THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

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

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Noted for Consideration: 12/2/11

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I. INTRODUCTION

This case is about the systemic denial of the right to counsel to indigent persons charged with crimes in the cities of Mount Vernon and Burlington ("the Cities"). As shown in detail below, these two Cities operate a joint public defense system that routinely fails to provide actual assistance of counsel to indigent defendants in violation of the United States Constitution and the Washington Constitution. The cause of the violations is clear: the Cities do not provide adequate funding for public defense and do not monitor or oversee their public defense system. The Cities have chosen to pay only two attorneys on a flat-fee basis to handle as many as 2,300 misdemeanor cases per year. Because of their excessive workloads, these attorneys fail to meet with indigent defendants outside of court, fail to respond to communication from indigent defendants, fail to investigate the cases of indigent defendants, fail to counsel indigent defendants, and fail to stand in court with or advocate on behalf of indigent defendants. In other words, the attorneys do not provide even minimal representation to the indigent defendants to whom they are assigned. Despite numerous complaints, the Cities have systematically failed to address these deficiencies in their public defense system.

Plaintiffs and proposed class representatives Joseph Jerome Wilbur, Jeremiah Ray Moon, and Angela Marie Montague bring this lawsuit on behalf of themselves and the following class of similarly situated individuals (the "Class"):

> All indigent persons who have been or will be charged with one or more crimes in the municipal courts of either Mount Vernon or Burlington, who have been or will be appointed a public defender, and who continue to have or will have a public defender appearing in their cases.

Certification of this Class is appropriate under Rule 23(a) and (b)(2). The Class is so numerous that joinder of all members is impracticable. The claims of the named Plaintiffs and Class members are based on a common course of conduct—the Cities' implementation and operation of a public defense system that fails to provide actual representation to indigent defendants—and this common course of conduct raises issues of fact and law that can be resolved on a Class-wide basis. Plaintiffs' claims are typical of the claims of the Class because

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all claims arise from the same practices and are based on the same legal and equitable theories. Plaintiffs and their counsel will adequately represent the interests of the Class. Finally, the Cities have acted or refused to act on grounds that apply generally to the Class, making final injunctive relief or declaratory relief appropriate as to the Class as a whole.

II. BACKGROUND

A. Overview of the Cities' Public Defense Contract System

Mount Vernon and Burlington jointly maintain a contract system for the public defense of indigent persons charged with crimes in the Cities' municipal courts. Ex. 1.[1] Under this system, the Cities have contracted with two attorneys—Richard Sybrandy and Morgan Witt—to provide all public defense services in the municipal courts except where there is an actual legal, ethical, or professional conflict of interest. *See id*. at 199 (§4(D)). If such a conflict arises, defense services are handled under the same contract by attorney Glen Hoff. *See id*. at 197 (§1(Q)). Sybrandy and Witt have acted as the Public Defender in Mount Vernon since 2000 and in Burlington since 2005. Ex. 2.

Sybrandy and Witt are defined in the joint contract as the "Public Defender." Ex. 1 at 194. The Cities currently pay the Public Defender a total of $178,150 per year—$117,400 from Mount Vernon and $60,750 from Burlington. *Id*. at 215. These funds are used to compensate the attorneys and to pay for "adequate investigative, paralegal, and clerical services and facilities necessary for representation of indigent defendants." *Id*. at 198. "Administrative expenses" are likewise "paid out of [the] compensation provided to the Public Defender." *Id*. at 197; *see also* Ex. 3. In addition, expert services must be paid out of the Public Defender's compensation unless those services have been approved by a court. Ex. 1 at 197.

The compensation the Cities pay to the Public Defender has declined over the years despite significant increases in attorney caseloads. In 2005, for example, Mount Vernon paid

[1] Unless otherwise stated, all exhibits are attached to the Declaration of Toby J. Marshall in Support of Plaintiffs' Cross-Motion for Preliminary Injunction and Opposition to Defendants' Motions for Summary Judgment, which is Docket Number 57 in the Court record. For the sake of brevity, preceding zeros have been deleted from pin cites.

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$120,000 to the Public Defender, and the primary assigning entity referred 702 cases to the Public Defender for that jurisdiction. Exs. 4 & 5. In 2009, Mount Vernon paid $117,400 (or $2,600 less) to the Public Defender, and the primary assigning entity referred 1,128 cases for that jurisdiction, an increase of approximately 61 percent. Exs. 6 & 7. During the same period, Burlington likewise reduced the amount of compensation paid to the Public Defender from $63,600 per year to $60,750. Exs. 1, 8, & 9. Notably, it is not only the caseloads that have seen a substantial increase over the past decade. According to Sybrandy and Witt, their "costs and overhead" have increased "significantly" as well. Ex. 2. In one of the few public defense services bids that the Cities obtained from someone other than Sybrandy and Witt, a law firm determined it would cost over $336,000 and require the services of five full-time attorneys to handle a caseload similar to that of the Public Defender in 2009. Ex. 10.[2]

B. The Cities Fail to Impose Reasonable Caseload Limits on the Public Defender

Washington law requires every city to "adopt standards for the delivery of public defense services," and "[t]he standards endorsed by the Washington state bar association ["WSBA"] for the provision of public defense services should serve as guidelines to local legislative authorities in adopting [such] standards." RCW 10.101.030; *see also In re Michels*, 150 Wn.2d 159, 174, 75 P.3d 950 (2003) ("Each county or city operating a criminal court holds the responsibility of adopting certain standards for the delivery of public defense services, with the most basic right being that counsel shall be provided."); *State v. A.N.J.*, 168 Wn.2d 91, 110, 225 P.3d 956 (2010) ("[E]ach county or city providing public defense . . . [shall be] guided by standards endorsed by the Washington State Bar Association.").

The cases handled by the Public Defender are all misdemeanors. Ex. 1 at 194, 195, 197. Under applicable WSBA standards, the caseload of a full-time public defense attorney should normally be capped at 300 misdemeanor cases per year and "shall not" exceed 400

[2] The law firm in question proposed a base figure of $202,800 for 1,180 cases and an additional $115 for each case in excess of the base. Ex. 10. There were 2,343 public defense cases in Mount Vernon and Burlington in 2009. Exs. 11 & 12.A. That results in 1,162 cases over the base and an additional payment of $133,630.

