THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH JEROME WILBUR, a Washington resident; JEREMIAH RAY MOON, a Washington resident; and ANGELA MARIE MONTAGUE, a Washington resident, individually, and on behalf of all others similarly situated,

Plaintiffs,

v.

CITY OF MOUNT VERNON, a Washington municipal corporation; and CITY OF BURLINGTON, a Washington municipal corporation,

Defendants.

No. C11-01100 RSL

PLAINTIFFS' POST-TRIAL BRIEF IN RESPONSE TO JUNE 28, 2013, ORDER

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CONTENTS

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TABLE OF AUTHORITIES

FEDERAL CASES

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TABLE OF AUTHORITIES
(continued)

STATE CASES

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Phone: 206.359.8000
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TABLE OF AUTHORITIES
(continued)

FEDERAL STATUTES

STATE STATUTES

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Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF AUTHORITIES
(continued)

RULES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

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TABLE OF AUTHORITIES
(continued)

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Plaintiffs respectfully submit this response to the Court's June 28, 2013 Order, Dkt. No. 319.[1]

1. Have any federal courts taken over supervision of a public defense agency, either directly or through appointment of a supervisor/monitor, anywhere in the United States?

Yes.[2] The District Court for Montana approved a consent judgment that set out detailed requirements for a county public defense system, including staffing, compensation, and supervision requirements. *See* Appx. 1.A (Judgment, *Trombley v. Cnty. of Cascade*, No. CV-87-114-GF-PGH (D. Mont. July 30, 1980)). Further, a district court in Georgia approved a settlement that provided substantive requirements for a county public defense system, extensive monitoring, and reporting by the county. *See* Appx. 1.B (Consent Order, *Stinson v. Fulton Cnty. Bd. of Comm'rs*, No. 1-94-CV-240-GET (N.D. Ga. May 21, 1999)); *see also* Appx. 1.C (Order, *Stinson v. Fulton Cnty. Bd. of Comm'rs*, No. 1-94-CV-240-GET (N.D. Ga. July 27, 2005) (approving amended settlement that required compliance with state standards)).[3]

Numerous state courts have enforced substantive requirements for public defense systems, directly or through appointment of a third-party supervisor or monitor.[4] For example, in *Doyle v. Allegheny County Salary Board*, a Pennsylvania state court approved a settlement that set out detailed

[1] Many of the court documents and local statutes and ordinances responsive to the Court's questions are unpublished. Plaintiffs have attached such documents as an Appendix to this brief and ask the Court to take judicial notice of their contents. *See* Fed. R. Evid. 201.

[2] Plaintiffs respectfully submit that they are not asking the Court to "take over" the public defense system. Rather, Plaintiffs are asking the Court to order the Cities of Mount Vernon and Burlington to hire a supervisor to perform the monitoring and supervision function that the Cities have abdicated and to ensure that the public defender is providing the minimum representation to which indigent defendants are entitled. The supervisor would periodically issue reports that the Court would receive, but would not work for or be directed by the Court. Thus, Plaintiffs understand the Court's first question to ask whether there are any examples in which federal courts have enforced substantive requirements for a public defense system, either directly or through appointment of a third-party supervisor or monitor.

[3] Plaintiffs note that for jurisdictional reasons, few systemic indigent defense cases have been filed in federal court since the Eleventh Circuit, *sua sponte*, dismissed such a case on *Younger* abstention grounds in 1992. *See Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992) (*Luckey II*). Similar abstention considerations, however, are inapplicable here because the Cities removed the case to federal court after Plaintiffs filed in state court, Dkt. No. 1, thereby invoking he Court's jurisdiction. *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613, 620 (2002) (stating that, by removing case to federal court, state "voluntarily invoked the federal court's jurisdiction"); *see also* Dkt. No. 285 (parties' Proposed Pretrial Order, stating that the Court has proper jurisdiction). Under these circumstances, the Cities have forfeited any argument that federal abstention concerns preclude a remedy. *See Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 285 (N.D. Ga. 2003) ("State Defendants are in federal court only because of their own decision to remove the case from state court. It would be fundamentally unfair to permit State Defendants to argue that this Court must abstain from hearing the case after they voluntarily brought the case before this Court."); *Cummings v. Husted*, 795 F. Supp. 2d 677, 692-94 (S.D. Ohio 2011) (holding governmental defendant was barred from asserting abstention defense in action after defendant removed to federal court); *cf. Lapides*, 535 U.S. at 624 (holding that defendant who voluntarily removes action from state court waives its Eleventh Amendment immunity).

