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John Farrow, Jerome Wade,
And all others similarly situated

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN FARROW, JEROME WADE, on their behalf, and on behalf of all others similarly situated,

Plaintiffs,

vs.

CONTRA COSTA COUNTY, and DOES 1 through 20, et al.,

Defendants.

No. C12-6495 JCS

PLAINTIFFS' MOTION AND NOTICE OF MOTION FOR SUMMARY JUDGMENT AND, ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF CHRISTOPHER MARTIN IN SUPPORT SUBMITTED HEREWITH; PROPOSED ORDER SUBMITTED HEREWITH

(Oral Argument Requested)

Date: January19, 2017
Time: 9:30 a.m.
Crtrm: G, 15th Floor
Judge: Hon. Joseph C. Spero Presiding
Date Action Filed: December 21, 2012
Trial Date: None Assigned

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NOTICE

PLEASE TAKE NOTICE that on January 19, 2018, at 9:30 a.m., or as soon thereafter as the matter may be heard, before the Honorable Joseph C. Spero in Courtroom G, 15th Floor, of the above-entitled court, Plaintiffs will move, and hereby do move, for an order granting Plaintiffs summary judgment pursuant to Rule 56(a) on the Third Amended Complaint and granting the relief requested therein of a permanent injunction, declaratory judgment, and nominal damages; or, alternatively, for an order granting Plaintiffs partial summary judgment of the following:

(1) That Plaintiffs John Farrow and Jerome Wade possessed a constitutional right under the Sixth Amendment of the U.S. Constitution pursuant to *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct 2578 (2008), of which each Plaintiff was deprived;

(2) That the Public Defender of Defendant Contra Costa County had a Policy of withholding representation for a period of 5 to 13 days, and sometimes longer, to criminal indigent detainees;

(3) That Defendant's Policy amounted to deliberate indifference to the Plaintiffs' constitutional right;

(4) That Defendant's Policy was the moving force behind the violation of each Plaintiff's constitutional right identified above in paragraph (1);

(5) That, as a result of Defendant's violation of Plaintiffs' constitutional right identified above in paragraph (1), each Plaintiff is entitled to recover nominal damages in the amount of $1.00 from Defendant;

(6) That, as a result of Defendant's violation of Plaintiffs' constitutional right identified above in paragraph (1), Plaintiffs are entitled to declaratory judgment pursuant to Federal Rules of Civil Procedure, rule 57, and 28 U.S.C. 2201(a) that Defendant's Policy identified above in paragraph (2) violates Plaintiffs' constitutional right identified above in paragraph (1);

(7) That, as a result of Defendant's violation of Plaintiffs' constitutional right identified above in

paragraph (1), Plaintiffs are entitled to declaratory judgment pursuant to Federal Rules of Civil Procedure, rule 57, and 28 U.S.C. 2201(a) that the Public Defender violated California Government Code section 27706 by failing to appear at "all stages" of the proceedings, including the first arraignment stage; and

(8) That as a result of Defendant's violation of Plaintiffs' constitutional right identified above in paragraph (1) and of the statutory right provided in California Government Code section 27706 identified in paragraph (7), Plaintiffs are entitled to a permanent injunction mandating that Defendant provide representation to each and every indigent criminal detainee at the detainee's first court appearance.

The motion will be made upon the ground that there is no genuine dispute as to any material fact, and movant is entitled to judgment as a matter of law.

The motion will be based on this Notice, the Memorandum of Points and Authorities submitted herewith, the Declaration of Christopher Martin submitted herewith, the papers and records on file in this action, and upon such other and further argument and evidence as may be presented at the hearing.

PLAINTIFFS' MEMORANDUM
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I
PRELIMINARY STATEMENT

Plaintiffs John Farrow and Jerome Wade filed this action on December 21, 2012. The gravamen of their Complaint alleged a violation of their constitutional rights under the Sixth Amendment of the U.S. Constitution pursuant to *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct. 2578 (2008), and also alleged that the Public Defender violated California Government Code section 27706 by failing to appear at "all stages" of the proceedings, including the first arraignment stage.

At that time, the Public Defender of Contra Costa County had a written Policy of withholding representation to indigent criminal detainees for a period of 5 to 13 days, and sometimes longer, and Plaintiffs, in addition to seeking relief for themselves individually, sought by their Complaint to represent

a class of similarly situated individuals who had suffered violations of their Sixth Amendment rights as a result of this decades-long Policy of the Public Defender of Contra Costa County. However, because Plaintiffs' Complaint and its *Rothgery* claim presented novel legal issues of national significance, the Court determined that it would pass for the time being on deciding class-wide issues and defer Plaintiffs' proposed motion for class certification in order to decide as a threshold matter (and test by appellate review) the important, novel constitutional issues raised by Plaintiffs' claims in their Complaint.

Now, after this Court has decided two motions to dismiss filed by Defendant, after Plaintiffs' successful appeal to the Ninth Circuit, and after this Court's decision to overrule in part Defendant's third motion to dismiss, the Court has proposed to decide competing motions for summary judgment prior to determining class certification and related class-wide issues. This timing arguably has the potential effect of limiting Plaintiffs' right to the prospective remedies that they seek on behalf of the substantial class of individuals who suffered similar violations of the (proposed) class members' constitutional rights. Nevertheless, Plaintiffs contend herein that under well-established authorities the Court has the power at this stage (prior to class certification) to grant judgment to Plaintiffs and provide the equitable relief they seek for declaratory judgment and permanent injunction.

II
DENIAL OF THE RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT

In order to impose liability based on a Policy of deliberate inaction, the "plaintiff must establish: **(1)** that he possessed a constitutional right of which he was deprived; **(2)** that the municipality had a Policy; **(3)** that this Policy 'amounts to deliberate indifference' to the plaintiff's constitutional right; and **(4)** that the Policy [was] the 'moving force behind the constitutional violation.'" *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) (quoting *City of Canton v. Harris*, 489 U.S. 378, 389-91, 109 S.Ct. 1197 (1989)). Proof is by a preponderance of the evidence. *Wilbur v. City of Mount Vernon*, 989 F.Supp.2d 1122, 1124 (E.D. Wash. 2013).

Here, there is no genuine issue of material fact with respect to any of these four elements. As

shown below: **(1)** Defendant has admitted that its Policy of withholding representation for a period of 5 to 13 days, and sometimes longer, was arbitrary, unconstitutional, outmoded, and unlawful – i.e., unreasonable. Furthermore, Professor Boruchowitz's report, submitted on behalf of Plaintiffs, meticulously delineates why the Policy is unreasonable. Defendant's expert did not address the question posed by the Ninth Circuit and this court concerning whether Defendant's Policy of delaying representation for 5 to 13 days, and sometimes longer, was unreasonable – because he was told to ***"take a microscopic look at two cases and render my opinion on that."*** Additionally, when asked various hypotheticals, he readily agreed that delaying representation for a week or two could prejudice a criminal detainee. **(2)** Defendant has admitted that it had a Policy of withholding representation from detainees for the period between their first and second arraignments, for however long the Contra Costa County Superior Court saw fit. **(3)** Defendant has admitted that it was indifferent to the length of the delay for all detainees, that it kept no records, that it did not and does not know the length of the longest detention without counsel, that it made no effort to research the issue, and that it took no action to change the bifurcated arraignment Policy until after Plaintiffs filed California Government Claims in this case. **(4)** Defendant's Policy of withholding counsel was the moving force behind the denial of counsel during the relevant period.

III
FACTS

1. PUBLIC DEFENDER

On August 27, 1984, the Contra Costa County Public Defender struck a deal with the Superior Court of the County of Contra Costa, setting forth the protocol for arraignment of defendants in Contra Costa County. (B 2-11; E 20).[1] In the letter from the Public Defender's Office to the Presiding Judge, memorializing the agreement, the Public Defender's Office stated it would assume representation of in-

[1] All excerpts are Bates stamped in sequence and designated "B." Deposition citation follows, designated by the first letter of the deponent's last name and the letter "D." Deposition exhibits are referenced by the deponent's name and the letter "E."

custody detainees after the initial appearance in court ***"on any date such a coordinated plea and bail study can be scheduled, as long as it is no sooner than three court days away."*** (B 10, ¶1.)

In 2010, shortly after becoming the department head, Public Defender Robin Lipetzky was interviewed by a reporter for the county's newsletter, County Clips. The article states that, "In keeping with the constitutional guarantees to persons charged with crimes, PD Lipetzky's goal in 2010 is to have her attorneys appear with clients at their first court appearance on misdemeanor cases."