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misdemeanor cases per year. Ex. 13 at 4.[3] "A case is defined 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." Ex. 13 at 5. "In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the caseload [limit] should be based on the percentage of time the lawyer devotes to public defense." *Id*.

According to the bid proposal they submitted to the Cities in November 2008, Sybrandy and Witt serve as the Public Defender on a part-time basis only. Ex. 2 at 48, 52. Indeed, in the "Legal Experience" section of his resume, Sybrandy informed the Cities that he has an ongoing and extensive private practice. *See id*. at 52. Specifically, Sybrandy stated he has been an attorney at the firm of "Sybrandy and Witt" from "1998 to Present," and he listed his duties as follows: "Managing heavy domestic and criminal trial and motions practice" and "[c]onducting approximately 9 criminal jury trials and 6 civil trials per year." *Id*. (emphasis added). Below this, Sybrandy separately listed "Public Defense" as another area, stating he has also been a public defender with Mount Vernon since 2000 and with Burlington since 2004. *Id*.

Other documents corroborate the fact that Sybrandy and Witt spend a majority of their time working on private matters. *Id*. On his website www.sybrandy-law.org, Sybrandy lists "Family Law" and "Bankruptcy" as areas of practice. Ex. 15 at 2; *see also* Ex. 15 at 4-5 (listing "Practice Areas" as "40% Family," "20% Criminal Defense," "20% DUI/DWI," "10% Construction/Development," "5% Landlord/Tenant," and "5% Foreclosure"). On his website www.legalwitt.com, Witt lists "Civil Disputes," "Real Estate Matters," "Estate Planning Services," "Dissolutions/Divorces," and "Traffic Infractions" as the types of "Legal Services" that he performs. Ex. 16 at 2; *see also* Ex. 16 at 4 (stating Witt spends "33%" of his time on "Criminal Defense" and the remainder on "Litigation").

[3] In September 2011, the WSBA adopted amended standards that similarly cap the number of misdemeanor cases at 300 per attorney per year or, in jurisdictions that have not adopted a numerical case weighting system as described in the standards, 400 misdemeanor cases per attorney per year. Ex. 14.

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Under the WSBA standards, an attorney who devotes only 33 percent of his time to public defense services should not handle more than 133 misdemeanor cases per year for indigent clients. *See* Ex. 13. The public defense caseloads of Sybrandy and Witt greatly exceed this limit. Based on the closed case reports they submitted to the Cities in 2009, for example, Sybrandy served as the Public Defender in 1,206 cases, and Witt served as the Public Defender in 1,136 cases—a total of 2,342. Exs. 11 & 12.A. According to their 2010 reports, Sybrandy served as the Public Defender in 963 cases and Witt served as the Public Defender in 1,165 cases—a total of 2,128 misdemeanor cases in one year. Exs. 17 & 12.B.[4]

The WSBA standards provide that yearly caseloads of this magnitude require the equivalent of 5.32 full-time attorneys and one part-time supervisor. Ex. 13. The combined time Sybrandy and Witt spent on public defense cases, however, was substantially less than one full-time attorney. *See* Exs. 2, 15, 16. Assuming 1,800 billable hours per attorney in 2010 and a part-time basis of 33 percent on public defense cases, Sybrandy and Witt would have an average of only 34 minutes of attorney time per public defense case.[5] In 2009, this average would have been 31 minutes per case.[6] Time records submitted to the Cities show the attorneys regularly report spending only 30 minutes per case. Exs. 12 and 17.[7] Interestingly, complaints by indigent defendants indicate these time records are grossly overstated. *Compare* Ex. 18.B (Public Defender spent only minutes on case), *with* Ex. 17 at 134 (Public Defender reported spending one hour on case); *compare also* Ex. 18.G (same), *with* Ex. 12.A at 285 (same). Even if Sybrandy and Witt are inflating the amount of civil cases they litigate, 2,300 public defense cases per year between two full-time attorneys is excessive and unmanageable. *See* Ex. 13.

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[4] As noted above, the WSBA standards 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." Ex. 13 at 5. The yearly caseloads identified here are simply based on a count of the case numbers set forth in the closed case reports that Sybrandy and Witt submitted to the Cities. *See* Exs. 11, 12.A, 12.B, 17.

[5] Two attorneys at 1,800 billable hours each equals 3,600 total hours. One-third of 3,600 hours is 1,200 hours. 1,200 hours divided by 2,128 cases equals .5639 hours or 33.8 minutes per case.

[6] Two attorneys at 1,800 billable hours each equals 3,600 total hours. One-third of 3,600 hours is 1,200 hours. 1,200 hours divided by 2,342 cases equals .5124 hours or 30.7 minutes per case.

[7] *See also* Exs. 12.C & 12.B at 33, 143, 169, 273, 303, 330.

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Shortly after this lawsuit was filed, Sybrandy acknowledged that his caseload is "too high," adding "I've been frustrated to the point of tears." Ex. 15 at 11. This is nothing new, as excessive indigent defense caseloads have long been a problem in Mount Vernon. *See City of Mount Vernon v. Weston*, 68 Wn. App. 411, 415, 844 P.2d 438 (1992) ("the public defenders here were operating with caseload levels in excess of those endorsed by the ABA, by the [WSBA], and by the Skagit County Code."). Remarkably, the Cities knowingly permit each of their public defense attorneys to handle as many as 1,200 misdemeanor cases per year. *See* Ex. 1 at 195, 197. The current contract, which has been in place since January 1, 2009, provides that each attorney "shall not exceed 400 caseload credits per year," but the Cities allocate as little as "1/3" of a "case credit" to many misdemeanors, including theft, malicious mischief, driving while license suspended, and unlawful issuance of bank checks. *Id*.

Records produced in this lawsuit suggest the Cities implemented this case credit approach only after recognizing that Sybrandy and Witt were grossly exceeding the WSBA caseload standards and to create the false impression that the Cities' public defense system is in compliance with those standards. *See* Decl. of Toby J. Marshall in Support of Plaintiffs' Motion for Class Certification ("Marshall Class Cert. Decl."), Ex. 1. In the Request for Proposal for Public Defender Services that was issued in late 2008, the Cities informed prospective applicants that "all attorneys providing services shall maintain a caseload of no more than 450 misdemeanors, or any combination of misdemeanors and [private] matters that result in an equivalent workload." *Id*. at 525. The Request for Proposal further provided: "A case is counted" either "at the time of first appointment" for pretrial cases or at "[the] post-conviction hearing" for post-trial cases. *Id*. at 522 (emphasis added). There is no mention of case weighting. *See id*. Notably, the Request for Proposal was issued just months before the finalization of the 2009 contract. *See* Marshall Class Cert. Decl., Ex. 2.[8]

[8] The Cities have withheld or redacted numerous documents from the period of time in which the 2009 contract was being drafted. *See* Marshall Class Cert. Decl., Ex. 3.

