HON. 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

DEFENDANT CITIES OF MOUNT VERNON AND BURLINGTON'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Noted for Consideration: March 29, 2012

I. INTRODUCTION

Defendants, the Cities of Mount Vernon and Burlington ("the Cities"), respectfully submit this memorandum in opposition to plaintiffs' motion for summary judgment.

In 2011, plaintiffs moved for a preliminary injunction, which required a lesser showing than this one. It took the Court one page to deny the request, dkt. 142, and since then, plaintiffs' case has only gotten weaker. Discovery and investigation have proven most of their claims to be objectively (and in some cases, wildly) untrue. Indeed, at this juncture, the only "factual disputes" are questionable stories told by a few class members about Sybrandy and Witt—the old public defenders—and their emphatic rejection by the

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

public defender, prosecutor, judges, court staff, contract administrators, and virtually everybody else in a position to know. It is thus no coincidence that plaintiffs have suddenly limited their ambitions to "modest" relief.[1]

But that is secondary. Because this is a lawsuit seeking prospective relief, the real issue is the Cities' *current* public defense system—which has twice as many attorneys, all of whom regularly certify their Supreme Court-approved caseloads. Funding is more than doubled, and there have been virtually no complaints about them.[2] It is also undisputed that the Cities monitor their public defenders as thoroughly—or better—than other municipalities in Washington. Plaintiffs' misquoted citations do not change this.

At bottom, plaintiffs have known that their case was moot for some time now, *see* dkt. 192, and this motion is, more than anything, a transparent, last-ditch effort to stave off dismissal. Plaintiffs are not entitled to summary judgment; the Cities are.

This motion should be denied.

II. CLARIFICATION OF FACTUAL BACKGROUND

A. The Early 1990's

Plaintiffs begin in the early 1990's, not with facts, but with Court of Appeals dicta. In *City of Mount Vernon v. Weston*, 68 Wash. App. 411, 415, 844 P.2d 438 (1992), a public defender attempted to withdraw and secure conflict counsel for the appeal. The trial court refused, citing "some overall savings to the taxpayers of this state." *Id.* at 414. The appellate court reversed, primarily because the trial court was wrong about the sources of funding. *Id.* 414-15. It also cited an "undisputed record" about public defenders carrying excessive caseloads as an alternative rationale. *Id.* at 415. Not only was this non-binding dicta, but more importantly, there is no indication in the record that the prosecutor

[1] *Compare* Mot. at 2 (asking only for a "part time monitor"); *with* Dkt. 45-1 (Proposed Preliminary Injunction Order with 18 mandatory requirements).

[2] To be fair, approximately a year ago, during the Mountain Law transition, one indigent client complained because she wanted Mr. Sybrandy to continue representing her. *See Declaration of Judge Svaren in Support of Motion* ¶ 9.

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800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

investigated, challenged, or even opposed the claims about the workload of the public defender. *Weston* is not a source of historical facts, nor binding.[3]

B. Richard Sybrandy and Morgan Witt

Fast-forwarding almost twenty years—during which plaintiffs present no evidence of problems—they arrive at Richard Sybrandy and Morgan Witt. And though these two attorneys are no longer affiliated with the Cities'—and have nothing to do with the "system" plaintiffs seek to enjoin—the vast majority of their motion centers upon the years 2008 to 2011.

Despite being irrelevant,[4] the criticisms are explored below.

1. "THOUSANDS OF CASES"

Plaintiffs, surprisingly, continue to assert that Sybrandy and Witt handled "thousands" of cases. This time, they rely upon a calculation performed by an un-named staff-person, and summarized by an undisclosed paralegal for class counsel. *See Boschen Decl.* ¶ 2-5. Not only is the calculation inadmissible on a number of levels,[5] *see infra* Section III, A, but its conclusion of 963-1173 cases per year is grossly inflated (and rejected by those with personal knowledge).

Generally speaking, Boschen claims to have looked at "closed case reports" and generated a calculation by finding "unique case numbers." The first problem is that this confuses "cases" with "charges," and in the process, ignores the Washington Supreme Court's public defense standards. It is now established that "[i]n courts of limited

[3] To be binding on the Cities, the fact must have actually been litigated. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). This did not happen in *Weston.*

[4] *See* Dkt 218 (Order) ("Plaintiffs seek injunctive relief and will bear the burden at trial of showing that the ***then-existing systems*** warrant such an extraordinary remedy.") (emphasis added).

[5] The proponent of a summary by legal staff must establish that he or she "summarize[d] the information contained in the underlying documents accurately, correctly, and in a non-misleading manner." *United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998). And since any such summary must be tested on cross examination, *Gordon v. United States*, 438 F.2d 858, 877 (5th Cir. 1971), ***it must be sponsored by a properly disclosed witness***. *Colon-Fontanez v. Municipality of San Juan*, 660 F.3d 17, 31 (1st Cir. 2011) (emphasis added). Paralegal Boschen was never disclosed as a witness who would sponsor a calculation.

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800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

jurisdiction multiple citations from the same incident can be counted as one case." *Harrison Decl.* ¶ 3, Ex. A.[6] Boschen ignored this—and as a consequence, in just the first 10 pages of the closed case reports, inflated Sybrandy and Witt's caseload by over 40%. *See* Dkt. 246 (Exhibit 14, at 142-151) (comparing 77 incidents with 108 "unique numbers"). Or, for a more tangible illustration Class Representative Moon had three citations from a single incident. While appropriately treated as *one*, Boschen treated it as *three*. Dkt. 246 (Exhibit 14, at 250).

Boschen then compounded her error by ignoring *when* the work was done. Because she analyzed only "closed" cases, cases handled in 2008 were deemed part of 2009, merely because of when they were reported as complete. *See* Dkt. 246 (Exhibit 14, at 164). Again, one need go no further than Plaintiff Moon. He was arrested in August 2008, and his case was closed in early 2009. *Cooley Decl.* Ex. 1 (Moon Dep. Tr. Ex. 10); Dkt. 246 (Ex. 14, at 250). Though counted as a 2009 case, there is no evidence that any work was actually done that year.

And finally, there is no indication that Boschen even attempted to account for the way the parties weighted cases during this time period, as provided for in their agreement. Boschen instead counted each and every citation as "one case." When Sybrandy and Witt were handling public defense, they (quite ethically) limited their count of case credits to matters where they did actual work. They, for example, did not count cases where a client immediately FTA'd. Dkt. 120 (*Sybrandy Decl.* ¶ 20). Nor did they count serial arrests and disappearances as multiple cases, *id.*, even though they would have "unique case numbers." Once again, the mischief is illustrated by the class representatives. Boschen counted Plaintiff Wilbur's first five arrests and immediate disappearances as *five cases*—when Sybrandy and Witt would not have counted it at all. *See generally* Dkt. 26 (*Cooley Decl.*). Montague, too, was arrested and immediately disappeared twice, before finally defending

[6] This makes sense as a practical matter. When a person is driving under the influence, and cited for not having a license as well, it should be counted as *one* case. As the Washington Supreme Court was aware, there will be the same number of meetings, hearings, witnesses, and trials.

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SEATTLE, WASHINGTON 98104-3175
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her charges. Dkt. 33 (*Cooley Decl.* at 97-101). Assuming that Wilbur and Montague are "typical"—and plaintiffs successfully argued they were (Dkt. 82)—Boschen's numbers are exaggerated by roughly another 350%.

But fuzzy math aside, plaintiffs' "calculation" is disputed. Sybrandy—who obviously has better knowledge than Boschen—estimated that he may have handled 900 "charges" per year, *Cooley Decl.* Ex. 2 (Sybrandy Dep. Tr. 53:5 – 54:1), while rejecting plaintiffs' claim that he handled "thousands of cases a year" as "crazy," dkt. 120 (*Sybrandy Decl.* ¶ 18). Witt, similarly, testified that there was *never* a time when he felt like he "couldn't do the work either competently from a legal standpoint or competently from a resources and time standpoint." *Cooley Decl.* Ex. 3 (Witt Dep. Tr. 279:23-280:8).

Plaintiffs' belief that the public defenders were handling "thousands of cases" is supported *only* by an inadmissible and inaccurate calculation, done by a paid advocate. And even if this were competent evidence (though, it is not), it is contested.

2. "COMPELLED TO COMMIT MALPRACTICE BY AN EXCESSIVE CASELOAD"

Plaintiffs also rely upon the following reasoning: Sybrandy and Witt had an excessive caseload, which they were unable to handle—and they were too incompetent or unethical to say anything—so their clients' rights were violated. Every part of this is wrong.

First, as discussed above, Sybrandy and Witt did not have an excessive caseload. The only "evidence" supporting the proposition is an inadmissible calculation.

Next, plaintiffs' theory presupposes that experienced two attorneys were taking on triple their contractual workload for absolutely no reason. To date, plaintiffs have yet to even *attempt* an explanation for this—because it makes no sense. *See* Dkt. 60 (*Stendal Decl.* ¶ 9; 19). Sybrandy and Witt had no incentive, financial or otherwise, to take on "thousands" of cases in excess of their contract. *Id.* They were well-aware of the workload contemplated in their contract, and further knew that when it was reached, they could either

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800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

declare it concluded or seek more resources. *Cooley Decl.* Ex. 2 (Sybrandy Dep. Tr. 90:23-92:2). Sybrandy, for example, explained:

> Q. If you were having ongoing problems [being too busy], would you have any concerns about reaching out to the cities and telling -- and discussing changes with them?
>
> A. If I had clients suffering because I didn't have time to make sure that they weren't getting the right representation, if I thought that was there, I would have contacted [the City Attorney or Contract Administrator] or whoever it is I needed to contact and say, This is out of hand, we need -- something needs to change.

