THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

v.

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

Defendants.

NO. 2:11-cv-01100 RSL

PLAINTIFFS' TRIAL BRIEF

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STATE CASES

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FEDERAL STATUTES

STATE STATUTES

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I. INTRODUCTION

Indigent defendants charged with misdemeanors in the municipal courts of Mount Vernon and Burlington have a constitutional right to the assistance of counsel. Defendants Mount Vernon and Burlington ("the Cities") operate a public defense system that systemically deprives indigent defendants of this right. Among other things, the Cities appoint attorneys who fail to meet with or respond to indigent defendants in or out of custody; who fail to engage in confidential attorney-client communications with defendants; who fail to reasonably investigate the charges against defendants; and who fail to spend sufficient time on the cases of defendants, effectively forcing defendants to accept plea deals.

This lawsuit was brought to correct the underlying cause of these violations: the failure of the Cities to engage in any meaningful oversight of the public defense system. Remarkably, the Cities previously had a structure in place that allowed for such supervision. That structure included ordinances with standards for the delivery of public defense services, a public defense contract with provisions designed to secure the right to counsel, and established caseload limits. The Cities, however, did nothing to ensure that their public defenders complied with these standards, provisions, or limits. Instead, ignoring complaints and excessive caseload reports, the Cities continued to maintain an unconstitutional public defense system year after year.

Since the filing of this lawsuit, the Cities have moved further in the wrong direction. Among other things, the Cities have eliminated the very standards and provisions that, had they been utilized, could have allowed the Cities to meaningfully supervise their public defense system. In 2012, for example, the Cities repealed their public defense ordinances and redrafted their public defense contract so as to omit numerous performance benchmarks and evaluation tools. When an expert concluded in January 2013 that the current public defenders are failing to devote sufficient time to cases, the Cities instructed the attorneys to stop reporting hours.

At trial Plaintiffs will demonstrate that the Cities' deficiencies in oversight persist to this day. Plaintiffs will also demonstrate that the Cities' past actions necessarily inform an

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evaluation of the current system. The Cities, for example, will argue that they have revised their public defense complaint process. But this process has numerous problems, including the fact that all complaints continue go to Eric Stendal, the Mount Vernon administrator who admits he has never considered an indigent defendant's complaint to be valid. Likewise, the Cities will argue they are monitoring Mountain Law, but that monitoring consists of passively receiving closed case reports, which is exactly what the Cities did with Sybrandy and Witt.

It is clear that in the absence of injunctive relief, the Cities will continue on a path of refusing to supervise their public defense system. As a representative of Mount Vernon testified in January 2013: "The City does not agree that it has to ensure, secure, or guarantee anything." Under the facts of this case, Plaintiffs' request for an order compelling the Cities to hire a part-time supervisor is reasonable and appropriate.

II. STATEMENT OF EVIDENCE

What follows is a summary of evidence Plaintiffs will present at trial to demonstrate the Cities' longstanding refusal to oversee their own public defense system, the problems that continue to this day, and the need for prospective injunctive relief.

A. The Cities Have a Long Track Record of Failing to Provide Actual Assistance of Counsel to Indigent Defendants

1. The Cities Maintained a Public Defense System that Failed to Provide Adequate Time for Actual Assistance of Counsel

Under the Washington State Bar Association ("WSBA") public defense standards in place at the time this lawsuit was filed, the acceptable caseload of a full-time public defender could not exceed 400 misdemeanor cases per year. For public defenders who maintained private law practices, the caseload limit was proportional to the percentage of time the lawyer devoted to public defense. These standards are designed to ensure that public defenders give each client the time and effort necessary to ensure effective representation.

From January 2005 to April 2012, all of the Cities' public defense services were performed by two attorneys, Richard Sybrandy and Morgan Witt. Sybrandy and Witt served as

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the Cities' "Public Defender" on a part-time basis only, a fact of which the Cities were well aware. Indeed, Sybrandy and Witt spent no more than half of their time on public defense cases. An attorney who devotes only fifty percent of his time to public defense should handle no more than 200 misdemeanor cases per year for indigent clients. The caseloads of Sybrandy and Witt greatly exceeded these limits, however. In 2009, for example, Sybrandy closed 1,206 cases and Witt closed 1,136 cases—a total of 2,342. The following year Sybrandy closed 963 cases and Witt closed 1,165 cases—a total of 2,128. And in 2011 Sybrandy closed 1,173 cases and Witt closed 1,098 cases—a total of 2,271.

For over three years, the Cities received monthly reports detailing excessive caseloads. These reports showed the Public Defender was regularly spending only 30 minutes per case.

2. The Cities Maintained a Public Defense System that Lacked Confidential Attorney-Client Communication

With little time to devote to public defense, the Cities' Public Defender had a general practice of failing to communicate with assigned clients outside of court. Typically, the only contact an indigent defendant had with his appointed attorney was during proceedings in open court. This practice of not meeting with indigent defendants was entirely at odds with established WSBA standards, and Plaintiffs' experts will testify that it is always best for a public defender to meet with a client in a private setting as soon as possible.

3. The Cities Knew or Should Have Known the Public Defender Failed to Meet with Indigent Defendants in Custody

The failure of the Public Defender to meet with or respond to clients extended to indigent defendants who were incarcerated at the Skagit County Jail. Witnesses will testify that they regularly asked the Public Defender to come see or call them at jail, but the Public Defender failed to do so. This lack of contact is confirmed by jail records, which show that the Cities' Public Defender made only six visits to the local jail during all of 2010 and met with only seven clients. By contrast, the same records show that attorneys from the Skagit County

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Public Defender's Office (who handle district and superior court proceedings) made 750 visits to the jail and met with 1,551 clients. The results were similar for 2009.

The Cities knew the Public Defender was not meeting with incarcerated defendants. Indeed, Sybrandy explicitly told the Cities he found such contact to be "useless," and he refused to agree to a contract that directed the Public Defender to initiate contact with indigent defendants located at the Skagit County Jail.

4. The Cities Constructively Deprived Indigent Defendants of the Right to Counsel by Maintaining a Systemically Deficient Public Defense System

The interactions indigent defendants had with their appointed attorneys were typically limited to a few minutes in a crowded courtroom. During that short time, defendants were forced to make important decisions about their cases, often without any explanation or discussion of the elements of the charge, the applicable defenses, the options available, or the attendant risks. This was usually the first time defendants had an opportunity to converse with an attorney regarding their case, and the conversations took place in an open courtroom and typically lasted only a few minutes. Witnesses will testify that under these circumstances they felt pressured to accept plea deals.