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The Cities also changed their approach on the private practices of public defenders. As noted above, the Request for Proposal said the 450-caseload limit would be reduced in proportion with the percentage of time spent on private matters. *See* Marshall Class Cert. Decl., Ex. 1. In the 2009 contract, however, the Cities chose not to reduce the maximum number of public defense cases that attorneys may handle based on private caseloads. *See generally* Ex. 1. This is not only a violation of state law but also of the Cities' own ordinances and resolutions. *See* RCW 10.101.030 (each city "shall adopt standards" that include "limitations on private practice of contract attorneys"); Mount Vernon Muni. Code 2.62.030 ("the caseload ceiling [of a public defender] should be based on the percentage of time the lawyer devotes to public defense"); Ex. 19 (same for Burlington).

C. The Cities' Indigent Defense System Fails to Provide the Minimum Constitutionally Required Assistance of Counsel to Indigent Persons Charged With Crimes in Municipal Court

The excessive caseloads and other forms of deficient performance of the Public Defender described below have resulted in systemic deficiencies in the most basic aspects of client representation. The impact of those deficiencies is real and substantial: indigent persons who are charged with crimes in the municipal courts of Mount Vernon and Burlington are being constructively denied their constitutional right to counsel. Simply put, the Cities' public defense system has devolved to a state of "'meet 'em, greet 'em and plead 'em' justice." *State v. A.N.J.*, 168 Wn.2d at 98 (quoting Deborah L. Rhode, *Access to Justice*, 69 Fordham L. Rev. 1785, 1793 & n.42 (2001)).

1. <u>The Public Defender Refuses to Establish Confidential Attorney-Client Relationships With Indigent Defendants</u>

When an indigent defendant is charged with a crime in the municipal courts of Mount Vernon or Burlington, the defendant is arraigned without an attorney present. *See* Decl. of Jaretta Osborne ("Osborne Decl.") [Dkt. No. 51] ¶ 9; Decl. of Bonifacio Sanchez ("Sanchez Decl.") [Dkt. No. 50] ¶ 2. If the defendant indicates that she would like an attorney but cannot afford one, she is sent to be screened for indigency and her case is continued. *See id*. If a

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finding of indigency is made, the defendant is assigned either Sybrandy or Witt to represent her. Ex. 1 at 194, 196.

According to Plaintiffs and numerous other witnesses, Sybrandy and Witt refuse to talk to their assigned clients outside of court. Decl. of Angela Montague ("Montague Decl.") ¶¶ 16, 17, 20, 21, 24, 30; Decl. of Joseph Wilbur ("Wilbur Decl.") [Dkt. No. 46] ¶¶ 7, 10, 11, 14, 18, 19, 22; Decl. of Jeremiah Moon ("Moon Decl.") [Dkt. No. 47] ¶¶ 3, 11; Osborne Decl. [Dkt. No. 51] ¶¶ 9-18, 28; Sanchez Decl. [Dkt. No. 50] ¶ 3; Decl. of Tina Johnson ("Johnson Decl.") [Dkt. No. 49] ¶ 3; Exs. 18.A-18.C & 18.I. Indeed, witnesses testify that the Public Defender's office personnel have specifically stated the attorneys do not meet in private with indigent defendants. Sanchez Decl. [Dkt. No. 50] ¶ 3; Johnson Decl. [Dkt. No. 49] ¶ 3; Ex. 18.B.

The case of Ryan Osborne demonstrates the magnitude of this problem. Mr. Osborne was arraigned on November 12, 2010, and Sybrandy was assigned to represent him the following week. Osborne Decl. [Dkt. No. 51] ¶¶ 9-10. Because Mr. Osborne is a special needs adult with developmental disabilities and mental health conditions, his mother, Jaretta Osborne, started calling Sybrandy at his office and leaving messages shortly after Sybrandy was assigned, in an attempt to inform him promptly of her son's condition in case they were relevant to his legal case. *Id.* ¶ 11. Ms. Osborne wanted to explain her son's situation to the attorney because her son lacked the capacity to do so himself. *Id.* She continued to call over the course of several months, but Sybrandy never responded to her. *Id.* ¶¶ 11-18, 28. At one point, Ms. Osborne had to write directly to the court to request a continuance on her son's behalf because he was institutionalized in a state-operated residential habilitation center for persons with developmental disabilities and could not attend his hearing. *Id.* ¶¶ 16-17. If she had not done this, a warrant would have been issued for her son's arrest and confinement in jail. *See* Ex. 20; *see also* Ex. 21.

Documentary evidence corroborates the testimony of the witnesses. Exs. 18, 22, 23. In December 2008, for example, the director of the Skagit County Office of Assigned Counsel

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("OAC") wrote to Sybrandy and Witt and stated that "lack of attorney contact or communication has been a major complaint" of indigent defendants. Ex. 23.A at 558. The director copied the message to several city officials as well as the judges of the Mount Vernon and Burlington municipal courts. *Id.*; *see also* Ex. 23.C. Around the same time, the Mount Vernon Municipal Court Administrator sent the following message to the city attorney: "I see that the contract with Sybrandy and Witt expires at the end of this year. Is there anything that I can do to assist in getting out the [Request for Proposal] for this position? I do feel that there is a need for change in this area." Marshall Class Cert Decl., Ex. 4. The Cities, of course, chose to rehire Sybrandy and Witt. Two years later, in January 2011, the director noted that the OAC "continues to receive complaints" about public defense services. Ex. 23.B.

Records confirm this practice and that the typical reason given by the Public Defender for refusing to meet with clients is that the attorneys do not have the police reports. Osborne Decl. [Dkt. No. 51] ¶ 14; Exs. 18.B, 23.A at 558, 24. In fact, prior to the filing of this lawsuit, Sybrandy and Witt sent a standard one-page memorandum to indigent defendants that referenced their standard policy:

> You are free to make an appointment with our office to meet with your attorney. We will not, however, schedule an appointment with you until we have copies of all the police reports in your case, because without that information, a meeting is completely useless.

