deposition, Mr. Moon admitted he was incorrect with respect to the specific charge on which Witt represented him at one point (Moon thought it was a DUI but it was a different charge). Fisher Decl., Ex. 1 at 44:21 – 45:7. Contrary to what the Cities assert, however, Mr. Moon adamantly maintained that everything else he said about Witt was true. *Id*. Notably, Witt has represented Mr. Moon numerous times over the years, including at the time the DUI charge was resolved, and Witt has represented Mr. Moon on related charges, including an ignition interlock violation. *See generally* Dkt. # 47; *see also* Dkt. # 28 at 43, 50; Dkt. # 29 at 75. The record is clear that Mr. Moon inadvertently cited the incorrect charge but otherwise correctly and consistently recalled all of the pertinent information regarding Witt.

In the case of Ms. Montague, one of her declarations stated as follows: "I recently secured a job for the first time since I was incarcerated. I work on a part-time basis, and my income is limited." Dkt. # 63 ¶ 5. At her deposition, Ms. Montague explained that at the time she signed her declaration, she had been offered and had accepted a secretarial position with a propane company and was expecting to start working any day. Fisher Decl., Ex. 2 at 16:19 –

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17:10, 18:3-13, 19:1 – 20:18. Unfortunately, though, the job "fell through" shortly thereafter. *Id*. at 16:23. Ms. Montague also stated that because she is without work, she has "no income." *Id*. at 20:19 – 21:5. This testimony is consistent with Ms. Montague's declaration.

III. LEGAL BASIS FOR INJUNCTIVE RELIEF[9]

A. Plaintiffs Have Standing to Pursue Their Constitutional Claims

Contrary to the Cities' assertions, standing is determined as of the time the complaint is filed and does not need to be maintained throughout all stages of the litigation. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1171 (9th Cir. 2002); *see also Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957) ("jurisdiction is tested by the facts as they existed when the action [was] brought" and "that after vesting, it cannot be ousted by subsequent events"); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.4 (1992) (noting that when the *Friends of the Earth* Court concluded that plaintiffs had standing to seek injunctive relief, it applied its "longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint was filed"); *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167, 184 (2000) (In holding that plaintiffs had standing, the Court stated "[h]ere, in contrast [to *Lyons*], it is undisputed that [the] unlawful conduct … was occurring at the time the complaint was filed.").[10]

When they commenced this proposed class action on June 10, 2011, Plaintiffs demonstrated all necessary standing requirements. *See* Dkt. # 45 43-44. They alleged they had suffered an injury in fact by appearing at a critical stage of the prosecution without

[9] In Dkt. #45 at 48-51, Plaintiffs have already refuted arguments that injunctive relief is inappropriate for constitutional violations, that judicial estoppel precludes Plaintiffs' claims, that equitable estoppel precludes Plaintiffs' claims, and that the fugitive from justice doctrine precludes Plaintiffs' claims.

[10] In addition to the Supreme Court, numerous circuit courts agree that standing is determined at the commencement of the litigation. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 50-52 (1991); *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000); *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 458 (5th Cir. 2005); *Focus on Family v. Pinellas Suncoast Transit Authority*, 344 F.3d 1263, 1275 (11th Cir. 2003); *Cleveland Branch Nat'l Assoc. for the Advancement of Colored People v. City of Parma, Ohio*, 263 F.3d 513, 524 (6th Cir. 2001); *Becker v. Fed. Election Comm'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000); *Park v. Forest Serv. of the United States*, 205 F.3d 1034, 1037 (8th Cir. 2000); *Perry v. Village of Arlington Heights*, 186 F.3d 826, 830 (7th Cir. 1999); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991).

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representation, even though the Cities' public defense attorneys had been appointed to represent them at the time. *See e.g.*, Dkt. # 48 ¶¶ 11–13, 20; Dkt. # 46 ¶¶ 7, 16–19, 21; Dkt. # 47 ¶¶ 3, 6–7, 10. Plaintiffs showed that their injury was causally connected to the Cities' failure to adequately structure and supervise their indigent defense system. Plaintiffs asserted that they faced a real and immediate threat—namely, that they would continue to be prosecuted without the assistance of counsel.[11] And finally, they illustrated that their injury would be redressed by a decision in their favor. Plaintiffs, therefore, have standing to pursue injunctive relief. *Chapman v. Pier 1 Imports*, 631 F.3d 939, 946 (9th Cir. 2011) (en banc).