Cooley Decl. Ex. 2 (Sybrandy Dep. Tr. 237:2-238:11). This did not happen, because it "never got to that point." *Id.* Witt agreed, testifying that if he was not capable of doing the work, he would take steps to remedy that; he would *not* simply take on clients and provide them bad representation. *Cooley Decl.* Ex. 3 (Witt Dep. Tr. 279:23-280:8). Witt's workload, too, never got to that point. *Id.*

And lastly, plaintiffs take for granted that exceeding a caseload of 400 is tantamount to a Sixth Amendment violation. It is not; at best, the proposition is disputed. Craig Cammock, the prosecutor for Burlington and Anacortes, believed, based upon his experience, that "caseload limits at the misdemeanor level are inappropriate." Dkt. 117 (*Cammock Decl.* ¶ 12). When dealing with DWLS cases, as many of Sybrandy and Witt's cases were, "a competent defense attorney can literally handle thousands of these cases per year." *Id.* Patrick Eason, the prosecutor for Mount Vernon, similarly explained that "caseloads [do not] set the standard for claims of ineffective assistance of counsel," largely because they fail to take into account the defense attorneys' experience, familiarity with the jurisdiction, and local circumstances. Dkt. 118 (*Eason Decl.* ¶ 17); *see also Cooley Decl.* Ex. 3 (Witt Dep. Tr. 229:2-18) (could competently handle 400 cases in a matter of weeks or months, depending on the mix); Dkt. #119 (*Ladenburg Decl.* ¶ 23) (expert opinion that

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SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

"caseload alone is not a reliable way to calculate proper public defense"); *Cooley Decl.* Ex. 4 (Feldman Dep Tr. 111:24 -112:15) (similar expert opinion). [7]

In fact, even plaintiffs' own consultant, Christine Jackson, acknowledged that up until recently, in King County—where her agency worked—public defenders were exceeding the WSBA standard of 450 cases. *Cooley Decl.* Ex. 6 (Jackson Dep. Tr. 105:8-19). She, however, denied that King County was violating the Sixth Amendment, because "[t]he caseloads are ***one factor*** that you look at with regard to whether or not Constitutionally adequate counsel is being provided." *Id* (emphasis added).

To be clear, the State Supreme Court has endorsed caseload limits[8]—and the Cities will comply with them. Dkt. 237; Dkt. 241. But that is in no way a concession that they form a *per se* Sixth Amendment standard.

3. "DID NOT ADVOCATE FOR THEIR CLIENTS"

Again, this claim is belied by just about every person with personal knowledge and any semblance of experience. Judge Svaren, a current district court judge and president-elect of the District and Municipal Court Judges Association, has observed Sybrandy and Witt for years. According to him:

> Richard Sybrandy and Morgan Witt… brought motions, tried cases, argued pleas, and otherwise defended their indigent clients in my presence. Based upon my observations, Mr. Sybrandy and Mr. Witt are both experienced advocates and tried more cases than private counsel, on average. Although some public defender clients lodged occasional complaints about their

[7] The importance of familiarity with a jurisdiction cannot be overstated. Plaintiffs' expert, Jackson, criticizes the public defenders for not engaging in more "aggressive" motions practice. This betrayed her lack of familiarity. In the Cities, the prosecutors regularly dismiss charges when an issue is informally brought to their attention. Dkt. 118 (Decl. ¶ 7), Dkt. 117 (Decl. ¶ 6); Dkt. 120 (Decl. ¶ 6); Dkt. 236 (*Decl.* Ex. D); *Cooley Decl.* Ex. 5 (Laws Dep. Tr. 336:8-337:11). This is a far better, faster result than a risky motion that could result in loss of leverage in plea negotiations.

[8] It is worth noting that the Supreme Court standards, by their own terms, do not go into effect until the end of 2013. If exceeding 400 cases indicated a Sixth Amendment violation, it is unclear why the Supreme Court would permit the practice for nearly a year. The wording to the caseload standards are also permissive, discussing the number of cases a public defender "should" carry. *Harrison Decl.* Ex. A. If exceeding them were a *per se* Sixth Amendment violation, one would expect mandatory language, *i.e.*, "shall."

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> attorneys, overall, it was my impression that these attorneys were liked and respected by their clients.

Declaration of District Court Judge David Svaren ("*Svaren Decl.*") ¶ 2-3.

This is entirely consistent with the impressions of virtually everybody else. Dkt. 117 (*Cammock Decl.* ¶ 8-10) ("both very competent advocate for their clients… prepare their cases well… among the most aggressive in the area"); Dkt. 118 (*Eason Decl.* ¶ 6-7) ("Secure more dismissals than private counsel… 10-20 trials against each of them… Sybrandy and Witt do their due diligence"); *Cooley Decl.* Ex. 7 (Judge Skelton Dep Tr. 28:14- 24) (nobody "pled guilty to something they didn't do."); *id.* (Tr. 62:14-63:2) (presided over suppression motions, *Knapstad* motions and 3.6 motions).[9]

The defense of Class Representative, Angela Montague, is a testament to this. Montague met with Morgan Witt in his office at least three times, three more times at the jail, in addition to "a couple" phone calls. *Cooley Decl.* Ex. 3 (Witt Dep Tr. 351:1–353:1). Witt stood next to her in court. *Cooley Decl.* Ex. 3 (Witt Dep Tr. 353:8–12). He filed several motions on her behalf, *id.* (359:18–364:1), one of which was vigorously opposed by the prosecutor. Witt made persuasively argued on her behalf at the hearing, and Montague prevailed. *Cooley Decl.* Ex. 3 (Witt Dep Tr. 365:4–365:18). Thereafter, within one day of receiving a request from Montague pertaining to her sentence, Witt acted quickly, drafting and filing a motion for a modification, *Cooley Decl.* Ex. 3 (Witt Dep Tr. 383:14-385:16; 385:24-25), and won again. *Id.* Never once, in any of the 6-12 occasions where Montague was in open court with Witt, did she complain about him as the public defender. *Cooley Decl.* Ex. 3 Witt Dep. Tr. 387: 12 – 21. She received effective and eminently constitutional representation. *Cooley Decl.* Ex. 3 (Witt Dep Tr. 387:22 – 25).

[9] Plaintiffs' countervailing "evidence" is, in many cases, just plain wrong. They, for example, continue to rely upon the "Washington Courts" website for trial statistics. As was pointed out to them over a year ago, it is hearsay and inaccurate. Not only were there regular trials in Mount Vernon and Burlington—as stated by the prosecutors, who were there—but there were *not* "24 jury trials in Anacortes." Mot. at 11. According to the Anacortes prosecutor, there were *two* jury trials. Dkt. 68 (*Cammock Decl.* ¶ 7).

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The Skagit County Court Administrator was so consistently impressed with Mr. Witt's work that she referred a close friend to him on a criminal matter. *Cooley Decl.* Ex. 3 (Witt Dep. Tr. 318:16 – 320:6).[10]

The feedback received by the Cities, from those in a position to make a competent assessment, was no different. *Cooley Decl.* Ex. 10 (Stendal Dep. Tr. 153:2 – 25; 198:8; 208:1; 220:1 – 220:20).

4. "NEVER VISITED THEIR INCARCERATED CLIENTS"

Plaintiffs rely heavily on the claim that in 2010, the public defenders visited the jail only six times. Mot. at 8. They go so far as to claim that only "seven inmates were visited," although this assertion goes without citation and cannot be derived from anything in Exhibit 34 to Mr. Marshall's declaration. Even if the jail log were admissible—which it is not[11]—it is inaccurate.

Both Sybrandy and Witt testified that they met with clients in the jail regularly—on an as-needed basis—but because of their familiarity, they were seldom required to "sign in." *Cooley Decl.* Ex. 2 (Sybrandy Dep. Tr. 219:11-220:19) ("Sometimes it would be twice in a week… they don't pull out the [visitor log] and I don't even think to sign in."); *see also Cooley Decl.* Ex. 3 (Witt Dep. Tr. 122:7-13) ("They'd see me and just, oh, it's Morgan."). Sybrandy and Witt would also call the jail regularly and speak with clients. *Cooley Decl.* Ex. 3 (Witt Dep. Tr. 122:19-23; 351:1–353:1).

As pertaining to *competent* evidence, Sybrandy and Witt's testimony is undisputed.

5. "COMPLAINTS"

[10] This is corroborated by written documentation, which proves that the public defenders would advise clients about various rights, including the right to a jury trial. *Cooley Decl.* Ex. 3 (Witt Dep. Tr. 333:21); Id., Ex. 8 (Witt Tr., Ex. 62).

[11] The claims are based upon purported statistics from the Skagit County Jail. The hearsay jail log books, upon which this statistics are based, are not in evidence and there is no witness to testify to how they were prepared. They are, in effect, a summary of "unproven facts" and therefore not admissible. *Gomez v. Great Lakes Steel Div., Nat. Steel Corp.*, 803 F.2d 250, 258 (6th Cir. 1986).

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Plaintiffs are therefore left to rely upon "complaints" from former clients—and cite them collectively, and in the abstract, as "a lot." *See* Mot. at 12-15 ("numerous complaints"). In reality, however, almost none of these grievances were provided to the Cities. The inmate kites were viewed as privileged and never provided to the Cities. Dkt. 90; *see also Cooley Decl.* Ex. 3 (Witt Dep. Tr. 255:25-256:19).[12] And the grievances cited in plaintiffs' attorney-drafted declarations—*see, e.g.,* Dkt. 197 (Aguilar Sr.); Dkt. 198 (Osborn); Dkt. 199 (Reyna); Dkt. 200 (Delacruz); Dkt. 201 (Norman)—were seen by the Cities for the first time upon receiving ECF notice. An after-the-fact grievance about a legal representation—which the Cities never saw—is neither substantive evidence,[13] nor does it bear upon "state of mind."

Plaintiffs also misleadingly imply that the Assistant Chief of Police saw Sybrandy and Witt "playing crossword puzzles." Mot. at 13. Not true; a closer look at the exhibit shows that this was the impression of an unknown, un-named officer, *i.e.*, third hand hearsay from an unknown source. *See Marshall Decl.* Ex. 42. It is also contradicted by everybody who was actually in court with Sybrandy and Witt. *See Svaren Decl.* ¶ 3, 10; Dkt. 117 (*Cammock Decl.* ¶ 8-10); Dkt. 118 (*Eason Decl.* ¶ 6-7); *Cooley Decl.* Ex. 7 (Judge Skelton Dep Tr. 28:14- 24).

What the Cities *did* receive were complaints from one person: Letty Alvarez, of the Skagit County Office of Assigned Counsel. *See* Mot. at 12 (citing exclusively portions of Alvarez transcript); Mot. at 13 (same); Mot. at 15 (same). Alvarez has no legal training generally, nor Sixth Amendment training specifically. *Cooley Decl.* Ex. 9 (Alvarez Dep. Tr. 9:1-24; 164:4-10). She has no background in the criminal justice system and, in fact, no

[12] This makes sense. The kites regularly included discussions of plea and strategy, which, if received by the prosecuting Cities, would represent an extraordinary conflict of interest.