The article also quotes the Public Defender, Ms. Lipetzky, stating,

> Currently, in Contra Costa County, defendants charged with misdemeanors are arraigned before a judge without benefit of counsel. For those defendants who want an attorney but cannot afford one, the judge refers them to the Public Defender Office. The defendants then must come back on another court date. At the first court appearance, many defendants waive their right to a lawyer and proceed without benefit of counsel.

(B 12-13; B 16-17; LD 22:2-23:8; LE 21.)

The public defender made no mention of changing the Policy with respect to felony cases; and ***the practice of leaving out-of-custody defendants facing misdemeanor charges without representation remains in full force today in the Richmond courthouse.*** (B 18-25; LD 34-41.)

It is undisputed that Plaintiff John Farrow first appeared in custody in the Walnut Creek branch of the Superior Court for the County of Contra Costa on September 2, 2011. At that time, his case was automatically continued after he requested appointed counsel to September 15, 2011, ***thirteen days later***.

Plaintiff Jerome Wade, a juvenile, first appeared in custody in the Martinez branch of the Superior Court for the County of Contra Costa on November 14, 2011. It is undisputed that, after he requested appointed counsel, his case was continued to November 21, 2011, ***seven days later***. It is undisputed that, at the time of his first appearance in court, Mr. Wade had already been held for six days without arraignment in violation of *Riverside v. McLaughlin*, 500 U.S. 44 (1991), *Gerstein v. Pugh*, 420 U.S. 103 (1975), and California Penal Code section 825.

Both John Farrow and Jerome Wade filed Government Claims in this case in 2012, alleging that

the Public Defender's Policy of withholding representation to in-custody defendants between the time of their first appearance in court and their second appearance in court violated their Sixth Amendment right to counsel and California Government Code section 27706, which requires the Public Defender to represent indigent defendants at ***all stages*** of the proceedings. It is undisputed that, prior to the filing of these Government Claims, the Public Defender's Office had taken no action to ensure representation of either in-custody or out-of-custody indigent defendants at their first appearance in court, or during the time between their first and second appearances in court for the ***28 years*** that the deal between the Public Defender and the Contra Costa County Superior Court had been in place. (B 26-27 LD 73:23-74:10.)

After government claims were filed on behalf of Plaintiffs, the Public Defender admitted in a county performance review dated, July 1, 2012, that,

> In the coming year I will be exploring ways to ensure that we fulfill ***our legal mandate to provide representation to clients at the first court appearance in arraignment court***. ***The current model for referring clients to our office for representation is outdated and arguably unlawful.*** I hope to secure funding from the AB109 fund to add three attorney positions and two paralegal positions. ***If successful***, I will be able to use these new positions to fill ***the gap that we now have in providing effective, legally mandated representation to our clients***. (Emphasis added.)

(B 28-29; LD 32:14-24; LE 22, 9 of report.)

In a memorandum to the Community Corrections Partnership dated July 13, 2012, the Public Defender admitted that,

> In Contra Costa County, poor people accused of criminal offenses spend up to two weeks in custody ***just waiting to be represented by an attorney***. These are people who have been arrested and charged but cannot afford an attorney and cannot afford to post bail. [¶] Here's how the system currently works: Under the law, a person who has been arrested and is in custody must have charges filed and be brought before a judge within 48 hours or be released from custody. If charges are filed, the accused person will be brought before a judge to be arraigned on the charges. For persons who cannot afford an attorney the judge will set a bail amount, send the case to the Public Defender's Office, and set a new arraignment date in one to two weeks. The bail amount is set according to a bail schedule based only on the charges. The vast majority of persons charged cannot afford the bail set and must stay in custody at least until the next court date when an attorney from the Public Defender's Office will be able to represent them. [¶] Under this system, the first real opportunity that the charged person has to ask for a lower bail or an O.R. release is after they have been in custody at least two weeks. As a result, many people who could safely be released to the

> community while awaiting trial spend an unnecessary one to two weeks in custody taking up jail space simply because they cannot afford bail and do not yet have an attorney to represent them.

(B 30-31; B 32; [Emphasis in original]; LD 64:2-65:8; LE 25.)

In another memorandum to the Community Corrections Partnership dated September 6, 2012, she admitted that:

> Under the current system, incarcerated persons who request the public defender services (the vast majority of people charged) must wait a period of time – between 7 and 14 days—in custody before their next court date when they will have an attorney to represent them. Only at that time, after spending one to two weeks in custody, will they have an opportunity to ask a judge to reduce their bail or release on their own recognizance.

(B33; B34; LD 55:12-23; LE 23.)

This Policy was also posted on the public defender's website. (B 37; LD 58:4-22; LE 24.)

Plaintiffs filed this lawsuit on December 21, 2012. The Public Defender maintains that she changed her Policy, and began representing indigent in-custody detainees at their first arraignment appearance on January 7, 2013. (B 36; excerpt from Defendant's Motion to Dismiss, Dkt. 6.)

The Public Defender admitted that all detainees who received credit for time served sentences at their second court appearance, when counsel was furnished, had spent up to two additional weeks in custody as a result of the public defender's absence at the first appearance. (B 38-44; LD 66:1-6; 69:1-8; 75:19-25; 77:11-15.) The Public Defender admitted that she was able to secure the release of some detainees because they had been misidentified, and that they would have been released earlier if she had appeared at the first court appearance. (B 42-43; LD 81:23-82:12.) The Public Defender admitted that having representation at the first appearance resulted in fewer negative consequences to her clients, stating: ***"Well, anytime somebody has to stay in jail longer than necessary, they risk losing jobs, losing their housing, losing custody of their children, those sorts of things."*** (B 44; LD 69:22-25.)

With respect to keeping track of how many people were released at the first appearance, the following colloquy took place at the Public Defender's deposition,

> A. I think at the very beginning we were keeping track and keeping some statistics just manually, by hand, like, yellow-paper-and-pencil kind of thing. But we don't have any, you know, database system that keep track of those in. [¶] And I don't think we're keeping track anymore.
>
> Q. So you don't know how many people are – you don't have statistics to gauge the success of the program then?
>
> A. Not hard-and-fast statistics, no.

(B 45; LD 97:13-98:16.)

At her deposition, the Public Defender was asked about a statement in the Contra Costa County AB 109 Report as follows:

> Q. ***"The ACER collaboration between the Office of the Public Defender and the District Attorney's Office has resulted in thousands of defendants receiving representation at arraignment and does appear to facilitate both pretrial releases and early case resolution."*** Do you agree with that?
>
> A. Yes.
>
> Q. It goes on to say (as read): "As Figure 17 shows, more than 5,500 defendants were represented at arraignment through the ACER program; of these between approximately 19 percent and 35 percent were released on recognizance." Do you agree with that?
>
> A. I don't know about the statistics. I don't know where they're drawing those statistics. I have no reason to think it's not accurate.

(B 48-49; B50; LD 100:9-101:2; LE 29.)

Throughout her deposition testimony, the Public Defender made it clear that representation at the first court appearance was contingent upon funding from the county. (B 51-56; LD 32:11-13; 43-25-44:2; 62:2-4; 83:3-84:2.) In her July 1, 2012, Memorandum to the Community Corrections Partnership, she stated,

> This year the Department was able to launch a pilot program to represent misdemeanor clients at the first appearance in arraignment court. Due to staffing shortages we were only able to provide this representation in one of the branch courts (Delta). Nevertheless, we did make a start and we now have a blueprint for expanding this representation to the other branch courts ***if and when our staffing levels improve***. So far the program has been working well; we have been able to assist clients at an earlier ***stage*** in the process and consequently cut down the numbers of court appearances and custody days. It is too early to make projections on whether a greater number of cases will resolve at an earlier ***stage*** in the proceedings, but we will be tracking the data and will be able to report results as the program continues. (Emphasis added.)

(B 51; LD 31:80-32:13.)

However, the Public Defender also repeatedly stated that providing representation at the first court appearance would save the county money. For example, she stated:

> We anticipate that the ACER program will result in ***across-the-board savings*** to other county departments as well as provide the long-term benefit of reduced recidivism rates in the population served. We will maintain close tracking of clients served for reporting and statistical purposes. (Emphasis added.)

(B 59; LD 70:4-11; LE 25.)

The Public Defender also stated that representation at the first court appearance would,

> Reduce the jail population. By cutting down on the number of persons in pretrial detention and ***reducing the overall time the average client spends in pretrial detention***, this program will ***result in a significant reduction in jail costs*** and will free up jail space for the most serious offenders. (Emphasis added.)

