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. 2:11-cv-01100-RSL

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[ANGELA MONTAGUE]

NOTED FOR: OCTOBER 21, 2011

I. INTRODUCTION

Plaintiff, Angela Montague, is a criminal defendant alleging that the public defense system for the City of Burlington has "systemically deprived her of her constitutional right to assistance of counsel." Complaint ¶ 6. The thrust of her Complaint is that the attorneys awarded the public defender contract, Richard Sybrandy and Morgan Witt, are overworked and incompetent. Complaint ¶ 6. According to Montague, among other things, these two attorneys "do not return calls" and "fail to stand with indigent defendants during hearings." Complaint ¶ 52. She is seeking injunctive and declaratory relief against the Cities of Burlington and Mount Vernon ("the Cities").[1]

[1] Montague is one of three putative class representatives pursuing allegations against Mount Vernon and Burlington. Messrs. Sybrandy and Witt perform public defender services for both cities.

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The "extraordinary relief" sought is unwarranted. To date, no court has ever "constitutionalized" the type of grievances raised by plaintiff—and this Court should not be the first. Summary judgment should be granted for the following reasons:

First, injunctive relief requires "no adequate remedy at law." This could not be further from the truth here. To the extent that attorneys Sybrandy or Witt are ineffective, or even unlikeable, a criminal defendant can simply request a substitution of counsel—a remedy that Montague herself exercised only a few months ago. When a request for substituted counsel is verbalized by a criminal defendant, it is reversible error if the trial court refuses to conduct "such necessary inquiry as might have eased [the defendant]'s dissatisfaction, distrust, and concern." *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970). And failing that, Sixth Amendment deprivations are regularly addressed through evidentiary hearings, and on appeal. Given these ongoing, *mandatory* remedies already built into the system, this is precisely the wrong case for prospective relief.

Second, none of the named plaintiffs lack standing to seek the relief contemplated in their lawsuit. This requires, under Article III, "a very significant possibility" that the future harm will ensue. Montague's theory is, in essence, that she *will* engage in future criminal 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. Montague, for one thing, cannot presume her 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). Nor may the plaintiffs 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. Public defender error, if it exists, must be found in

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trial court record.[2] Hypothetical future crime, followed by hypothetical malpractice, which is hypothetically ignored by the prosecutor and judges, does not support standing.

Third, even if Montague's allegations were proven,[3] it would not entitle her to the relief she seeks. The fact that a contract attorney errs does not create a constitutional claim against the municipality. Defense attorneys have free-standing ethical obligation to provide the best defense possible, regardless of who is paying or how busy they are. Thus, even if plaintiffs are correct—and Sybrandy and Witt accepted a public defender contract that overburdened them—blame is not passed onto the Cities. Indeed, given the need for independent operations of the public defender, it would be problematic for the Cities to exercise more control over the public defenders than they already do. This is particularly true here, in a case where there is *no* objective indicia of malpractice. Plaintiffs will point to no reversals for ineffective assistance, nor any bar discipline. Prejudicial error is required under, *Strickland v. Washington*, 466 U.S. 668 (1984), not dissatisfaction based upon a subjective desire for "more meetings." If this were the constitutional standard—*i.e.*, complaints about "the process"—there would be no stopping point. Every criminal defendant would complain as a means of verdict insurance, and no public defense agency would be left standing.

Fourth, basic equitable principles preclude the relief sought by plaintiff Montague. A party seeking equity must do equity. But here, this record tells quite a different story. Montague would repeatedly violate court orders until rejecting the court's jurisdiction completely, and becoming a fugitive. As a matter of law and fairness, parties are not entitled to litigate for court benefits while simultaneously ignoring court authority. Thus, even if relief were available in this case, plaintiff would be foreclosed by her own unclean hands and the "fugitive from justice" doctrine. Furthermore, her allegation that the public

[2] *Cronic* involved a novice real estate attorney who was assigned to defend a complex check kiting case on 25 days' notice. The Court of Appeals presumed ineffective assistance, given the limited time for preparation and experience. The Supreme Court rejected the presumption in favor of a required showing in the record.
[3] The Cities view plaintiff's allegations as demonstrably *untrue*. But, as discussed in this motion, dismissal of this case does not necessarily turn on veracity.

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defender did not adequately consult and inform her is directly contrary to Montague's own sworn representations: "My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this 'Statement of Defendant on Plea of Guilty.' I have no further questions to ask the judge." This is precisely the type of opportunistic doublespeak that judicial estoppel prevents against.

This lawsuit should be dismissed in its entirety.

II. FACTUAL BACKGROUND

A. Montague Is Arrested For Driving Drunk And Outstanding Warrants

On July 8, 2007 Montague was arrested by Burlington Police for DUI. *Declaration of Andrew Cooley* ("*Cooley Decl.*") at 101. At the time, she had at least one outstanding warrant for her arrest, related to a different DUI. *Id*. She was brought to jail, but likely for administrative reasons, unable to be booked. *Id*. Montague was released and order to appear for arraignment on July 18, 2007. *Id*.

Montague failed to appear for that arraignment, and a warrant was issued on July 23, 2007. *Id*. at 100. She was ultimately arrested again a few months later, on September 5, 2007. *Id*. at 99. She again failed to appear at her September 19, 2007 arraignment, and a second bench warrant was issued for her arrest. *Id*. at 98; 97.

B. Montague Goes Fugitive And Remains On The Run For Over A Year

Montague remained fugitive for more than one year. On October 13, 2008, Montague was arrested on a Skagit County District Court Warrant.[4] *Id*. at 96. In connection with her Burlington warrant, Montague signed a personal recognizance release agreement. In it, she promised to appear on October 15. *Id*. at 95. She did not appear and

[4] This was related to a 2006 DUI (with accident) charge, pending in Skagit County District Court.

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a bench warrant was issued. *Id*. at 94. She was arrested again on November 17, 2008. *Id*. at 93.