The Cities' public defense system long ago devolved to a state of meet 'em, greet 'em and plead 'em' justice. No trials were held in Burlington's municipal court in 2010, and only five were held in Mount Vernon's municipal court. In 2011, no trials were held in Burlington and only two were held in Mount Vernon. Plaintiffs' experts will explain that it is important for public defenders to set cases for trial and regularly try them because this helps keep pressure on the prosecution and allows defendants to obtain better plea offers.

B. The Cities Knew or Should Have Known Their Public Defense System Was Depriving Indigent Defendants of the Right to Counsel

1. The Cities Were on Notice Because of Numerous Complaints by Governmental Officials and Indigent Defendants

Before the fall of 2011, the Skagit County Office of Assigned Counsel ("OAC") conducted indigency screenings for criminal defendants charged with crimes in Mount Vernon

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and Burlington, and the Cities' Public Defender was assigned to those defendants who were found to be indigent. For several years the director of the OAC, Letty Alvarez, fielded complaints from indigent defendants about the Cities' Public Defender. Among other things, indigent defendants complained that the Public Defender failed to meet with them in or out of custody; that the Public Defender failed to respond to their telephone calls or the kites they sent from jail; that the Public Defender failed to investigate or discuss the facts of their cases with them; that the Public Defender failed to explain jail alternatives and plea consequences; and that the Public Defender effectively forced them to accept plea deals. Ms. Alvarez estimates that the OAC received more than 100 complaints per year.

On numerous occasions during the period from 2008 (or earlier) to 2011, Ms. Alvarez brought these complaints directly to the attention of the Public Defender and various municipal and judicial officials within the Cities. These officials included the Cities' public defense contract managers, four of the Cities' municipal court judges/commissioners, three of the Cities' municipal court administrators, and the mayor of Mount Vernon. Ms. Alvarez spoke in person with these officials and wrote to them. In the case of Eric Stendal, Mount Vernon's public defense contract manager, Ms. Alvarez even sent indigent defendants directly to his office to complain to him in person.

Ms. Alvarez was not the only person who voiced concerns to the Cities. In August 2008, for example, the Assistant Chief of the Burlington Police Department wrote to the city administrator, city attorney, and mayor of Burlington and criticized the public defense attorneys for "playing crossword puzzles and other games while at the defense table on at least 7 different occasions while defending their clients." At another point in time, Mount Vernon's Chief of Police wrote to officials for the Cities to complain that his officers were not able to reach the Public Defender at designated phone numbers, particularly when assisting defendants who had been arrested for driving under the influence. The officers noted that this "[w]asn't an isolated case."

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In 2009, at Ms. Alvarez's request, the Cities initiated a process by which indigent defendants could submit written complaints about public defense services. The Cities received several of these written complaints but only addressed the complaints in a perfunctory manner. Eric Stendal, the Mount Vernon official in charge of managing the public defense contract, will testify that he never took any action in regard to complaints other than ask the Public Defender for a response. In fact, Mr. Stendal will say that he has "never found any complaint by any criminal indigent defendant to be meritorious."

In January 2011, Ms. Alvarez notified Mr. Stendal that she "continues to receive complaints" about the Cities' Public Defender, "especially from clients who are in custody." At trial, Ms. Alvarez will testify that she is not aware of anything Mr. Stendal did to address these ongoing complaints.

2. The Cities Were on Notice Because of the Information Contained in the Public Defender's Closed Case Reports

In 2009 the Public Defender began submitting monthly reports to the Cities that listed each of the cases closed in the prior month, the disposition of the case, and the amount of attorney time spent on the case. Plaintiffs' experts will testify that the information in these reports shows the Cities were systemically depriving indigent defendants of the right to counsel. Professor John Strait, for example, will state that the excessive caseloads carried by the Cities' public defense attorneys made it impossible for them to provide reasonably competent criminal defense representation. Christine Jackson will similarly state that even a highly experienced misdemeanor criminal defense lawyer could not have provided minimally adequate representation under those caseloads. It is simply not possible to adequately handle a majority of misdemeanor cases in thirty minutes, sixty minutes, or even two hours.

C. The Cities Failed to Address the Deficiencies in the Public Defense System and Engaged in Acts and Omissions that Allowed Those Deficiencies to Continue

Despite the serious complaints made about the Cities' public defense system and the mounting evidence of that system's deficiencies, the Cities failed to take steps to protect

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indigent persons, secure their constitutional rights, or even enforce the very contractual obligations the Public Defender was paid to perform. The impact of the Cities' actions and inactions was real and substantial: indigent defendants were deprived of the right to counsel.

1. The Cities Continued to Recommend and Hire Sybrandy and Witt as the Public Defender in the Face of Numerous Complaints

Sybrandy and Witt began serving as the Public Defender in Mount Vernon in 2000 and in Burlington in 2005. By 2008, Eric Stendal and Jon Aarstad, the administrators who oversaw the Cities' public defense contracts, had received numerous complaints about the attorneys. Nonetheless, Mr. Stendal and Mr. Aarstad recommended that the Cities enter into a new contract with Sybrandy and Witt for 2009 and 2010. Both city councils accepted the recommendation and voted to approve the contract.

Complaints about the public defense system continued through 2009 and 2010. Near the end of 2010, however, the Cities' councils voted to extend the contract of Sybrandy and Witt for another two years at the recommendation of Mr. Stendal.1

2. The Cities Continued to Underfund the Public Defense System and Assign Excessive Caseloads to the Public Defender Despite Knowing the "Legal Requirements" for the Constitutional Right to Counsel

In 2008, the Cities decided to make certain changes to their public defense system for the ostensible reason of bringing the system "up to date with its legal requirements." Among other things, the Cities enacted new ordinances on public defense, drafted a public defense contract that was nearly four times the length of the Cities' prior contracts, and established caseload limits for public defense attorneys. Almost as quickly as these changes were made, however, the Cities began taking steps to undo them.

For example, the Cities initially stated that "all attorneys providing services shall maintain a caseload of no more than 450 misdemeanors, or any combination of misdemeanors and [private] matters that result in an equivalent workload." There was no mention of case

[1] Mr. Aarstad retired in March 2009, and his position remained open until August 2011.

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weighting; instead, a case was to be counted at the time of first appointment. Within a couple of months, however, the Cities abandoned the caseload approach in favor of the case credit approach found in the 2009-2010 contract. The obvious purpose for this was to make it appear as though the annual caseloads were capped at 400 per attorney when, in actuality, the Cities were allowing each attorney to handle as many as 1,200 cases per year (by assigning only a third of a credit to many types of cases). The Cities also refused to reduce the maximum number of public defense cases that attorneys may handle based on private caseloads, meaning the Cities were allowing part-time attorneys like Sybrandy and Witt to carry full-time caseloads. This violated state law and the Cities' own ordinances. *See* RCW 10.101.030 (public defense systems must include "limitations on private practice").