[13] "Law is admittedly a highly technical field beyond the knowledge of the ordinary person." *Lynch v. Republic Pub. Co.*, 40 Wn.2d 379, 389, 243 P.2d 636 (1952). Accordingly, "the standard of care must normally be established by the testimony of an attorney." Tegland, 5B WASHINGTON PRACTICE, § 702.48 (5th ed. 2012).

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800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

"firsthand experience with Sybrandy or Witt." *Cooley Decl.* Ex. 9 (Alvarez Dep. Tr. 11:21–23); *Cooley Decl.* Ex. 9 (Alvarez Dep. Tr. 20:5 – 8).[14]

But what Alvarez *did* have was a palpable dislike of, and bias against, Sybrandy and Witt—which was visible in both her words and demeanor. *Cooley Decl.* Ex. 10 (Stendal Dep. Tr. 151:13 – 154:1).[15] Alvarez would actively attempt to undermine these two attorneys, refusing to provide new clients with their contact information, hindering their ability to communicate with new clients. *Cooley Decl.* Ex. 2 (Sybrandy Dep. Tr. 261:2-20). She also complained about Sybrandy mistreating a "client," when it turned out that this person had not even been referred to him or subject to a conflict check. *Cooley Decl.* Ex. 9 (Alvarez Dep. Tr. 26:22 – 27:19). From the perspective of the Cities, Alvarez seemed to be "encouraging" people to complain about Sybrandy and Witt. *Cooley Decl.* Ex. 10 (Stendal Dep. Tr. 207:1 – 6).[16] The complaints made by Alvarez were, therefore, placed in the context of the otherwise positive feedback[17] and complete lack of objective wrongdoing.[18]

This is consistent with a broader, undisputed fact: many complaints about the public defender were simply unfair or unfounded. As plaintiffs' own witness, Roy Howson—former managing director of the Associated Counsel for the Accused—explained, there will invariably be complaints about all defense attorneys, including Skagit County, the ACA, or "anybody else that… represented an individual." *Cooley Decl.* Ex. 11 (Howson Dep. Tr. 64:15-67:16).[19] The perception is that public defenders are not "real lawyers," leads to "unfair complaints" and skepticism about their conduct. *Id.* Indeed, Howson himself is

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[14] Her limited experience with Sybrandy and Witt is not surprising. Alvarez screens between 5,000 and 7,000 clients per year; or one client every 15 minutes on average. *Cooley Decl.* Ex. 9 (Alvarez Dep. Tr. 21:13 – 15).

[15] Sybrandy and Witt attempted to provide their clients contact information at the time of OAC assignment, but Alvarez flatly refused to furnish their letter. *Cooley Decl.* Ex. 2 (Sybrandy Dep. Tr. 261:2-20). Sybrandy and Witt had to send it themselves, delaying their ability to communicate with new clients. *Id.*

[16] Alvarez remains an unbridled "advocate" against Sybrandy and Witt, even today. She myopically described Montague—a convicted drug felon and liar—as a "bright young woman." *Cooley Decl.* Ex. 9 (Alvarez Dep. Tr. 53:24-54:3).

[17] Judge Skelton would regularly encourage the clients to file a written complaint, so that he would be in a position to act upon it. *Cooley Decl.* Ex. 7 (Skelton Dep. Tr. 25:20-26:15). He never received a single one about Sybrandy or Witt. *Cooley Decl.* Ex. 7 (Skelton Dep. Tr. 28:11-13).

[18] There was no record of any bar discipline or reversals for ineffective assistance.

[19] *See also Cooley Decl.* Ex. 7 (Skelton Dep. Tr. 25:20-26:15) (testifying that, as a judge, Skelton received complaints from time to time about *all* of the criminal defense lawyers that appeared in his court).

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aware of complaints by former Sybrandy and Witt clients that, as it turned out, were not problems at all. *Id.*

Jorge Martinez's situation (*Marshall Decl.* Ex. 32 at 1163 – 1173) provides a helpful illustration. While in jail, Martinez sent *two and three kites per day* on a single topic: the length of his sentence. *Id* at 1163 ("The jail does not recognize that these charges are to run concurrent…"); *Id*. at 1164 ("The jail thinks different" than I do about sentence length); *Id*. at 1167 ("Jail is not giving me credit…"). There are two problems were taking these "complaints" at face value. First, the public defender did not represent Martinez at the time. *Cooley Decl.* Ex. 3 (Witt Decl. 325:16 – 22). Martinez had already pled guilty, been sentenced, and his case was closed. *Id.* And second, the process of calculating the length of a particular sentence is controlled by the jail, not the court. *Cooley Decl.* Ex.3 (Witt Dep. Tr. 329:12 – 21). "Good time credit" and "jail infractions" are known only by the jail, not the public defender. *Id.*; *see also* Witt Dep. Tr. 326:20 – 327:15. Martinez was, in other words, demanding that a public defender (who did not represent him) visit him and answer questions (the public defender would have no way of answering).

Relatedly, plaintiffs also accuse the Cities of failing to "follow-up" on complaints. Mot. at 14. This seems unreasonable because, in most cases, "follow-up" would be illegal. An investigation into whether the public defender asked his client if he was guilty (Mot. at 14:5), or had a chance to "tell his story" (Mot. at 10:16) would constitute a gross invasion into the attorney-client privilege. Dkt. #119 (*Ladenburg Decl.* ¶ 13) ("An effort to determine if meetings are held and what is said in those meetings would be dead wrong."). The WSBA, too, believes that "[i]neffective assistance of counsel issues are best raised ***in court proceedings***…" *Cooley Decl.* Ex.12 (WSBA Jackson Grievance) (emphasis added). In fact, even this Court enforced an Order, along similar reasoning, disallowing the Cities and counsel from speaking with criminal defendants about their representation. Dkt. 164 (Order at 3) ("Defendants may not contact any members of the plaintiff class…"). Having

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ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
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the Cities—the adverse, prosecuting party—attempting to pierce communications between defendants and their attorneys, would be unprecedented.

Complaints about Sybrandy and Witt, when read properly, were not at all significant. At a minimum, their scope and weight are disputed.

C. Changes To The Public Defense Contract

As was detailed, at length, in the Cities' summary judgment motion, they completely overhauled their public defense system in light of Sybrandy and Witt's termination and the new Supreme Court standards governing public defense. This included retention of W. Scott Snyder, from the law firm of Ogden, Murphy & Wallace. Dkt. 237, *Harrison Decl.* ¶ 6-7. He independently recommended James Feldman—an exceedingly experienced public defender, of almost 40 years (*Snyder Decl.* Ex. A)—to independently investigate public defense in the Cities. Dkt. 238, *Snyder Decl*. ¶ 6-7.; Dkt. 237, *Harrison Decl.* ¶ 7. This culminated in a written report, findings, and detailed suggestions, which formed the basis for new public defense legislation. Id., *Harrison Decl*. Ex. B-D.

The Cities used the legislation as the foundation for an RFQ, seeking experienced counsel to take over the public defense work. The process, which involved yet another a local expert (Dkt. 236, *Rosenberg Decl.* Ex. C (Hayden Dep. Tr. 14:15-23; 15:13-17; 39:22-40:24)), yielded several interested applicants. Mountain Law distinguished itself with both its experience and ability to track its cases. Dkt. 236, *Rosenberg Decl.* Ex. C (Hayden Dep. Tr. 165:13-166:8); Dkt. 238, *Snyder Decl.* ¶ 10. The parties negotiated and entered into a contract in April, 2012. Dkt. 237, *Harrison Decl.* ¶ 23, Ex. H. It was envisioned that Michael Laws, an experienced defense attorney, would hire additional attorneys to handle public defense with him. Dkt. 238, *Snyder Decl.* ¶ 11; Dkt. 236, *Rosenberg Decl.* Ex. C (Hayden Dep. Tr. 61:25-62:11). As of now, there are four full-time attorneys at Mountain Law defending indigent clients in the Cities. Dkt. 236, *Rosenberg Decl.* Ex. D (Laws Dep. Tr. 314:3-315:4).

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

Plaintiffs suggest that Mountain Law was paid "nearly half of what the Cities' own expert said would be required to operate a constitutionally adequate public defense system." Mot. at 23. They also claim that "the Cities' own expert stated that it would take up to five attorneys to meet the requirements." *Id.* This is deeply misleading. Plaintiffs are citing a bid made by Feldman and Lee in response to the RFQ. The bid amount reflected a substantial premium for the firm, which had other opportunities and was lukewarm about working for the Cities. *Declaration of James Feldman* ("*Feldman Decl.*") ¶ 4. The firm's bid was *in no way* intended to declare a minimum cost to operate constitutionally; the work could have been done competently (and profitably) for far less than what was bid.[20] *Id.* (emphasis in original). Furthermore, it is categorically untrue that "five attorneys" would have been assigned. *Feldman Decl.* ¶ 5. The bid itself contemplated one partner, who would hire two additional attorneys over time. *Id.*

The Cities have also since revised their public defense contract to more closely track the Supreme Court standards. This included, most importantly, abandoning the "case weighting" system—which caused so much confusion with Sybrandy and Witt. Dkt. 237, *Harrison Decl.* ¶ 25-28. Now, every case—no matter how simple—is counted as "one case." Dkt. 237, *Harrison Decl.* ¶ 28; Dkt. 238, *Snyder Decl.* ¶ 14. The definition of case is also taken directly from the Supreme Court: "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. In courts of limited jurisdiction multiple citations from the same incident can be counted as one case." Dkt. 238, *Snyder Decl.* ¶ 13 n.1; Dkt. 237, *Harrison Decl.* ¶ 28(a). Both the Cities and Mountain Law agree that this is "much easier" to apply. *Id.*; *see also Dkt. 236 Rosenberg Decl.* Ex. D (Laws Dep. Tr. 318:15-319:1).