C. Montague Retains A Private Attorney, Not A Public Defender, And Becomes Confused

In custody, Montague finally made her initial appearance the morning of November 18. *Id*. at 92. Montague was held on $5,000 bond, and directed to apply for a public defender. She was ordered to return at 1:00 pm for further arraignment. *Id*. And at that later hearing, Montague was released on personal recognizance.[5] *Id*. at 90. She was *not* referred to the public defender, however. She was ordered to contact her "private attorney." *Id*. Montague signed the form, agreeing to "comply with the above order…" Her next scheduled hearing was December 3, 2008. *Id*.

On November 25, Montague —who remained incarcerated, likely on other charges—complained via kite that she "hadn't been assigned public defender for court on Dec. 3." *Id*. at 89. The next day she sent a kite saying she wanted to speak to "someone about getting a public defender…" *Id*. at 88. She sent a second kite, making the same request, later that same day. *Id*. at 87. All of these requests were sent to the court—the same court she told, just days earlier, that she wanted a "private attorney." She offered no explanation for her abrupt reversal.

In any event, public defender Sybrandy filed an appearance for Montague on November 30th. *Id*. at 86. On December 2nd, they both appeared in court, and both signed an agreed Motion to Continue. *Id*. at 83. Above Montague's signature, it stated:

> *the moving party certifies that the continuance will not substantially prejudice the defendant in the presentation of the defendant's defense…*

[5] She probably remained incarcerated on other charges.

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Id. The trial court agreed that the "defendant will not be prejudiced in the presentation of his or her defense." The case was continued to December 17, 2008, and then unilaterally continued to January 7, 2009 by the court. *Id*. at 80. Montague declined to appear that day, so Sybrandy successfully moved for another continuance until February 4, 2009. *Id*. at 78. No warrant was issued.

D. Montague Begins Exploring Deferred Prosecution With Both Sybrandy, And Then With A Privately-Retained Attorney

On February 4, 2009, another continuance was sought and granted. *Id*. at 76. This time, the reason was to "explore deferred prosecution."[6] *Id*. at 76. Montague's case was moved to March 18. *Id*. On that date, she failed to appear—claiming she "forgot about court." *Id*. at 75. Her case was moved again to April 1, 2009. *Id*. at 75; 153.

A deferred prosecution requires an alcohol evaluation to confirm that the defendant is an alcoholic, as well as a treatment plan. *See* RCW 10.05.030; RCW 10.05.060. On April 1st, Montague appeared and sought another continuance to "get into deferred prosecution program." *Cooley Decl*. at 72.

Around this time, Montague asked her public defender to withdraw, and had a private lawyer enter a Notice of Appearance. *Id*. at 70; 68. Montague and her private lawyer, pursuing deferred prosecution, continued the case to June 3, 2009. *Id*. at 67. On that date, Montague requested another continuance; she had an evaluation, and was getting a treatment date. *Id*. at 64. The case was moved again to July 22, 2009. *Id*.

During this period, Montague was ordered by the court to be under "pre-trial supervision" through the Skagit County District Court Probation Department.[7] *Id*. at 150.

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[6] RCW 10.05.020 sets forth the statutory scheme for a deferred prosecution. In exchange for admitting guilt, admitting to alcoholism, agreeing to treatment, and a host of other conditions, a DUI may be deferred and dismissed. In contrast, if the defendant fails in any way, a finding of guilt is entered and the defendant sentenced.

[7] Presumably this is due to her long history as a fugitive and numerous criminal charges.

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E. Montague Fails Treatment, Refused To Communicate With Her Attorneys, And Goes Fugitive

On June 15, her District Court Probation Officer filed an "Affidavit of Detention." *Id*. at 62. In this affidavit, he explained that Montague was grossly out of compliance with the terms of her pre-trial supervision. Id. He sought a bench warrant, which was issued that day. *Id*. at 60. Montague was arrested on June 19th while car prowling at a freeway truck scale. *Id*. at 59; 57.

Montague and her private lawyer brought a motion to have her released, which was granted on June 23, 2009. *Id*. at 58; 155. The following week, Montague's private lawyer filed a Notice of Withdrawal. *Id*. at 54. Montague had refused to communicate with her attorney. *Id*. at 53. Her private attorney suggested "that the defendant request a Public Defender in this case." *Id*. at 53.

Montague was ordered to appear on July 1, 2009. *Id*. at 55. She appeared *pro se*, and was "referred to assigned counsel." *Id*. at 48. The Public Defender entered another Notice of Appearance. *Id*. at 52.

On July 7, 2009, the pre-trial supervision Probation Officer filed another report. *Id*. at 51. He stated that Montague had violated the conditions of her pre-trial supervision, and admitted to using heroin, in addition to other "recent drug use." *Id*. The parties agreed to continue Montague's case on July 15, with the same certification of non-prejudice. *Id*. at 46. Montague told the court that she was still seeking a deferred prosecution, and would be in "in patient treatment" until September 2009. *Id*. The case was moved to September 23rd, 2009. *Id*.

F. Montague Pleads Guilty, Certifying That She Committed The Crime And Had Been Informed Of Her Rights—On The Record And Under Oath

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Montague signed agreed motions to continue on September 23rd, and November 4th. *Id*. pp. 45,43. In each, she certified that she was not prejudiced. She consistently claimed to be working on the deferred prosecution.

Finally, on December 2, 2009, Montague and her public defender filed a Petition for Deferred Prosecution. *Id*. at 43. Montague made the following representations—under penalty of perjury—on the record:

- 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…..

Id. at 42. Montague also represented that she was an alcoholic, stipulated to the correctness of all the police reports, to the facts in those reports, and agreed those facts would support an immediate entry of a finding of guilt without further trial. *Id*. She said "I sincerely believe I am guilty of the offense charged…" *Id*.

Montague intelligently waived her right to jury trial, speedy trial, confrontation of witnesses, and "to present evidence or a defense." She acknowledged that the court would not accept the petition if she did not sincerely believe she was guilty of the crime of DUI. Montague personally signed the form, which provided:

> *I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.*

The trial court made factual findings accordingly. *Id*. at 38. The court then, in reliance upon the above representations, agreed to defer prosecution for five years, on ten conditions. There were 10 specific conditions. *Id*.