Before finalizing the 2009 contract, the Cities made several other changes for the purpose of modifying or removing altogether provisions that are basic requirements of public defense services, particularly requirements for client contact. These changes resulted from the following email that Sybrandy wrote to the Burlington city manager, Jon Aarstad:

> There is much in the proposed contract which is not possible for us to comply with, at least at the level of compensation we have proposed . . . . [This] include[s] our communication with clients . . . . It would be extraordinary for us to be directed to initiate contact with [indigent] defendants . . . . [W]e may know we represent a person in custody, but we have no idea what the nature of their charges are or their criminal history . . . . Contact is useless at that point . . . . [Likewise, we] rarely have any information that would be of use in any contact with [non-incarcerated defendants] prior to pretrial . . . . Initiating any contact prior to that . . . would serve no purpose . . . .

At trial, Christine Jackson will testify that client-contact requirements like those that the Cities' removed from their contract are an essential part of a public defense system.

3. The Cities Chose a Policy of Failing to Monitor the Public Defender and Failing to Enforce the Terms of Their Own Laws and Contract

As noted above, the Cities enacted public defense ordinances in 2008 for the ostensible purpose of ensuring that their public defense system efficiently and effectively protected the

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constitutional right to counsel. The Cities also substantially revamped their public defense contract. On the face of it, the Cities' new laws and contract included many provisions necessary for ensuring that actual assistance of counsel was provided to indigent defendants. The Cities, however, have a longstanding practice of failing to undertake any meaningful actions to enforce such provisions.

For example, the Cities' contract limited the number of cases that could be taken, yet the Cities failed to discuss those limitations with the Public Defender and failed to put any mechanism in place to count caseload credits or otherwise ensure compliance with the term. To this day, neither the Cities nor the attorneys know how many public defense cases were being handled at any point in time.

The Cities also failed to ensure that the attorneys' private work was not performed "to the exclusion or detriment" of the public defense services, as required by the contract.

The Cities also failed to ensure the Public Defender complied with the contractual requirement of "provid[ing] adequate investigative, paralegal, and clerical services . . . necessary for representation of indigent defendants."

The Cities also failed to ensure that the Public Defender was meeting in person with indigent defendants at the Skagit County Jail or, for those who were not incarcerated, at private locations. Likewise, the Cities failed to ensure that the Public Defender "return[ed] phone calls or other attempts to contact the public defender within 48 hours, excluding weekends."

The Cities' contract also provided that the Public Defender shall comply with "the ordinances of The City of Mount Vernon and The City of Burlington," in addition to all applicable laws of the United States and the State of Washington. The Cities failed to ensure compliance with these obligations.

Even when the public defense contract with Sybrandy and Witt was extended after the filing of this lawsuit, the Cities failed to follow up with the attorneys to ensure they were in

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compliance with the contract's provisions. Likewise, the Cities failed to ask the Public Defender to change its practices in any way.

The ordinances enacted in 2008 required the Cities to "establish a procedure for systematic monitoring and evaluation of attorney performance based upon published criteria." The only thing the Cities did in terms of monitoring, however, was to passively receive closed case reports. There is no evidence to show the Cities engaged in any meaningful evaluation of the Public Defender or followed up on the numerous red flags that were raised over the years.

The repeated failure of the Cities to enforce their own ordinances and contracts cannot be ignored when evaluating the current state of the system. What the Cities claim to be doing today is really the same as what the Cities have done (or failed to do) for years.

D. Since the Lawsuit Was Filed, the Cities Have Continued to Operate a Public Defense System that Systemically Fails to Provide Meaningful Assistance of Counsel to Indigent Defendants

1. The Cities Chose to Continue Their Practice of Underfunding the Public Defense System

In late 2011, Sybrandy and Witt informed the Cities that they were going to terminate the public defense contract effective December 31, one year early. The Cities asked the attorneys to stay on for another four months, which would allow the Cities to search for replacements. Sybrandy and Witt agreed to do so.

The Cities issued a request for proposals. In response, the Cities received bids from six interested law firms or associations. The bids ranged from $15,000 per month to $62,500 per month. Among these bids was one from James Feldman, an expert retained by the Cities. Mr. Feldman stated that it would cost between $30,500 and $32,500 per month ($366,000 to $390,000 per year) to provide constitutionally appropriate services.

The Cities chose to hire Mountain Law PLLC, which submitted the second lowest bid at $17,500 per month or $210,000 per year.[2] This was an increase of only $32,000 annually over

[2] The Mountain Law bid was actually submitted under the name of Baker, Lewis, Schwisow & Laws, PLLC ("Baker Lewis"). The members of Baker Lewis, who also happen to be the members of Mountain Law, chose to form Mountain Law after the bid was submitted.

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the compensation paid to Sybrandy and Witt each year since 2009 and nearly half of what the Cities' own expert said would be required to operate a constitutionally adequate public defense system. The Cities selected Mountain Law even though the firm explained that it would provide only two attorneys to handle more than 1,700 cases. By contrast, the Cities' own expert stated that it would take up to five attorneys to meet the requirements of the contract.

2. The Cities Chose to Continue Their Practice of Assigning Excessive Caseloads to the Public Defender

Within ten weeks of taking over the Cities' public defense contract from Sybrandy and Witt, the two attorneys from Mountain Law opened a combined total of more than 1,200 cases. During that same period, the attorneys closed 143 cases. Thus, as of late June 2012, each attorney had more than 500 active misdemeanor cases, and the Cities were well aware of this. The two attorneys continued to open a combined average of 140 new cases per month, which is the functional equivalent of an additional 840 cases per attorney on an annual basis.

In late September 2012, Mountain Law added a third attorney. By the end of 2012, Mountain Law's attorneys had opened a total 2,070 public defense cases in relation to their contract with the Cities. Under applicable WSBA standards, the maximum combined number of cases that the attorneys should have handled over this period of time was approximately 700.[3] Consequently, the caseloads of Mountain Law's attorneys vastly exceeded the limitations set forth by applicable WSBA standards. Expert Christine Jackson will testify that these caseloads are particularly excessive when you consider that attorneys Jesse Collins and Sade Smith had zero experience with criminal defense and the third attorney, Michael, Laws was the only person responsible for supervising the two of them.