Plaintiffs chide the Cities for taking this step, accusing them to intentionally "cutting out" standards. The opposite is true. The Cities sought to enforce the most applicable, current standards—*i.e.*, the mandatory Supreme Court standards—and under the

[20] This point is academic. To comply with the Supreme Court standards, the Cities have elevated Mountain Law's compensation to exceed Feldman and Lee's bid. Dkt. 238, *Snyder Decl.* Ex. B.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

guidance of Mr. Snyder, modified their public defense contract accordingly. *Supplemental Declaration of Bryan Harrison* ("*Supp. Harrison Decl.*") ¶ 3; 7. The nefariousness that plaintiffs read into this is unsupported by *any* evidence. Nor is the notion that the Cities modified their agreement in response to their expert's opinion. The Cities' new public defense contract—which *pre-dates* Jackson's opinions—did not call for Mountain Law's time records, because the Supreme Court did not call for time records. *Supp. Harrison Decl.* ¶ 2-3.[21] Had the Supreme Court deemed them important, the Cities would have required them. *Id.*

D. Mountain Law

1. REGULAR TRIALS AND MOTIONS PRACTICE

Plaintiffs' characterization of Mountain Law as "Meet'em, Greet'em, and Plead'em" (Mot. at 24) is nothing more than hyperbole. Nobody with any level of personal knowledge endorses with this.

It is—and will be—undisputed that that the Mountain Law attorneys regularly go to trial, sometimes collectively setting upwards of 15 cases per week for trial, in each City. Dkt. 236, *Rosenberg Decl.* Ex. B (Laws Dep. Tr. 280:5-281:3; 345:2-8); Dkt. 240, *Eason Decl.* ¶ 4-5 ("The Mountain Law attorneys go to trial more often, on average, than private counsel…"). Ms. Smith and Mr. Collins, who are slightly younger, are particularly aggressive. *Id.* They also bring more motions, regularly catch issues in their cases, stand with their clients at hearings, and work to bring about systemic improvement. Dkt. 240, *Eason Decl.* ¶ 6-11.

Judge Svaren, who presides, agrees:

[21] The Cities stand behind this decision. As discussed in their cross-motion, the amount of time spent is a poor indicator of attorney-effectiveness. A client with a winnable case might want a quick resolution, and be thrilled with a plea agreement at their initial appearance. Conversely, a public defender would not be "effective" by bringing frivolous motions when a phone call would favorably resolve the case. Given the host of variables, the contract administrators did not feel that getting "hours," in the abstract, was helpful. *Supp. Harrison Decl.* ¶ 4. Furthermore, the burden of keeping accurate time should not be borne by the public defender, when similar or better information can be secured with a phone call. *Supp. Harrison Decl.* ¶ 5.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

> The Mountain Law attorneys bring motions and present argument in favor of their clients. I have also presided over several of the Mountain Law attorneys' trials. Like Mr. Sybrandy and Mr. Witt, on average, the Mountain Law attorneys try more cases than private counsel.

Svaren Decl. ¶ 6.

Equally significant, Mountain Law's testimony was clear: the work they do is a function of their independent legal judgment, client directives, and *nothing else*. This includes the investigation they conduct, motion they bring, and experts they utilize. Dkt. 236, *Rosenberg Decl.* Ex. D (Laws Dep. Tr. 322:12-325:7); (339:9-340:9); (342:1-343:4). Neither the Cities' funding, nor their workload, has *any* bearing on the attorneys' decisions in this regard. *See id.*[22] This will be undisputed.

2. MEETINGS AND JAIL VISITS

It will also be undisputed that Mountain Law regularly meeting with clients. In fact, their assistant schedules appointments the moment that a client qualifies for a public defender. Dkt. 236, *Rosenberg Decl.* Ex. B (Laws Dep. Tr. 325:16-327:22); Dkt. 240, *Eason Decl.* ¶ 10 (noting large poster in courtroom, with attorneys' pictures, prominently inviting clients to speak with them). And at the meeting, the client is usually offered coffee, advised of their charges, risks, process, and right to go to trial. *See Cooley Decl.* Ex. 5 (Laws Dep. Tr. 55:12-62:17). Ideally, Mountain Law will have the police report and an offer at the time, but they regularly meet earlier than that if the client wishes. *Id.*; *see also id* (329:20-331:12) (noting that it is not unusual to meet before receipt of the police report, but more productive to do so afterward).

Mountain Law also meets with their incarcerated clients *at least* once per week—notwithstanding the infrequently-used jail visitor logs. *Cooley Decl.* Ex. 5 (Laws Dep. Tr. 381:24-382:5) (every Monday). And, to prove their meetings, the Mountain Law attorneys

[22] The Mountain Law attorneys are also fully aware that they can secure funding for additional investigation or expert work, if called for in a given case. *Cooley Decl.* Ex.5 (Laws Dep. Tr. 323:12-324:13). They have never been refused these funds, nor discouraged from seeking them. *Id.* This discretion is consistent with Washington Public Defense standards, which mandate only that such services be used "as appropriate." *Harrison Decl.* Ex. A (Section 6.1).

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

maintain "In Custody Response Assessment Profile" (ICRAP) documents, which their clients sign at the outset of any jail meeting. *See Dkt. 236, Rosenberg Decl.* Ex. F.[23]

3. NO COMPLAINTS

It is also undisputed that the Cities implemented a new system for addressing and resolving complaints. Grievances are now segregated into two distinct categories. The first involve complaints that a meeting was refused or a plea was coerced. To address this, the Cities enacted a fast-tracked complaint system with a check-box style complaint form. All indigent defendants receive this form as a matter of course upon assignment to a public defender. *See Dkt. 239, Van De Grift Decl.* ¶ 3-5, Ex. A-B. In addition, it is broadly available at the courthouse and city halls—or, in Mountain Law's words, it is "printed on almost everything but the toilet paper." Dkt. 236, *Rosenberg Decl.* Ex. D (Laws Dep. Tr. 223:1-13). There is also a website where the form and statement of rights are available. *See* http://mountvernonwa.gov/index.aspx?NID=591. If a defendant believes that he or she was denied a meeting, the box can simply be checked and returned. *Ibid.*; Dkt. 237, *Harrison Decl.* ¶ 35-39. Upon receiving it, the Cities will ensure that a meeting is held. *Id.* Or, if the defendant believes that his or her plea was not knowing and voluntary, the box can be checked, and the Cities will ask that the prosecutor move to vacate the plea. *Id.* To date, there have been ***zero complaints*** of this nature. *Id.*; Dkt. 239, *Van De Grift Decl.* ¶ 7.[24]

As for other complaints pertaining to the attorneys' style, judgment, performance, or advocacy, the Cities legislatively directed that they go to the judge and/or the Bar Association. This right and recourse is reflected in another form the defendants receive

[23] The Class Members' willingness to make baseless accusations against their public defenders has led the attorneys to take steps to protect themselves. *See Cooley Decl.* Ex. 5 (Laws Dep. Tr. 287:13-289:7).

[24] The closest thing to complaints that the Cities have received about Mountain Law were the declarations filed in opposition to a continuance in *this case*, approximately six months ago. The Cities promptly sent a letter to class counsel, requesting to investigate them consistent with this Court's prior order on communications with the class; plaintiffs never bothered to respond. Dkt. 237, *Harrison Decl.* ¶ 41, Ex. L. And when the clients themselves were offered new counsel, to replace Mountain Law, they uniformly declined (Dkt. 215)—leading one to suspect that their grievances were not as serious as previously believed.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

upon assignment to a public defender. Dkt. 239, *Van De Grift* ¶ 4, Ex. B.; Declaration of Cooley, Ex. 12 (WSBA Correspondence: "Ineffective assistance of counsel issues are best raised in court proceedings.")

The Cities' view this as an appropriate balancing of competing considerations. If a meeting were refused, for example, the Cities' contract administrators would be in a position to quickly resolve the problem. But if a defendant believes that a certain motion should be filed, the dilemma is not properly addressed by the Cities. The government should not—and cannot—dictate to the independent public defender what motions to bring, or what arguments to make—as even plaintiffs' consultant concedes. Dkt. 236, *Rosenberg Decl.* Ex. D (Jackson Dep. Tr. 74:18-77:1) ("So I think that when you talk about independence you're talking about a system where the government is not in a position -- is -- the public defense in relationship to the government is not in a position where there are forces or systems in place that discourage or prevent you from representing your particular client as well as make systematic changes in the system.").

This distinction is somewhat academic, however, as there have been zero complaints of this nature as well. Dkt. 237, *Harrison Decl.* ¶ 42; Dkt. 236, *Rosenberg Decl.* Ex. D (Laws Dep. Tr. 300:24-301:11).

4. FUNDING AND MONITORING

Mountain Law has four full-time attorneys handling public defense, and is compensated at a rate of $374,200 per year for their services (not including separately budgeted expenses for investigators and experts). Dkt. 237, *Harrison Decl.* ¶ 31.[25] Plaintiffs offer no evidence—or even argument—that this is inadequate. Dkt. 236, *Rosenberg Decl.* Ex. B (Jackson Dep. Tr. 232:3-5).

And when plaintiffs assert that the Cities "do not meaningfully monitor or supervise their public defense system," it is just flat-out wrong. The Cities do the same as, or more

[25] This is more than double the funding, and twice the attorneys. *Compare* Dkt. 57 (*Marshall Decl.* Ex. 1).

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ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

than, plaintiffs' expert's agency. In Seattle, they conduct an audit, review case reports and caseloads, conduct monthly meetings, review complaints, and solicit input from court staff. Dkt. 236, *Rosenberg Decl.* Ex. B (Jackson Dep. Tr. 91:22-92:1). The Cities do more. It is undisputed that they review open and closed case reports that are *more* detailed than those produced by the Seattle public defenders. *Compare Dkt. 236, Rosenberg Decl.* Ex. I (Seattle's) *with* Ex. J (Mountain Law's).[26] The Cities enforce a caseload that is in line with the state supreme court. Dkt. 237, *Harrison Decl.* ¶ 34. The Cities regularly meet with the public defender to discuss the substance of the case reports, among other things—by telephone and in-person. Dkt. 237, *Harrison Decl.* ¶ 34; Dkt. 236, *Rosenberg Decl.* Ex. D (Laws Dep. Tr. 350:24-351:16). The Cities' implemented a complaint system and monitor it. Dkt. 237, *Harrison Decl.* ¶ 34. And the Cities solicit input from prosecutors, court staff, and the judges. Dkt. 237, *Harrison Decl.* ¶ 34; *see also Dkt. 240, Eason Decl.* ¶ 13. In addition—and unlike Seattle—the Cities administrators actually go watch the public defenders in court, unannounced, as well as visit their office. *Ibid.*[27]

The Cities exceed state law as well. RCW 10.101.030—a higher standard than the federal constitution—calls for certain provisions, all of which are addressed by the Cities:

RCW 10.101.030	**THE CITIES:**
Compensation of counsel	*Dkt. 238, Snyder Decl.* Ex. A (Section 2) ($31,200 per month)

[26] Plaintiffs misleadingly cite colloquy in which Mountain Law discussed problems they had with case credits *during the transition*. Mot. at 27-28. Everybody agreed that the "case credit" system was unduly confusing, and action was taken. The public defense contract was revised. Now, every case is counted as one case—which Mr. Laws subsequently testified was "much easier" to apply. Dkt. 236, *Rosenberg Decl.* Ex. D (Laws Dep. Tr. 318:15-319:1); *see also Dkt. 238, Snyder Decl.* ¶ 13 n.1; Dkt. 237, *Harrison Decl.* ¶ 28(a).