Exs. 25 & 26 (emphasis added).

This policy is totally at odds with the WSBA's established performance guidelines, which provide that a public defender "shall make contact with the client at the earliest possible time." Ex. 27 at 3 (emphasis added). Indeed, "[i]f the client is in custody, contact should be within 24 hours of appointment and shall be within no more than 48 hours unless there is an unavoidable extenuating circumstance." *Id.*

Roy Howson, a long-time defense attorney who practices in the Cities' municipal courts, reports it is not difficult for defense attorneys to get police reports in a timely manner. Howson Decl. [Dkt. No. 52] ¶¶ 3-5. Like Sybrandy and Witt, Mr. Howson routinely requests

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discovery in his notice of appearance, and the cities typically send the responsive documents to him within a week of that request. Howson Decl. [Dkt. No. 52] ¶¶ 4-5; Ex. 28. Furthermore, under the contract with the Cities, the Public Defender is supposed to review discovery within five days of receipt "for purposes of determining any conflicts of interest." Ex. 1 at 201. Despite this, numerous witnesses state that Sybrandy and Witt never met with them outside of court, regardless of whether it was weeks, months, or even years after the charge was filed. Montague Decl. ¶¶ 17, 24; Sanchez Decl. [Dkt. No. 50] ¶ 3; Johnson Decl. [Dkt. No. 49] ¶ 3; Moon Decl. [Dkt. No. 47] ¶ 3; Osborne Decl. [Dkt. No. 51] ¶¶ 11-18, 28; Exs. 18.A & 18.B.

2. The Public Defender Refuses to Meet with Indigent Defendants in Custody

The refusal of the Public Defender to meet with or respond to clients extends to indigent defendants who are incarcerated at the Skagit County Jail. Montague Decl. ¶¶ 11-13, 33; Wilbur Decl. [Dkt. No. 46] ¶¶ 7, 16, 21; Moon Decl. [Dkt. No. 47] ¶¶ 3, 10; Johnson Decl. [Dkt. No. 49] ¶ 3; Exs. 23.B & 24. This can be seen in the "Public Defender Request Form[s]" (also known as "kites") that inmates use to request contact with attorneys. Ex. 29. On January 12, 2010, for example, an incarcerated defendant sent a kite to the OAC with the following complaint: "I need a different attorney who can properly represent me please. I have been here since December 25th [nearly three weeks] and have yet to speak to Sybrandy and Witt. I have sent countless kites and [have had] family members call them but to no use." Ex. 29.B at 260. In 2011, another incarcerated defendant wrote to Sybrandy: "I need either a global resolution or bail reduction hearing as soon as possible [because] I will be homeless [and] posse[ssi]onless and veh[icle]less [unless I can get out of jail and take care of my affairs]." Ex. 29.M at 85. Four days later, having still not heard from Sybrandy, the defendant sent another request: "I have been here 20 days and you have yet to come to see me, call or write." Ex. 29.M at 82; *see also* Ex. 29.H at 46 ("I need to speak to you . . . . Please don't leave me hanging like last time."); Ex. 29.N at 96 ("[I] would appreciate you following up with me

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about the cases you are supposed to be representing me on."); Ex. 18.C (asserting Witt "doesn't answer" the kites her son sends from jail).

For the entire year of 2010, Sybrandy and Witt made only six visits to the local jail, meeting with a total of seven clients.[9] Ex. 30. By contrast, attorneys from the Skagit County Public Defender's Office (who handle district and superior court proceedings) made 750 visits to the jail and met with 1,551 clients. *Id*. The results were similar for 2009. Sybrandy and Witt made only five visits to the jail and met with eight clients, whereas attorneys from the county defender's office made 691 visits and met with 1,232 clients. *Id*.

Law enforcement officials have also noted the difficulty defendants have contacting the Public Defender. In November 2009, Mount Vernon's Chief of Police wrote to city officials regarding complaints that his officers had been making about the "public defender services being provided by Witt and Sybrandy." Ex. 31. The officers were not able to reach the attorneys at designated phone numbers, particularly when assisting defendants who had been arrested for driving under the influence. *Id*. The officers noted that this "[w]asn't an isolated case;" rather, "[there] has been a pretty consistent inability to contact them after hours." *Id*.

3. The Public Defender Refuses to Stand With or By Indigent Defendants at Hearings, Leaving Them to Speak to the Judge Directly without Representation

In addition to having a well-known and proven practice of not meeting with clients outside of court, Sybrandy and Witt regularly fail to advocate on behalf of or even stand next to indigent defendants who are appearing before the judge. *See* Osborne Decl. [Dkt. No. 51] ¶¶ 19, 24-26; Montague Decl. ¶¶ 36-38; Johnson Decl. [Dkt. No. 49] ¶¶ 8-10; Sanchez Decl. [Dkt. No. 50] ¶¶ 10-11; Howson Decl. [Dkt. No. 52] ¶ 7. Rather, while one defendant is before the court, the attorneys are typically talking with other defendants." *See id*. Plaintiff Montague, for example, says that the Public Defender did not stand next to her at numerous hearings and did not advocate on her behalf or explain her circumstances to the judge or

[9] It is not known whether those clients were indigent defendants or private clients.

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prosecutor. Montague Decl. ¶¶ 36, 38. Ms. Montague continues, "[w]hen I was in court, I regularly saw indigent defendants appearing without counsel at their side or advocating on their behalf." *Id.* ¶ 37. Jaretta Osborne testifies that the Public Defender failed to stand next to or advocate on behalf of her developmentally disabled son each time he appeared before the judge. Osborne Decl. [Dkt. No. 51] ¶¶ 19, 24-26. The judge even reprimanded Ms. Osborne's son for laughing at one point, yet the Public Defender "failed to say anything on [the son's] behalf or explain the fact that [he] did not understand what was going on around him" due to his developmental disabilities and mental health conditions. *Id.* ¶ 26.