In August 2012, Mountain Law informed the Cities that they would need to employ at least 4.3 attorneys to comply with the WSBA's maximum caseload standard of 400

[3] Mr. Collins and Mr. Laws each worked for approximately eight and a half months, and Ms. Smith worked for just over three months. Thus, the combined working time of the attorneys was approximately 21 months or 1.75 years. At a maximum of 400 misdemeanor cases per year, 1.75 years results in 700 total cases.

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misdemeanors per attorney. This assertion was based on data provided by the Cities that resulted in a projection of 1,722 cases annually, not the 2,070 cases that the Cities ultimately assigned to Mountain Law. During 2012, long after this lawsuit was filed, the Cities should have been employing more than five full-time attorneys to provide public defense services but chose to employ the equivalent of just over two.[4]

Last September, the Cities represented to the Court that each of their public defense attorneys would be in compliance with new caseload standards "by January 1, 2013," meaning the attorneys would not have more than 400 cases per year. Dkt. No. 192 at 1:22-25, 7:4-6. As of January 16, 2013—the date of the last report received before the close of discovery—Mr. Collins was carrying 362 open cases, Ms. Smith was carrying 241 open cases, and Mr. Laws was carrying 210 open cases.[5] Thus, the attorneys were on pace to exceed the maximum of 400 cases per attorney per year by the end April, if not sooner.

3. The Cities Chose to Continue the Same Unconstitutional Practices

Though Sybrandy and Witt have been replaced, little has changed in the Cities' public defense system. Mountain Law's three attorneys (one of whom started in late September) opened more than 2,000 cases during an eight-month period in 2012 but utilized an investigator only four times and tried a total of only seven cases. Like Sybrandy and Witt, Mountain Law informs each new client that its attorneys usually "cannot schedule a meeting prior to [the] first pretrial hearing" because "there may not be enough time, or we may not yet have information about your case." And like Sybrandy, Mr. Laws has stated that it is "fairly pointless" to meet with clients, including incarcerated clients, unless he has police reports and/or an offer to go over with them. Jail logs from May to September 2012 show that Mr. Laws visited incarcerated clients on only four occasions.

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[4] 2,070 cases divided by a maximum of 400 cases per attorney equals 5.175 attorneys. As described in note 3, *supra*, Mountain Law had the equivalent of 1.75 attorney years. As for Sybrandy and Witt, the two worked only 3.5 months at half-time (if not less), which is the equivalent of 0.29 attorneys (3.5 months x 2 attorneys x 50 percent / 12 months = .29 attorney years). Thus, the Cities had the equivalent of 2.04 attorneys for all of 2012.

[5] This does not include 343 cases that were in bench warrant status at the time.

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According to their closed case reports, the attorneys at Mountain Law are spending an average of less than two hours per misdemeanor case.[6] Plaintiffs' expert, Christine Jackson, will testify that this is insufficient to meet minimum Sixth Amendment requirements for assistance of counsel. Remarkably, the time reported is overstated because the reports include "staff time" and also duplicate time entries that double, triple, or quadruple the number of actual hours spent on a given case.

Ms. Jackson will testify that in her review of fifty randomly selected case files from Mountain Law, she was unable to find any investigative work, even for cases where an investigation may have resulted in the development of exculpatory information. This is consistent with the admission by Mountain Law that it utilized an investigator on only four cases in 2012. Ms. Jackson will also testify that significant legal and factual issues were missed in the cases, issues that were apparent from the discovery. Overall, Ms. Jackson saw a consistent lack of elements necessary to provide meaningful assistance of counsel.

E. The Cities Continue to Refuse to Take Steps that Will Ensure Their Public Defense System Provides Meaningful Assistance of Counsel

1. The Cities Maintain They Have No Obligation to Monitor or Supervise Their Public Defense System

From the outset of this lawsuit, the Cities have consistently maintained they have no obligation to monitor, supervise, or evaluate their public defense system. For example, when asked to produce documents showing the Cities have taken steps to ensure the Public Defender fulfills its contractual obligations, both Mount Vernon and Burlington gave the following response: "The question improperly presupposes that the City has a constitutional duty to 'monitor or supervise' the independent lawyers serving as public defenders . . . ." The Cities provided this answer in response to no less than 64 discovery requests.

[6] A full-time attorney who works 1,750 hours in one year should be able to dedicate more than twice this many hours to each case under the Supreme Court's maximum of 400 cases.

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In January 2013, Plaintiffs deposed each of the Cities pursuant to Rule 30(b)(6). At one point in the Mount Vernon deposition, Plaintiffs posed a question to the city's designated representative, Eric Stendal: "Historically, what has Mount Vernon done to ensure that the public defender does what the U.S. and Washington constitutions require?" Mr. Stendal responded: "The City does not agree that it has to ensure, secure, or guarantee anything." True to form, the Cities currently fail to supervise or oversee the attorneys of Mountain Law, just as the Cities failed to monitor Sybrandy and Witt.

2. The Cities Fail to Meaningfully Monitor or Supervise Their Public Defense System

As with Sybrandy and Witt, the Cities' oversight of Mountain Law is essentially limited to passively receiving closed case reports and passively processing any complaints that are made. Neither of these procedures results in any meaningful monitoring of the public defense system. During all of 2012, for example, Mountain Law submitted closed case reports that failed to comply with the terms of the public defense contract, yet the Cities never asked Mountain Law to correct the issue. Likewise, no one from the Cities followed up with Mountain Law to address the Public Defender's excessive caseloads.

Even more troubling is the fact that the Cities have been actively eliminating provisions and standards that would allow for the meaningful monitoring of Mountain Law's attorneys. This can be seen by comparing the 2013 Mountain Law contract with both the 2012 Mountain Law contract and the 2009 Sybrandy and Witt contract. For example, each of the following provisions was included in either the 2009 and 2012 contracts (or in most instances both), but the Cities chose to omit these provisions from the 2013 contract:

- "The Public Defender shall establish reasonable office hours in which to meet with defendants prior to the day of hearing or trial."
- "The Public Defender will be available to talk and meet in person with indigent defendants in the Skagit County Jail and/or an appropriate location in either the City of Burlington or the City of Mount Vernon that provides adequate assurances of privacy."

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- "The Public Defender shall visit each inmate incarcerated, including inmates incarcerated in the Skagit County Jail, either in pretrial status or pending a court hearing on a probation review matter on a weekly basis and furnish that individual with an updated status of the case."
- "The Public Defender . . . shall maintain contemporaneous records of all legal services provided on a specific case. The records shall provide a factual description of the work done and shall be sufficiently detailed to allow monitoring of legal service activity by the Contract Administrator."
- "The Public Defender shall maintain records and accounts . . . including records of the time spent by the Public Defender on each case. The Public Defender must ensure that the City has full access to materials necessary to verify compliance with all terms of this Contract."
- "The Public Defender agrees to cooperate with the City or its agent in the evaluation of the Public Defender's performance under this Contract and to make available all information reasonably required by any such evaluation process or ongoing reporting requirements established by the City."