[4] These state court rulings are relevant because they illustrate that the kind of relief sought in this case can be granted and has been granted many times before by courts similarly charged with enforcing the Sixth Amendment of the U.S. Constitution.

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staffing requirements and caseload provisions and required monitoring of a public defense system for over 15 years. Appx. 1.D (Settlement Agreement, *Doyle v. Allegheny Cnty. Salary Bd.*, No. 96-13606 (Pa. Super. Ct. May 15, 1998)); 1.E (Order approving settlement, *Doyle v. Allegheny Cnty. Salary Bd.*, No. 96-13606 (Pa. Super. Ct. July 28, 1998)). Similarly, in *Best v. Grant County*, a Washington state court approved a settlement that included detailed requirements for the Grant County public defense system and seven years of monitoring. Appx. 1.F (Settlement Agreement, *Best v. Grant Cnty.*, No. 04-2-00189-0 (Wash. Super. Ct. Nov. 2, 2005)); 1.G (Order Approving the Parties' Settlement Agreement, *Best v. Grant Cnty.*, No. 04-2-00189-0 (Wash. Super. Ct. Dec. 22, 2005)). In *Heckman v. Williamson County*, a Texas state court approved a settlement agreement that contemplated court enforcement of its terms in the event of noncompliance. *See* Appx. 1.H (Joint Motion to Dismiss, *Heckman v. Williamson Cnty.*, No. 06-453-C277 (Tex. Dist. Ct. Jan. 14, 2013)); 1.I (Order, *Heckman v. Williamson Cnty.*, No. 06-453-C277 (Tex. Dist. Ct. Jan. 15, 2013)); *see also Heckman v. Williamson Cnty.*, 369 S.W.3d 137 (Tex. 2012) (holding at least one plaintiff had standing to challenge constitutionality of public defense system and class claims were not moot). In ongoing litigation in Missouri, the state court appointed a special master to examine caseload issues. *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 601-02 (Mo. 2012). In Arizona, after finding that the public defenders' caseloads prevented ineffective assistance of counsel, a state court allowed the public defenders to move to withdraw as counsel and noted that the presiding judge would be responsible for determining how replacement counsel would be assigned to indigent defendants affected by the order. Appx. 1.K at 13-14 (Order, *Ariz. v. Lopez*, CR-2007-1544 (Ariz. Super. Ct. Dec. 17, 2007)). In Georgia, two separate courts adopted consent decrees with detailed compliance, documentation, and monitoring requirements for indigent defense systems, and both retained jurisdiction to enforce the terms of those decrees. Appx. 1.L (Consent Order, *Cantwell v. Crawford*, No. 09EV275M (Ga. Super. Ct. July 8, 2010)); Appx. 1.M (Order Granting Final Approval, *Flournoy v. Georgia*, No. 2009CV178947 (Ga. Super. Ct. Mar. 12, 2012)).