Montague signed the final Order, which provided:

> DEFENDANT'S STATEMENT: I HAVE RECEIVED A COPY OF THIS ORDER AND AGREE TO COMPLY WITH ALL OF ITS

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> TERMS. I UNDERSTAND THAT THE CHARGES WILL NOT BE DISMISSED UNLESS AND UNTIL I HAVE COMPLETED ALL REQUIREMENTS OF THIS, AND ANY SUBSEQUENT ORDERS ISSUED IN THIS CASE.

(Capitalization in Original).

To this point, Montague had been seeking a deferred prosecution for 10 months. This objective had been the same, with both her private lawyer and her public defender. At no point did she register any complaint or concern about the process or outcome—indeed, the sworn petition and order conclusively demonstrate the opposite. This was done "knowingly and voluntarily," in an effort to persuade the court to give her the benefit of deferred prosecution.

G. Montague Is Unwilling To Comply With The Conditions Of Her Deferred Prosecution And Goes Fugitive

In November, 2010, Montague failed to appear in court. *Id*. at 34. The following month, the court found that Montague did not meet the terms of the deferred prosecution order. *Id*. at 31. She also failed to comply with her treatment requirements. *Id*. New criminal charges are added. *Id*.

Montague's case was continued several times, until she went fugitive on April 28, 2011. *Id*. at 27. A warrant was issued and she was arrested soon after, on May 16, 2011. *Id*. at 22. The court again referred Montague to the office of assigned counsel to determine if she was eligible for a public defender. *Id*. at 165. The following day, the Public Defender entered a Notice of Appearance.[8] *Id*. at 25. That day, Montague appeared and held on bond of $2500. *Id*. at 165. The court noted that Montague had a new VUCSA conviction.

[8] Montague may suggest that while she was on the deferred prosecution, the Public Defender was still somehow "her lawyer"—and responsible for assisting her if she had trouble attending AA meetings or paying fines. The new referral by the court and the new Notice of Appearance filed by the public defender at this point proves otherwise. The public defender does not maintain a permanent relationship for the five year duration of deferred prosecution.

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Id. at 21.[9] Her deferred prosecution was revoked and she was found guilty of the previous charges. *Id*. at 21. On May 24th, 2011, she was sentenced to 135 days in jail. *Id*. at 15. The following week, Montague's public defender filed a Motion to Release Defendant. *Id*. at 12. The motion was granted. *Id*. p. 10. Montague was released on June 15th to attend treatment until September 7, 2011. *Id*. at 7.

H. Montague Requests A Substitution Of Counsel, Which Was Immediately Granted

On June 27, Montague's civil lawyers filed a Notice of Appearance in the Burlington Municipal Court action. *Id*. at 174. Montague requested substitute counsel, which was immediately granted.[10] *Id*. at 169.

I. Summary Overview

This record is one-sided in several important respects. First, whether Montague was represented by a public defender or a private lawyer of her choosing, she wanted a deferred prosecution. Both attorneys pursued that objective (though it was obtained by the public defender). Second, whether Montague was represented by a public defender or a private lawyer, she routinely failed to appear or sought continuances. When seeking continuances, she certified that she was not prejudiced. Third, when entering a plea, Montague knowingly and intelligently waived her rights—and specifically represented she understood them. Fourth, the private attorney Montague consulted with expressly recommended that she retain a public defender. Private counsel registered no objection to Sybrandy or Witt. Fifth, Montague never registered any specific objection to Sybrandy or Witt's skill, judgment, or abilities. But when Montague did want a new attorney, she had no trouble getting either conflict counsel or her own.

[9] State v. Montague, King County Cause No 11-1-00361-1(Pled to both VUCSA and false statements)
[10] Mr. Witt has represented Montague in regards to a 2010 Mount Vernon Municipal Court theft case. She pled guilty in that matter.

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III. LEGAL STANDARD

At summary judgment, the non-moving party must demonstrate more than "some metaphysical doubt as to the material facts... the nonmovant must come forward with specific facts showing there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith RadioCorp*., 475 U.S. 574, 586-87 (1986). An order of dismissal is properly entered when, as here, a lawsuit is not supported with credible evidence and argument. *See Devereaux v. Abbey*, 263 F.3d 1070, 1082 (9th Cir. 2001) (plaintiff's failure to marshal facts and argument resulted in summary judgment).

It is expected that plaintiff will hide behind vague, but broadly-worded, "allegations"—and request more time for boundless discovery. This is not a legally tenable response, nor is it fair to the defendants. Particularly in the class action context, courts are sensitive to the "potentially enormous expense of discovery." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557-59 (2007) (noting the likelihood of "largely groundless claim[s]… tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value."). Deficiencies must therefore be "exposed at the point of minimum expenditure of time and money by the parties and the court." *Id*. at 558.[11]

As discussed below, plaintiff's claims fall short. Both binding authority and the undisputed record compel early dismissal—without the necessity of "enormous expenses."

IV. AUTHORITY

Montague is requesting an injunction and a declaratory judgment, both of which involve standards that she cannot meet. A plaintiff seeking an injunction must demonstrate the following: (1) irreparable injury; (2) inadequate remedies at law; (3) the balance of hardships tilts in his or her favor; and (4) the public interest would not be disserved. *See,*

[11] This language is taken from a case involving Rule 12(b)(6), to be sure. But the underlying rationale is equally applicable in the summary judgment context. *See Mutual Fund Investors, Inc. v. Putnam Management Co*., 553 F.2d 620 (9th Cir. 1977) (when the legal or factual record foreclose the plaintiff's legal theories, summary judgment is proper and should be granted).

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e.g., eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006) (citing *Weinberger v. Romero-Barcelo*, 456 U. S. 305, 311–313 (1982)). The Declaratory Judgment Act ("DJA"), similarly, allows the Court to prospectively declare the rights of interested party, so long as there is an "actual controversy." 28 U.S.C. § 2201(a); *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir.2001) (repetition of the violation must be "realistically threatened).[12]

As outlined below, both theories fail. Not only is there no showing of likely harm or a real controversy, there is no wrongdoing whatsoever.