As Roy Howson testifies, "[o]ne of the most important things for any defense attorney to do—public or private—is to stand between the client and the judge or prosecutor and advocate on the client's behalf." Howson Decl. [Dkt. No. 52] ¶ 9. This "ensure[s] that the client does not say things that could harm him or her when answering the judge's questions, particularly when the attorney better understands the judge's question and can provide the necessary information in a manner that is helpful to the client." *Id.* Like so many other witnesses, Mr. Howson has personally observed "that Mr. Sybrandy and Mr. Witt regularly fail to stand next to or speak for [their] public defense clients while those clients are being addressed by the judge." Howson Decl. [Dkt. No. 52] ¶ 7. Though Sybrandy and Witt are "present in the courtroom," they are off "doing other things" and not representing clients. *Id.*

4. The Evidence Shows Indigent Defendants are Constructively Denied the Constitutional Right to Counsel by the Cities

The Cities provide indigent criminal defendants with attorneys who refuse to create confidential attorney-client relationships, who refuse to provide counsel and advice, who refuse to advocate for or stand next to their clients in court, and who give incorrect or misleading information to secure guilty pleas. As such, the Cities are depriving indigent persons of the most basic aspects of representation on a systematic basis. As one defendant put it in a complaint to the Cities: "[What I want is] [s]omeone who will go over my case w/ me, discuss my options, meet w/ me before court e[tc]." Ex. 18.E; *see also* Ex. 29.G (seeking counsel "that

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will at least try and help me in this situation I regret putting myself into"). Given the Public Defender's excessive caseloads and the fact that the attorneys have little time to devote to any single case, regardless of the number of charges, it is not difficult to see how this occurs. The interactions, if any, that indigent defendants have with their assigned attorney are typically limited to a few minutes in a crowded courtroom. Johnson Decl. [Dkt. No. 49] ¶ 4; Moon Decl. [Dkt. No. 47] ¶ 3; Montague Decl. ¶ 18; Sanchez Decl. [Dkt. No. 50] ¶ 5; Exs. 18.A, 18.B & 18.G. During that short time, defendants are forced to make important decisions about their cases, often without any explanation or discussion of the elements of the charge, the applicable defenses, the options available, or the attendant risks. *See, e.g.*, Montague Decl. ¶¶ 18, 19, 39, 40; Moon Decl. [Dkt. No. 47] ¶¶ 4, 5, 11; Sanchez Decl. [Dkt. No. 50] ¶ 9; Osborne Decl. [Dkt. No. 51] ¶ 22-23; Wilbur Decl. [Dkt. No. 46] ¶¶ 8-9, 23; *see also* Ex. 18. Such risks may include loss of employment, incarceration for failure to comply with probationary conditions and, for non-citizens, deportation. Ex. 32.

The story of Bonifacio Sanchez provides a good example of this. *See generally* Sanchez Decl. [Dkt. No. 50]. After he was arraigned, Mr. Sanchez was told that Sybrandy had been assigned to represent him. *Id*. ¶ 2. Mr. Sanchez called Sybrandy's office to discuss the charge but was told that Sybrandy "would not meet with [him] outside of court." *Id*. ¶ 3. When he showed up at his hearing, Mr. Sanchez met with Sybrandy at a table in the courtroom. *Id*. ¶ 4. They talked for only a couple of minutes, and Mr. Sanchez "never had a chance to fully explain [his] story." *Id*. ¶ 5. Moreover, the meeting lacked any privacy because others were standing around, and "the prosecutor was only six or seven feet away" from them. *Id*. Sybrandy did not go over the police report with Mr. Sanchez but, instead, told Mr. Sanchez that he had seen many cases like this and that there was "no way" Mr. Sanchez could win. *Id*. ¶ 7. This left Mr. Sanchez feeling that Sybrandy would not fight on his behalf. *Id*. ¶ 8. Having spent less than five minutes with his appointed attorney, Mr. Sanchez pled guilty. *Id*. ¶ 8.

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Mr. Sanchez's story is echoed by others in several critical respects. First, witnesses testify that interactions with the Public Defender are reduced to brief encounters in packed courtrooms. *See, e.g.*, 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."); Ex. 18.G (assigned attorney "spent no more than 5 minutes" with defendant before she made decision); Montague Decl. ¶¶ 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").

Second, witnesses testify that they are not able to obtain advice or counsel from their attorneys. As Plaintiff Angela Montague says,

> I was only able to discuss [my cases] with Mr. Sybrandy in the courtroom because Mr. Sybrandy did not return any of my calls or schedule any meetings with me. These courtroom conversations typically lasted a couple of minutes. It wasn't possible to have a detailed and private conversation regarding deferred prosecution, treatment, and how to handle my case in the courtroom while other cases were being heard. I was very confused about what was required of me and what was happening with my case.

Montague Decl. ¶ 20; *see also* Wilbur Decl. [Dkt. No. 46] ¶¶ 7, 16-19; Moon Decl. [Dkt. No. 47] ¶¶ 6-7, 10. As one defendant succinctly stated: "I basically represented my self." Marshall Class Cert. Decl., Ex. 5. Several witnesses also testify that what little information they do receive is often incomplete or incorrect. *See, e.g.*, Montague Decl. ¶ 18; Moon Decl. [Dkt. No. 47] ¶¶ 8-9; Johnson Decl. [Dkt. No. 49] ¶ 9; Osborne Decl. [Dkt. No. 51] ¶ 23; Ex. 18.H.

Third, witnesses testify that the attorneys do not investigate their cases or even have a meaningful discussion of the facts. Moon Decl. [Dkt. No. 47] ¶¶ 6, 7, 11 (saying "Witt was not interested in discussing the facts of my case with me"); Wilbur Decl. [Dkt. No. 46] ¶ 23; Montague Decl. ¶ 35; Osborne Decl. [Dkt. No. 51] ¶ 14; Sanchez Decl. [Dkt. No. 50] ¶ 9; Marshall Class Cert. Decl., Ex. 5 (complaining "[Sybrandy] brought me to court unprepaired"). After this lawsuit was filed, Sybrandy stated publicly that he has not hired an investigator to look into the facts of a case for at least two years. Ex. 15 at 12. Similarly, it appears the Public Defender has never utilized an expert witness. Exs. 33 & 34.