Many courts across the country have granted systemic relief for problematic public defense systems in ways that are far more invasive and burdensome than the minimal supervision that Plaintiffs

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seek here. Examples of other forms of relief include issuing injunctions precluding further prosecutions unless and until Sixth Amendment requirements for representation by counsel were followed;[5] requiring adequate compensation for public defense counsel;[6] establishing rebuttable presumptions that indigent defendants were not provided with effective assistance of counsel to be applied in future individual Sixth Amendment challenges;[7] allowing public defenders to refuse to take cases due to excessive caseloads;[8] and requiring that governmental entities provide reports to the court regarding whether and how constitutional requirements are being met.[9]

As demonstrated above, many courts (both state and federal) have found it necessary and appropriate to issue orders remedying systemic indigent defense problems. The Court has the authority to do the same and should grant the relief Plaintiffs seek in light of the evidence presented at trial. *See* Order Denying Defs.' Mots. for Summ. J. & Pls.' Mot. for Prelim. Inj. (Feb. 23, 2012) ("February 2012 Order"), Dkt. No. 142, at 11.

2. Have any state or federal courts held a municipality liable under *Monell* for constitutional defects in its public defense system?

Yes. Several courts have explicitly held that a municipality (or county) may be held liable under 42 U.S.C. § 1983, as interpreted by *Monell v. Department of Social Services*, 436 U.S. 658 (1978), for constitutional defects in its public defense system. In *Miranda v. Clark County, Nevada* the Ninth Circuit found that the administrative head of the public defender's office could be held liable under section 1983 where, as alleged in the complaint, he instituted certain policies as part of his

[5] *See, e.g., Gilliard v. Carson*, 348 F. Supp. 757, 762-63 (M.D. Fla. 1972).

[6] *See N.Y. Cnty. Lawyers' Ass'n v. State*, 763 N.Y.S.2d 397, 418-19 (N.Y. Sup. Ct. 2003) (granting permanent injunction requiring the State of New York and City of New York to pay assigned counsel $90 per hour); *N.Y. Cnty. Lawyers' Ass'n v. State*, 745 N.Y.S.2d 376, 389 (N.Y. Sup. Ct. 2002) (finding statutory compensation inadequate and granting preliminary injunction directing the State of New York and City of New York to pay assigned counsel $90 per hour).

[7] *See State v. Peart*, 621 So. 2d 780, 790 (La. 1993) (finding that "because of the excessive caseloads and the insufficient support with which their attorneys must work, indigent defendants in [this jurisdiction] are generally not provided with the effective assistance of counsel the constitution requires"); *State v. Smith*, 681 P.2d 1374, 1384 (Ariz. 1984) ("As to trials commenced after the issuance of the mandate, if the same procedure for selection and compensation of counsel is followed as was followed in this case, there will be an inference that the procedure resulted in ineffective assistance of counsel, which inference the state will have the burden of rebutting.").

[8] *See Pub. Defender, 11th Judicial Circuit of Fla. v. State*, 115 So. 3d 261, 282 (Fla. May 23, 2013) ("[T]his Court has repeatedly recognized that excessive caseload in the public defender's office creates a problem regarding effective representation.").

[9] *See* Appx. 1.J (Opinion and Order, *Flora v. Luzerne Cnty.*, No. 04517, at 23 (Pa. Super. Ct. June 15, 2012) (granting preliminary injunction and requiring county "[to] submit a report to this court . . . outlining [the county's] plan to meet its constitutional obligations in regard to the operation, staffing and expenses of the office of public defender")).

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administrative functions that resulted in a deprivation of the plaintiff's rights. 319 F.3d 465, 469 (9th Cir. 2003). Specifically, the administrator instituted a policy whereby each public defense client was subjected to a polygraph test, the results of which determined the extent of the investigation and defense that would be provided. *Id.* The Court of Appeals concluded that the administrator could be held liable under *Monell* because he was responsible for allocating the county's funds for public defense. *Id.* ("The resource allocation policy alleged in this case constitutes a viable claim and subjects Harris to suit as a policymaker on behalf of Clark County.") (citing *Monell*, 436 U.S. at 690-91). Similarly, the court held that the alleged policy of assigning the least experienced attorneys to capital cases without providing any training for those cases constituted deliberate indifference to the Sixth Amendment rights of capital defendants and could be the basis of section 1983 liability consistent with *Monell*. *Id.* at 471 (citing *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