A. The Court Should Dismiss This Case Because Plaintiffs Have Adequate—*And Ongoing*—Remedies At Law

Plaintiff is asking the Court to impose relief that she already has access to. Injunctive and declaratory relief are, quite logically, unavailable when unnecessary. Or, in the nomenclature, equitable relief should not awarded when there is an "adequate remedy at law." This is plainly so, here. Plaintiff has *mandatory* remedies and safeguards all the way through the criminal process—some of which she has already successfully exercised.

The claims should be dismissed on this basis alone.

1. Criminal Defendants Can Always Request A Substitution Of Counsel—As Illustrated By *All* Of The Named Plaintiffs Doing So

"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). Accordingly, a party seeking a federal injunction must demonstrate that it ***does not*** have an adequate remedy at law." *Northern California Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306 (1984) (emphasis added); Wright & Miller, FEDERAL

[12] While the DJA empowers a court to grant such relief, it does not compel a court to hear a declaratory judgment action. *Id.*; *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995) (characterizing the DJA as "confer[ing] discretion on the courts rather than an absolute right upon the litigant.").

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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."). The same is true of declaratory actions, which require an "actual controversy"—not a hypothetical one arising if multiple safeguards theoretically and inexplicably fail. *See* 28 U.S.C. § 2201(a).

Applied here, plaintiff has not only one "adequate remedy," but a series of them. The first is a simple request for conflict counsel. The Cities' public defense contract with Sybrandy and Witt explicitly provides for this. If they are not up to the task—for any reason—the defendant may raise issue during proceedings. And this certainly occurs from time to time during arraignment, status hearings, and/or before acceptance of a plea. If there are colorable grounds, the judge will order a new attorney to appear on behalf of the defendant.[13] There is no showing or evidence that this, while simple, is an inadequate remedy.

Certainly, plaintiff Montague cannot make that argument, given that she successfully exercised this remedy. In June, 2011 Montague objected to her representation by Public Defender Witt. A different attorney, Thomas Hoff, was appointed to represent her immediately. The other plaintiffs did this as well.[14] The prosecutors did not object to the substitutions, nor did their public defender or the judge. All of the requests were summarily granted.

Even assuming for the sake of argument that Sybrandy and Witt could not adequately represent plaintiff, the problem would not be without a remedy. Upon request, plaintiff can—and did—immediately obtain a new attorney for the remainder of her criminal case. 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)

[13] Plaintiffs may argue that, as lay people, they "cannot know" when their attorney is incompetent. Such an argument is belied by the nature of their claims. *See, e.g.*, Complaint ¶ 59-81 (various complaints related to timeliness and availability); ¶ 115-122 (Wilbur); ¶ 136-138 (Moon); ¶ 153-160 (Montague).

[14] The Cities believe that this was largely posturing for their civil case. But irrespective of their motives, all three of the plaintiffs illustrated the ease and effectiveness of their existing remedy at law.

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(an injunction is an "extraordinary and drastic remedy" that "is never awarded as of right") (internal marks omitted); *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.").

2. When A Court Fails To Conduct A Searching Inquiry Following A Request For Substitution, It Constitutes Reversible Error

Plaintiff may argue that the sound discretion of a municipal court judge—and past experience—is not enough. A criminal court judges could capriciously deny substitution, or refuse to even engage in the inquiry. This is faulty reasoning: judges ***are required*** to closely evaluate substitution—under pain of reversal.

In *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970), a criminal defendant had become 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.").[15]

Thus, plaintiff is protected by an existing remedy—substitution of counsel—which, itself, is safeguarded by decades of precedent. Trial court judges are, by law, *required* to undertake a serious inquiry into the merits of a substitution request. When they do not—even if the request is specious—it is reversible error.

3. Prejudicial Error Can Also Be Remedied On Appeal

Plaintiff has more remedies still. Like any criminal defendant, she is entitled to

[15] *D'Amore* was subsequently overruled by *United States v. Garrett*, 179 F.3d 1143 (9th Cir. 1999). *Garrett* actually slanted the playing field even further in favor of criminal defendant, lowering the continuance standard.

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reversal on appeal if her case is mishandled by trial counsel. Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant is entitled to a reversal if he or she can show that counsel's performance was deficient and prejudicial. *Id.* at 687.

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.

Again, the suggestion that there is "no adequate remedy at law" could not be further from the truth; indeed, it is belied by *an entire body of case law*. The multiplicity of remedies that inhere the criminal process are incompatible with the "extraordinary and drastic remedy" of an injunction, *Munaf v. Green*, 553 U.S. 674, 689-90 (2008), and declaratory judgment, *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir.2001) (must be "*realistically* threatened" by a repetition of purported violation); *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1044 (9th Cir.1999) ("contingent future events that may not occur as anticipated or indeed may not occur at all" do not support prospective relief).[16]

B. Plaintiffs Lack Standing To Pursue The "Extraordinary Relief" They Seek

Even assuming that there is adequate remedy at law, none of the plaintiffs have standing under Article III to pursue this lawsuit. They must make an "individualized showing that there is a very significant possibility that future harm will ensue" to establish

[16] The Cities would also note that plaintiffs have an additional remedy in the form of a malpractice lawsuit. Assuming that they could make the necessary showing, they would be entitled to monetary damages associated with their public defender's breach of the standard of care. *See Hipple v. McFadden*, No. 39802-8-II (2011) (legal malpractice claim against two attorneys from the Pierce County Department of Assigned Counsel).

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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).

The same is true in class action lawsuits. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Sierra Club v. Morton*, 405 U.S. 727 (1972). The standing analysis precedes any determination under Rule 23. *See German v. Federal Loan Home Mortgage Corp.*, 885 F. Supp. 537, 547 (S.D.N.Y. 1995); *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir. 1987); *see also Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981). The Court assesses standing "*based upon the standing of the named plaintiff*, not upon the standing of unidentified class members." *Adair v. Sorenson*, 134 F.R.D. 13, 16 (D Mass. 1991), citing *Warth v. Seldin*, 422 U.S. 490, 502 (1975) (emphasis added).

In hopes of making this showing, Montague engages in the following fiction: ***first***, she will engage in future criminal conduct; ***second***, she will be caught and arrested; ***third***, she will remain indigent and be appointed a public defender; ***fourth***, that public defender will be Sybrandy or Witt, and any attempt to substitute counsel will be unlawfully rejected; and ***fifth***, Sybrandy and Witt will be too "busy" or "financially motivated" to comply with their legal and ethical obligations—leading to prejudicial harm.

