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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JOHN FARROW, JEROME WADE, on their behalf, and on behalf of all others similarly situated, Plaintiffs, v. CONTRA COSTA COUNTY, Defendant.	No. C12-6495 JCS NOTICE OF MOTION AND MOTION OF DEFENDANT CONTRA COSTA COUNTY FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT Date: January 19, 2018 Time: 9:00 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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PLEASE TAKE NOTICE that on January 19, 2018, at 9:00 a.m., or as soon thereafter as the matter may be heard in Courtroom G, 15th Floor, of the above-entitled court, located at 450 Golden Gate Avenue, San Francisco, California, defendant Contra Costa County will and hereby does move this Court for an order for summary judgment, or partial summary judgment, pursuant to Federal Rule of Civil Procedure 56 with respect to the claims brought by Plaintiffs John Farrow and Jerome Wade, specifically their claims under 42 U.S.C. section 1983 ("Section 1983") (First Cause of Action in the Third Amended Complaint) that Contra Costa County Public Defender Robin Lipetzky violated Farrow's and Wade's rights under the Sixth Amendment and their claims for a Writ of Mandate based on allegations that Lipetzky violated California Government Code section 27706 (Third Cause of Action).[1] *See* Third Amended Complaint ("TAC"), ECF No. 91. As stated below, summary judgment is appropriate for the following reasons:

1) There was no violation of the Sixth Amendment because there was no unreasonable delay in appointment of counsel under *Rothgery*;

2) Farrow is collaterally estopped from alleging a violation of his Sixth Amendment right to counsel based on the failure to timely appoint counsel because he raised this issue with the state court on September 15, 2011, and the state court ruled against him on that date;

3) In the absence of a viable federal claim, the Court should dismiss the remaining state law claim for lack of subject matter jurisdiction;

4) If the Court elects to retain jurisdiction over Farrow and Wade's state law claim that the County violated Government Code section 27706, summary judgment on that claim is appropriate because there was no direct request for representation made by either Farrow or Wade to the Public Defender, the Court did not appoint the Public Defender to represent either Plaintiff, and the Public Defender, including the Alternate Defender's Office ("ADO"), could not represent either individual due to a conflict of interest;

5) Plaintiffs' claims for injunctive and declaratory relief should be denied as moot

[1] On April 28, 2017, the Court dismissed the Second Cause of Action under the Bane Act with prejudice. April 28, 2017 Order Regarding Motion to Dismiss Third Amended Complaint at 30:6-9, ECF No. 107.

because Lipetzky has represented in-custody criminal defendants at their initial appearances since January 9, 2013, and had commenced the process of instituting this representation prior to the filing of this litigation; and

6) Farrow cannot assert a state claim involving monetary relief where he failed to file a government claim within the time required.

This motion is supported by this notice, the memorandum of points and authorities, the accompanying Declarations of Robin Lipetzky and D. Cameron Baker and exhibits thereto, all the papers and records on file in this action, and on such other materials as may be submitted at or before the hearing on the motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In this case, Farrow and Wade assert that Contra Costa County had a written policy of not providing representation by the Public Defender to in-custody criminal defendants at their initial appearance in Contra Costa County Superior Court and delaying representation until the second appearance in that court, which allegedly took place 5 to 13 days later. *See* TAC, ¶1 at 2. Plaintiffs contend that this policy violated their Sixth Amendment right to counsel and California Government Code section 27706. *Id.,* ¶¶18, 61-63. As set out below, the undisputed facts warrant summary judgment in favor of the County on these two claims.

Summary judgment should be granted on the Sixth Amendment claim because Plaintiffs cannot establish all of the necessary *Monell* elements. There was no underlying violation of the Sixth Amendment because the short delay in obtaining counsel did not cause any actual prejudice, nor pose any grave potential for prejudice, to Plaintiffs' ability to defend against the charges against them. Further, the County was not "deliberately indifferent" to the risk of injury to their Sixth Amendment rights and the County's "policy" did not cause the alleged violation.