In *Swift v. County of Wayne*, the Eastern District of Michigan concluded that a county could be held liable under *Monell* for constitutional violations of a plaintiff's constitutional rights when those violations are caused by a municipal policy or custom. No. 10-12911, 2011 WL 1102785 (E.D. Mich. Mar. 23, 2011) (denying Rule 12(b)(6) motion to dismiss). There, the plaintiff alleged that the county's policy for funding its indigent defense system, and its custom or practice of underfunding the system, prevented plaintiff's counsel from retaining the services of an expert. *Id.* at *3-4. The court found these allegations sufficient to withstand a motion to dismiss. *Id.* at *4.[10]

The Court has previously cited *Miranda* and *Monell* in support of the principle that "the [Cities] may be held responsible for their own conduct to the extent it deprived plaintiffs of their constitutional rights." February 2012 Order, Dkt. No. 142, at 10. This is an accurate statement of the law. Because the evidence presented at trial demonstrates that the Cities have been operating a constitutionally defective public defense system that results in systemic violations of the right to counsel, the Court can

[10] While not explicitly addressing *Monell*, other courts have at least implicitly held that a municipality or county is liable for systemic defects in the public defense system. *See, e.g.*, *Hurrell-Haring v. State*, 930 N.E.2d 217, 224-28 (N.Y. 2010) (holding putative class had pleaded cognizable claims against state where plaintiffs alleged that counsel was "uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and . . . waived important rights without authorization from their clients").

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and should hold the Cities liable.

3. Has any state or municipality adopted "hard" caseload standards like those that Washington is contemplating?

Yes. At least 23 jurisdictions in Washington and a significant number of other jurisdictions across the country have adopted numerical caseload standards.[11] The following six cities in Washington have municipal codes or ordinances adopting numerical caseload limits for misdemeanors, either by incorporating the limit of 300-400 misdemeanors in the WSBA Standards or by setting their own limit: Asotin, Bellingham, Bonney Lake, Medina, Seattle, and Shelton. *See* Appx. 3 (list of Washington cities with numerical caseload limits).[12] Twelve Washington counties have numerical caseload limits for misdemeanors in their codes: Adams, Cowlitz, Island, Klickitat, Jefferson, Lewis, San Juan, Skagit, Skamania, Spokane, Thurston, and Yakima. *See id.* (list of Washington counties with numerical caseload limits).[13] At least five other Washington jurisdictions have set caseload limits by contract, including the City of Port Angeles, Benton County, Grays Harbor County, King County, and Whitman County. *See id.*[14] Though they lack written caseload standards, many other Washington jurisdictions currently comply with the caseload limit in the WSBA Standards.[15]

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[11] Plaintiffs interpret the phrase "'hard' caseload standards" to mean caseload standards with a numerical caseload limit. Further, Plaintiffs have included as responsive examples those standards that, like the rule contemplated by Washington's Supreme Court, are numerical standards for which substantial compliance is expected, even if the caseload limit is not an absolute mandate. As Professor Strait explained at trial, whether the numerical standard is phrased as a "guideline" or a "standard," the message is the same: full-time public defender caseloads should not generally exceed that number and should in no event substantially exceed that number.

[12] *See also* Appx. 3.A (Asotin Mun. Code § 2.16.050(C) ("No contract attorney shall be appointed to more than 60 cases per year in the municipal court of the city.")); 3.B (Bellingham Mun. Code § 2.16.090 (adopting WSBA Standards)); 3.C (Bonney Lake Mun. Code § 2.17.010 (adopting WSBA Standards)); 3.D (Medina Mun. Code § 4.04.010 (adopting WSBA Standards)); 3.E (Seattle Ordinance No. 122493 (380 misdemeanors/year)); 3.F (Shelton Mun. Code § 2.96.040 (adopting Supreme Court standards)).