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Fourth, witnesses testify that they are pressured to accept guilty pleas. Wilbur Decl. [Dkt. No. 46] ¶ 9; Sanchez Decl. [Dkt. No. 50] ¶ 8; Exs. 18.A, 18.F, 18.I. One defendant, for example, says that she tried to reach Sybrandy several times before court, but he never returned her call. Ex. 18.A. When she appeared in court, she asked for Sybrandy. *Id*. He identified himself and told her to sit down and wait for him to call her. *Id*. Approximately 15 minutes later, Sybrandy read her file and then asked her about the charge. *Id*. When she started to explain her position, Sybrandy told her she was "not special" and "need[ed] to face what [she] did." *Id*. He also told her that she was "luck[y]" to have only been charged with a misdemeanor, and he recommended that she "should just end [it] today." *Id*. Feeling she had "no cho[ic]e," the defendant pled guilty. *Id*.

Remarkably, no jury trials were held in Burlington's municipal court in 2010, and only two were held in Mount Vernon's municipal court that same year. Ex. 35. It is not known how many of these trials involved indigent defendants but even if all of them did, that represents less than one-tenth of one percent of the more than 2,000 misdemeanor cases filed in those jurisdictions that year.[10] By comparison, there were 24 jury trials held in the municipal court of Anacortes, which had 931 misdemeanor cases filed in 2010. Exs. 36 & 35.

D. The Cities Systematically Fail to Monitor or Address the Deficiencies in their Public Defense System

The Cities are legally obligated to supervise, monitor, and evaluate the Public Defender. RCW 10.101.030; *see also* Mount Vernon Muni. Code 2.62.080 (requiring the establishment of "a procedure for systematic monitoring and evaluation of attorney performance based upon published criteria"); Ex. 19 (same for Burlington). The evidence demonstrates that the Cities are failing this requirement despite having knowledge of the specific right to counsel tasks the Public Defender should perform and despite having knowledge of the numerous complaints about and deficiencies in their public defense services.

[10] Two jury trials divided by 2,128 cases equals .0009398 or 0.094 percent.

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For example, pursuant to the contract between the Cities and the Public Defender, the Cities understood and agreed to the following right to counsel obligations:

- The *maximum number of cases* which each Public Defender serving under the Contract shall handle *shall not exceed 400* caseload credits per year. *See* City of Mount Vernon City of Burlington Public Defense Services 2009-2010 Contract for Services, § 2C (Caseload Limits) (emphasis added).
- The Public Defender *shall establish reasonable office hours* in which *to meet with defendants prior to the day of hearing* or trial. *Id.* § 2F (Support Services) (emphasis added).
- The Public Defender shall be responsible for *ensuring that they are able to properly communicate* with defendants. *Id.* (emphasis added).
- The Public Defender *shall provide to the police* departments of the Cities the *telephone number or numbers* at which the Public Defender can be reached *for critical stage advice* to defendant during the course of police investigation and/or arrests twenty-four (24) hours each day. *Id.* § 2G (Twenty-Four Hour Telephone Access) (emphasis added).
- *Legal services shall be* statutorily and *constitutionally based*. *Id.* § 4A (Purpose) (emphasis added).
- The Public Defender *shall provide the services of attorneys* and staff members *in compliance with* all of the applicable *laws* and administrative regulations *of the State of Washington, the United States*, Mount Vernon Municipal Code, Burlington Municipal Code, *and Washington State Rules of Professional Conduct* (RPC). *Id.* § 4B.1 (Professional Conduct) (emphasis added).
- Services include, but are not limited to: *preparation for and representation of the client at the pre-trial hearings, trial, sentencing, post-conviction review, and any appeals to Superior Court of Washington Appellate Courts, and attending all court hearings* required by the Washington Court or Local Court Rules now or hereafter adopted. *Id.* § 4F.1 (Duties and Responsibilities of Public Defender Attorneys) (emphasis added).
- The Public Defender *will be available to talk and meet in person with indigent defendants in the Skagit County Jail and/or an appropriate location* in either the City of Burlington or the City of Mount Vernon *that provides adequate assurances of privacy*. *Id.* § 4F.4 (emphasis added).

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- The Public Defender will also *return phone calls or other attempts to contact the Public Defender within forty-eight (48) hours*, excluding weekends. *Id.* § 5A.4 (Practice Standards and Records) (emphasis added).

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. Exs. 11, 12, 17, 18, 23, 29, 31, 39; *see also* Section II.C, *supra*. In fact, the attorneys have explicitly told the Cities as much. Ex. 37. In December 2008, for example, Sybrandy wrote an email to the Burlington city manager with the following admission that the Public Defender would not be initiating contact or communications with their indigent clients:

> There is much in the proposed contract which is not possible for us to comply with, at least at the level of compensation we have proposed . . . . [This] include[s] our communication with clients . . . . It would be extraordinary for us to be directed to initiate contact with [indigent] defendants . . . . [W]e may know we represent a person in custody, but we have no idea what the nature of their charges are or their criminal history . . . . Contact is useless at that point . . . . [Likewise, we] rarely have any information that would be of use in any contact with [non-incarcerated defendants] prior to pretrial . . . . Initiating any contact prior to that . . . would serve no purpose, and be somewhat comical. The conversation would go something like this 'hi, I am your lawyer, I know nothing about your case, we will see you in court.' Surely that would serve no purpose, when the clients already have [such] information given to them at the very beginning of our representation.

Id. Notably, the provisions that the attorneys said they could not and would not comply with were retained, despite the fact that the parties to the contract (including the Cities) knew as much. *Compare Id.* at 1790-1817, *with* Ex. 1.

The Cities' response to complaints about the Public Defender's failure to perform these tasks is similarly perfunctory. When an indigent defendant complained that his assigned attorney refused to meet with him outside of court and only gave him three minutes of time in court, the Mount Vernon public defense contract manager forwarded the complaint to Sybrandy. Ex. 18.B. In his response, Sybrandy did not deny that he only meets with clients the day of their court appearance. *Id*. Moreover, he blamed the defendant, saying "I don't think I really have to explain to anyone why it is that we were unable to make [the defendant] happy,"

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and "I hope . . . this demonstrates why [the defendant's] complaint should be directed at himself, not me." *Id*. Upon receiving this, the Mount Vernon contract manager wrote: "I am satisfied with Mr. Sybrandy's response and will not be taking further action." *Id*.

Despite the serious complaints made about the Public Defender, the Cities have failed to make efforts to protect indigent persons, secure their constitutional rights, or enforce the very contractual obligations the Public Defender is paid to perform. Indeed, at the end of 2010, the Cities' councils voted unanimously to preserve the status quo by extending the contract at the same compensation rates with the same attorneys for another two years. Exs. 1 & 38.