The Cities' old contracts also included terms on providing adequate investigative services, ensuring proper communication with defendants, ensuring access by police departments for critical stage advice, but all of these provisions were omitted from the most recent contract.

In addition, the Cities have repealed the public defense ordinances enacted in 2008 and replaced them with ordinances that no longer require oversight, monitoring, or supervision of the Public Defender. The prior ordinances, for example, required the Cities to "establish a procedure for systematic monitoring and evaluation of attorney performance based upon published criteria," which accords with Standard Eleven of the WSBA Standards for Indigent Defense Services. Under the newly enacted ordinances, the Cities no longer have any responsibility for monitoring or evaluating the Public Defender. Instead, the burden is on the Public Defender to monitor and evaluate itself, and the Public Defender is merely "encouraged, but not required" to do so.

The Cities have also reduced the amount of information that is reported by the public defense attorneys in their monthly reports. In January 2013, less than two weeks after

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Plaintiffs' expert concluded that the average amount of time spent by Mountain Law attorneys on cases is insufficient, the Cities instructed Mountain Law to stop reporting hours worked.

As for the new complaint system, the Cities are further disposing of any real responsibility by attempting to substantially limit their own legal obligations and shifting the burdens to others. The Cities will only address two specific types of complaints by indigent defendants: being denied a meeting or entering into a plea agreement involuntarily or without understanding. All other complaints must be lodged with the WSBA or the municipal courts. Moreover, the Cities will only respond to a complaint that meets several strict "rules." For example, if the defendant fails to submit a complaint within 15 days of the event giving rise to it, the Cities will refuse to address the complaint. If the defendant fails to complete a written form, the Cities will refuse to address the complaint. If the defendant submits the form to someone other than Mr. Stendal, the Cities will refuse to address the complaint. If the defendant "stop[s] being a public defender client any time within the 30 day period" for the Cities to act, which is usually the case when a defendant pleads guilty, the Cities will refuse to address the complaint. Finally, if the defendant is the subject of an active arrest warrant "issued anywhere in the State of Washington or issued by the Federal Government," the Cities will refuse to address the complaint.

If a defendant satisfies all of the artificial hurdles imposed by the Cities and the complaint is about being denied a meeting, the Cities will attempt to set up a meeting with the Public Defender. If the complaint is about entering into a plea agreement involuntarily or without understanding, the Cities will ask the prosecutor to file a motion to vacate the plea. "If the Public Defender declines a meeting or the prosecutor refuses to file a motion to vacate," the Cities will take no further action other than to "forward [the] complaint to the Washington State Bar Association and the Municipal Court."

Based on their review of the evidence, Plaintiffs' experts will testify that the Cities are failing to conduct any meaningful oversight of Mountain Law and its attorneys and, as a result,

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are failing to ensure that the public defenders are in compliance with their contractual requirements or applicable standards for indigent defense, including caseload limitations.

F. Absent Injunctive Relief, Indigent Defendants Will Continue to Suffer Harm as a Result of the Cities' Failure to Ensure the Operation of a Constitutional Public Defense System

Christine Jackson and John Strait are the only expert witnesses who have reviewed the evidence as it relates to the Cities' current public defense system. These experts will testify that the Cities are continuing to operate an unconstitutional public defense system in violation of the Sixth Amendment. These experts will also testify that indigent defendants in Mount Vernon and Burlington will suffer harm unless the Court orders the Cities to hire a part-time supervisor who will ensure compliance with the Constitution. The Cities' long track record of failing to provide actual assistance of counsel to indigent defendants, coupled with the current failures in the Cities' system and the Cities' steadfast refusal to acknowledge a duty to supervise that system, make imminent harm a certainty absent injunctive relief by the Court.

III. ARGUMENT AND AUTHORITY

A. Legal Standards

1. Standard for Liability under 42 U.S.C. § 1983

To establish a claim under section 42 U.S.C. § 1983, a plaintiff must show: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law. *Long v. Cnty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006) (citing *West v. Atkins,* 487 U.S. 42, 48 (1988)). Municipalities are not relieved of liability simply by delegating a constitutionally required function to professionals under contract. 487 U.S. at 53-54. Furthermore, section 1983 applies to a municipality's use of "trained professionals" to carry out a constitutional duty. *Long*, 442 F.3d at 1187 (citing *Miranda v. Clark County*, 319 F.3d 465 (9th Cir. 2003)).

The Cities are liable under section 1983 because their policymaking decisions and actions have systemically deprived Class members of the Sixth Amendment right to counsel.

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Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978). The Cities are also liable because they "ha[ve] a policy of inaction and such inaction amounts to a failure to protect constitutional rights." *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) (citing *City of Canton v. Harris*, 489 U.S. 378, 389 (1989)).[7]

2. Standard for Injunctive Relief

District courts have broad discretion to grant equitable relief, including permanent injunctions. *eBay Inc. v. MercExchange LLC*, 547 U.S. 388, 391 (2006). Injunctive relief is particularly "appropriate in cases involving challenges to governmental policies that result in a pattern of constitutional violations." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (emphasis added); *see also Allee v. Medrano*, 416 U.S. 802, 815 (1974); *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998). "[A] district court has 'broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may be fairly anticipated from the defendant's conduct in the past." *Orantes-Hernandez*, 919 F.2d at 564 (quoting *N.L.R.B. v. Express Pub'g Co.*, 312 U.S. 426, 435 (1941)).

To obtain a permanent injunction, a plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for their injury; (3) that, considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest

[7] "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011). Likewise, a policy "promulgated, adopted, or ratified by a local governmental entity's legislative body unquestionably satisfies *Monell*'s policy requirement." *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *overruled on other grounds by Bull v. City & Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc). Even a policy of inaction may be a municipal policy within the meaning of *Monell*. *See Waggy v. Spokane Cnty. Wash.*, 594 F.3d 707, 713 (9th Cir. 2010); *Long*, 442 F.3d at 1185; *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir. 2002) (per curiam); *Lee v. City of Los Angeles*, 250 F.3d 668, 681 (9th Cir. 2001); *Oviatt*, 954 F.2d at 1474. A plaintiff may also establish municipal liability by showing there is a permanent and well-settled practice by the municipality which gave rise to the alleged constitutional violation. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); *Navarro v. Block*, 72 F.3d 712, 714-15 (9th Cir. 1996). Once the plaintiff has demonstrated that a custom existed, it is unnecessary to also demonstrate that "official policy-makers had actual knowledge of the practice at issue." *Navarro*, 72 F.3d at 714-15.