[13] *See also* Appx. 3.G (Adams County Code § 2.92.050 (300-400 misdemeanors per year)); 3.H (Cowlitz County Code § 2.44.070 (450 misdemeanors/year)); 3.I (Island County Ordinance No. 100-09, Standard 3 (300-400 misdemeanors/year); 3.J (Klickitat County Ordinance No. 002209, § 1.45.10 (300 misdemeanors/year); 3.K (Jefferson County Code § 2.20.030(1) (300-400 misdemeanors/year)); 3.L (Lewis County Code § 2.40.050 (300 misdemeanors/year)); 3.M (San Juan County Code § 2.128.050 (300-400 misdemeanors/year)); 3.N (Skagit County Code § 2.36.065 (425 misdemeanors/year); 3.O (Skamania County Code § 2.90.010 (300 misdemeanors/year)); 3.P (Spokane County Code § 1.17A.040 (300-400 misdemeanors/year)); 3.Q (Thurston County Code § 10.100.030 (300-400 misdemeanors/year)); 3.R (Yakima County Code § 2.124.050(3)(b) (400 misdemeanors/year)).

[14] Appx. 3.S (Port Angeles contract (300 cases/year)); 3.T (Benton County contract ¶ 7 (390 case equivalents/year)); 3.U (Grays Harbor County contract ¶ 7 (375 misdemeanors/year, including probation violations)); 3.V (King County 2011 contract, Ex. II, § 3.B.14 (450 misdemeanors/year)); 3.W (Whitman County contract ¶ 8 (400 misdemeanors/year)).

[15] The Washington Supreme Court has delayed the compliance deadline for its misdemeanor caseload standard while the Washington Office of Public Defense ("OPD") conducts a time study. Only those jurisdictions that are already in substantial compliance with the "hard" caseload standard the Supreme Court is evaluating (400 unweighted cases per year)

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Numerous jurisdictions outside of Washington also have numerical caseload limits. *See id.* (list of other jurisdictions with numerical caseload limits).[16] In addition, courts have ordered that caseload standards be developed in Florida, Nevada, and Georgia.[17]

Nearly all of the jurisdictions that have adopted standards limit misdemeanor cases to 400 or fewer. This is not surprising, given that well-established national guidelines for indigent defense have set 400 as the recommended maximum misdemeanor caseload for the past 40 years. *See* Appx. 3.BB (National Advisory Commission on Criminal Justice Standards and Goals (1973) (recommending misdemeanor caseload limits of not more than 400 cases)); 3.CC (National Legal Aid & Defender Association Standards) (recommending misdemeanor caseload limits of 400 cases)); 3.DD (American Council of Chief Defenders Statement on Caseloads and Workloads) (recommending misdemeanor caseload limits of 400 cases)); 3.EE (Washington Defender Association Standard for Public Defense Services) (recommending caseload limits of 300 misdemeanors per year)). The caseload of 400 that Plaintiffs have asked the Court to impose on the Cities based on the facts of this case is consistent with standards recommended by these authorities and adopted in numerous jurisdictions in Washington State and around the country.[18]

4. Is the issue of the constitutionality of the representation afforded by Messrs. Sybrandy and Witt moot? If so, what impact does that have on the available remedy, including award of attorney fees?

No. Injunctive relief is necessary to prevent future violations of the right to counsel on two independent grounds. First, the evidence proves that the Cities are currently violating the right to counsel and that ongoing violations will continue unless abated. Second, the evidence proves that the

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were eligible to participate in the study. *See* Wash. State OPD, Wanted: Attorneys Interested in Joining a Misdemeanor Study, http://opd.wa.gov/TrialDefense/TimeStudy/0105-2013_TimeStudy.pdf (last accessed July 23, 2013).