In addition to these points, collateral estoppel bars Farrow from asserting his Sixth Amendment claim as a result of collateral estoppel.

Plaintiff's Government Code section 27706 claim fails because the County never had a

duty under that section to represent Plaintiffs where Plaintiffs did not make a direct request for representation, the Public Defender was never appointed by the state court, and the Public Defender was ethically barred from representing Plaintiffs. Further, Plaintiffs cannot point to anything that the Public Defender could have done that wasn't done.

Finally, summary judgment should be granted as to Plaintiffs' claims for injunctive and declaratory relief because they are moot because the County has funded and staffed the initial appearances of in-custody defendants since January 9, 2013, and the Public Defender commits to continuing this practice.

As discussed in greater depth below, summary judgment should be granted in the County's favor.

II. ISSUES TO BE DECIDED

1. Do the undisputed facts establish that the County violated Farrow's and Wade's Sixth Amendment rights where, *inter alia,* each received counsel within a reasonable time after attachment of the right to counsel, and there was neither a grave potential for prejudice nor actual prejudice to their criminal proceedings based on the timing of when they received the assistance of counsel?

2. Is Farrow collaterally estopped from asserting a violation of his Sixth Amendment rights due to the failure to appoint counsel at his initial appearance where he raised that issue with the state court and the state court ruled against him, finding that Farrow's rights were not violated?

3. In the absence of a viable federal claim, should the Court dismiss the remaining state law claim for lack of subject matter jurisdiction?

4. Can Farrow or Wade assert a violation of Government Code section 27706 where there was no direct request for representation to the Public Defender's Office, the Court did not appoint the Public Defender to represent either Plaintiff, and the Public Defender could not represent either Plaintiff due to a conflict of interest?

5. Are Plaintiffs' claims for injunctive and declaratory relief moot where the County has funded and staffed the initial appearances of in-custody criminal defendants since

January 9, 2013, commenced the process prior to the initiation of this action, and is commited to continue this practice in the future?

6. Can Farrow assert a state claim involving monetary relief where he failed to file a government claim within the time required?

III. SUMMARY OF RELEVANT FACTS

Because the Court has not yet certified a class in this case, this motion focuses on the facts and events occurring in Farrow's and Wade's state court criminal proceedings. July 14, 2017 Transcript, ECF No. 117, at 19:14-16 (summary judgment will be on the individual cases). The County first sets out the undisputed facts applicable to Farrow and then the undisputed facts applicable to Wade.

A. Criminal Prosecution of Farrow

On August 30, 2011, officers from the Concord police department arrested Farrow for domestic violence charges arising from a physical altercation with his girlfriend, Jessica Fakhimi. Deposition of John Farrow ("Farrow Depo.") at 12:18-13:1, attached as Exhibit A to the Declaration of D. Cameron Baker ("Baker Decl."). Following his arrest, Farrow was detained at the Martinez Detention Facility ("MDF"). *Id.* at 17:3-6.

On Friday, September 2, 2011, Farrow had his initial appearance in state court before Judge Nancy Stark. September 2, 2011 Clerk's Docket and Minutes, Exhibit A to the Declaration of Robin Lipetzky ("Lipetzky Decl.") At this initial hearing, Judge Stark asked Farrow if he wanted an attorney and if he could afford an attorney. Farrow Depo. at 18:25-19:8. After Farrow answered affirmatively to the first question and negatively to the second, Judge Stark set Farrow's bail,[2] referred Farrow to the Public Defender's Office, and scheduled a "Counsel & Plea" hearing for September 15, 2011. *Id.*; September 2, 2011 Clerk's Docket and Minutes, Lipetzky Decl., Exhibit A. Farrow, who was present at the hearing, does not know why Judge Stark scheduled the Counsel & Plea hearing for September 15, 2011, as

[2] Farrow's bail was set at $106,000. Plaintiff's attorney, Christopher Martin, who was also their criminal attorney, never formally requested that the Court lower that bail amount. Plaintiff's Response to Request for Admissions to Plaintiff John Farrow, Set Two ("Farrow Responses to Second Set of RFA's"), Response to Request No. 20, Exhibit C to the Baker Decl.

opposed to a week earlier. Plaintiff's Response to Special Interrogatories to Plaintiff John Farrow, Set Two ("Farrow Interrogatory Responses"), Response to Special Interrogatory No. 22, Exhibit B to the Baker Decl.