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would not be disserved by a permanent injunction. *eBay Inc,* 547 U.S. at 390; *see also Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010); *Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1174 (9th Cir. 2010); *Stormans, Inc. v. Selecky*, 854 F.Supp.2d 925, 991-992 (W.D. Wash. 2010).

B. The Cities Have Engaged in a Persistent Pattern and Practice of Violating the Constitutional Right to Assistance of Counsel, and the Class Is Entitled to Injunctive Relief

1. Class Members Have a Constitutional Right to Assistance of Counsel

The United States and Washington State Constitutions guarantee a criminal defendant the right to the assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I § 22; *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).[8] "[This] guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 22 (N.Y. 2010) (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)). Rather, the appointed attorney must actually represent the client—through presence, attention, and advocacy—at all critical stages of the defendant's criminal prosecution. *United States v. Cronic*, 466 U.S. 648, 654-56 (1984); *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979); *Avery*, 308 U.S. at 446.[9] If an accused is denied the actual assistance of counsel at any critical stage, there can be no other conclusion than that representation was not provided. *Cronic*, 466 U.S. at 659. A criminal defendant whose appointed counsel is unable to provide actual representation is in no better position than one who has no counsel at all. *Evitts v. Lucey,* 469 U.S. 387, 396 (1985).

[8] As this Court has already noted, *Gideon* provides the proper standard in this case, rather than the standard articulated for individual ineffective assistance of counsel claims in *Strickland v. Washington*, 466 U.S. 668 (1984). Dkt. No. 142 at 4:17 – 7:11.

[9] Critical stages include, among others, initial court appearances, *Rothgery v. Gillespie Cnty, Tex.*, 554 U.S. 191, 212 (2008); certain arraignments, *Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961), *White v. Maryland*, 373 U.S. 59, 60 (1963); preliminary hearings, *Coleman v. Alabama,* 399 U.S. 1, 9-10 (1970); and plea negotiations, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *White,* 373 U.S. at 60; *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (U.S. 2010).

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2. The Cities Are Persons Acting Under the Color of State Law

Section 1983 applies to municipalities and other local governmental units. *Monell*, 436 U.S. at 690. A municipality or other local governmental unit acts "under the color of state law" when it exercises power "possessed by virtue of state law and made possible only because [it] is clothed with the authority of state law." *West*, 487 U.S. at 49 (*quoting United States v. Classic*, 313 U.S. 299, 326 (1941)).

The Cities have prosecuted and continue to prosecute criminal charges against indigent defendants in their municipal courts. As such, the Cities have had and continue to have a responsibility under state law to provide assistance of counsel to Class members. *See* RCW 10.101.030; *In re Michels*, 150 Wn.2d 159, 174, 75 P.3d 950 (Wash. 2003) ("Each county or city operating a criminal court holds the responsibility of adopting certain standards for the delivery of public defense services, with the most basic right being that counsel shall be provided."); *State v. A.N.J.*, 168 Wn.2d 91, 110, 225 P.3d 956 (Wash. 2010) (each city "[shall be] guided by standards endorsed by the Washington State Bar Association."). Because they are "persons" acting under the color of state law, the Cities may be held liable for policies and customs that have caused deprivations of the right to counsel.

3. The Cities Have Violated the Constitutional Right to Assistance of Counsel Held by Class Members, Causing Irreparable Injury

a. *The Cities' Policies and Customs Have Deprived Class Members of Their Sixth Amendment Right to Counsel*

As this Court has already concluded, the decisions that the Cities make regarding the "funding, contracting, and monitoring" of their public defense system are decisions that "serve as 'policymaking'" for purposes of *Monell*. Dkt. No. 142 at 10:1-6. Over the past several years, these decisions have directly and predictably deprived indigent defendants of their constitutional right to counsel.

First, the Cities have repeatedly chosen to understaff their public defense system, which has resulted in grossly excessive caseloads that leave little time for the Public Defender to provide actual representation to each indigent defendant. From 2009 through 2011, for

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example, the Cities hired only two part-time attorneys to handle more than 2,100 cases per year. In April 2012, well after this lawsuit was filed, the Cities knowingly continued to have only two attorneys (one of whom had no criminal defense experience) handle what was estimated at the time to be more than 1,700 cases annually—and what turned out to be more than 2,000 cases in an eight-month period. Because they have been understaffed, the Cities' public defense attorneys have not had sufficient time to devote to the cases of indigent defendants, and this has led to a systemic deprivation of the right to counsel.

Second, the Cities have repeatedly chosen to circumvent or ignore laws and standards related to public defense, including the Cities' own ordinances. For example, the Cities implemented different caseload "credit" systems in an effort to get around WSBA limitations. The Cities also refused to impose provisions that would further limit the caseloads of attorneys with private practices. And when Sybrandy told the Cities that he would not comply with provisions requiring contact with indigent defendants both in and out of custody, which is essential to actual assistance of counsel, the Cities removed those provisions from the contract.

Third, the Cities have chosen to severely limit their oversight of their public defense system, both historically and currently. Among other things, the Cities have failed to monitor caseloads; failed to ensure that the Public Defender is devoting enough time to public defense services; failed to ensure the Public Defender is visiting incarcerated defendants; failed to ensure the Public Defender is meeting with defendants in private settings; and failed to ensure the Public Defender is complying with city ordinances and state and federal laws. In sum, the Cities have failed to establish a procedure for systematic monitoring and evaluation of attorney performance based upon published criteria.

In addition to being held liable under section 1983 for their policymaking decisions, the Cities may be held liable for an unconstitutional custom where (1) the custom is so "well settled and widespread that the policymaking officials . . . can be said to have either actual or constructive knowledge of it yet did nothing to end the practice" and (2) the custom was "the

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cause and the moving force behind the deprivation of constitutional rights." *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989); *see also Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1233 (9th Cir. 2011) (liability may be established based on longstanding practices or customs that constitute the "standard operating procedure" of the local government entity).

For years, the Cities knew or should have known of the unconstitutional nature of their public defense system. Indeed, the Cities received monthly caseload reports that demonstrated the Public Defender was not giving sufficient time to indigent defendants. Nevertheless, the Cities continued to allow the Public Defender to carry excessive caseloads, including for a period of at least eighteen months after this lawsuit was filed.