(B 60-61; LD 71:19-72:1.)

In a report dated July 13, 2012, the Public Defender further stated that, "The Public Defender's Office proposes to begin representation for indigent in-custody clients at their first court appearance. With just three attorneys and two paralegals, the Public Defender's Office would be able to fully staff all of the arraignment courts in the county – at significant savings to the Sheriff's Office and the courts." (B 65; LD 68:12-22; Ex 25.)

The Public Defender also stated that,

> As a result of the successful implementation of ACER, we have been able to help reduce the pretrial population in the jail, as well as cut down on the number of court appearances and eliminate some court calendars. Accordingly, in addition to our primary goal of providing expeditious representation for our clients, ***this program has resulted in financial savings to the court and the Sheriff's Department.***

(B 65-66; LD 86:11-23; Ex 25.)

In her September 6, 2012, "Submission to the Community Corrections Partnership, the Public Defender wrote, under the heading "Expected Savings to the Sheriff's Office":

> [D]ata show that out of approximately 21 in-custody felony cases per week, about 50 percent of the accused are charged with AB109 offenses

> (non-non-nons). If even one-half of these cases (5) are released on their own recognizance or on electronic (sic) monitoring at the first appearance, this ***will save approximately 160 jail-bed days per month for the East County alone***.

(B 67-68; LD 57:19:5-20-5; LE 23.)

The Public Defender, however, also made it clear that representation at the first court appearance was contingent upon permission from the court. In spite of the Public Defender having announced her goal of providing representation to all defendants charged with misdemeanors at their first appearance in court back in 2010 – 7 years ago – out of custody defendants charged with misdemeanors are still arraigned without counsel in the Richmond Branch of the Contra Costa County Superior Court. Judges still negotiate dispositions with these individuals who are deliberately kept in the dark about the fact that the public defender could represent them then and there. Indeed, the judges in these departments have ordered deputy public defenders to refrain from announcing their availability to assume representation prior to commencement of arraignment calendars. Additionally the public defender's office has acquiesced to these judges and not petitioned for a writ of mandate to assert its right, and obligation, under California law to announce its availability to provide legal services to these indigent unrepresented defendants. (B 69-77; LD 34:21-41:25.)

The Public Defender testified, "So I don't know if it's every judge every time. I don't know what – I can't say that that is the practice every single day. I know in the past that's what we have attempted to do, and we have been shut down." (B 77; LD 42:17-21.) With respect to the judges who have permitted the Public Defender to appear at the first appearance, however, the Public Defender stated that the appearance of the Public Defender at the first appearance cut down on the number of court appearances and the number of custody days for detainees. (B 78; LD 50:13-20.)

When questioned about statistics prepared by the county for an evaluation of AB 109 programs prepared by Resource Development Associates, which states that ***the new program reduced the pretrial detention population by 50 to 100 defendants each quarter since the program was launched in 2013***,

the Public Defender testified, "I have no idea if that's true." (B 80-81; LD 94:20; LE 28.)

In terms of referrals to her office from misdemeanor arraignments, the Public Defender stated, ***"I'm not sure I ever knew what the misdemeanor process was."*** (B 82; LD 44:10-11.)

With respect to receiving felony referrals from the court, the Public Defender testified, "For felony clients, the court would bring them in at the first appearance, read them their charges, ask if the can hire their own attorney. [¶] If they say "no," they would refer the case to our office and set the next court date at a – there were standard what were called counsel-and-plea calendars. The court would then set the case on a counsel-and-plea calendar date. [¶] ***And then – I don't know the process by which we got referrals. But some – sometime between that time and the time of the next court date, we would get the referral for the case.***" (B 82; LD 44:12-23.)

When asked what the longest duration was between the first court date and the appearance of counsel, the Public Defender testified, "I believe that the longest period of time would have been about 13 days." ***When asked if she had researched the issue, she replied, "No."*** (B 83; LD 47:19.)

The Public Defender also testified,

> ***Now, which counsel-and-plea calendar the court chose to set that case on we had nothing to do with.*** [¶] I don't know how the court made that determination. I don't know if there were different policies in different courtrooms with regard to when they wanted their counsel-and-plea calendar set or how many people they wanted on a counsel-and-plea calendar, or whether they put some over longer if they thought it needed – we're going to need a longer bail study review. [¶] ***It would be pure speculation for me to try to figure out why a court would decide which counsel-and-plea calendar to set a case on. We had nothing to do with that.***

(B 84-85; LD 109:19-110:7.)

When asked if her office kept track of the duration between first and second appearances, the Public Defender testified, "We didn't keep track of it in any formal way, no." (B 86; LD 111:2-5.)

When asked, "Is it possible that some cases were continued until the third counsel-and-plea date, the Public Defender testified, "Yeah, I don't know. Not to my knowledge." She also testified, "And as I said, I'm not aware of any that had been put over beyond two weeks. That was not – that certainly was

not a common practice, if it happened at all." (B 86; LD 111:6-20.)

In her July 13, 2012, memorandum to the Community Corrections Partnership, the Public Defender stated:

> For the upcoming fiscal year the Public Defender...will seek to address one of the major unfortunate (but expected) realities of the realignment – of realignment – the growing jail population. Contra Costa County has one of the highest pretrial detention rates in the state. In this county roughly 85 percent of the jail population on any given day is made up of persons who are awaiting trial. This is 14 percent higher than the statewide average and ***24 % higher than the national average***. (Emphasis in original.)

(B87-88; LD 62:9-21; LE 25.)

2. PROFESSOR ROBERT BORUCHOWITZ

Robert Boruchowitz is a Professor from Practice at the Seattle University School of Law. (B 109:17; BE 1:20.) He is a nationally renowned expert in the field of Sixth Amendment rights and indigent defense services, having testified before the United States Senate Judiciary Committee at a hearing on "Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors." (B 112:25; BE 1:23.)

Professor Boruchowitz stated,

> In my opinion, it is not reasonable to delay appointing counsel for five to thirteen days or longer after the right to counsel attaches as articulated in Rothgery. In my opinion, a Policy of leaving indigent criminal detainees unrepresented in jail for a period of one to two weeks or more poses a "grave potential for prejudice", including prejudice at later critical stages of the proceedings. As the United States Supreme Court has made clear, "Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." Missouri w Frye, 566 U.S. 133, 140, 132 S.Ct. 1399, 1400 (2012), citations omitted.

(B 90:4; BE 1:4.)

Professor Boruchowitz also stated that, "It is my opinion that the delay in appointing counsel of five to thirteen days or longer violates California Government Code section 27706." (B 91:7; BE 2:7.)

More important than Professor Boruchowitz's expert opinion on these topics, however, is the basis for his reasoning, which includes his experience as a defense lawyer, national and state standards, potentials for prejudice as the result of delaying representation, the Public Defender's ability to provide

counsel at the first appearance, case law, and Government Code section 27706, all of which are meticulously set forth in his report. (B 90-116.)

At his deposition, when asked about what factors he would consider in addressing the reasonableness of Defendant's Policy under the Court's "totality of the circumstances" test, the following colloquy took place,

> A. Well, I think as I've outlined in my report, I would consider all the case law; the standards; the statute; the guidelines, California and national; ethical obligations; and all the things that can happen to people in jail before the lawyer gets to them.
>
> Q. What about consequences to the in-custody defendant as -- simply as a result of being incarcerated?
>
> A Yes. I have a section in my report called Three Days in Jail Can Harm a Client, and one of the things I read is a Contra Costa politician, elected official, who was talking about how we need to provide resources for the mentally ill people who are in our jail, recognizing that there can be a lot of problems. And I have a section in my report about suicide in jail and the problems that mentally ill people face in jail and the death that can happen in jail.
>
> Q. Now, with respect to John Farrow and Jerome Wade, Mr. Coker in his report essentially does a post hoc analysis to determine whether or not these two were subjected to any potential prejudice. Would you agree with that?
>
> A. Yes.
>
> MR. BAKER: Objection: Leading.
>
> Q (By Mr. Martin) Prior to meeting with a client and interviewing them, is there any way for you to assess whether they will lose their job, whether they do have medical issues, whether they do have psychological issues, whether evidence will be lost as a result of a crime scene not having been preserved, whether witnesses need to be interviewed, or any of these other matters that are within the universe of factors that are within the totality of the circumstances? Is there any way of knowing that before actually meeting with the client?
>
> A. You might get some hints of it. You know, in highly publicized cases that you know about before you see the client, you might have some idea about the need to preserve the scene or get witnesses or get mental health treatment, but you need to see the client as soon as possible to assess all those factors effectively.
>
> Q. Would you also want to be able to read the discovery in the case?
>
> A. Obviously you want to read the discovery. Even if you don't have it, you should see the client.