[27] Seattle conducts an "audit," to be sure, but it turned out that this was little more than an "honor system," in which the public defender is vaguely questioned about their files (*e.g.*, "was investigation done"). *Rosenberg Decl.* Ex. B (Jackson Dep. Tr. 80:16-23); (93:24-94:16). Nobody other than Seattle conducts this exercise, and even Seattle has not done so since 2010. Ex. B (Jackson Dep. Tr. 103:11-14); (Jackson Dep. Tr. 123:20-124:16) (no recollection of 2011 audit); (Jackson Dep. Tr. 95:13-17) (no recollection of 2012 audit). The Cities in any event perform the same task by speaking with Mountain Law regularly about the substance of their case reports. *Harrison Decl.* ¶ 34; Ex. D (Laws Dep. Tr. 350:24-351:16).

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800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

Duties and responsibilities	*Dkt. 238, Snyder Decl.* Ex. A (Section 2) (adopting Supreme Court standard and requirements).[28]
Case load limits and types of cases	*Dkt. 238, Snyder Decl.* Ex. A (Section 2.1); *see also Dkt. 241, Stendal Decl.* Ex. A (less than 400 per year).
Responsibility for expert witness fees, administrative expenses, and support services	*Dkt. 238, Snyder Decl.* Ex. A (Section 2.3-2.4)
Attorney activity reports	*Dkt. 238, Snyder Decl.* Ex. A (Section 1-2.1) (sworn certifications); *see also Cooley Decl.* Ex. 5 (Laws Dep. Tr. 350:24-351:7) (open and closed case reports)
Training	*Dkt. 238, Snyder Decl.* Ex. A (Section 1) (adopting Supreme Court standard)[29]
Supervision and monitoring	*Cooley Decl.* Ex. 30 (Stendal, 30(b)(6) Dep. Tr. 80:20-83:19); *Cooley Decl.* Ex. 5 (Laws Dep. Tr. 350:24-351:7) (producing open and closed case reports); Dkt. 237, *Harrison Decl.* ¶ 34 (regular meetings); Dkt. 236, *Rosenberg Decl.* Ex. D (Laws Dep. Tr. 350:24-351:16) (regular meetings). Dkt. 238, *Harrison Decl.* ¶ 34 (complaint system). Dkt. 238, *Harrison Decl.* ¶ 34 (input from prosecutors and judges); Dkt. 240, *Eason Decl.* ¶ 13 (input from prosecutors and judges); *Svaren Decl.* ¶ 10.
Substitution of attorneys	*Svaren Decl.* ¶ 9; Dkt. 118 (*Eason Decl.* ¶ 11); Dkt. 117 (*Cammock Decl.* ¶ 11); *see also* Dkt. 49 (*Johnson Decl.* ¶ 5).
Limitations on private practice	*Dkt. 238, Snyder Decl.* Ex. A (Section 1) (adopting Supreme Court standard)[30]
Qualifications of attorneys	*Dkt. 238, Snyder Decl.* Ex. A (Section 1) (adopting Supreme Court standard)[31]

[28] *Harrison Decl.* Ex. A (Sections 3.2; 3.5; 14.1).
[29] *See Harrison Decl.* Ex. A (Section 14.1).
[30] *See Harrison Decl.* Ex. A (Section 13).
[31] *See Harrison Decl.* Ex. A (Section 14.1).

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ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

Client complaints	*Dkt. 237, Harrison Decl.* ¶ 34 (complaint system); *see also Van De Grift Decl.*
Termination	*Dkt. 238, Snyder Decl.* Ex. A (Section 3)
Nondiscrimination	*Dkt. 238, Snyder Decl.* Ex. A (Section 4)

Plaintiffs' assertions that the Cities "do not monitor" or limit oversight to "passively receiving closed case reports" (Mot. at 27) are so unsupported that they are almost reckless.[32]

But perhaps the best summary comes from Mount Vernon's contract administrator, Eric Stendal, whose deposition testimony was selectively quoted. When asked what Mount Vernon has done to ensure that the public defender does what the constitution requires, Mr. Stendal replied, in full:

> Okay. The current public defender contract is with Mountain Law. *The City does not agree that it has to ensure, secure, or guarantee anything.* The City maintains that it has a limited duty in regards to public defenders. The Supreme Court amended a preamble to the new court rule of the State, quote, To the extent that certain standards may refer to or be interpreted as referring to local governments, the Court recognizes the authority of its rules as limited to attorneys in courts, end quote. The City maintains that public defenders are members of a heavily regulated profession with independent duties to their clients, supports the Washington State Bar Association. All three are in superior positions to understand whether the public defender's

[32] Plaintiffs also cite counsel's objections to written discovery. This is unavailing. Plaintiffs had been seeking to "constitutionalize" various aspects of public defense, such as caseloads, audits, forms of monitoring, and the like. *See* Dkt. 45-1 (proposed order granting preliminary injunction). Counsel properly interposed objections on *this* basis—which, as it turns out, are supported by plaintiffs' own expert. *Cooley Decl.* Ex. 6 (Jackson Dep. Tr. 204:4-8) ("In isolation, that one -- there's rarely, if ever, one thing that -- except for a few circumstances, that is going to make or break that this is a Constitutional violation based on this or very rarely, the Supreme Court says this has to be done in every case."). The Supreme Court also supports the concern:

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

Nix v. Whiteside, 475 U.S. 157, 165 (1986); *see also Strickland*, 466 U.S. 668 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel… Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.").

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

> performing adequately and all three are better equipped to address any claimed deficiencies. The City is a contracting agency, which pays for a valuable service with taxpayers' money. It has a duty to ensure that its money is being spent for contracted service and that the taxpayers and the public are receiving good service at a good price. The terms of the contract are self-evident. There are several things the City has in place to ensure that its money is being spent well. First, it had a rigorous system for creating a public defense ordinance, including a legislative investigation and a legislative record. Neither this investigation or this record disclosed any systemic problem. Next, the City advertised for the RFP and received several qualified bids. Those were evaluated by… a panel of experts. The successful proposal was awarded based upon these presentations that looked at competence and qualifications and would also serve to produce a public defender that would not likely violate any duty to a client. The public defender has to submit quarterly certificates to the City, to the Mount Vernon Municipal Court, that certifies that each attorney is meeting the rigorous terms of the new Washington Supreme Court rule. The City does not believe that any of its public defenders will jeopardize their law licenses by filing false certificates. Since October of 2013, the City has delivered an easy-to-use, checkbox-style complaint form to public defender clients at the screening stage. To date, the City has delivered 183 complaint forms and received 0 complaints.
>
> Now I'm prepared to answer Mount Vernon's efforts, if any, to monitor, evaluate, and/or oversee the misdemeanor public defense system or any defender system in that system. The City does not have a misdemeanor public defense system, since it -- both misdemeanors and gross misdemeanors. The public defense system is under the current contract with Mountain Law. Since October, 2013, the City has delivered an easy-to-use, checkbox-style complaint form to public defender clients at the screening stage. To date, the City has delivered 183 complaint forms and received 0 complaints. The City Contract Administrator -- that's me -- has visited court several times. The City has in place numerous methods for interested parties to provide feedback or criticism to the City about the public defense system. These include the rare defendant who doesn't use the simple checkbox complaint form referenced above, reports from the two municipal court judges, the commissioner, and any pro tem judges, reports from the police, reports from the prosecutor, reports from others who have information. The City Contract Administrator -- me --has a collaborative relationship with Mountain Law that gives the City valuable information about Mountain Law's performance.

Cooley Decl. Ex.13 (Stendal 30(b)(6) Dep. Tr. 80:20-83:19).[33]

[33] Plaintiffs' response was "Move to strike." *Id.* It is unclear how this was nonresponsive, or if it was, why they are citing a stricken portion of transcript in their brief.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

5. COMPLIANCE WITH SUPREME COURT STANDARDS

As noted above, it is undisputed that Mountain Law is in compliance with the Supreme Court caseload standards—seven months ahead of time. So rather than spell out every conceivable standard which may bear on public defense (as plaintiffs argue), the Cities—with the oversight of independent counsel, simply adopted the Supreme Court standards. Dkt. 238, *Snyder Decl.* Ex. B. In this, the public defender warrants that they are:

- Authorized to practice law in Washington;
- Familiar with the statutes, court rules, constitutional provisions, and case law relevant to their practice area;
- Familiar with the Rules of Professional Conduct;
- Familiar with the Performance Guidelines for Criminal Defense Representation approved by the WSBA;
- Familiar with the consequences of a conviction or adjudication, including possible immigration consequences and the possibility of civil commitment;
- Familiar with mental health issues and able to identify the need to obtain expert services; and
- Completing seven hours per year of continuing legal education relating to public defense.

Id. (citing *Harrison Decl.* Ex. A (Section 14.1)). The attorneys may accept only a caseload that they can handle while providing "the minimum level of attention, care, and skill that Washington citizens would expect…" *Id.* (citing *Harrison Decl.* Ex. A (Section 3.2)). Presently, the attorneys are on track to carry only 400 un-weighted cases this year, and are certifying with the local judges accordingly. Dkt. 241, *Stendal Decl.* ¶ 5, Ex. A; Ex. B (Laws Dep. Tr. 363:16-364:8).