In sum, the Cities are fully aware of their obligation to provide the right to counsel, aware of what that right to counsel requires, and aware that their contract, the United States Constitution, and the Washington State Constitution are being violated by the Cities' failure to provide counsel. Ex. 1 at 198; *Id*. at 200; and Exs. 33 & 34.

E. The Experts on Prosecution and Defense Agree That Systemic Constitutional Violations Are Occurring

Plaintiffs have obtained the assistance of three well respected criminal law and ethics experts in the State of Washington to offer their opinions on the facts presented in this case. These expert witnesses uniformly conclude that the constitutional right to counsel is being violated by the Cities' systemic failure to, at a minimum, require the establishment of a confidential attorney-client relationship where there is a discussion of the government's charges and evidence, a discussion of whether to investigate and challenge the government's case, a discussion of whether a negotiated resolution of the charges should be pursued, and a discussion of whether to try the case. *See* Decl. of David Boerner ("Boerner Decl.") [Dkt. No. 53] ¶ 12; Decl. of John Strait ("Strait Decl.") [Dkt. No. 54] ¶¶ 19-27; Decl. of Christine Jackson ("Jackson Decl.") [Dkt. No. 55] ¶ 7-17. Moreover, all of the experts agree that the Cities are violating the right to counsel because of their failures to ensure, at a minimum, that the Public Defender meets with indigent defendants to confidentially discuss critical case issues before the defendants appear in court; that the Public Defender appears and stands with

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indigent defendants whenever the defendants are required to address the courts; and that the Public Defender provides indigent defendants with accurate information regarding jail alternatives, plea alternatives, dispositional alternatives, and plea consequences, among other things. Boerner Decl. [Dkt. No. 53] ¶¶ 16-17; Strait Decl. [Dkt. No. 54] ¶¶ 19-25, 27; Jackson Decl. [Dkt. No. 55] ¶ 7-17. Expert Professor Strait further opines that the excessive caseloads do not allow for "adequate communication" and that the system of indigent defense operated by the Cities makes it impossible to provide indigent accused with the right to counsel under the Sixth Amendment and Article I, Section 22. Strait Decl. [Dkt. No. 53] ¶¶ 20-21.

III. AUTHORITY AND ARGUMENT

This action is still in the early stages of discovery, but Plaintiffs have already presented substantial evidence showing the Cities operate a public defense system that systemically deprives indigent defendants of their constitutional right to counsel. Because the Cities are acting or refusing to act on grounds generally applicable to all indigent defendants, final injunctive relief and corresponding declaratory relief are appropriate respecting the proposed Class as a whole. Accordingly, Plaintiffs respectfully request that the Court certify this case as a class action pursuant to Rule 23(b)(2).

A. Plaintiffs Satisfy the Requirements for Class Certification Under Rule 23(a)

"The decision to grant or deny class certification is within the trial court's discretion." *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010). In order to grant class certification, the Court "must be satisfied, after a 'rigorous analysis,' that the prerequisites of Rule 23(a) are met and that the class fits within one of the three categories of Rule 23(b)." *Unthanksinkun v. Porter*, C11-0588JLR, 2011 WL 4502050, at *6 (W.D. Wash. Sept. 28, 2011) (quoting *Wal–Mart Stores, Inc. v. Dukes*, —— U.S. ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011)). "Any inquiry into the merits . . . should be limited to determining whether the requirements of Rule 23 are met and 'may not go so far . . . as to judge the validity

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of the claims.'" *Id*. (quoting *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. ConocoPhillips Co.*, 593 F.3d 802, 808 (9th Cir.2010)).

There are four prerequisites to class certification: numerosity, commonality, typicality, and adequacy of representation. *Rodriguez v. Hayes*, 591 F.3d 1105, 1122 (9th Cir. 2009) (citing Fed. R. Civ. P. 23(a)). For the reasons set forth below, Plaintiffs satisfy each of these.

1. Plaintiffs Satisfy the Numerosity Requirement

A class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "The party seeking certification need not identify the precise number of potential class members." *Garrison v. Asotin County*, 251 F.R.D. 566, 569 (E.D. Wash. 2008). Moreover, numerosity has been held presumptively satisfied when a proposed class comprises 40 or more members. *See McCluskey v. Trustees of Red Dot Corp. Emp. Stock Ownership Plan & Trust*, 268 F.R.D. 670, 673-74 (W.D. Wash. 2010) (citing cases).

The evidence before the Court shows that at any given time there are hundreds of indigent defendants with cases pending in the municipal courts of Mount Vernon and Burlington. *See* Exs. 4−7, 11, 12.A, 12.B, 17. Indeed, there were more than 2,000 such defendants in 2010 alone. Exs. 17 & 12.B. Furthermore, Plaintiffs seek declaratory and injunctive relief, and an order granting such prospective remedies will benefit thousands of additional persons who are currently unnamed and unknown. *See Jordan v. Los Angeles County*, 669 F.2d 1311, 1319 (9th Cir.1982), *vacated on other grounds*, 459 U.S. 810 (1982) (holding joinder of unknown members is impracticable). Finally, the demographics of the proposed Class underscore the importance of maintaining the present suit as a class action. The Class includes individuals who are unsophisticated, uneducated, or unable to speak English. *See, e.g.*, Ex. 29. These factors are also considered in determining the impracticability of joinder. *Rodriguez v. Carlson*, 166 F.R.D. 465, 471 (E.D. Wash. 1996).[11]

[11] *See also Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976) ("Only a representative proceeding avoids a multiplicity of lawsuits and guarantees a hearing for individuals, such as many of the class members here, who by reason of ignorance, poverty, illness or lack of counsel may not have been in a position to seek one on their own behalf.").

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Because joinder of a class of hundreds (if not thousands) of indigent defendants would be impracticable, the numerosity requirement is met.