> Q. In your opinion, is it reasonable to wait between five and thirteen days and sometimes longer to interview the client?
>
> A. No.
>
> Q. Why?
>
> A. There's all the factors you mentioned about figuring out what needs to happen as soon as possible. If there are issues related to excessive bail or unlawful detention, you might be able to bring either an administrative or negotiated resolution, or you can bring a habeas corpus procedure. You want to establish a good relationship with the client right up front; Ms. Lipetzky refers to the importance of that. You need to figure out what you need to learn about the case and about the client. You may be able to prevent more charges being filed; sometimes you can prevent the death penalty being sought. There are just so many things that have to happen. There may be immigration issues; you may be able to reach an immigration safe resolution earlier, depending on how quickly you can get to the client. There's just a whole range of issues to address on the first interview.
>
> Q. County counsel asked you about my representation of John Farrow and Jerome Wade. In your opinion, would it have been reasonable for me to delay interviewing those clients for five to thirteen days or longer?
>
> A. No.
>
> Q. Would it have been reasonable for me to effectively sit on my hands for five to thirteen days and do nothing to represent those defendants?
>
> A. No.

(B 118-120; BD 67:2-69:25.)

3. HENRY COKER

My Coker, a retired San Diego Public Defender, was retained by Defendant to render an opinion in this case. Mr. Coker believed that the public defender's administrative concerns – which had nothing to do with Mr. Farrow's case – justified leaving him unrepresented in jail for 13 days. (B 126:17; CE 1:5 at 17.) Mr. Coker opined in his report that the delay in providing representation to Jerome Wade was due to the fact that it was a codefendant case. (B 126:16.)

At his deposition, Mr. Coker stated,

> ***I was asked to look at these two cases and render an opinion on those. I was not asked to look at the entirety of Contra Costa's practice and how things are done there, so I cannot give you any informed opinion about the overall practice of Contra Costa County.***

(B 158; CD 54:6-10.)

He also stated,

> I was not – without having looked at the broad system – ***I was not asked to look at the entire system. I was asked to take a microscopic look at two cases and render my opinion on that.*** So I want to keep my views tightly to things that I have looked at. I don't know what's the overall Policy in Contra Costa on a Monday through Friday.

(B 140; CD 56:4-10.)

Additionally, Mr. Coker agreed that he was not offering any opinion as to whether it was reasonable to delay representation for a period of 5 to 13 days, and sometimes longer, in cases other than the two he examined, stating, "I am not doing that, because if I offer that opinion it will not be an informed opinion, I have not made a careful study of the systemic way things work in the office, and, you know, it would be a man-on-the-street opinion." (B 140-41; CD 56:19-57:3.) The following colloquy took place with regard to his opinion on the reasonableness of the delay in appointing counsel:

> Q. Well, you indicate that the date that counsel is actually assigned or provided is more relevant to our consideration than the date of the next court hearing. So you're assuming that when counsel is assigned or provided that they actually do something; is that right?
>
> A. Yes. That is the assumption. And that assumption I had two cases in front of me, and those two cases something was done. In one faster than the other, but as I said, it was probably based on consideration of the needs of the particular case, so.

(B 142; CD 44:14-23.)

Mr. Coker agreed, however, that it would be unreasonable for an appointed attorney to leave a client in jail for two weeks without interviewing the client, without asking for bail, and without conducting any investigation. (B 143; CD 45:9-24.) He also agreed that it would be prejudicial if an exculpatory video were recorded over because counsel was not there to protect it. (B 144; CD 60:11-15.) He agreed that it is important to know a detainee's mental state, and that it would be prejudicial if a depressed detainee committed suicide because he was not provided with medication. (B 145; CD 62:15-63:1.)

Mr. Coker stated that in big cases involving 17 or 18 codefendants, it might take a week to figure out all of the conflicts. He also stated, though, that the San Diego Public Defender appears for all

indigent detainees at their first appearance in court regardless of whether there are multiple codefendants, that ***he could not recall a case ever requiring two weeks to determine conflict status***, and that appearing on the first day preserves the detainees statutory speedy trial rights. (B 147; CD 71:15-72-7.)

Mr. Coker stated that it is important to conduct timely investigations, emphasizing the need to preserve physical evidence, take pictures, or have an expert attend an autopsy. (B 150; CD 27:19-29:3.)

On the topic of interviewing the client, the following colloquy took place:

> Q. "Why is it important to interview the client quickly?"
>
> A. It is good practice to interview any client that you're going to represent at the first opportunity that you have.
>
> Q. Why?
>
> A. Because they will provide you with information that will give you leads and stats and at least help you as the lawyer to digest the situation and begin to come up with a strategy, a theory of the case, that kind of thing.

(B 153; CD 30:19-31:10.)

Mr. Coker testified that, "[F]rom my experience visiting other counties, surrounding counties, and I talk on a regular basis with other public defenders, we tend to do things pretty much the same way." (B 154; CD 7:6-9.) ***He also stated that he knows of no other county in the state that employs a bifurcated arraignment process.*** (B 155; CD 43:5-8.)

Mr. Coker was very clear that his office has the ability to track every event in a client's case, including the dates of first and second appearances. (B 156; CD 35:11-36:6.)

IV
ISSUES TO BE DECIDED

There is no genuine dispute in regard to the following facts and, hence, Plaintiffs are entitled to an order granting Plaintiffs partial summary judgment of the following:

(1) That Plaintiffs John Farrow and Jerome Wade possessed a constitutional right under the Sixth Amendment of the U.S. Constitution pursuant to *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct 2578 (2008), of which each Plaintiff was deprived; **(2)** That the Public Defender of Defendant

Contra Costa County had a Policy of withholding representation for a period of 5 to 13 days, and sometimes longer, to criminal indigent detainees; **(3)** That Defendant's Policy amounted to deliberate indifference to the Plaintiffs' constitutional right; and **(4)** That Defendant's Policy was the moving force behind the violation of each Plaintiff's constitutional right identified above in paragraph (1).

Plaintiffs further contend that they have established that there is no genuine dispute in regard to Plaintiffs' entitlement to an order granting Plaintiffs partial summary judgment for each of the following remedies: **(5)** That, as a result of Defendant's violation of Plaintiffs' constitutional right identified above in paragraph (1), each Plaintiff is entitled to recover nominal damages in the amount of $1.00 from Defendant; **(6)** That, as a result of Defendant's violation of Plaintiffs' constitutional right identified above in paragraph (1), Plaintiffs are entitled to declaratory judgment pursuant to Federal Rules of Civil Procedure, rule 57, and 28 U.S.C. 2201(a) that Defendant's Policy identified above in paragraph (2) violates Plaintiffs' constitutional right identified above in paragraph (1); **(7)** That, as a result of Defendant's violation of Plaintiffs' constitutional right identified above in paragraph (1), Plaintiffs are entitled to declaratory judgment pursuant to Federal Rules of Civil Procedure, rule 57, and 28 U.S.C. 2201(a) that the Public Defender violated California Government Code section 27706 by failing to appear at "all stages" of the proceedings, including the first arraignment stage; and **(8)** That as a result of Defendant's violation of Plaintiffs' constitutional right identified above in paragraph (1) and of the statutory right provided in California Government Code section 27706 identified in paragraph (7), Plaintiffs are entitled to a permanent injunction mandating that Defendant provide representation to each and every indigent criminal detainee at the detainee's first court appearance, or at the latest, within 24 hours of the criminal detainee's first court appearance.

V
ARGUMENT
POINTS AND AUTHORITIES IN SUPPORT OF MOTION

1. *STRICKLAND'S* INDIVIDUALIZED ANALYSIS IS INAPPLICABLE TO CASES SEEKING SYSTEMIC REFORM.

Determining the reasonableness of Defendant's written Policy of withholding representation from indigent in-custody detainees for a period of between 5 and 13 days, and sometimes longer, in a case seeking systemic reform, depends largely upon whether the Policy is examined in terms of its potential for damage to the thousands of lives it impacted, or its potential for damage in terms of the named Plaintiffs' underlying criminal cases. Fortunately, this threshold question has been resolved in a number of recent cases, each of which has determined that *Strickland's* individualized analysis requirement is inapplicable in cases seeking prospective, systemic reform.