[16] *See* Appx. 3.X (New York City, Rules of the Chief Administrative Judge, Pt. 127.7 (maximum of 400 misdemeanor cases per year)); 3.Y (Indiana Public Defender Commission Standards, Standard J (maximum of 300-400 misdemeanor cases per year, depending on level of support staff)); 3.Z (Massachusetts Assigned Counsel Manual (limiting district court cases to 250 per year)).

[17] *See Pub. Defender, 11th Judicial Circuit of Fla.*, 115 So. 3d at 282; Appx. 3.AA (Order, *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, No. 411 (Nev. Oct. 16, 2008)); Appx. 1.L at 6-7 (Consent Order, *Cantwell v. Crawford*, No. 09EV275M (Ga. Super. Ct. July 8, 2010); Appx. 1.L at 5 of Consent Decree (Order Granting Final Approval, *Flournoy v. Georgia*, No. 2009CV178947 (Ga. Super. Ct. Mar. 12, 2012)).

[18] Plaintiffs reiterate that they are not asking the Court to determine the maximum misdemeanor caseload allowed by the U.S. and Washington Constitutions. Further, setting a caseload limit is just one piece of the overall remedy necessary to ensure that the Cities comply with their constitutional obligations.

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Cities have a longstanding history of violating the right to counsel—including violations occurring at the time this case was filed—and the Cities have failed to demonstrate with absolute clarity that this wrongful behavior cannot be reasonably expected to recur in the future. Under either approach, the constitutionality of the Cities' public defense system as it existed when Sybrandy and Witt were defense attorneys is relevant to the Court's assessment of the facts and the appropriateness of injunctive relief. Once such relief is granted, Plaintiffs will be entitled as prevailing parties to all fees reasonably expended in relation to the lawsuit.

a. Evidence drawn from both the past and the present supports the conclusion that the Cities are currently failing to provide indigent defendants with the right to counsel.

In assessing the current public defense system and the continuing nature of the Cities' constitutional violations, the Court will not draw its conclusions in a vacuum. "[P]resent events have roots in the past, and it is quite proper to trace currently questioned conduct backwards to illuminate its connections and meanings." *United States v. Ore. State Med. Soc'y*, 343 U.S. 326, 332-33 (1952) (analyzing past and present practices in determining whether prospective injunctive relief is appropriate). If the Cities' "past and present misconduct indicates a strong likelihood of future violations," then "[p]ermanent injunctive relief is warranted." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 561, 564 (9th Cir. 1990) (granting injunctive relief based on "pattern and practice of [mis]conduct" occurring "both *before and after* [changes were made in response to] the issuance of [an] injunction") (emphasis added).

Plaintiffs have proven that the Cities are denying indigent defendants the right to counsel on a systemic basis and that injunctive relief is necessary to end those ongoing violations. These conclusions are supported by evidence that derives from the current state of the Cities' public defense system, including excessive caseloads,[19] insufficient time spent on cases,[20] insufficient supervision by

[19] After taking over for Sybrandy and Witt, the Cities' two public defense attorneys (one of whom had no experience with criminal cases) were assigned more than 1,300 cases in their first five months of work. Trial Ex. 151. A third public defense attorney (who also lacked experience defending against criminal charges) was assigned 420 cases in her first four months. Trial Exs. 218, 219, 223. Excluding cases in bench warrant status, the Cities' attorneys each had between 210 and 362 pending cases as of January 16, 2013 and were continuing to accept an average of more than 30 new cases per month. Trial Ex. 223.

[20] *See* Testimony of Jackson and Strait; Trial Exs. 218, 219.