E. Class Members

The discussion above is virtually undisputed and, the Cities would submit, dispositive. But even if it were not, the class members' lack of credibility is worth

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

exploring—for purposes of examining whether their testimony even carries the initial burden on summary judgment.

1. MONTAGUE

Montague is a convicted liar, who has already perjured herself in these proceedings a number of times. Approximately a month before filing this lawsuit, Montague pled guilty to making criminally false statements in Kitsap Superior Court. *See State v. Montague*, Kitsap Cause No. 11-1-00361-1. Her plea specifically acknowledged that she "knowingly participating in an attempt to obtain a controlled substance by forged prescription in Kitsap County, WA." Dkt. 125 (*Rosenberg Decl*. Ex. D).

Some irony, in this regard, can be found in the fact that Montague pled guilty to this *felony* during her first appearance and meeting with the public defender—without ever having a "confidential meeting" at his or her office:

3	05-13-2011	ORDER APPOINTING ATTORNEY ATD0001	Order Appointing Attorney Public Defenders Office	
	05-13-2011	ORDER SETTING ACTION	Order Setting Sentencing	08-15-2011S2
4	05-13-2011	PLEA AGREEMT/SENTENCE RECOMMDN	Plea Agreemt/sentence Recommdn	
5	05-13-2011	STATEMENT OF DEFENDANT,PLEA GUILTY	Statement Of Defendant,plea Guilty	

See State v. Montague, Kitsap Cause No. 11-1-00361-1 (last visited March 20, 2013). This is the only "meet'em, greet'em, and plead'em" process, and Montague cited no problem with it.[34]

Montague's conduct in this proceeding has been no different. She submitted one false declaration to the Court about securing a job—which she later admitted was a lie. Dkt. 111 (*Rosenberg Decl*. Ex. A (Montague Dep. Tr. 21:6-22:5) ("the statement is false").

[34] The Cities discovered this on their own. In her deposition, Montague dishonestly refused to talk about this interaction on "Fifth Amendment" grounds. Dkt. 125 (*Rosenberg Decl*. Ex. C) (Montague Dep. Tr. 22:21-23:25). It is difficult to understand how testifying about a guilty plea you entered into can be "self-incrimination."

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

But then she claimed that it was all a big misunderstanding, and that she *had* a job when she signed the declaration, but lost it. Dkt. 125 (*Rosenberg Decl*. Ex. C (Montague Dep. Tr. 17:2-6; 18:3-6) ("I had the job, yes."). Plaintiffs even criticized the Cities for suggesting otherwise. Dkt. 93 (Opp. at 5, n. 1) ("Defendants fail to inform the Court, however, that Ms. Montague had secured a job at the time she signed her declaration, but the position fell through by the date of the deposition…"). But it turned out that Montague was just lying again. The hiring manager, where Montague supposedly had a job, testified that she never even filled out an application, nor was she ever offered employment. Dkt. 127 (*Grice Decl.* ¶ 4-6).

As discussed above, Morgan Witt contradicted Montague's claims in specific terms.

2. MOON

Moon's candor is equally lacking—and goes directly to the merits of his case. In his declaration, Moon told a very detailed story about his negative experiences with the Cities' public defender following a DUI. Dkt. 47 (*Moon Decl*. ¶ 6-9). He stated that he was assigned Mr. Witt, given a "guarantee" by Mr. Witt, and ultimately misled about sentencing by Mr. Witt. *Id*. But, again, this turned out to be a lie. The DUI was prosecuted by Skagit County, and Moon was represented by a public defender named Marc Fedorack. Dkt. 111 (*Rosenberg Decl*. Ex. B (Dep. Tr. 37:7-38:1)). Witt was not even involved in this charge.

The only thing more surprising than this is the fact that plaintiffs continue to cite and rely on Moon's perjured declaration. *See* Mot. at 6, 7, 9, 10 (cited twice), 13.

Witt also contradicted Moon's other claims. They met at least 4 times outside of court, *Cooley Decl.* Ex. 3 (Witt Dep. Tr. 297:5-9), at his office, *id.*, (297:10-12), and discussed Moon's case. *Id*. (297:13-16). Witt even provided corroborating details about the office meetings and remembered the name of Moon's girlfriend. *Cooley Decl.* Ex. 3 (Witt Dep. Tr. 297:25-298:12). To the extent that Moon's testimony is worthy of *any* weight, it is disputed.

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

3. WILBUR

Wilbur never showed for his deposition, and, by way of background, went fugitive in his own criminal proceedings five different times. Dkt. 26 (*Cooley Decl*. at 18-19, 29, 41, 50, 59). And his declaration is "all lies" according to Sybrandy. *Cooley Decl.* Ex. 2 (Sybrandy Dep. Tr. 289:5); (Sybrandy Dep. Tr. 294:2) (Wilbur "is completely not telling the truth…"). Sybrandy *repeatedly* called Wilbur, Wilbur's mother, Wilbur's counselor and Wilbur's rehabilitation center, all on Wilbur's behalf. *Id*. In fact, when the allegations in this lawsuit became public, Sybrandy met Wilbur at the jail to discuss conflict counsel. Wilbur confided, "you've always done right by me" and expressed reluctance and confusion about this lawsuit. *Cooley Decl.* Ex. 2 (Sybrandy Dep. Tr. 296:4-299:10).

4. OSBORN

Plaintiffs also continue to rely on Jaretta Osborn's declaration, which is false. She claims that Sybrandy refused to speak with her and would not accept paperwork about her son's disabilities. Dkt. 51 (*Decl*. ¶ 18). In reality, Sybrandy spoke to Ms. Osborn regularly, both on the phone and elsewhere. *Cooley Decl.* Ex. 2 (Sybrandy Dep. Tr. 304:16-305:5). And contrary to her declaration, he did take her papers about her son—he could not have provided them to the prosecutor otherwise. *Cooley Decl.* Ex. 2 (Sybrandy Dep. Tr. 305:16-24). Sybrandy also rejected Ms. Osborn's criticism that he never sought a "competency hearing." Dkt. 51. A competency hearing would have been "very invasive" and only "dragged things out," when it was clear the case could be dismissed (which it was). *Cooley Decl.* Ex. 2 (Sybrandy Dep. Tr. 305:16-24).

5. THE SEPTEMBER 2012 DECLARATIONS

Finally, the closest thing to "complaints" about Mountain Law were a series of declarations filed in opposition to a continuance, six months ago, while the new public

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

defender was transitioning into the Cities. It is, first, notable that not a single one of these individuals registered any grievance with the Cities or with the Court. The extent of their "complaint" was signing attorney-drafted pleadings. Second, in hopes of resolving their concerns, the Cities promptly sent a letter to class counsel, requesting to investigate consistent with this Court's Order controlling class communication. Dkt. 237, *Harrison Decl.* ¶ 41, Ex. L. Neither plaintiffs, nor their counsel, even bothered to respond. *Id.* This was consistent with the clients' actual conduct: when conflict counsel was offered, to replace Mountain Law, the declarants uniformly declined (Dkt. 215).

Mountain Law also rejects the allegations made in these declarations, both generally—inasmuch as they always meet with clients and advocate (see *supra*)—and specifically. *See Cooley Decl.* Ex. 5 (Laws Dep. Tr. 377:19-382:19) (refuting the declarations' substance).

III. AUTHORITY

A. Motion to Strike

1. PARALEGAL BOSCHEN'S DECLARATION

The Cities respectfully move to strike the Boschen Declaration. While true that, in limited circumstances, a paralegal can summarize voluminous data under Fed. R. Evid. 1006, this rule demands that the witness provide "great detail about the documents relied upon and methodology used…" *Colon-Fontanez v. Municipality of San Juan*, 660 F.3d 17, 32 (1st Cir. 2011). The proponent must establish that it "summarizes the information contained in the underlying documents accurately, correctly, and in a non-misleading manner." *United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998). And since any such summary must be tested on cross examination, *Gordon v. United States*, 438 F.2d 858, 877 (5th Cir. 1971), it must be sponsored by a ***properly disclosed witness***. *Colon-Fontanez*, 660 F.3d at 31 (emphasis added). A summary that is based upon "unproven facts" is not

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ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

admissible. *Gomez v. Great Lakes Steel Div., Nat. Steel Cor*p., 803 F.2d 250, 258 (6th Cir. 1986).

Here, Boschen's "summary" fails both ways. She was never disclosed as a witness, nor was the un-named staff-member who apparently did the work. Accordingly, the analysis cannot be "tested on cross-examination." It is, also, as discussed above, based upon unproven facts and wrongful assumptions. The Boschen Declaration is not competent evidence for trial or summary judgment purposes—and should be disregarded.

2. JAIL KITES AND LOGS

The kites sent to Sybrandy and Witt from jail should be stricken as well. *See, e.g., Marshall Decl.* Ex. 32. They do not bear on the Cities' state-of-mind, because they were viewed as privileged and never provided to the Cities. At best, their substance is a lay opinion about legal work, which was, many times, is demonstrably wrong. *See Marshall Decl.* Ex. 32 at 1163 – 1173 (Martinez Kite). They should be disregarded as hearsay and lacking in foundation.

Similarly, it is undisputed that the Skagit Jail Log is not used on a regular basis. It does not purport to be an accurate record-keeping of the public defenders' visits to the jail; and is in fact conclusively refuted by undisputed testimony and documentation, such as the ICRAP forms. At best, it is a summary of unproven (and provably false) hearsay facts, *Gordon v. United States*, 438 F.2d 858, 877 (5th Cir. 1971), and not sponsored by a properly disclosed witness. *Colon-Fontanez v. Municipality of San Juan*, 660 F.3d 17, 31 (1st Cir. 2011). It should be stricken. Gomez v. Great Lakes Steel Div., Nat. Steel Corp., 803 F.2d 250, 258 (6th Cir. 1986).

3. CHRISTINE JACKSON'S DECLARATION

For the reasons exhaustively discussed in the Cities' Cross-Motion for Summary Judgment, Dkt. 235 (Mot. at 29-36), Jackson's opinion should be stricken. It is based upon

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800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

wildly inaccurate wrong assumptions, speculation, and supported by nothing resembling a sound methodology. It is of no assistance to the Court and properly ignored under Fed. R. Evid. 702 and *Daubert.*

B. Plaintiffs Are Not Entitled To Summary Judgment

Summary judgment is appropriate only if, taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Corales v. Bennett*, 567 F.3d 554, 562 (9th Cir. 2009). Plaintiffs are not entitled to this relief.