In *Church v. Missouri*, -- F.Supp.3d ---- (2017) WL 3383301 at 14, the United States District Court for the Western District of Missouri – quoting the Idaho Supreme Court in *Tucker v. State*, 162 Idaho 11 (2017), stated – "The U.S. Supreme Court in Strickland was very clear about the ***individualized analysis*** it was creating. (Citation omitted.) '***Strickland, therefore, is inapplicable when systemic deficiencies in the provision of public defense are at issue***.'" Accord, *Kuren v. Luzerne Cty*., —— Pa. ——, 146 A.3d 715, 718 (2016); and *Hurrell–Harring v. State*, 15 N.Y.3d 8, 904 N.Y.S.2d 296 (2010).

Also before reaching its determination that piecemeal litigation is inappropriate in systemic reform cases, the Pennsylvania Supreme Court in *Kuren v. Luzerne*, *supra*, at 732, quoted the American Bar Association, stating:

> The ABA argues that Strickland-type post-conviction relief not only would fail to remedy the civil claims asserted by Appellants, but also would fail to hold a public defender's office or the funding county to account for non-compliance with Gideon. Strickland can provide a remedy only to one person at a time. Such sporadic, piecemeal rulings are unlikely to compel public defender's offices to make necessary changes, or to induce counties to provide the resources necessary to provide meaningful legal representation to indigent defendants.

Additionally, the Florida Supreme Court stated in *Public Defender v. State,* 115 So.3d 261 (2013) that,

> In extreme circumstances where a problem is system-wide, ***the courts should not address the problem on a piecemeal case-by-case basis***. This approach wastes judicial resources on redundant inquiries. If this Court had not approved systemic aggregate relief in the appellate cases cited above, the courts would have been clogged with hundreds of individual motions to withdraw. This is tantamount to applying a band aid to an open head

> wound. [¶] The Strickland standard has been criticized as "inappropriate" for suits seeking prospective relief. See Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir.1988). (Emphasis added.)

Similarly, in *United States v. Wade*, 388 U.S. 218 (1967), the Supreme Court concluded that post-indictment, pretrial lineups without counsel violated the Sixth Amendment regardless of whether a particular defendant had been accurately identified as the perpetrator. Indeed, the phrase "grave potential for prejudice" was introduced into Sixth Amendment jurisprudence by *Wade* within the context of the right to counsel during pretrial lineups. *Wade* recognizes that all defendants are subject to the same risk of prejudice inherent in the procedure of conducting lineups without counsel. The prejudice is not crystallized at the point that the lineup is conducted without counsel, but the deprivation of counsel at that point results in the grave potential for prejudice for every defendant nonetheless.

It is this commonality of risk that all defendants were subjected to that provides guidance in determining how to analyze the present issue before the court. Significantly, the Ninth Circuit quoted the phrase "grave potential for prejudice" to illustrate this point. Additionally, the Ninth Circuit asked this Court to assess whether the delay in appointing counsel for 5 to 13 days, and sometimes longer, was reasonable – a determination that cannot be made through reference limited strictly to the Plaintiffs in this case, neither of whom was held without counsel for more than 13 days. Consequently, the inquiry must be on the grave potential for prejudice inherent in the written Policy of agreeing to withhold representation till any date the court chooses so long as that date is at least three court days out; a Policy that typically resulted in a delay of a week or two – but may have resulted in a delay of three weeks in some cases because the public defender set no outside limit on the length of the delay, did not pay any attention to the length of the delay (LD 111:2-5), delegated responsibility for the length of the delay in representation to the court (LD 109:19-110:7), and kept no records from which the outside length of the delay could be determined. (LD 111:6-20.)

Similarly, in *Carey v. Piphus*, 435 U.S. 247 (1978), the Supreme Court stated that students who had been suspended without a hearing were denied their due process rights regardless of whether they

would have been suspended had due process been observed: In other words, you cannot determine whether a constitutional violation has occurred by examining whether the outcome of the case would have been different in the absence of the constitutional violation.

2. DEFENDANT'S WRITTEN POLICY WAS PATENTLY UNREASONABLE BY HER OWN ADMISSION AND BY THE UNCONTESTED FACTS.

This Court held that "the reasonableness of a delay in appointing counsel after attachment depends on the totality of the circumstances, including the time needed to prepare for an upcoming critical stage–but not limited to that factor." It also determined that even though no critical stage was imminent, "[T]hat in no way diminishes the value of appointed counsel to protect Walter Rothgery's process and liberty interests after the right had attached." *Farrow v. Lipetzky*, WL 1540637 (N.D. Cal. Apr. 28, 2017) at 27.

2(A) Defendant's Rationalizes its Policy, in the alternative, as follows:

(1) The Public Defender did not have sufficient staff to provide representation at the initial arraignment stage of the proceedings and for the duration between the initial arraignment stage and the further arraignment stage because the County did not provide adequate funding; **(2)** The Court prevented the Public Defender from providing representation at the initial arraignment stage and for the duration between the initial arraignment stage and the further arraignment stage; **(3)** The Public Defender needed the extra time to sort out financial eligibility for indigent defense services, and to determine if she had a conflict in the particular case; **(4)** The Public Defender did not need to provide representation to the named Plaintiffs at the initial arraignment and for the duration between the initial arraignment and the further arraignment because hindsight shows that it would not have made any difference in their underlying criminal cases.

Pursuant to *Gideon v. Wainwright*, 372 U.S. 335 (1963), the County had an obligation to provide adequate funding for indigent defense services. However, even if the Court were to recognize funding as a legitimate factor under the totality of the circumstances, the evidence conclusively establishes that

providing indigent defense services at detainee's first appearance in court saved the county an enormous amount of money. (LD 70:4-11; Ex 25, B 33; LD 71:19-72-1; Ex 25, B. 33; LD 68:12-22; Ex 25, B 32; LD 85:11-23; Ex 25, B 50, 5 of report; LD 57:19:5-20-5: Ex 23, B 30.) Therefore, the Policy cannot be justified on economic grounds.

Furthermore, in *Kuren v. Luzerne County*, *supra*, indigent criminal defendants awaiting trial, along with the Chief Luzerne County Public Defender, filed a class action lawsuit seeking an injunction compelling the County to provide adequate funding for defense services. The Pennsylvania Supreme Court determined that an action for prospective relief brought by detainees and the Chief Public Defender alleging an actual or constructive denial of counsel due to underfunding of a public defender's office was cognizable under *Gideon v. Wainright*, 372 U.S. 335 (1963), as opposed to either *Cronic* or *Strickland*. The Pennsylvania Supreme Court stated,

> We recognize for the first time in Pennsylvania a prospective cause of action enabling indigent criminal defendants to prove that the level of funding provided by a county to operate a public defender's office has left that office incapable of complying with Gideon, creating the likelihood of a systematic, widespread constructive denial of counsel in contravention of the Sixth Amendment to the United States Constitution. We further hold that Appellants have sufficiently averred facts to state a claim upon which injunctive relief can be granted.

Luzerne, *supra*, at 752.

The public defender admitted that the Court did not prevent her from appearing at the initial appearance in every court in the county, other than the Richmond court in out of custody misdemeanor cases, where the judges currently forbid her from announcing her services in court prior to the commencement of proceedings. Therefore, the Court did not prevent her from discharging her duties in any of the other courts for the 28-year period that the Policy was in effect. Furthermore, the letter from the Public Defender's Office to the Presiding Judge of the Superior Court in 1984 establishes that the Public Defender not only agreed to the Policy, but also jointly drafted the Policy with the Superior Court. Consequently, this argument is hollow. (LD, 15:7-20:10; Exhibit 20.)

The Public Defender stated back in 1984 that it could assume representation within three court

days. Therefore, by Defendant's own admission, it did not need 5 to 13 days, and sometimes longer, to check eligibility and conflicts. Indeed, the public defender now appears at the first appearance in every case, except out of custody misdemeanor cases in Richmond, conclusively demonstrating that she did not need even three days to perform functions prerequisite to providing representation. ***Moreover, in her deposition testimony the Public Defender was emphatic that her office had nothing to do with setting the duration of time between the first and second arraignment proceedings, conceding that eligibility and conflicts checks were never a factor in determining the delay in providing counsel.*** (LD 109:19-110:7.) Given that financial eligibility and conflicts were not considered when the delay was imposed, the argument that the delay was needed for these purposes, as stated by Mr. Coker, is nothing more than a hypothetical premised upon facts that the public defender has explicitly refuted. Every case was continued without rhyme or reason as far the public defender was concerned, not due to the reasons posited by Mr. Coker. *Id.* Consequently, Defendant's Policy is utterly unjustified.