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the Cities,[21] and an overarching failure to submit the prosecution's cases to meaningful adversarial testing.[22] These conclusions are further supported by historical evidence—namely, evidence from the public defense system that existed at the time of Sybrandy and Witt—including the Cities' longstanding policies and customs of allowing inordinate caseloads,[23] failing to monitor compliance of (let alone enforce) contractual and legal provisions,[24] and being deliberately indifferent to complaints.[25] Simply put, the Cities' persistent pattern of misconduct, which spans both past and present, informs the current state of affairs and establishes section 1983 liability on the part of the Cities and the appropriateness of injunctive relief. *See Orantes-Hernandez*, 919 F.2d at 561-62, 567-68 ("evidence in the record show[ed] that despite the change . . . the pattern of [violations] . . . persisted" and warranted relief).

b. The Cities have failed to demonstrate it is "absolutely clear" their longstanding history of constitutional violations will not recur.

Even if the Court were to find that the Cities voluntarily ceased their unlawful conduct through actions taken shortly before trial, the Class is still entitled to injunctive relief. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ("Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct."). Plaintiffs have proven that the Cities' public defense system during the Sybrandy and Witt years resulted in systemic violations of the right to counsel.[26] As such, the Cities were required to prove it is "'*absolutely clear*"' that '"[their] wrongful behavior could not reasonably be expected to recur."' *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (emphasis added) (quoting *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). "This *heavy burden* applies to a government entity that voluntarily ceases allegedly illegal conduct." *Bell v. City of Boise*, 709 F.3d 890, 898-99 (9th Cir. 2013) (emphasis added). The Cities failed to meet their burden.

[21] For example, the Cities instructed the current public defender to stop reporting the amount of time spent on cases. *See* Testimony of Laws.

[22] For example, the Cities' current public defender utilized an investigator on only four cases in 2012, rarely interviewed witnesses, failed to engage in motion practice, and tried less than one percent of the cases closed. *See* Testimony of Laws and Jackson.

[23] *See, e.g.*, Trial Exs. 2, 5, 11, 12, 89, 199, 226.

[24] *See* Testimony of Stendal, Aarstad, Sybrandy, and Witt.

[25] *See, e.g.*, Trial Exs. 9, 10, 33, 44, 46, 57, 71, 72, 75, 76, 85, 97, 98, 104, 113; Testimony of Alvarez and Stendal.

[26] There is insufficient space here for Plaintiffs to recap all of the evidence in support of this assertion.

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The evidence overwhelmingly demonstrates a reasonable expectation that systemic violations of the right to counsel will be repeated. Among other things, every witness from within the Cities—including administrators, prosecutors, and judges—vigorously asserts that the old system was constitutional,[27] and "[a] defendant's persistence in claiming that (and acting as if) his conduct is blameless is an important factor in deciding whether future violations are sufficiently likely to warrant an injunction." *Fed. Election Comm'n v. Furgatch*, 869 F.2d 1256, 1262 (9th Cir. 1989).[28] Additional evidence in support of injunctive relief includes the following: the Cities maintain that they have no duty to monitor or supervise their system;[29] the Cities have affirmatively sought to avoid any responsibility for enforcing contractual and legal provisions aimed at ensuring the right to counsel is met;[30] the Cities have continued to allow their public defender to handle excessive caseloads;[31] and the Cities have instructed the public defender to stop reporting the amount of time spent on each case, the most objective measure of determining whether the right to counsel is met.[32] Because it is reasonably likely that violations will recur, injunctive relief is necessary.

c. If the Court grants injunctive relief, Plaintiffs will be entitled to all fees reasonably expended in relation to the lawsuit.

A plaintiff in a civil rights suit "prevails" for purposes of a fee award under 42 U.S.C. § 1988 if there is a "material alteration of the parties' legal relationship" that "is accompanied by 'judicial *imprimatur* on the change.'" *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 715 (9th Cir. 2013) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001)). An order granting permanent injunctive relief satisfies this requirement. *See Gerling Global Reinsurance Corp. of Am. v. Garamendi*, 400 F.3d 803, 806, 811 (9th Cir. 2005).[33]

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[27] *See, e.g.*, Testimony of Stendal, Aarstad, Cammock, Eason, Svaren, and Gilbert.