The problems with this chain of hypotheticals, while perhaps self-evident, are explored below.

1. The Court Does Not Presume That Individuals Will Engage In Future Criminality

In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the plaintiff was stopped for a traffic infraction, and, without provocation, put in a chokehold. He sought declaratory relief and an injunction barring chokeholds under those circumstances. *Id.* at 98. The Supreme Court reversed, concluding that Lyons had failed to demonstrate a live case or controversy that would justify equitable relief. Applying the established rule that "past exposure to illegal conduct does not in itself show a present case or controversy regarding

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injunctive relief," *id*. at 102, the *Lyons* court reasoned:

> Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of the chokeholds by police officers. That Lyons may have been illegally choked by the police on October 6, 1976… does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.

Id. at 105.

Lyons relied, in part, on *O'Shea v. Littleton*, 414 U. S. 488 (1974). *O'Shea* was a class action in which the plaintiffs claimed they were subjected to discriminatory enforcement of the criminal law.[17] The lower courts endorsed the cause of action. But the Supreme Court reversed and 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.* Accordingly, 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. This does not pass muster under Article III of the constitution:

> Of course, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury. But here the prospect of future injury rests on the likelihood that respondents 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. … If the statutes that might possibly be enforced against respondents are valid laws, and if charges under these statutes are not improvidently made or pressed, the question becomes whether any perceived threat to respondents is sufficiently real and immediate to show an existing controversy simply because they anticipate violating lawful criminal statutes and being tried for their offenses, in which event they may appear before petitioners and, if they do, will be affected by the allegedly illegal conduct charged. Apparently, the proposition is that if respondents proceed to violate an unchallenged law and if they are charged, held to answer, and tried in any

[17] They alleged, among other things, that they were subject to disparate sentencing by the county magistrate.

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> proceedings before petitioners, they will be subjected to the discriminatory practices that petitioners are alleged to have followed. But it seems to us that attempting to anticipate whether and when these respondents will be charged with crime and will be made to appear before either petitioner takes us into the area of speculation and conjecture.

Id. at 497-98.

As here, the representatives in *O'Shea* had no constitutional right to violate the law in the future, nor any stated intention to continue doing so. Accordingly, the threat of injury arising out of such a course of conduct is too remote to satisfy the case-or-controversy requirement. *See id.*

Montague is, in essence, asking this Court to overrule *Lyons* and *O'Shea*. No different than those plaintiffs, the *only* likelihood of future injury rests on her future violation of valid laws. Future illegal conduct does not constitute standing. The Court can end its analysis there.

2. The Court Does Not Presume That Licensed Attorneys Will Engage In Malpractice Barring An Extraordinary Showing, Grounded In The Trial Court Record

Setting aside the assumption of future lawlessness, the second problem with Montague's standing is that it presupposes future malpractice. 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.* And public defenders are no different. Absent some showing to the contrary, 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).

In *United States v. Cronic*, 466 U.S. 648 (1984), a young real estate attorney was appointed to represent a criminal defendant in a complex financial felony trial. Though the government had taken over four years to investigate the case, the new attorney was afforded a mere 25 days. This trial was also the young attorney's first. The jury convicted. On

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appeal, the Tenth Circuit reversed, concluding that the defendant did not have adequate assistance of counsel under the Sixth Amendment. *Id.* Significantly, the Court of Appeals did not point to any specific error in the trial court record, but instead, reasoned that no such showing was necessary when "the circumstances" hamper a given lawyers preparation of a defendant's case." *Id.*

The United States Supreme Court granted *certiorari* and unanimously reversed. In rejecting the Tenth Circuit's analysis, it framed the issue:

> While the Court of Appeals purported to apply a standard of reasonable competence, it did not indicate that there had been an actual breakdown of the adversarial process during the trial of this case. Instead it concluded that the circumstances surrounding the representation of respondent mandated an inference that counsel was unable to discharge his duties.
>
> In our evaluation of that conclusion, ***we begin by recognizing 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.*** Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, the burden rests on the accused to demonstrate a constitutional violation.

Id. at 657-58 (internal citations omitted) (emphasis added). From there, it rejected the Tenth Circuit's "inferential analysis," noting its deficiencies.[18]

Nonetheless, plaintiff would urge this Court to re-adopt the now-defunct Tenth Circuit "inferential analysis" because Sybrandy is "busy" and/or "underpaid." She theorizes that these "circumstances" necessarily beget ineffective assistance of counsel. *Cronic and Connick* squarely reject this. Further, the "circumstances" complained of are equally compatible with an efficient, experienced attorney who did not enter into criminal defense entirely for money. That is why courts do not "infer" prejudicial error; they find it

[18] The length of investigations, for example, need not have parity. The burden of searching for admissible evidence to support a conviction beyond a reasonable doubt may be different than the time needed to rebut the government's case. *Id.* at 663. Similarly, the fact that the public defender was a young real estate attorney cuts both ways. Younger attorneys can be competent, too, and a real estate background tended to be more applicable than experience trying "armed robbery" cases. *Id.* at 665.

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in the record.[19] The Sixth Amendment "does not exist for its own sake." *Id.* at 657-58 (citing *United States v. Valenzuela-Bernal*, 458 U. S. 858, 867-869 (1982)).

For purposes of granting prospective relief, the Court should not—and cannot—presume future attorney malpractice. This is particularly true here, where there is ***no evidence*** of any error prejudicing plaintiff Montague's case (in fact, she represented as much on the record, *see infra*).

3. Future Harm Will Only Come To Fruition In The Event That Everybody Involved In The Criminal Process Abdicates Their Responsibilities

The "very significant possibility that future harm" alleged in plaintiffs' complaint also presupposes that every attorney in the courtroom will disregard their duties, in unison. The rules certainly require that the public defender provide competent assistance. But they also require the prosecutor to safeguard the system, and the judge to oversee the process. All of these offices have independent obligations.