In the years leading up to this lawsuit, the Cities also received numerous complaints from the director of the Skagit County Office of Assigned Counsel, from police officials, and from indigent defendants regarding the lack of actual assistance of counsel. These complaints detailed a public defense system that lacked actual representation at every step of the process, including a failure of the Public Defender to respond to inquiries of indigent defendants, a failure of the Public Defender to meet with defendants in or out of custody, a failure of the Public Defender to investigate the facts of cases, a failure of the Public Defender to explain jail alternatives and plea consequences to defendants, a failure of the Public Defender to advocate on behalf of defendants in court, and pressure the Public Defender placed on defendants to accept plea deals. The Cities, however, did not take any meaningful action in regard to the complaints. Indeed, the official in charge of handling complaints has testified that he never found any complaint by any criminal indigent defendant to be meritorious.

The failure of the Cities to take any remedial steps in response to years of complaints and this lawsuit is further evidence of a custom of operating an unconstitutional public defense system. *See Larez v. City of Los Angeles*, 946 F.2d 630, 647 (9th Cir. 1991); *see also Hunter*, 652 F.3d at 1235 ("a recurring failure to investigate . . . constitutional violations" is evidence of "the existence of an unconstitutional practice or custom").

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b. *The Cities Have Been Deliberately Indifferent to the Sixth Amendment Right of Class Members*

In addition to being held liable for affirmative policies and customs that cause constitutional violations, "a local governmental body may be liable if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights." *Oviatt*, 954 F.2d at 1474. To impose liability on the Cities for failing to act to preserve constitutional rights, Plaintiffs must show (1) a constitutional right that was deprived; (2) that the Cities had a policy; (3) that the Cities' policy "amounts to deliberate indifference" to the constitutional right; and (4) that the policy was the "moving force behind the constitutional violation." *Id.* (quoting *City of Canton*, 489 U.S. at 389-91).

A "decision not to take any action to alleviate [a] problem" resulting in constitutional violations "constitutes a policy for purposes of § 1983 municipal liability." *Id.* at 1477. Such a policy "evidences a 'deliberate indifference'" to constitutional rights "when the need for more or different action 'is so obvious, and the inadequacy of the current procedure so likely to result in the violation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need." *Id.* at 1477-78 (quoting *City of Canton*, 489 U.S. at 389-90).

The contract managers of both Cities have asserted that in the absence of information to the contrary, they merely assumed that the rights of indigent defendants were being met. This "policy was one of inaction: wait and see if someone complains." *Oviatt*, 954 F.2d at 1477. When complaints were made, however, the Cities failed to address the substance of those objections. Moreover, there was overwhelming evidence of excessive caseloads and insufficient time being spent on the cases of indigent defendants, yet the Cities failed to take any action to address those problems. Instead, the Cities rehired the same public defense attorneys in both 2009 and 2011.

After this suit was filed, the Cities continued to allow the Public Defender to maintain excessive caseloads and, most importantly, to operate without necessary monitoring and

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oversight. Rather than address the deficient nature of their public defense system, the Cities affirmatively chose to do away with standards and procedures necessary to ensuring that the right to assistance of counsel is satisfied. Evidence of the Cities' reaction to the lawsuit is both "admissible for purposes of proving the existence of a municipal defendant's policy or custom" and "highly probative with respect to that inquiry." *Henry v. Cnty. of Shasta*, 132 F.3d 512, 519 (9th Cir. 1997). Indeed, the Cities' "failure even after being sued to correct a blatantly unconstitutional course" of conduct "is even more persuasive evidence of deliberate indifference" than the Cities' failure to correct the problem before the lawsuit. *Id.* at 520.

c. *The Cities' Violations of the Right to Counsel Have Caused Irreparable Injury to Class Members*

Plaintiffs and Class members have suffered an irreparable injury because they have been systemically deprived of their constitutional right to the assistance of counsel. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) (the denial of the right to counsel itself demonstrates a constitutional violation, and court swill not "indulge in nice calculations as to the amount of prejudice" that results from that denial) (summarizing *Glasser v. United States*, 315 U.S. 60 (1942)); *Bery v. City of New York*, 97 F.3d 689, 694 (2nd Cir. 1996) (When "an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); Dkt. 142 at 6:16-19 (where there is a lack of representation, "there is . . . no requirement that the indigent defendant plod on towards judgment in order to establish harm: the constitutional violation is clear and a remedy is available").[10] The evidence demonstrates that these violations are a result of the Cities' policies and customs. The Cities' deliberate indifference to the constitutional rights of indigent defendants is also a moving force behind the systemic deprivation of assistance of counsel.

[10] Of course, it cannot be forgotten that myriad harms can and do flow freely from the lack of meaningful representation. Jackson 2d Suppl. Decl. ¶ 39. These harms include being convicted of a crime for which one is innocent or not legally guilty, being subjected to increased imprisonment or supervision, being debt ridden as a result of excessive fines, being deported, and suffering the consequences of a criminal record. *Id.*; *see also* Ex. 30 at 26:16 – 28:9.

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4. The Cities' Past and Present Misconduct Indicates a Strong Likelihood of Future Violations of the Constitutional Right to Assistance of Counsel

The evidence before the Court demonstrates that the Cities' past and present misconduct is very likely to result in future violations of the right to counsel. For years leading up to this lawsuit, the Cities failed to address extensive evidence of the unconstitutional nature of their public defense system. Moreover, to this day the Cities maintain there was nothing wrong with the public defense system. To the contrary, the Cities believe the representation provided to indigent defendants was more than adequate.

Since this lawsuit was filed, the Cities have remained strident in asserting that they are under no obligation "to ensure, secure, or guarantee anything." Indeed, the Cities have actively chosen to eliminate provisions and standards that would allow for the meaningful monitoring and oversight of the current Public Defender. The purposeful omission of objective data and other critical information is of important significance considering the Cities' long history of failing to monitor the public defense system. Moreover, there is evidence that deprivations of the right to counsel are continuing. Similar to the system that was in place at the time this lawsuit was filed, the current Public Defender spends insufficient time on cases, discourages client contact prior to the first pretrial hearing, rarely investigates facts, and takes few cases to trial. Finally, the Cities are making it more difficult for indigent defendants to complain about the Cities' failure to provide actual assistance of counsel.

Plaintiffs' experts will testify that the Cities are not taking the steps necessary to stop the unconstitutional practices that have been occurring for years with the Cities' knowledge. In particular, the Cities are failing to monitor compliance with contractual and constitutional requirements and applicable standards for indigent defense, which has the result of constitutional deficiencies continuing to plague the Cities' public defense system. Systemic deprivations of the right to counsel will continue unless the Court orders the Cities to hire a part-time supervisor who will ensure compliance with the Constitution.