1. Plaintiffs Cannot Meet Their Initial Summary Judgment Burden; And A Close Reading Of The Record Supports Only Sybrandy And Witt;

The Court need not even get to the overwhelming amount of evidence proffered by the Cities, because plaintiffs' motion is, itself, rife with credibility issues. If, as here, the credibility of the movant's witnesses is challenged and specific bases for possible impeachment are shown, summary judgment should be denied. *See* Wright & Miller, 10A FEDERAL PRACTICE AND PROCEDURE, § 2726 (3d ed. 2012); *S.E.C. v. Koracorp Indus., Inc.*, 575 F.2d 692, 699 (9th Cir. 1978) (summary judgment is singularly inappropriate where credibility is at issue).

Irrespective of Sybrandy and Witt, the sponsors of the accusatory evidence have:

- Repeatedly lied to this Court, and others;
- Refused to participate in proceedings in this Court, and others;
- Made demonstrably false accusations;
- Relied upon evidence which is conclusively contradicted; and
- Are, in many cases, lifelong criminals.

Liars and criminals are entitled to seek judicial redress, to be sure, but, contrary to plaintiffs' suggestion, their "version" is *not* "the objective record" (*see* Mot. at 32-33).

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800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

Particularly where plaintiffs are seeking "extraordinary relief" and bear the burden of persuasion, the specific bases for impeachment of the class representatives is sufficient to deny judgment as a matter of law.

What's more, many issues of fact, when read closely, are not contested at all. For example, the number of jury trials conducted is not really "disputed." Plaintiffs are relying upon a hearsay website, which the prosecutors and judges themselves testified was wrong. *See* Dkt. 118 (*Eason Decl*. ¶ 6-7) ("10-20 trials" each against Sybrandy and Witt); Dkt. 68 (*Cammock Decl*. ¶ 7) (explaining that there were not "24 jury trials" in Anacortes); *see also Svaren Decl.* ¶ 2-3 (more trials than private counsel, on average); *Cooley Decl.* Ex. 7 (Judge Skelton Dep Tr. 62:14-63:2) (presided over suppression motions, Knapstad motions and 3.6 motions). If anything, the high level of Sybrandy and Witt's advocacy is entirely uncontested.

Sybrandy and Witt's caseload is likewise not really disputed. Plaintiffs' claim about "thousands of cases" is supported only by the undisclosed testimony of a paralegal for class counsel, who did an analytically bankrupt calculation. Sybrandy testified that it was closer to 900 "charges," which, if the class representatives' circumstances are truly "typical," is somewhere closer to 300-400 "cases." This more closely comports with common sense. It would make no sense for Sybrandy and Witt to handle "thousands" of cases for no economic benefit, and never raise the issue, despite being aware of their contractual limit of 400 case credits—while their clients were suffering. It also makes no sense that these two attorneys, with a supposedly crushing caseload, managed to try more cases, and secure better results, than private counsel.

And finally, there is no real dispute about a connection between the Cities' policies and Sybrandy and Witt's conduct. Both testified, emphatically, that their decisions were a function of legal judgment and client wishes *See, e.g., Cooley Decl.* Ex. 2 (Sybrandy Dep. Tr. 241:9-242:23) ("They better not [tell me how to exercise discretion]. And if they did, I'd tell there where to put it."). Plaintiffs cite nothing to the contrary.

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SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

It is unclear that plaintiffs have marshaled any material evidence against Sybrandy and Witt. But if they did, it would be hotly disputed by the two attorneys, the prosecutors, the judges, the contract administrators, and the balance of the objective record.

2. There Is No Meaningful Criticism Of Mountain Law

As discussed at some length in the Cities' cross-motion, there is absolutely no evidence that Mountain Law did anything wrong. On the contrary, it is undisputed that they try cases, bring motions, regularly meet with clients, and otherwise please their clients. They are funded at a rate that nobody criticizes, and the four attorneys—all of whom meet the Supreme Court's qualification standards—carry caseloads of 400 or less.

Professors Straight and Boerner—who have looked at Mountain Law (Dkt. 193 (*Rosenberg Decl.* Ex. K))—offer no criticism. The *only* criticism comes from Christine Jackson—who bases her opinions on review of their "random files." For the reasons identified in the Cities' motion, her declaration—which assumes incorrect facts and is supported by no discernible methodology—should be stricken.

And like Sybrandy and Witt, there is no evidence that Mountain Law is conducting its work pursuant to any "policy or custom" for purposes of *Monell*; there is only evidence to the contrary. How many witnesses they interview is a matter of their own judgment and client wishes. *Cooley Decl.* Ex.5 (Laws Dep. Tr. 324:24-325:7). The number of motions they bring is a matter of their own judgment and client wishes. *Cooley Decl.* Ex. 5 (Laws Dep. Tr. 340:10-13). Whether to retain experts is a matter of their own judgment and client wishes. *Cooley Decl.* Ex. 5 (Laws Dep. Tr. 342:18-343:4). And whether to go to trial is a matter of their own judgment and client wishes. *Cooley Decl.* Ex. 5 (Laws Dep. Tr. 343:5-344:15). There is absolutely no evidence that "the system" hinders them at all.

3. There Is No Evidence Of Deliberate Indifference

Plaintiffs also claim, seemingly "in the alternative," that the Cities were deliberately indifferent, even if the "system" did not harm plaintiffs. This is a non-starter. Deliberate

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800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

indifference under § 1983 occurs "where—and only where—a deliberate choice to follow a course of action is made from among various alternatives… [and it] reflects a "deliberate" or "conscious" choice by a municipality." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989); *see also Farmer v. Brennan*, 511 U.S. 825, 837 (1994) ("official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference."). As the Supreme Court cautioned in *Canton*—a case relied upon by plaintiffs—"[i]n virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident." *Canton*, 489 U.S. at 392. Accordingly, a high standard of fault and causation must be applied, without which municipalities would be subject to "unprecedented liability under § 1983." *Id.* ("permitting cases against cities… to go forward under § 1983 on a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities-a result we rejected in *Monell*"); *see also Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011) (noting "***stringent standard of fault***, requiring proof that a municipal actor disregarded a ***known or obvious consequence*** of his action.") (emphasis added).

This is particularly true here, where the allegation is that the Cities failed to "supervise" formally trained, bar-certified attorneys. Precedent is very clear: attorneys are presumptively competent. They 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*, 131 S.Ct. 1350, 1369 (2011). Accordingly, lawyers are not "average public employees," *id.*, and absent some showing to the contrary, presumptively capable of providing the "guiding hand" that an indigent defendant needs. *See, e.g., Michel v. Louisiana*, 350 U.S. 91, 100-101 (1955); *United States v. Cronic*, 466 U.S. 648 (1984) (refusing to find novice real estate attorney, with 25 days to prepare, presumptively incompetent to handle a complex financial felony trial).

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SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

Connick provides a helpful illustration. There, the prosecutor's office failed to disclose *Brady* materials, leading to the wrongful conviction of an innocent man, who spent 14 years on death row. *Connick*, 131 S.Ct. at 1355. As it turned out, there had been four reversals of prosecutions for *Brady* violation in the previous ten years, *id.* at 1360, and the prosecutors, when pressed, did not even understand *Brady* (*id.* at 1378). A jury found the District Attorney deliberately indifferent and awarded $14 million. *Id.* at 1355.

The Supreme Court reversed, explaining that attorneys are subject to formal education, and ongoing education. They are also bound by character and fitness standards, such that "constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with in-house training about how to obey the law." *Id.* at 1363. A licensed attorney making legal judgments is therefore not the same as the "untrained police officer" in *Canton*. *Id.*

Our case presents an even easier call. Here, there was no "obvious" reason for the Cities to doubt Sybrandy and Witt, and is certainly no "obvious" reason to doubt Mountain Law. The only negative feedback about Sybrandy and Witt came from Letty Alvarez, an openly biased, untrained source, with no first-hand knowledge. Weighed against the positive feedback from virtually everywhere else—including other clients, judges, prosecutors, and court staff—along with a lack of objective problems and presumption that lawyers do their job, there was no "obvious need" to take action. And as it pertains to Mountain Law, there is no need at all. Their feedback about them is uniformly positive. Indeed, two out of *plaintiffs'* three experts endorse Mountain Law.

The Cities would do agree with plaintiffs, however, that their conduct since this lawsuit was filed *is* admissible and highly probative. Mot. at 41-42 (citing *Henry v. County of Shasta*, 132 F.3d 512, 519 (9th Cir. 1997)). And it plainly belies "deliberate indifference." Their post-lawsuit conduct has included a full investigation by an experienced by public defender, James Feldman, overseen by independent counsel, Scott Snyder. This led to several changes, new legislation, a new complaint system, a more

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ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

accurate contract, early compliance with the state supreme court, doubled funding, and double the number of attorneys—who have yet to be subject to a complaint of any kind. If this is "deliberately indifferent," it is difficult to know what would not be.

If anybody is entitled to summary judgment on this theory, it is the Cities.

4. Plaintiffs Have Not Remotely Established That They Are Entitled To Injunctive Relief

"Injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). It requires that the proponent prove the following: (1) success on the merits; (2) they are likely to suffer irreparable harm in the absence of relief; (3) that the balance of equities tips in their favor; (4) and that an injunction is in the public interest. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546 n.12, 107 S. Ct. 1396, 1404, 94 L. Ed. 2d 542 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show… actual success."). The Court's authority to award this relief should be used sparingly and only in rare circumstances. *See, e.g., Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (school desegregation).

In other words, there must be "extraordinary justification":

> There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing [of] an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. ***The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction; but that will not be awarded in doubtful cases, or new ones, not coming within well-established principles***; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. ***It will be refused till the courts are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act***…

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

Wright and Miller, FEDERAL PRACTICE AND PROCEDURE, § 2942, 11A Fed. Prac. & Proc. Civ. § 2942 (2d ed. 2012) (citing *Bonaparte v. Camden*, C.C.D.N.J.1830, 3 Fed. Cas. 821, 827 (No. 1, 617)) (Baldwin, J.)) (emphasis added).