The Cities further, but again incorrectly, contend that *Lujan* stands for the proposition that standing must exist at all stages of the litigation. *See* Dkt. # 115, at 17. In *Lujan*, the Supreme Court stated that each element of standing must be supported "with the manner and degree of evidence required at the successive stages of the litigation." 504 U.S. at 561. What this means is that Plaintiffs are required to provide evidence satisfying the burden of proof for standing (i.e., standing existed at the commencement of the case) at each procedural stage of the case. Plaintiffs must show that they had standing when the complaint was filed and be prepared to prove this at every stage of the litigation, but it does not require them to prove that they have standing, separate and apart from when the complaint was filed, at every stage of this litigation.

The Cities fail to address *County of Riverside v. McLaughlin*, 500 U.S. 44, 50-52 (1991), wherein the Court examined a case involving a criminal defendant's right to a probable cause determination within 36 hours of arrest. Riverside County argued there was no standing because by the time plaintiffs' complaint was heard, it was "too late for them to receive a prompt hearing and, under *Lyons*, they cannot show that they are likely to be subjected again to the

[11] The Cities themselves admit that Plaintiffs and those they represent are often repeat offenders who are continually subjected to representation by Sybrandy and Witt. *See* Declaration of Craig Cammock ¶ 7 ("As a result, a large percentage of criminal cases are with person who have been Mr. Witt's or Mr. Sybrandy's clients in the past, and with witnesses whom they have known or experienced."); Declaration of Richard Sybrandy ¶ 4 ("A large percentage of my criminal cases are with persons who have been my clients in the past, and with witnesses whom I know or have had prior experience with.").

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unconstitutional conduct." *Id*. Rejecting this argument, the Court held that the plaintiffs had standing because at the time the plaintiffs' complaint was filed the plaintiffs were being held in custody without having received a probable cause determination. *Id*. *Lyons* was "easily distinguished" because in *Lyons* the "constitutionally objectionable practice ceased altogether before the Plaintiff filed his complaint." *Id*. (emphasis added). Further, even though the named plaintiffs' claims were rendered moot when they eventually received a probable cause determination, "by obtaining a class certification, plaintiffs preserved the merits of the controversy for [the Court's] review." *Id*.

The Cities also attempt to confuse the issue by asserting that Plaintiffs lack standing because (1) they do not have pending criminal charges within their jurisdictions; and (2) they are not currently represented by Sybrandy and Witt, having obtained substitute indigent defense counsel. As noted above, the Cities are wrong to assert that Plaintiffs have no pending criminal charges,[12] and any post-filing developments go to the question of whether Plaintiffs' claims are moot. *See Friends of the Earth*, 528 U.S. at 190. Because Plaintiffs had charges pending in Mount Vernon and Burlington when the complaint was filed, and did not have substitute counsel at that time, they satisfy this standing requirement. *See Sperling*, 354 U.S. at 93 n.1; *Lujan*, 504 U.S. at 570 n.4; *Friends of the Earth*, 528 U.S. at 184 .

B. Plaintiffs Have Standing to Seek a Preliminary Injunction

The Cities once again erroneously attempt to analogize Plaintiffs' case with *Los Angeles v. Lyons*, 461 U.S. 95 (1981), and *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). Plaintiffs' ongoing involvement with the Cities' municipal courts, however, distinguishes their situation from both of these cases. The plaintiff in *Lyons* sought a permanent injunction against the use of chokeholds by Los Angeles Police officers, but he had alleged only an isolated past incident (an illegal chokehold that occurred before the suit was filed). 461 U.S. at 105.

[12] *See* Section II.A, *supra*.

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Similarly, in *O'Shea*, there was no allegation that "any of the named plaintiffs at the time the complaint was filed were themselves serving an allegedly illegal sentence or were on trial or awaiting trial before petitioners." 414 U.S. at 496. In both *Lyons* and *O'Shea*, the plaintiffs lacked standing to pursue an injunction because, at the time the complaint was filed, they were not involved with the police and courts, respectively. This case stands in stark contrast; because Plaintiffs were subject to pending proceedings with representation by the public defenders at the time litigation commenced, they faced a real and immediate threat of future violations of their Sixth Amendment rights. *See McLaughlin*, 500 U.S. at 50-52 (*Lyons* is inapplicable when Plaintiffs' injury is capable of redress at the time the complaint is filed).