[28] *See also United States v. Laerdal Mfg. Corp.*, 73 F.3d 852, 856 (9th Cir. 1995) (party's "intransigent insistence on its own blamelessness" supports "inference of a likelihood to commit future violations"); *Prison Legal News v. Columbia Cnty.*, No. 3:12-CV-00071-SI, 2013 WL 1767847, at *21 (D. Or. Apr. 24, 2013) (permanent injunctive relief is supported by fact defendants "never admitted that the [challenged] policy is unconstitutional").

[29] *See, e.g.*, Stendal Dep. at 80:8-24.

[30] *Compare* Trial Exs. 26, 45, 48 *with* Trial Exs. 211, 212, 216.

[31] *See* Note 19, *supra*. "[C]essation that occurs 'late in the game' will make a court 'more skeptical of voluntary changes that have been made.'" *Harrell v. Fla. Bar*, 608 F.3d 1241, 1266 (11th Cir. 2010) (quoting *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279, 284 (3d Cir. 2008)).

[32] *See* Testimony of Laws and Jackson.

[33] *See also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (plaintiff prevails by "succeed[ing] on any significant issue in litigation which achieves some of the benefit the [plaintiff] sought in bringing suit") (internal quotation marks and

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A prevailing plaintiff is "entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved." *Hensley*, 461 U.S. at 431, 433, 435 (citation omitted). "Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised." *Id*. at 435, 440 ("rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee").

Even if the Court were to find that the constitutionality of the Cities' public defense system during the Sybrandy and Witt years is moot in light of the unconstitutional nature of the current system, this conclusion would have no impact on Plaintiffs' entitlement to an award of attorneys' fees because Plaintiffs' challenges to the Cities' public defense system—both past and present—are "sufficiently related to one another to entitle [them] to fees for all the work performed." *Watson v. Cnty. of Riverside*, 300 F.3d 1092, 1094-97 (9th Cir. 2002) (affirming award of fees for practically "all of the time [plaintiff's] lawyers spent on the case" even though case "was rendered moot. . . [n]early two years after [a] preliminary injunction issued" and expressly rejecting argument that fees should have been limited "to work done in securing the preliminary injunction"). To the extent they can be divided between past and present, Plaintiffs' claims against the Cities "involve a common core of facts" and "are based on [the same] legal theories." *Thomas v. City of Tacoma*, 410 F.3d 644, 649 (9th Cir. 2005) (internal quotation marks and citation omitted); *see also Webb v. Sloan*, 330 F.3d 1158, 1168 (9th Cir. 2003) (commonality of facts *or* law is sufficient to show relatedness of claims). Thus, if Plaintiffs prevail they will be entitled to an award of fees for all hours reasonably expended in prosecuting the lawsuit.

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citation omitted). Note that a plaintiff fails to become a "prevailing party" solely because the lawsuit causes a voluntary change in the defendant's conduct. Absent entry of an enforceable judgment, such change lacks the requisite "judicial *imprimatur*." *Buckhannon*, 532 U.S. at 605 (rejecting "catalyst theory"). But when the challenged conduct is shown to be unconstitutional and the defendant fails to meet the heavy burden of proving mootness, the plaintiff is entitled to injunctive relief and a subsequent award of fees. *See id*. at 608-09.

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RESPECTFULLY SUBMITTED this 14th day of August, 2013.

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CERTIFICATE OF SERVICE

JOYCE NORVILLE states as follows:

1. I am a legal secretary at the firm of Perkins Coie LLP, one of the counsel for Plaintiffs herein, have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I certify that on August 14, 2013, I made arrangements to electronically file the foregoing Plaintiffs' Post-Trial Brief in Response to June 28, 2013 Order using the CM/ECF system, which will send notification of such filing to the following:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 14th day of August, 2013.

s/ Joyce Norville
Legal Secretary

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