Plaintiffs addressed Defendant's assertion that representation was not needed in the named Plaintiffs' cases at the first appearance and for the duration between arraignment stages, because representation would not have benefitted either Plaintiff, in Section V(A) of this brief, *supra*. Plaintiffs, however, were harmed by Defendant's Policy as described in the Third Amended Complaint and Professor Boruchowitz's report.

2(B) Plaintiffs have Proven that Defendant's Policy of Delaying Representation from 5 To 13 days, and Sometimes Longer, was Unreasonable.

In contrast to Defendant – who provides no reason at all for the institutionalized delay in providing representation – Professor Boruchowitz identified and documented 55 reasons why Defendant's Policy was unreasonable under the totality of the circumstances. (BE 1:5-17.)

Defendant has not contradicted a single study or standard referenced by Professor Boruchowitz, or refuted a single factor that he considered in determining that Defendant's Policy was unreasonable under the totality of the circumstances. In addition, Defendant admitted that Contra Costa County had the

highest pretrial custody rate in the state, stating that its pretrial custody rate was 14 percent higher than the statewide average and 24 % higher than the national average. (LD 62:9-21; Ex 25, B 31.) Moreover, Mr. Coker, who is aware of the practices of public defender offices, stated that he was not aware of any other public defender office in the state that engages in a bifurcated arraignment process. (CD 43:5-8.)

The backdrop of grave potential for prejudice in the Policy as described by Professor Boruchowitz, juxtaposed with no economic or administrative justification for the Policy, establishes that the Policy was unreasonable. Defendant recognizes that the Policy was arbitrary and patently unreasonable, which explains why it has tried to shift the focus from its Policy to the irrelevant facts of Plaintiffs' underlying criminal cases, which were not considered when the delay was imposed. Under these circumstances – where the Public Defender states that it "had nothing to do" with determining how long her office would delay representation – no reasonable jury could find that the delay was reasonable or in any way justified.

3. DEFENDANT VIOLATED GOVERNMENT CODE SECTION 27706 BY NOT APPEARING AT THE INITIAL ARRAIGNMENT STAGE PROCEEDING AND FOR THE DURATION BETWEEN THAT STAGE AND THE SUBSEQUENT "FURTHER ARRAIGNMENT" STAGE.

In *Farrow v. Lipetzky*, WL 1540637 (N.D. Cal. Apr. 28, 2017) at 30, this Court asked whether Government Code section 27706 absolutely requires the public defender to attend the first court appearance, leaving open the possibility there might be some compelling reason for delaying representation until whenever the court set the second appearance. ***Assuming that the public defender is not absolutely required to attend the first court appearance and that there could be a justification for the delay, no justification has been provided in this case.*** Indeed, by definition, an arbitrary delay is not justified. Here, defendants were subjected to a lottery, where the length of the delay in providing representation was determined by chance, with utter indifference to the circumstances of any given case. As this Court has pointed out, the fact that the Superior Court set the "further arraignment" date does not excuse the undisputed fact that the Public Defender waited till the second court date to provide representation. In fact, it is reasonable to assume that all detainees

who proceeded with their cases on a time not waived basis would have immediately asked the public defender to place their cases back on calendar in order to assert their statutory speedy trial rights, rather than having to wait up to two weeks in jail to enforce the right to a preliminary hearing within 10 court days. It is also reasonable to assume that a high percentage of detainees would have asked the public defender to immediately file a bail motion.

As discussed above, the Public Defender has admitted that it had nothing to do with determining the duration of the delay between the "initial arraignment" and the "further arraignment." Consequently, the public defender cannot now argue that it withheld representation for that arbitrary period, which differed from case to case, because it needed the time to sort out financial eligibility and conflict questions. On the contrary, the reason that the Public Defender did not provide representation is that it was so indifferent to the needs of these detainees that it did not even bother to monitor how long they were in custody without representation, a message that was not lost on the named Plaintiffs.

Similarly, in *DeWolfe, Jr. v. Richmond* 2012 WL 10853 (2012), the Plaintiffs filed a class action complaint seeking injunctive and declaratory relief. They sought a declaratory judgment that the initial bail hearing before the commissioner is a stage of the criminal proceeding, entitling them to representation under § 16–204(b)(2) of the Public Defender Act, which states that "[r]epresentation shall be provided ... in all stages of a proceeding listed in paragraph (1) of this subsection, including, in criminal proceedings, custody, interrogation, preliminary hearing, arraignment, trial, and appeal." They also filed claims alleging that the City of Baltimore violated their Sixth Amendment right to counsel by failing to furnish representation at their first appearance in court where bail was set. The Maryland Supreme Court, following state Policy on avoiding resolution of claims on constitutional grounds where possible, found that pretrial detainees were entitled to counsel at their first appearance under the state's Public Defender Act and declined to address the Sixth Amendment claim.

The Maryland Public Defender Act is virtually identical to California Government Code section 27706 in that each requires representation at "all stages" of the proceedings. Indeed, the Plaintiffs in that

case argued that, by its plain language, the statute dictates the outcome: indigent defendants are entitled to public defender representation at "all stages" of the proceedings, and "all means all." *DeWolfe, supra,* at 9. The same basic statutory construction, where the statute is crystal clear, should apply here.

Ultimately, the Maryland Supreme Court held that,

> [T]he bail-hearing portion of the initial appearance before the Commissioner is a "stage" of the criminal proceeding, as that term is employed in § 16–204(b)(2) of the Public Defender Act. Because public defender representation is to be afforded "in all stages of a proceeding listed in paragraph [(b)](1)," and we have determined that the bail hearing is a stage of a "criminal ... proceeding" enumerated at (b)(1)(i), it follows that indigent defendants charged with "serious offense [s]," as that term is defined in the Act, are entitled to appointed counsel at the bail hearing. This conclusion is fully in keeping with our prior decisions in Webster, Flansburg, and McCarter.[¶] We further hold that indigent defendants who are not charged with a serious offense, and therefore do not come within the ambit of § 16–204(b)(1)(i), do come within the reach of § 16–204(b)(1)(iv), because the bail hearing at the initial appearance for the non-serious offense might result in incarceration.

Id. at 11.

4. PLAINTIFFS ARE ENTITLED TO AN INJUNCTION

This is a putative class action lawsuit seeking systemic reform of Defendant's written Policy denying counsel to all indigent detainees for a period of between 5 and 13 days, and sometimes longer. The class has not yet been certified. Plaintiffs seek the equitable remedy under Federal Rules of Civil Procedure, rule 65(d) of a permanent injunction requiring the Public Defender of Contra Costa County to appear at the first court appearance for indigent detainees and to represent such criminal defendants at all stages of the proceedings.

The following four elements must be established by a plaintiff seeking permanent injunctive relief pursuant to equitable principles: 1) That Plaintiff has suffered irreparable injury; 2) that remedies at law (i.e., damages) are inadequate to compensate for that injury; 3) that, on balancing the hardships between Plaintiff and Defendant, an equitable remedy is justified; and that the public interest would not be disserved by a permanent injunction. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-157, 130 S.Ct. 2743 (2010).

The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. *Beacon Theatres v. Westover*, 359 U.S. 500, 506-507 (1959) Irreparable harm can be proved through a showing of real or immediate threat that Plaintiff will be wronged again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 111-112 (1983).

"Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm. Moreover, the loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages. (Citation omitted.) " *Nelson v. National Aeronautics and Space Administration*, 530 F.2d 865, 882 (9th Cir. 2008) [Holding that serious privacy issues and likely violation of low-level employees' Fourth Amendment rights raised by intrusive investigations by government required conclusion that the district court abused its discretion in denying plaintiffs' motion for a preliminary injunction, and granting temporary injunction pending determination of preliminary injunction on remand.]