To demonstrate standing to seek injunctive relief, a plaintiff must establish "real and immediate threat of repeated injury." *Chapman*, 631 F.3d at 946. Plaintiffs may show that an injury is likely to recur by demonstrating that harm is part of a "pattern of officially sanctioned . . . behavior, violative of the plaintiffs' constitutional rights." *See LaDuke v. Nelson*, 762 F.2d 1318, 1324 (9th Cir. 1985); *see also Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir. 2001) (quoting *LaDuke*) (abrogated on other grounds by *Johnson v. California*, 543 U.S. 499, 504-05 (2005)). At the time they filed suit, Plaintiffs demonstrated a real and immediate threat that they would be denied the right to counsel on account of the Cities' officially sanctioned indigent defense system, and they remain subject to pending proceedings. According to all the evidence and the Cities' own claims, Plaintiffs and many of the class members have repeated contact with the Cities' public defense system. "When a named plaintiff asserts injuries that have been inflicted upon a class of plaintiffs, [the court] may consider those injuries in the context of the harm asserted by the class as a whole, to determine whether a credible threat that the named plaintiff's injury will recur has been established." *Id.* at 1326.

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C. Plaintiffs' Claims Present a Live Case and Controversy

A claim for injunctive or declaratory relief becomes moot only if the plaintiff no longer has a live case or controversy justifying relief. *Flint v. Dennison*, 488 F.3d 816, 824 (9th Cir. 2007). The Cities argue that Plaintiffs no longer have a live controversy because each Plaintiff has been assigned conflict counsel. Though Plaintiffs are no longer represented by the Public Defender, they remain within the Cities' system for indigent defense, and the harms that existed at the time they filed suit are "capable of repetition but evading review."[13] This is sufficient to defeat a mootness challenge. *Cf. Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No 1*, 551 US 701, 719 (2007) (In a challenge to a school's racial assignment policies, the fact that a student was granted a transfer to "the school to which transfer was denied under the racial guidelines" did not deprive the court of jurisdiction because "the racial guidelines apply at all grade levels. Upon [the student's] enrollment in middle school, he may again be subject to assignment based on his race.").

The Cities' contention that Plaintiffs will suffer no injury unless they are erroneously convicted ignores that Sixth Amendment claims based on "the actual or constructive denial of counsel" differ fundamentally from those based on the "actual effectiveness of counsel's assistance" in a case going to trial. *See Strickland v. Washington*, 466 U.S. 668, 683 (1984). In this civil suit seeking prospective relief, the question is not whether Plaintiffs have been prejudiced by counsel's errors, but whether the system of indigent defense created and maintained by the Cities results in a systemic denial of the right to counsel.[14] *See Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) ("Whether an accused has been prejudiced by the

[13] Indeed, it would be perverse to hold that an indigent defendant must voluntarily surrender any opportunity to exercise his Sixth Amendment right to competent counsel in order to preserve a "live" controversy against the Cities in a civil suit challenging the systemic denial of the right to counsel.

[14] Because Plaintiffs allege systemic denial of the right to counsel—not merely the risk of erroneous conviction—their injuries are not vitiated or made speculative by the possibility that external actors (including the prosecutor, judge, or appeals court) might ultimately prevent the system of indigent defense set up by the Cities from bearing fruit in the form of unconstitutional convictions. *See Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988).

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denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively.").

In addition, the Cities refuse to acknowledge that Plaintiffs filed suit on behalf of a proposed class. In class actions,"[t]here may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on the certification motion." *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975); *see also McLaughlin*, 500 U.S. at 50-52. In such instances, a case is not mooted by subsequent events if the alleged illegal acts are "capable of repetition yet evading review" or the class is "inherently transitory." *See Gerstein v. Pugh*, 420 U.S. 103, 111 n.11 (1975) (holding that a class challenge to the constitutionality of a state's probable cause hearing procedure was not mooted by the conviction and transfer of the named class representatives); *Wade v. Kirkland*, 118 F.3d 667,669–70 (9th Cir. 1997) (holding that even if the named plaintiffs' claims were moot, the district court should rule on the motion for class certification and permit proposed class members to intervene if the class was inherently transitory).[15]

Plaintiffs' experiences perfectly illustrate why the courts recognize a "capable of repetition but evading review" exception to mootness, particularly where the class is inherently transitory.[16] The Cities' wrongful acts are capable of repetition in each case involving an indigent defendant but may evade review if the named Plaintiffs' cases are mooted by subsequent acquittal, conviction, or appointment of substitute counsel. In addition, the proposed class in this action is inherently transitory because it is a constant, though revolving class of persons suffering from the same deprivation. *McLaughlin*, 500 U.S. at 52. Because no member

[15] The Cities cite to *Weinstein v. Bradford*, 423 U.S. 147 (1975), but that case is inapposite because it deals with the application of the "capable of repetition, yet evading review" doctrine "in the absence of a class action." *Id*. at 149 Here, Plaintiffs brought the suit as a class action, and they are actively seeking class certification. Dkt. # 82.