Of course, the first duty rests with the public defenders. Consistent with *Cronic* and *Connick*, this Court—like the Cities—may presume that the public defenders will act diligently and competently. The Washington Rules of Professional Conduct in fact require them to decline representation they become incapable of doing a competent job. *See* RPC 1.16(a)(1) ("the representation will result in violation of the Rules of Professional Conduct or *other law*."). The ABA's Criminal Justice Standards echo this principle:

> (a) Defense counsel should act with reasonable diligence and promptness in representing a client….
>
> (e) Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations.

ABA Criminal Justice Standards, Defense Function 4-1.3

[19] *Cronic* noted a few extraordinary circumstances where prejudice is presumed—such as "the complete denial of counsel" or "appointment of an out-of-state attorney on the morning of a capital case." *Id.* at 659-60. These do not apply to our case.

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In *Mount Vernon v. Weston,* 68 Wn. App. 411, 844 P.2d 438 (1992), defense counsel requested to withdraw, citing a lack of "time, expertise, and resources." *Id.* at 413-14. The trial court's refusal was reversed as an abuse of discretion.[20] Likewise in *State v. Jones,* 2008-Ohio-6994 (11th Dist. December 31, 2008), a public defender was assigned a matter on short notice, and could not adequately prepare. He requested a continuance, which was denied. Then, because he believed that it would be inadequate assistance to proceed to trial, he refused to go forward. The trial court held him in contempt. The Ohio Supreme Court reversed, observing that "[i]t would have been "unethical" for appellant to proceed with trial as any attempt at rendering effective assistance would have been futile. Appellant properly refused to put his client's constitutional rights at risk by proceeding to trial unprepared." *Jones*, ¶ 28-29.

Sybrandy and Witt, too, would be obligated to decline a representation that they could not adequately handle. If—as plaintiffs suggest—they are too "busy" to provide competent assistance, they would seek a continuance or withdrawal. The Cities, for their part, may rely upon licensed attorneys to ethically do their job.

Similarly, the prosecutors in Mount Vernon and Burlington also have a special obligation to protect the rights of the accused. They are memorialized in the Rules of Professional Responsibility:

> The prosecutor in a criminal case shall:
>
> (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

[20] Because the trial court did not establish a contrary record, the Washington Supreme Court did not reach the constitutional question.

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Justice (3d ed. 1993) ("The duty of the prosecutor is to seek justice, not merely to convict.").

Washington is no different. 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).

Thus, both the case law and the Rules of Professional Conduct dictate the same result: that the prosecutor safeguards the constitutional rights of the accused. The prosecutors—by virtue of their independent duties—are not permitted to mindlessly obtain guilty pleas and verdicts which are the product of Sixth Amendment violations.[21] If indigent defenders were systematically being railroaded by incompetent lawyers, the prosecutor would be duty-bounded to halt the process.

Lastly, the judge also has an independent duty to the accused. Apart from the well-established obligations to address the concerns of the accused, *supra*, 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, they 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

[21] Prosecutors, Craig Cammock and Patrick Eason, are competent and well-respected attorneys who handle prosecution services for the Cities of Burlington and Mount Vernon, respectively. They do so under a bid contract where they agree to handle all the prosecutions for each City and to do so competently.

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constitutional violations are "rampant," they are empowered—and required—to fix the process.

In summary, for a constitutional violation to occur, the entire system has to break down at the same time. All of the attorneys involved, as well as the judge, must all disregard the constitutional rights of the defendant, in unison. Conversely, the Sixth Amendment remains safeguarded so long as at least one individual complies with his or her duties. It follows that plaintiff will *only* be subject to a constitutional deprivation if:

(1) he begins committing crime at some point in the future, which is an impermissible assumption under *Lyons* and *O'Shea*;

(2) Sybrandy or Witt are assigned to represent him, and do so unethically and incompetently, which is an impermissible assumption under *Connick* and *Cronic*;

(3) plaintiff requests a substitution of counsel, which is unlawfully ignored by the court;

(4) the prosecutors and judge turn a blind eye;

(4) the plaintiffs suffer prejudicial error; and

(5) the appellate courts ignore their duty to fix it under both *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970), and *Strickland v. Washington*, 466 U.S. 668 (1984).

This is, to put it mildly, a very theoretical and speculative chain of events.

Prospective relief requires imminent future harm. This is not the case when, as here, it rests upon "contingent future events that may not occur as anticipated or indeed may not occur at all." *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1044 (9th Cir.1999); *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir.2001) (must be "*realistically* threatened" by a repetition of purported violation) (emphasis added).

Plaintiffs' claims for injunction and declaratory relief fail.

4. This Case Does Not Involve "Exceptional Circumstances" Warranting The "Capable Of Repetition But Evading Review" Doctrine

It is anticipated that the Montague will point to the capable of repetition, but evading review doctrine, to prop up a standing argument. But "the capable-of-repetition

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doctrine applies only in exceptional situations." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983). Our case does not qualify.

First, this is not a case involving Sixth Amendment violations that are continually mooted. As the name of the doctrine implies, violations must actually be "capable of repetition," which infers that violations actually happen from time to time. But they do not. Plaintiff Montague's rights have ***never*** been violated; there is no prejudicial public defender error on this or any other record.[22] Unless the Court stands ready to overrule *Strickland*—and declare that process-based complaints, made after the fact, are now a species of constitutional violation—there is no Sixth Amendment violation by definition.

Second, the capable-of-repetition doctrine places a duty of diligence on the plaintiff. The Circuit Courts are uniform in this regard: a litigant who could have, but did not, attempt to stay a given action may not later claim his case evaded review, barring exceptional circumstances. *Armstrong v. FAA*, 515 F.3d 1294, 1297 (D.C. Cir. 2008) (collecting cases). If plaintiff Montague believed that her rights were being violated, she could have requested that his criminal case be stayed, sought an injunction, or at a minimum, ripened up the matter by objecting to some sort of error. *See Minn. Humane Soc'y v. Clark*, 184 F.3d 795, 797 (8th Cir. 1999) (applying the rule to numerous avenues of preliminary relief, including appeals). She did none of this. She instead skipped the process completely, becoming a fugitive. It is unclear how this is sufficiently "extraordinary" to create fictional standing.