To have standing for prospective injunctive relief on behalf of a class, Plaintiff must demonstrate that he is realistically threatened by a repetition of the violation. *City of Los Angeles v. Lyons*, *supra,* 461 U.S. at 103. The court retains jurisdiction after the expiration of the proposed class representative's individual interest where a named Plaintiff's claims on behalf of a class are "inherently transitory." These types of cases properly rely upon the "relation back" doctrine. *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52, 111 S.Ct. 1661 (1991). "That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction . . . . In such cases, the 'relation back' doctrine is properly invoked to preserve the merits of the case for judicial resolution." *Ibid.*

The Ninth Circuit Court of Appeals noted in *Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir. 2001) "that where a district court grants systemwide injunctive relief, the issues of standing, class certification, and the propriety and scope of relief are often intermingled." The Court went on to state at

861:

> There are at least two ways in which to demonstrate that such injury is likely to recur. First, a plaintiff may show that the defendant had, at the time of the injury, a ***written Policy, and that the injury "stems from" that Policy***. Hawkins, 251 F.3d at 1237. In other words, ***where the harm alleged is directly traceable to a written Policy***, see Gomez v. Vernon, 255 F.3d 1118, 1127 (9th Cir. 2001), ***there is an implicit likelihood of its repetition in the immediate future***. Second, the plaintiff may demonstrate that the harm is part of a "***pattern of officially sanctioned ... behavior, violative of the plaintiff's [federal] rights***." LaDuke v. Nelson, 762 F.2d 1318, 1323 (9th Cir. 1985). Thus, where the defendants have repeatedly engaged in the injurious acts in the past, there is a sufficient possibility that they will engage in them in the near future to satisfy the "realistic repetition" requirement. In this regard, where the plaintiffs constitute a certified class, "it is not irrelevant that [the named plaintiffs] s[eek] to represent broader interests than [their] own." LaDuke, 762 F.2d at 1326. When a named plaintiff asserts injuries that have been inflicted upon a class of plaintiffs, we may consider those injuries in the context of the harm asserted by the class as a whole, to determine whether a credible threat that the named plaintiff's injury will recur has been established. Id.; see also Hawkins, 251 F.3d at 1237. [Emphasis added.]

The written Policy is established by the Public Defender's letter to the Presiding Judge of the Superior Court in 1984, wherein the Public Defender's Office stated it would assume representation of in-custody detainees after the initial appearance in court "***on any date*** such a coordinated plea and bail study can be scheduled, as long as it is no sooner than three days away." (Ex 20 at Bates 94.) The written Policy is further reflected by the statement that appeared on the Public Defender's website stating that in-custody detainees would appear without counsel at their first court appearance and that appointed counsel would be available at the second appearance. (LD 58:4-22; Ex 24.) It is also reflected in the numerous official County documents wherein the Public Defender describes the Policy, stating that indigent detainees must wait "at least two weeks" for appointed counsel, or "between one to two weeks" without counsel. (LD 64:2-65:8, Ex.25, B 31; LD 55:12-23; Ex.23, B 30.) Furthermore, the Policy reflects a "pattern of officially sanctioned behavior violative of Plaintiff's federal rights."

Plaintiffs were held for 7 and 13 days, respectively, without counsel pursuant to Defendant's Policy. This harm is directly traceable to the Defendant's written Policy.

Defendant amended its Policy in response to this lawsuit so that in-custody detainees now

apparently receive representation at their first appearance in court. However, in *United States v. Brandau*, 578 F.3d 1064, at 1067 (9th Cir. 2009), the Ninth Circuit stated that,

> It is well established that the voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (quotation marks omitted). When a party abandons a challenged practice freely, the case will be moot only, "if subsequent events made ***it absolutely clear*** that the alleged wrongful behavior could not reasonably be expected to recur" ... The "***heavy burden of persuading***" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Similarly, the Supreme Court in *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 289, 102 S.Ct. 1070 (1982) stated that,

> It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. Such abandonment is an important fact bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice, but that is a matter relating to the exercise, rather than the existence, of judicial power. In this case, the city's repeal of the objectionable language **would *not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated.*** (Emphasis added.)

It is reasonable to expect that the practice of denying representation to indigent criminal defendants at all appearances will recur without the injunction sought. Even if the public defender states that she has disavowed the Policy and will not return to it, this assurance rings hollow where (1) there is no guarantee that the Community Corrections Partnership will continue to approve funding for her ACER program, a different public defender could be appointed, or the Board of Supervisors might deny funding. A county financial shortfall, for example, could instantly reduce public defender funding; and (2) there is no guarantee that the Superior Court will not resume the Policy on its own, given that it currently forbids the public defender from appearing in some arraignment courts, and the public defender has acquiesced to this violation of her client's right to counsel. (LD 42:17-21.) Ultimately, there is no way for Defendant to carry its "***heavy burden of persuading***" the court that the challenged conduct cannot reasonably be expected to start up again without unanimous assurances from all members of the

Community Corrections Partnership, including the Contra Costa County Superior Court, which is openly hostile to representation at the first appearance in court.

Inevitably, the continuing Policy of denying representation at the first court appearance results in hundreds of uncounseled pleas, where Fourth, Fifth, and Amendment violations are swept under the rug – in a county where the court requires appellate waivers for every guilty plea. The sheer volume of misdemeanor cases creates an expediency pressure on the court that creates a long recognized risk of prejudice to those persons charged. (*Argersinger v. Hamlin*, 407 U.S. 25, 34-35 (1972).)

This Court cited *In re Brindle*, 91 Cal.App.3d 660 (1979) in its April 2017 opinion, placing Defendant on notice concerning the obligations of the Public Defender's Office. *Brindle* states:

> Business and Professions Code section 6152, subdivision (d), referring to unlawful solicitation of business by attorneys was amended in 1976 to provide: 'Nothing in this section shall be construed to mean that a public defender ... may not make known his or her services as a criminal defense attorney to persons unable to afford legal counsel whether such persons are in custody or otherwise.' *Id.* at 682.

In spite of being directed to *In re Brindle* by this Court, the Public Defender has acquiesced to the Contra Costa County Superior Court's prohibition on announcing the availability of Public Defender services and has taken no legal action to enforce its right to "make known his or her services as a criminal defense attorney" to out of custody misdemeanor defendants unable to afford legal services in the Richmond Courthouse. Unlike the Chief Public Defender in *Kuren v. Luzerne County*, 146 A.3d 715 (2016), who sued the County for an injunction requiring the County to fund indigent defense services, the Contra Costa County Public Defender will fetter her duty in order to appease the Superior Court with respect to representing indigent defendants at the first court appearance. An injunction is necessary to ensure that the Public Defender of Contra Costa County represents indigent criminal defendants by appearing at the first court appearance.

5. PLAINTIFFS ARE ENTITLED TO NOMINAL DAMAGES

The seminal case *Carey v. Piphus*, *supra*, 435 U.S. 247, 98 S.Ct. 1042 analyzed the relationship

of damages awards for civil rights violations under section 1983 with the common-law tort rules of damages, stating at page 258, "In [some] cases, it may be appropriate to apply the tort rules of damages directly to the § 1983 action. (citation omitted) In other cases, the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law torts." At the conclusion of its analysis, at page 266, the Supreme Court stated,

> Common-law courts traditionally have vindicated certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.

Of course, a plaintiff seeking to vindicate an 'absolute' right (such as a constitutional right or some statutory rights) must meet the 'case or controversy' requirement in federal court that is articulated in the doctrine of standing. When the absolute right sought to be vindicated is a plaintiff's private right, the "[Supreme Court's] contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement." *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S.Ct. 1540, 1552 (2016) (Thomas, J. concurring) (citing *Carey v. Piphus, supra*, 435 U.S. at 266.)

Whether a plaintiff has suffered actual damages caused by a constitutional violation is irrelevant to the legal question whether the plaintiff is entitled to judgment and nominal damages. "If [the trier of fact] finds a constitutional violation, an award of nominal damages is mandatory, not permissive." *Floyd v. Laws*, 929 F.2d 1390, 1402-1403 (9th Cir. 1991); *accord, Schneider v. County of San Diego*, 285 F.3d 784, 794-795 (9th Cir. 2002).

In a recent Ninth Circuit case before Justice William Fletcher, *Bayer v. Neiman Marcus Group, Inc.*, 861 F.3d 853 (9th Cir. 2017), in a lawsuit alleging interference with plaintiff's rights under the Americans with Disabilities Act in violation of 42 U.S.C. § 12203(b), the court held that section 12203

authorizes courts to award nominal damages as equitable relief when complete justice requires, and hence reversed the trial court's order finding the action moot and granting summary judgment to Neiman Marcus. Citing *Carey v. Phiphus, supra*, the court stated, "nominal damages are divorced from any compensatory purpose. . . . [N]ominal damages are awarded to vindicate rights, the infringement of which has not caused actual, provable injury." *Id.* at 872. [Plaintiff Bayer was no longer an employee of Neiman Marcus, had no expectation of working again for the company, and earlier proceedings had confirmed that he was not bound by the company's mandatory arbitration terms that had been imposed on current employees.]