[16] The Cities' actions regarding Ryan Osborne, dismissing his criminal case after plaintiffs sought to add him as a plaintiff, also demonstrate why this case fits the "inherently transitory" category.

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of the proposed class is likely to have a live claim throughout the entire litigation, the duration of the challenged actions are short enough to evade review. *See Gerstein*, 420 U.S. at 111.

D. Plaintiffs Lack Adequate and Ongoing Remedies

The Cities argue that indigent defendants in Mount Vernon and Burlington have adequate remedies at law through the substitution of counsel or appeal. *See e.g.*, Dkt. # 25 at 13-16. This contention, however, makes an erroneous factual assumption and misconstrues the nature of Plaintiffs' claims. There is no evidence supporting the assumption that every indigent defendant in the Cities' criminal justice system will be aware that he or she may request a substitution of counsel. The only reason the named Plaintiffs in this case obtained substitute counsel is because class counsel intervened and facilitated that change, believing it was necessary to obtain substitute counsel to protect Plaintiffs' rights in the criminal case. The alternatives of substitution of counsel or waiting for an appeal are not adequate because they are unrealistic (one conflict attorney cannot absorb 2,000 cases) or force indigent defendants to suffer irreparable harm while they attempt to vindicate their rights.

E. Plaintiffs Have Met the Test for Likelihood of Success on the Merits

Based on proof of the specific deficiencies discussed above, Plaintiffs are likely to succeed on the merits of their constructive denial of counsel claim. Because Plaintiffs are not making a post-conviction challenge based on ineffective assistance of counsel, the prejudice requirement of *Strickland*, 466 U.S. at 687-88, does not apply. Numerous courts have so held. *See* Dkt. # 45 at 20-22. Therefore, this Court can award prospective relief for the pre-conviction Sixth Amendment claims that are at issue.

The evidence shows the Cities' public defense system violates the Sixth Amendment. Appointed counsel must actually represent the client—through presence, attention, and advocacy—at all critical stages of the defendant's criminal prosecution. *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979); *United States v. Cronic*, 466

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U.S. 648, 654, 655, 656 (1984). Indigent defendants with criminal charges pending in Mount Vernon and Burlington are suffering from the constructive denial of counsel. While the defendants are appointed counsel to represent them in their criminal proceedings, these court-appointed attorneys fail to provide the minimal level of assistance mandated by the United States and Washington State Constitutions and the law prescribed in Gideon v. Wainwright. Moreover, the Cities are aware of these longstanding deficiencies yet fail to take any action to correct these constitutional violations. As previously discussed in Section II, supra, Plaintiffs have the factual and expert evidence to succeed on the merits of their claim.

F. Plaintiffs have Shown Indigent Defendants Will Suffer Very Serious Irreparable Harm in the Absence of a Preliminary Injunction

When "an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." *Bery v. City of New York*, 97 F.3d 689, 694 (2nd Cir. 1996); *see also Best v. Grant County*, No. 042-00189-0 (Wash. Super. Ct. Aug. 26, 2004) at 7 (The allegation that a pre-trial defendant "is facing criminal prosecution without an effective lawyer by his side certainly raises the prospect of serious and immediate injury or threatened injury."). In this case, the above deficiencies violate the fundamental constitutional right to counsel of Plaintiffs and other indigent defendants, subjecting them to loss of liberty and numerous other severe consequences as a result of the violation. A lack of investigation and preparation, a failure to conduct confidential consultations, and all the other systemic shortcomings discussed above are in and of themselves deprivations of the indigent defendants' rights resulting in very serious damage. These are not mere "customer service complaints" and, unless the Cities are required to take steps to correct these shortcomings, the class of indigent defendants that Plaintiffs represent will continue to suffer irreparable harm in the absence of an injunction. *See Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895, 907 (Mass. 2004) (There is no adequate remedy at law because "the loss of opportunity to confer with counsel to prepare a defense is one that cannot be adequately addressed on appeal after an

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uncounselled conviction.") This is the kind of serious irreparable harm that satisfies the requirements for a mandatory injunction, and shows the public interest and the balance of equities favor an injunction.

IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request a preliminary injunction order.

RESPECTFULLY SUBMITTED this 2nd day of December, 2011.

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of December, 2011, I made arrangements to electronically file the foregoing Plaintiffs' Reply Re: Cross-Motion for Preliminary Injunction with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of America that the foregoing is true and correct.

DATED this 2nd day of December, 2011.

By: *s/* Toby J. Marshall, WSBA #32726

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