This is not *Roe v. Wade*. It is not continually mooted by a nine month gestational period. Rather, this is a case where plaintiffs are fully capable of addressing their own Sixth Amendment-based fears through a number of long-standing procedural mechanisms. To the extent raised, the "capable of repetition" doctrine may be safely set aside.

C. The Court Should Dismiss This Case Because Plaintiffs Would Not Be Entitled To The Relief They Seek, Even If All of Their Factual Allegations Were True

[22] Plaintiffs point to no reversals on appeal, nor any findings by any court or bar association.

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The Cities acknowledge that there are a small minority of cases—comprised almost exclusively of vacated[23] or un-appealed state trial court decisions[24]—in which a theory like this was permitted to go forward (on much stronger facts). Indeed, the only notable exception to the general rule disallowing this theory is the New York Court of Appeals' decision in *Hurrell-Harring v. State of New York*, 2010 NY Slip Op. 03798 (May 6, 2010), where it is not even clear that standing was even raised as an issue.[25]

Nonetheless, to the extent that the Court adopts the reasoning of these anomalous cases, the outcome does not change. Plaintiffs cannot establish "deliberate indifference," even if every single allegation in plaintiffs' complaint was proven.

1. The Government Does Not Violate The Constitution When A Licensed Criminal Defense Attorney Errs

If plaintiffs' lawsuit seems somewhat counterintuitive, that is because it is. It presumes that two attorneys with no record of bar discipline or reversal will commit rampant malpractice in the future—and therefore the Cities should be subject to judicial management. The law does not work this way.

In *Polk County v. Dodson*, 454 U.S. 312 (1981), the Supreme Court set out the relationship between the public defender and the government. It requires two primary things. First, the public defender's adherence to his or her responsibilities, irrespective of state influence. And second, independence from government influence. Case load and pay do not alter either of these principles:

> Because public defenders are paid by the State, it is argued that they are subject to supervision by persons with interests unrelated to those of indigent clients. Although the employment relationship is certainly a relevant factor,

[23] *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988), *vacated*, 976 F.2d 673 (11th Cir. 1992).

[24] *See, e.g., Best v. Grant County*, No. 4-2-00189 (Wash. Sup. Ct. 2005) (un-appealed summary judgment denial).

[25] This decision stands in sharp contrast to the majority of courts that, consistent with *Strickland*, reject such a theory. *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).

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> we find it insufficient to establish that a public defender acts under color of state law within the meaning of § 1983.
>
> First, a public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. ***State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function, cannot be, the servant of an administrative superior.*** Held to the same standards of competence and integrity as a private lawyer, [Citation omitted], a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client. ***A lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.*** DR 5-107(B), ABA Code of Professional Responsibility (1976)
>
> Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages. This Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), established the right of state criminal defendants to the guiding hand of counsel at every step in the proceedings against [them]. Implicit in the concept of a 'guiding hand' is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate.

Id. at 321-22 (internal citations omitted).

These principles were recently applied in the Western District by Judge McDonald. In *Gausvik v. Perez*, 239 F.Supp.2d 1047 (E.D.Wash. 2002), he addressed a nearly identical theory—with much more egregious facts—pursued against Chelan County, after the contracted public defenders mishandled the defense of a several sex abuse cases in Wenatchee. One of the exonerated defendants sued both the attorneys and the county, alleging, as here, that it "fail[ed] to supervise and monitor the public defender to ensure that the office was adequately funded and had adequate resources and that adequate and constitutionally mandated legal services [were] being provided." *Id.* at 1061.

The plaintiffs in *Perez* argued, as here, claimed that Chelan County failed to abide by RCW 10.101.030 and enact proper standards. They claimed that the public defender contract was awarded to the "lowest bidder," in a process that involved "no qualitative standards." They claimed that the public defender firm "was required to pay fees and costs

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for conflict attorneys from its lump contract sum—and the sex abuse cases "created a great risk of public defender lawyers failing to defend their clients" and leading to "financial motive to settle cases as quickly as possible." And the *Perez* plaintiffs also blamed the county for this systemic failure.[26] *Id.* at 1063-64.

Judge McDonald had no trouble rejecting the claims against the County. He reasoned that if the plaintiff did not receive effective assistance, it was because the public defenders, not Chelan County, erred. Attorneys have a free-standing ethical obligation to provide the best defense possible, regardless of who is paying, and how much is being paid. Thus, if the contract public defender was making decisions about a criminal representation "based on economic self-interest, that was a violation of his ethical obligation to their client." The blame could not be passed to Chelan County. *See also Clay v. Friedman*, 541 F. Supp. 500 (N.D. Ill. 1982) (rejecting constitutional theory against County Office of the Public Defender based on incompetent representation, excessive caseloads, and failure to monitor).

In ruling, Judge McDonald also rejected the notion that the public defenders were not adequately trained.

> [The public defender] is a law school graduate, a member in good standing of the state bar, and was hired for a deputy public defender position on the basis of his perceived abilities. Accordingly, the County's assignment of him to represent [the defendant] did not evince deliberate indifference to [the defendant's] right to effective assistance of counsel. The Sixth Amendment does not guarantee to [him], or any criminal defendant, the assistance of Perry Mason...

Id. at 1061.

A constitutional theory under § 1983 against the government involves an exceedingly high standard: "***deliberate indifference***." *Id.* Under *Monell*, the government entity is only liable when its policy or custom is the moving force behind a constitutional

[26] Unlike our case, prejudice was actually established in *Perez*. There, unlike here, an innocent man went to jail as a consequence of a shoddy defense.

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deprivation.[27] *Miranda v. Clark County*, 319 F.3d 465, 469-70 (9th Cir. 2003). In *Miranda*, the County implemented a "polygraph policy," which required minimal attention to defendants who failed a preliminary polygraph test. *Id*. at 469. The Ninth Circuit found, on a Rule 12(b)(6) record, that this "deliberate pattern and policy of refusing to train lawyers for capital cases" and assigning the least experienced public defender to the woeful defendant who failed a lie detector test, was sufficient to state a claim for "deliberate indifference to constitutional rights." *Id.* at 471.