2. There Are Numerous Common Questions of Fact and Law

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Unthaksinkun*, 2011 WL 4502050, at *12 (quoting *Dukes*, 131 S. Ct. at 2551) (internal marks omitted). "The class members' 'claims must depend upon a common contention,'" and that common contention "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'" *Id.* (quoting *Dukes*, 131 S. Ct. at 2551). It is not necessary that members of the proposed class "share every fact in common or completely identical legal issues." *Hayes*, 591 F.3d at 1122. Rather, the "existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.1998).[12]

The Cities have implemented and are continuing to operate a public defense system that fails to provide actual representation to indigent defendants. *See* Section II, *supra*. The claims of the Plaintiffs and proposed Class members all stem from this common course of conduct and raise the same factual and legal questions, including the following: (1) whether the Cities have a duty to provide Class members with assistance of counsel; (2) whether the Cities are systemically failing to meet that duty; (3) whether the Class members are entitled to declaratory relief under 42 U.S.C. § 1983; and (4) whether the Class members are entitled to preliminary and permanent injunctive relief. *See* Amend. Compl. ¶¶ 23, 177-182. The civil rights that Plaintiffs assert in this action are universally applicable to all members of the proposed Class,

[12] *See also Doe v. Los Angeles Unified Sch. Dist.*, 48 F. Supp. 2d 1233, 1241 (C.D. Cal. 1999) ("[C]ommonality exists if plaintiffs share a common harm or violation of their rights, even if individualized facts supporting the alleged harm or violation diverge.").

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and the constitutional, statutory, and contractual obligations governing the provision of actual representation to indigent defendants are unilaterally imposed upon the Cities with respect to all Class members. Because there are common questions of law and fact, the commonality requirement is satisfied.

3. The Named Plaintiffs' Claims Are Typical of the Class Claims

Typicality is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992). "It is not necessary that the class representatives' injuries be identical to all class members' injuries, 'only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same, injurious course of conduct.'" *Unthaksinkun*, 2011 WL 4502050, at *13 (quoting *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir.2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504–05 (2005)).

Plaintiffs' claims are typical of the claims of the proposed Class members because they all arise from a common course of conduct by the Cities—namely, the establishment and maintenance of a public defense system that routinely deprives indigent defendants of actual assistance of counsel in violation of the United States Constitution and the Washington Constitution. *See generally* Amend. Compl. Moreover, all of the claims are based on the same legal and equitable theories. *Id*. ¶¶ 177-182. The named Plaintiffs and Class members all seek the same declaratory and injunctive relief. For these reasons, the typicality element is satisfied.

4. The Named Plaintiffs and Their Counsel Will Fairly and Adequately Protect the Interests of the Class

Before certifying the class, the Court must find the named Plaintiffs and their counsel will adequately represent the Class. Fed. R. Civ. P. 23(a)(4) & (g)(1). This inquiry requires the Court to consider whether the Plaintiffs and their counsel have "any conflicts of interest with other class members, and whether they will prosecute the action vigorously on behalf of the

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class." *Hanlon*, 150 F.3d at 1020. With respect to the adequacy of counsel, the Court considers the work counsel has done to investigate the claims of the proposed Class, counsel's experience in handling complex cases, counsel's knowledge of applicable law, and the resources counsel will commit to representing the Class. Fed. R. Civ. P. 23(g)(1)(A).

The named Plaintiffs' claims are coextensive with, and not antagonistic to, the claims asserted on behalf of the proposed Class. Indeed, the named Plaintiffs and Class members have suffered the same injury: they have been denied their constitutional right to the assistance of counsel. Plaintiffs seek to ensure that the Cities provide actual representation to indigent defendants, and Plaintiffs have demonstrated a commitment to prosecuting this action vigorously on behalf of the Class. *See* Marshall Class Cert. Decl. ¶ 8. All three Plaintiffs have responded to extensive discovery requests, and two have sat for depositions. *See id.*

In addition, Plaintiffs have retained a competent and capable team of trial lawyers with significant experience in class actions and complex litigation, including matters involving civil rights and criminal defense. *See generally* Marshall Class Cert. Decl.; Zuchetto Class Cert. Decl.; Dunne Class Cert. Decl.; Williams Class Cert. Decl. Attorneys representing Plaintiffs have been appointed as class counsel in numerous actions. *See id.* They have successfully litigated cases in both state and federal courts, often on behalf of hundreds or thousands of individuals. *See id.* In this case, Plaintiffs' counsel have worked extensively to investigate the claims, are dedicated to prosecuting the claims of the Class, and have the resources to do so. *See id.* Accordingly, the adequacy requirement is satisfied.

B. Plaintiffs Meet the Requirements for Certification Under Rule 23(b)(2)

In addition to the four requirements of Rule 23(a), Plaintiffs must satisfy one of the three conditions of Rule 23(b). *Hayes*, 591 F.3d at 1122. Here, Plaintiffs seek certification under Rule 23(b)(2), which was specifically designed for civil rights cases challenging a common course of conduct. *See* Fed. R. Civ. P. 23 advisory committee's note to 1966 Amendment, Subdivision (b)(2) (noting "various actions in the civil-rights field" are

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appropriate for (b)(2) certification). "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Unthaksinkun*, 2011 WL 4502050, at *15 (quoting *Dukes*, 131 S. Ct. at 2557). "In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Id*. (quoting *Dukes*, 131 S. Ct. at 2557).

This case arises from the Cities' creation and maintenance of a public defense system that routinely deprives indigent defendants of actual assistance of counsel. A declaratory ruling from the Court regarding the Cities' systemic violation of the right to counsel and an injunctive order requiring the Cities to takes steps to end that unlawful practice will apply equally to all Class members. "The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Hayes*, 591 F.3d at 1125. Rather, "'it is sufficient' to meet the requirements of Rule 23(b)(2) that 'class members complain of a pattern or practice that is generally applicable to the class as a whole.'" *Id*. (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)). That is precisely the case here. To be clear: Plaintiffs are not seeking post-conviction relief but instead are requesting that the Court order the Cities to provide actual representation to indigent defendants who are charged with one or more crimes in the municipal courts of either Mount Vernon or Burlington.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court certify the proposed Class pursuant to Rule 23(b)(2); appoint Angela Montague, Jeremiah Moon, and Joseph Wilbur as Class representatives; and appoint Terrell Marshall Daudt & Willie PLLC, The Scott Law Group P.S., the ACLU of Washington Foundation, and Perkins Coie LLP as Class counsel.

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DATED this 10th day of November, 2011.

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CERTIFICATE OF SERVICE

I, Toby J. Marshall, hereby certify that on November 10, 2011, I electronically filed the foregoing 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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