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5. Remedies Available at Law Are Inadequate to Compensate Class Members for the Deprivation of the Right to Assistance of Counsel

Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages. *Am. Trucking Assocs., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058-59 (9th Cir. 2009). Moreover, "[t]he harm involved here, the absence of counsel, cannot be remedied in the normal course of trial and appeal because an essential component of the 'normal course,' the assistance of counsel, is precisely what is missing here." *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895, 907 (2004); *see also* Dkt. No. 142 at 6:1-3 ("case-by-case requests for new counsel, appeals, and/or malpractice actions would not resolve the systemic problems identified by plaintiffs"). Because any remedies that are available to Class members at law are inadequate to compensate for the deprivation of the right to assistance of counsel, an award of permanent injunctive relief is appropriate.

6. The Balance of Hardships Warrants Injunctive Relief

The balance of hardships also weighs in favor of the Class. Absent a permanent injunction, the Cities will continue to shirk their duty to meaningfully oversee their public defense system, and Class members will continue to be denied the assistance of counsel. This right, which is fundamental and essential to a fair trial,[11] greatly outweighs any hardship, including financial burdens, that a permanent injunction would cause the Cities. The Supreme Court has long held that financial concerns do not justify the infringement of constitutional rights. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 392 (1992).

Moreover, the likely cost to the Cities of the injunctive relief proposed by Plaintiffs is insignificant in relation to the overall budgets of the Cities. Mount Vernon's budget for 2013 is $47 million, and Burlington's budget is $36 million. Based on what they are currently paying Mountain Law, the Cities should be able to get a part-time public defense supervisor for less than $50,000 per year. Thus, while the proposed injunction will require the Cities to restore their public defense system to constitutional standards by spending a relatively small amount of

[11] *See Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972); *Gideon*, 372 U.S. at 344.

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money each year for two to three years, this expenditure pales in comparison to the loss of liberty of indigent defendants. *See Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir. 2009) ("A budget crisis does not excuse ongoing violations of federal law, particularly when there are no adequate remedies available other than an injunction."), *vacated on other grounds*, *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012).

7. A Permanent Injunction Will Serve the Public Interest

It is in the public interest to ensure that every individual indigent criminal defendant is afforded the procedural and substantive safeguards designed to assure a fair trial. *See Gideon*, 372 U.S. at 344. "This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him." *Id.* In fact, in order for justice to be served, both the government and the indigent defendant must have access to representatives who can zealously and effectively articulate their positions. If the legal process no longer entails a confrontation between adversaries, the right to counsel becomes illusionary and the criminal system loses its legitimacy in the eyes of the public. *See Cronic*, 466 U.S. at 656.

The injunctive relief Plaintiffs seek on behalf of the Class is narrowly tailored to address the root cause of the constitutional violations: the Cities' failure to meaningfully supervise their public defense system. Plaintiffs propose that the Court order the Cities to hire one part-time public defense supervisor who will work at least 16 hours per week for two to three years. *See* [Proposed] Order Granting Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Proposed Order"), attached hereto as Appendix A, ¶¶ A, G. The supervisor will be part of the attorney-client confidential relationship between the Public Defender and its clients but will not be part of the Public Defender's firm. *See* Plaintiffs' Proposed Order ¶ B. For a period of twenty-four to thirty months, the supervisor will report to the Court on the Cities' and Public Defender's compliance with the constitutional right to counsel, applicable WSBA standards, applicable ordinances, and the public defense contract. *Id.* ¶¶ D, G. These reports will be submitted every six months. *Id.* ¶ D.

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Among other things, the public defense supervisor will evaluate various aspects of the work of the Public Defender, including: whether the Public Defender is making efforts to contact and meet with indigent defendants in advance of their first court hearings; whether the Public Defender is meeting regularly with in-custody defendants; whether the Public Defender is reviewing discovery and identifying avenues of further inquiry for investigation and legal defenses; whether the Public Defender is analyzing and informing clients of treatment and other services; whether the Public Defender is fully advising indigent defendants of their options regarding plea offers, conviction consequences, and sentencing alternatives; whether the Public Defender is advocating on behalf of indigent defendants in Court; and whether the Public Defender is maintaining contemporaneous records of work performed. *See* Ex. 1 to Plaintiffs' Proposed Order.

The supervisor will also evaluate the allocation of cases among public defense attorneys; conduct random file reviews; collect data on investigations, dispositions, and trials; and review closed case reports. *See id.* The supervisor will develop checklists of the tasks that need to be accomplished for the most frequent types of cases handle by the Public Defender and recommend training for the attorneys to improve their criminal defense skills. *See id.* Finally, the supervisor will handle complaints and will establish a process for an indigent defendant to pursue a complaint if the supervisor is unable to resolve the complaint to the defendant's satisfaction. *See* Plaintiffs' Proposed Order ¶ C.

Because the relief Plaintiffs seek will help ensure that every individual indigent criminal defendant is afforded the procedural and substantive safeguards designed to assure a fair trial, a permanent injunction is warranted and a proposed order is attached.

IV. CONCLUSION

On the fiftieth anniversary of the Supreme Court's decision in *Gideon v. Wainwright*,[12] the Sixth Amendment continues to stand—perhaps more strongly than ever—"as a constant

[12] The Court's decision in *Gideon* was handed down on March 18, 1963. 372 U.S. at 335.

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admonition that if the constitutional safeguards it provides be lost, justice will not still be done."[13] Actual assistance of counsel is essential to the fair resolution of any criminal charge. It is also essential for avoiding the unintended collateral consequences that may attend a misdemeanor conviction.

The evidence before the Court will show that for many years now, the Cities of Mount Vernon and Burlington have systemically deprived indigent defendants of the most basic and fundamental of rights: the right to the assistance of counsel. This pattern of deprivation has been a direct result of the Cities' policies and customs, particularly the Cities' refusal to meaningfully supervise their own public defense system. Because the Cities' actions and inactions have resulted in constitutional violations, the Cities are liable under 42 U.S.C. § 1983. Furthermore, permanent injunctive relief is warranted because the Cities' past and present misconduct indicates a strong likelihood of future violations of the right to counsel.

RESPECTFULLY SUBMITTED AND DATED this 29th day of May, 2013.

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[13] *Gideon*, 372 U.S. at 343 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)) (internal marks omitted).

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CERTIFICATE OF SERVICE

I, Toby J. Marshall, hereby certify that on May 29, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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