It is the Cities' belief that Sybrandy and Witt are effective attorneys who adequately represent their clients' interest. But even if they erred, there is nothing that the Cities did, or failed to do, that would make them "deliberately indifferent" (to prejudicial violations that appear nowhere in the record).

2. The Cities Were Not Deliberately Indifferent To The Sixth Amendment In Contracting For And Maintaining Public Defense Services

The public defender contract between the Cities and Sybrandy/Witt does not evidence "indifference." It is approximately 25 pages in length, contemplates case load limits and performance reporting (though this is not required), as well as conflicts, confidentiality, and necessary qualifications.[28] Declaration of Cooley p. 94. Indeed, the contract itself was the product of an intensive bid process.

There is no evidence that the contract was not followed, nor evidence that it is in any way deficient under any applicable standard.

3. This Court Is Not The Appropriate Forum To Establish New Norms And Standards For Washington Practitioners

Plaintiff's complaint places the cart before the horse. It is true that, from time to time, the Supreme Court may look to ABA promulgations as "helpful guides" in determining professional reasonableness under the Sixth Amendment. But the courts do

[27] A city violates the constitution when its "policy" amounts to a "deliberate indifference" to a defendant's constitutional rights, and that is the moving force behind the violation. *City of Canton*, 489 U.S. at 388-89.
[28] Had the Cities gone further, they risked imposing *too much* control over the public defender.

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not generate *new* standards by constitutional fiat—such as "caseload limits" or "practitioner percentages." This is precisely what the Supreme Court warned against in *Nix v. Whiteside*:

> 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.

475 U.S. 157, 165 (1986). Yet many—if not, all—of plaintiffs' allegations are premised upon still-unadopted standards.

Indeed, two years ago, the Supreme Court reversed the Sixth Circuit for going further than this. In *Bobby v. Van Hook*, 130 S. Ct. 13 (2009), the Sixth Circuit had found ineffective assistance when trial counsel failed to comply with contemporary standards in his investigation and presentation mitigating evidence. On review, the Supreme Court reiterated that the *Strickland* "standard is necessarily a general one." *Id*. at 16. Promulgated professional standards, such as ABA guidelines, may be "useful guides" insofar as they describe the prevailing norms ***during*** the representation. *Id.*[29] It was therefore error for the Sixth Circuit to rely on guidelines that post-dated the trial. The Supreme Court concluded by observing:

> 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)).

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.

[29] In *Van Hook*, as in many other cases, the Court was quick to note that such standards do not amount to "inexorable commands." *Id.* Nor are they constitutional requirements.

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The standard in *this* case is not "best practices." 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).

Plaintiffs, and their attorneys, are free to publicly advocate for any standard that they deem appropriate. This may include a sum-certain number of "communications" with the public defender, case load limits, or mandatory meetings in jail. If adopted after public process and input, these new standards may become a "useful guide," *Van Hook*, 130 S. Ct. at 16, and perhaps influence "prevailing norms" in future Sixth Amendment litigation. But this lawsuit is an end-run; plaintiffs are not entitled to sue municipalities, in hopes of "imposing" un-adopted standards and avoid the public process.

This Court should dismiss, and send the debate back to a public forum.

D. Basic Equitable Principles Preclude The Relief Sought By Plaintiff Montague

As discussed above, there is no evidence that any individual has ever had his or her Sixth Amendment rights violated. There is no evidence that Sybrandy or Witt ever did anything that prejudiced anybody's defense. There is no evidence that the plaintiff's prospective fear is grounded upon anything more than speculative, hypothetical events. And there is no evidence that the Cities were deliberately indifferent to anything. But even ignoring *all* of this, plaintiff is precluded from the relief she seeks on equitable grounds.

1. Judicial Estoppel Precludes Plaintiff Montague's Claims

As discussed in the Factual Background portion of this brief, plaintiff explicitly endorsed the actions of her public defender, when she was not otherwise represented or on fugitive status. When a continuance was sought to investigate new charges, she signed and certified that "*the continuance will not substantially prejudice the defendant in the presentation of defendant's defense…*" Montague, moreover, went further than that in her

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plea agreement. She certified, among other things:

> • 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. She said these statements to induce the court to grant the petition and give her the possibility of escaping any conviction whatsoever.

Montague, like any other civil litigant, is not entitled to reject her own sworn statements—and now claim ignorance, involuntary compliance, and prejudice. These statements, in the municipal court, permitted her the fruits of a beneficial deferred prosecution. She cannot accept them, only to distance herself when tactically convenient in civil court. 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 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

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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)).

The inconsistent positions that Montague will take, if allowed—which did culminate in benefits in the prior forum—cannot be accepted by this Court. Her public defender's conduct, which was initially endorsed by plaintiff, concurred to, and accepted by the municipal court, is not subject to collateral attack in this forum.

2. Plaintiff Is Not Entitled To Seek Equitable Relief With Unclean Hands

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 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 plaintiff Montague played fairly and by the rules, with respect to "the controversy at issue," is not tenable. She repeatedly disregarded the jurisdiction of the very court that she now proposes to "fix." In lieu of adjudication for her crimes, she went AWOL until arrested several times. Indeed, she is a fugitive right now. *Cooley Decl.* at 175.

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

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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").[30]

This Court, too, has no obligation to grant equitable relief to a person who has repeatedly and systematically rejected judicial authority—and does so to this day. One who seeks equity must do equity. Montague has not, and as such, has disentitled herself from coming to Court demanding equitable relief.

V. CONCLUSION

For the foregoing reasons, the Cities respectfully request that this Court endorse and enter their proposed order dismissing this case on summary judgment, a copy of which accompanies this memorandum.

DATED this 29th day of September, 2011.

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[30] The fugitive from justice doctrine is typically applied as an appellate doctrine. But the underlying rationale is identical in this case. Parties are simply not allowed to have it both ways, seeking various benefits and resources from the court, while ignoring its burdens and authority.

CERTIFICATE 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 29th day of September, 2011, she caused a true and accurate copy of the foregoing Motion for Summary Judgment re Montague, Declaration of Andrew G. Cooley re Montague, and proposed Order to be filed and served on the individuals listed below using the USDC CM/ECF filing system:

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