The opinion in *Bayer* emphasizes that, "A claim for nominal damages that seeks to vindicate a constitutional right is not moot. *See Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 425-426 (9th Cir. 2008)." *Id.* at 871, n. 7. Further, "A live claim for nominal damages will prevent dismissal for mootness. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002)." *Id.* at 868. In *Bayer*, the plaintiff did not state a separate claim for nominal damages in the complaint, but he did assert a claim for damages and a general prayer for other relief as the district court deemed proper; he also explicitly argued he was entitled to nominal damages in opposing summary judgment. *Id.* at 869.

Despite the unavailability of injunctive or declaratory relief in *Bayer*, the plaintiff was entitled as a matter of law to an award of nominal damages. Similarly, Plaintiffs' claims herein for nominal damages are not moot, regardless whether injunctive or declaratory relief is available. Plaintiffs have established that there is no genuine dispute in regard to their entitlement to an order granting Plaintiffs partial summary judgment of their claim for violation of their Sixth Amendment rights pursuant to *Rothgery*, thus, under the reasoning of *Carey v. Piphus*, they are each entitled to an award of nominal damages ($1.00) for such violation.

6. PLAINTIFFS ARE ENTITLED TO DECLARATORY JUDGMENT

Plaintiffs are entitled (1) to declaratory judgment pursuant to Federal Rules of Civil Procedure,

rule 57, and 28 U.S.C. 2201(a) that Defendant's Policy of withholding representation for a period of 5 to 13 days, and sometimes longer, to criminal indigent detainees violates Plaintiffs' constitutional rights under the Sixth Amendment and the *Rothgery* case, and (2) Plaintiffs are entitled to declaratory judgment that the Public Defender violated California Government Code section 27706 by failing to appear at "all stages" of the proceedings, including the first arraignment stage.

Federal law governs the propriety of declaratory relief under FRCP rule 57, and 28 U.S.C. 2201(a). *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 674, 70 S.Ct. 876 (1950). The Article III, § 2 'case or controversy' requirement implies that, for a plaintiff to have standing to assert a claim for declaratory relief, the plaintiff must face an imminent or actual injury, not an injury that has not occurred and is conjectural or based on a remote contingency. *Burlington Northern R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1243-1244 (9th Cir. 1991). Also, in order to establish federal jurisdiction, the named plaintiff must be an "interested party" in the case or controversy at issue. *Coakley v. Sunn*, 895 F.2d 604, 606 (9th Cir. 1990). The requested declaratory relief must redress the injury from which the plaintiff suffers. *Id.* At 607. [Governing federal statute did not obligate a state participating in the AFDC program to provide for any exceptions to the ineligibility period mandate, hence granting the declaratory relief requested would leave the position of plaintiffs unchanged.]

A case requesting declaratory relief becomes moot when a court is no longer able to grant effective relief because the dispute has been completely resolved through other means, such as settlement and release, or because it is unlikely that the precise conditions of the case will recur; however, the unavailability of injunctive relief does not bar declaratory judgment. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 123-124, 94 S.Ct. 1694 (1974) [Labor dispute where preliminary injunction was dissolved because workers returned to work did not prevent declaratory relief.]

The issue of mootness of a constitutional violation was decided by the Supreme Court in a case involving a claim for declaratory and injunctive relief by a corporation operating a nude erotic dancing

club that was prevented from having its dancers be completely nude by an ordinance enacted by the City of Erie, Pennsylvania that made it a summary offense to intentionally appear in public in a "state of nudity." *City of Erie v. Pap's A.M*, 529 U.S. 277, 120 S.Ct 1382 (2000). The Pennsylvania state trial court struck down the public nudity section of the ordinance as an unconstitutional violation of the corporation's right to freedom of expression as protected by the First and Fourteenth Amendments, and the Pennsylvania Supreme Court reached the same conclusion. After certiorari was granted by the U.S. Supreme Court, the corporation filed a motion to dismiss the case as moot, claiming that it no longer operated the 'Kandyland' club as a nude dancing club, and that it did not operate a nude dancing club at any other location.

The Supreme Court addressed the threshold "justiciability question," stating at page 287, "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome. (Citations omitted.) The underlying concern is that, when the challenged conduct ceases such that there is no reasonable expectation that the wrong will be repeated (citation omitted), then it becomes impossible for the court to grant any effectual relief whatever to [the] prevailing party. (Citation omitted.) In that case, any opinion as to the legality of the challenged action would be advisory." (Internal quotes omitted.) The Court then found that the corporation still had a stake in the outcome of the case because it still operated the company and thus could resume at will its nude dancing operations, and that the City still had on ongoing interest in enforcing the challenged provisions of its ordinance. *Id.* at 288. Accordingly, the *City of* Erie case was not moot and the Court could determine the merits of the issue. *Id.* at 289. Similarly, Plaintiffs' claim for declaratory judgment is not moot because the Defendant herein could at any time fully resume its decades-old Policy of not providing representation to indigent detainees for five to thirteen days, or sometimes longer; and, as shown above, it still follows the old Policy in certain specific courts.

The Ninth Circuit follows the list of factors identified in *Allstate Ins. Co. v. Herron*, 634 F.3d

1101, 1107 (9th Cir. 2011), per *Brillhart v. Excess Ins. Co.*, 316 U.S. 491, 495, 62 S.Ct. 1173 (1942), for guiding the trial court's determination whether to exercise its discretion to grant the requested declaratory relief; to wit, whether a declaratory judgment would involve a needless determination of state-law issues (the present matter involves primarily a federal *Rothgery* claim), whether it would encourage forum shopping (this court is the proper venue for asserting a *Rothgery* claim), whether it risks duplicative litigation (there are no state-court proceedings so far as Plaintiffs are aware, and no duplicative federal actions), whether it would resolve all aspects of the issue in a single proceeding (same), whether it would serve a useful purpose in clarifying the legal relations at issue (Defendant has continuously contended that its Policy never violated the Sixth Amendment rights articulated in *Rothgery*, and a declaratory judgment would go far in educating the public regarding their Sixth Amendment rights under *Rothgery*).

In sum, the Court should grant Plaintiffs' declaratory judgment in their favor.

VI
CONCLUSION

The Public Defender has admitted that all factually innocent people subjected to the Policy remained in jail one to two weeks longer than necessary as a result of the delay in providing counsel. She also admitted that an enormous percentage of detainees were held unnecessarily due to the denial of counsel when they would have been released on bail or recognizance had counsel been provided earlier.

As Professor Boruchowitz chronicles in his report, unnecessary time spent in jail can have a devastating impact on the detainee's life. Here, the call of the question posed by the Supreme Court, and narrowed by the Ninth Circuit Court of Appeals and this Court is: Is it reasonable to arbitrarily and indiscriminately leave people in jail without counsel for a week or two without any justification; or is this delay unreasonable because there is no reason for it, and because it gratuitously punishes the factually innocent and ignores the needs of those who require legal attention to obtain release on bail, mount their defenses, or receive medical or psychiatric care.

This lawsuit seeks structural reform of a systematic practice of arbitrarily denying counsel to all

detainees, without reference to the facts of their criminal cases, their health, investigative needs, or any other factor. Defendant, however, is fixated on the inappropriate *Strickland* requirement of case-by-case analysis. Indeed, through Defendant's silence and its explicit instructions to its expert to microscopically restrict his analysis to the underlying facts of the named Plaintiffs' criminal cases, as opposed to the conspicuous potential for prejudice inherent in the Policy as applied to everyone, Defendant adoptively admits, through silence, that the Policy was patently unreasonable. Given the recognition that it cannot prevail on the question posed by the Court, Defendant understandably ducks the Court's question and attempts to reframe the issue based upon the unrelated question that it would prefer to answer: which is whether the named Plaintiffs lack standing to challenge the patently unreasonable Policy because guilt in their underlying criminal cases was so clear that they could not have benefitted from earlier provision of counsel.

Defendant's attempt to invoke *Strickland* yet again is totally inappropriate. Plaintiffs were arbitrarily denied counsel, in the same fashion as the tens of thousands of others, without the facts of their individual criminal cases having any bearing on the length of the delay in appointment of counsel, pursuant to Defendant's written Policy; and that gives them standing to seek systemic reform. Plaintiffs were injured by this Policy in terms of denial of rights and impaired investigation. However, they are seeking prospective relief and are not seeking to overturn their convictions. Therefore, the facts of their underlying cases, beyond the fact that they were subjected to Defendant's Policy, are irrelevant to this discussion.

Dated: November 22, 2017

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