Plaintiffs have not made this showing, or even a showing which approaches it.

i. The Likelihood Of "Irreparable Injury" Has Only Diminished Since The Last Time The Court Denied This Motion

For the reasons discussed above and in the Cities' cross-motion, this factor one-sidedly favors the Cities. There is no competent evidence that the legal work done by the Mountain Law attorneys is in any way flawed. Everybody who wants a meeting is able to get one. Everybody who wants to go to trial or bring a motion can do so. And to the extent that caseloads were a problem a few years ago, they no longer are. The attorneys are undisputedly handling 400 cases or less per year—pursuant to both their contracted and sworn certifications.

And even if there were reason to believe that all of the Mountain Law attorneys were going to suddenly violate their court-imposed obligations, contract, ethical duties, and the constitutional rights of their clients, there is no reason to believe that the local judges and prosecutors will absent-mindedly go along with the violations. Judge Svaren has made it clear that he is willing and able to protect the constitutional rights of the accused, even if the defense attorneys fail to. *See Svaren Decl.* ¶ 3; 10. This could include stopping proceedings, making rulings, or appointing conflict counsel—a remedy manifest in this Circuit, and one that plaintiffs have already availed themselves to. *See* Dkt. 49 (*Johnson Decl*. ¶ 5) (securing conflict counsel when she no longer had confidence in Morgan Witt); *see also United States v. D'Amore*, 56 F.3d 1202, 1204 (9th Cir. 1995) (abuse of discretion for court not to make reasonable inquiry when there is a conflict between a public defender and client).

The prosecutors are equally protective of the Sixth Amendment. *See* Dkt. 117 (*Cammock Decl.* ¶ 11) ("My role, as a prosecutor, is to pursue a just result; Washington's

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ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

Rules of Professional Conduct demand such a result, and Comment 1 to RPC 3.8 clearly establishes the prosecutor's role as a "minister of justice."); Dkt. 118 (*Eason Decl.* ¶ 11) ("If I believed that defense counsel was rendering ineffective assistance, I would have no problem intervening and/or objecting. I view my role as one in which I secure the right outcome, not mindlessly obtain convictions.").

But perhaps the best evidence that the Cities' system works is the manifest lack of harm that has come to *anybody*. After years of unfettered access to public documents, confidential information, and class member testimony, the net result is this testimony from plaintiffs' expert (offered on the last day of discovery):

> Q. Okay. Paragraph 39, you testified that it's certain that actual harm to indigent defendants under these circumstances. And some forms of harm may take the following forms. And then you list a few.
>
> A. Yes, mm-hmm.
>
> Q. Are you familiar with anyone being deported as a result of a guilty plea… in Mount Vernon or Burlington?
>
> A. Not from the information that I reviewed.
>
> Q. Are you familiar with anybody incurring years of debt from excessive fines?
>
> A. A specific individual?
>
> Q. Yes.
>
> A. I don't think I have any specific information on any of the available information that I have…
>
> Q. Are you familiar with anybody who lost gun rights as a consequence of a conviction that would have been avoided with Constitutional public defense?
>
> A. I don't -- I'm not quite sure I understand the question. But in terms of the case -- the specific cases that I looked at, I didn't see any specific information about any one individual...
>
> Q. You can't point me towards the name of an individual right now?

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SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

A. No.

Q. Anybody who had increased imprisonment or extended supervision as a consequence of inadequate consideration of the client's record and other pending cases?

A. No, because there was specifically not analysis on certain -- on many of the individuals with regard to whether they had open cases or not.

Q. Are you familiar with anybody whose life was destroyed as a consequence of the unconstitutional public defense in the cities?

A. Not based on the information that I had.

Rosenberg Decl. Ex. B (Jackson Dep. Tr. 268:21-270:21). No "irreparable harm" has occurred, nor should any be expected. Plaintiffs have not established otherwise.

ii. The Likelihood Of Future Violations Has Only Diminished Since The Last Time The Court Denied This Motion

When seeking prospective remedy, the plaintiff must show that he "is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). As discussed in the preceding section, there is no evidence that *anything* is wrong with the Cities' present system. It complies in every way with the most recently-enacted standards, and has been subject to no meaningful criticism. A future Sixth Amendment violation will require the Mountain Law attorneys to violate their client's rights:

(1) contrary to the standards they bound themselves to abide by;

(2) contrary to their contract;

(3) contrary to their ethical duties;

(4) contrary to the oversight of the Cities;

(5) contrary to the oversight of the judges and prosecutors;

(6) contrary to the Cities' fast-track complaint system;

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(7) contrary to their virtually perfect track record; and

(8) contrary to the U.S. Supreme Court's presumption that lawyers are competent.

To the extent that this can properly be characterized as a "danger of injury," it is manifestly remote. This factor does not favor plaintiffs.

iii. The Balance Of Equities, If Anything, Tips More Sharply In Favor Of The Cities Since The Last Time The Court Denied This Motion

The equities favor the Cities, not plaintiffs. Plaintiffs relied (and continue to rely upon) perjured documents, offered exhibits that are provably inaccurate, and otherwise dragged the named of several good attorneys through the mud. In contrast, there is no reason to doubt the testimony of Richard Sybrandy, Morgan Witt, Michael Laws, the prosecutors, or the judges—who all concur that the public defender has been, and remains, zealous, competent, and in every way consistent with *Gideon*. The equities do not demand extraordinary relief.

iv. The Public Interest Does Not Demand That This Court Assert Jurisdiction Over Two Municipalities That Are In Compliance With All Applicable Public Defense Standards

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Railroad Comm'n. v. Pullman Co.*, 312 U.S. 496 (1941). Where an injunction will adversely affect a public interest, the court may withhold relief. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-13 (1982). Here, plaintiffs are asking for no less than an assertion of jurisdiction over two municipalities, and ongoing oversight of independent attorneys, hiring and firing, public budgetary decisions, and a district court system.

This is drastic by any measure. But it is even more extreme in light of the lack of necessity. The Court would be taking over a public defense system with no documented problems, complaints, adverse results, or history of misconduct. To the contrary, it is the subject of exhaustive investigation, analysis, and overhaul, culminating in extraordinary

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SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

resources and funding. Enjoining it, nonetheless, would be unprecedented and discouraging—leaving the public interest un-served.

C. This Lawsuit Is Moot

For the reasons identified in the Cities' cross-motion, this lawsuit should be dismissed as moot. Where the government changes its policy, that presents "a special circumstance in the world of mootness." *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010). Such a change is usually enough to render a case moot, even if the governing body possesses the power to reenact the statute after the lawsuit is dismissed. *See Smith v. Univ. of Washington, Law Sch.*, 233 F.3d 1188, 1195 (9th Cir. 2000); *see also Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994) ("The exceptions to this general line of holdings are rare and typically involve situations where it is ***virtually certain*** that the repealed law will be reenacted.") (emphasis added).[35]

Even if there were problems during the Sybrandy and Witt era of public defense, those problems are undisputedly and undeniably resolved. There is no reason to expect that the Mountain Law attorneys will violate mandatory standards or their clients' rights. The Cities expended significant resources to bring about the changes, and view them as a positive. They are permanent, and as such, the need for extraordinary relief just does not exist.

This case should be dismissed as moot.

IV. CONCLUSION

It is unfortunate that plaintiffs expended the resources of both the Cities and Court on this opposition to summary judgment (in motion's clothing). Their brief is based upon

[35] *See also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010) (requiring, to deny mootness, "clear showings " of governmental "desire to return to the old ways"); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328-29 (11th Cir. 2004) ("[G]overnmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities."); *Amax, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003) (noting that cessation of conduct by the government is "treated with more solicitude ... than similar action by private parties").

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423

facts that at are, at a minimum, contested—if not, provably wrong. Artful briefing does not change the essential truth: the Cities public defense system is *not* subject to credible challenge. It is fully funded, complies with all applicable standards, and boasts what is effectively a 100% satisfaction rate. It is *Gideon* realized. The Cities respectfully request that the Court find this lawsuit moot and enter summary judgment in their favor. This cross-motion should be denied.

DATED this 25th day of March, 2013.

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

s/ Andrew G. Cooley
Andrew G. Cooley, WSBA #15189
Adam Rosenberg, WSBA #39256
Attorneys for Defendant Cities
800 Fifth Ave., Ste. 4141
Seattle, WA 98104-3175
Ph.: (206) 623-8861 / Fax: (206) 223-9423
acooley@kbmlawyers.com
arosenberg@kbmlawyers.com

DECLARATION OF SERVICE

I, Shelly Ossinger, hereby declare under penalty of perjury of the laws of the State of Washington that I am of legal age and not a party to this action, and that on the 25th day of March, 2013, I caused a copy of the ***Cities' Motion Opposition to Summary Judgment; Declaration of Andrew Cooley; Declaration of District Court Judge David Svaren; Declaration of James A. Feldman; and Supplemental Declaration of Bryan Harrison*** to be filed and served to the following parties of record using the USDC CM/ECF filing system:

Toby Marshall
Beth Terrell
Jennifer R. Murray
Breena M. Roos
Terrell Marshall Daudt & Willie PLLC
936 N. 34th St., #400
Seattle, WA 98103-8869
bterrell@tmdwlaw.com
tmarshall@tmdwlaw.com
jmurray@tmdwlaw.com
broos@tmdwlaw.com

James F. Williams
Camille Fisher
Perkins Coie, LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101-3099
cfisher@perkinscoie.com
jwilliams@perkinscoie.com

Sarah Dunne
Nancy L. Talner
American Civil Liberties Union of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164-2008
dunne@aclu-wa.org
talner@aclu-wa.org

Darrell W. Scott
Matthew J. Zuchetto
Scott Law Group
926 Sprague Ave., Suite 583
Spokane, WA 99201
scottgroup@mac.com
matthewzuchetto@mac.com

Scott Thomas
Burlington City Attorney's Office
833 S. Spruce St.
Burlington, WA 98233
sthomas@ci.burlington.wa.us

Kevin Rogerson
Mt. Vernon City Attorney's Office
910 Cleveland Ave.
Mt. Vernon, WA 98273-4212
kevinr@mountvernonwa.gov

DATED this 25th day of March, 2013, at Seattle, Washington.

/s Shelly Ossinger
Legal Assistant, Keating, Bucklin & McCormack, Inc., P.S. sossinger@kbmlawyers.com

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 FIFTH AVENUE, SUITE 4141
SEATTLE, WASHINGTON 98104-3175
PHONE: (206) 623-8861 FAX: (206) 223-9423