On Tuesday, September 6, 2011, the next court day after September 2,[3] a paralegal from the Contra Costa County Public Defender's Office met with Farrow at MDF. Lipetkzy Decl., ¶6; *see also* Farrow Responses to Second Set of RFA's, Response to Request for Admission No. 7, Exhibit C to the Baker Decl. At this meeting, the paralegal made various inquiries about Farrow's case and eligibility for representation. Lipetkzy Decl., ¶6; *see also* Applicant Interview Packet at 1-4, Exhibit B to the Lipetzky Decl.; *see also* TAC, ¶4 at 3 ("[d]uring initial client interview, a paralegal, law clerk or attorney will [] determine financial eligibility ... discuss confidentially the client's background ... [and] the specifics of the client's case"]). Based on her interview of Farrow, the paralegal wrote "[Defendant] would like copy of police report" in the space for "Notes re case progress, problems, settlement." Applicant Interview Packet at 3, Liptezky Decl., Exhibit B.

Following referral of Farrow's case to the Public Defender's Office, Robin Lipetzky determined that the main Public Defender's Office and the Alternate Defender's Office ("ADO") had to decline representation of Farrow's case, even though he was eligible for representation, due to ethical concerns arising from excessive case loads. Lipetzky Decl., ¶8; *see also* Deposition of Robin Lipetzky ("Lipetzky Depo.") at 27:14-20, attached as Exhibit D to the Baker Decl. In making her decision regarding whether to represent Farrow, Lipetzky considered the list of criminal cases scheduled for September 15, 2011 "Counsel & Plea" calendar, the reported case loads of her staff, and the nature of Farrow's case. Liptezky Decl., ¶8. On September 14, Lipetzky referred Farrow's case to the Contra Costa County Conflict Panel for referral to a private attorney.[4] *Id.* As part of the referral, Lipetzky's office provided copies of the complaint and the completed Criminal Conflict Program intake sheet to the

[3] Monday, September 5, 2011, was the Labor Day holiday.

[4] At some point, Lipetzky filed a declaration with the Court stating her decision to decline representation of Farrow. Lipetzky Decl., ¶8 and Exhibit C thereto.

Conflict Panel. *Id.*; *see also* Exhibit E[5] to the Baker Decl. (copy of completed intake sheet and first two pages of complaint produced by Plaintiffs).

On September 14, 2011, at approximately 1:57 p.m., the Conflict Panel referred Farrow's case to Christopher Martin, who had agreed to accept the representation. Martin Depo. at 9:25-10:6, Exhibit F to the Baker Decl. It is unclear exactly when the Conflict Panel first contacted Martin about this representation. Martin Depo. at 10:11-11:5. The Conflict Panel subsequently provided Martin with a copy of the "crimetime report," which sets forth the charges and potential exposure, possibly the complaint, and information respecting the next hearing. *Id.* at 10:11-11:5; September 14, 2011 email to C. Martin, Exhibit G to the Baker Decl.

Martin "didn't do anything" to prepare for the September 15 hearing. Martin Depo. at 11:25-12:7; Farrow Responses to Second Set of RFA's, Response to Request No. 9, Exhibit C to the Baker Decl.; *see also* Farrow Timesheets, Exhibit H to the Baker Decl. (no entry for September 14, 2011). On September 15, immediately prior to the hearing, Martin had a conversation with Farrow while in the courtroom. Martin Depo. at 13:23-14:3, 14:22-24; Farrow Depo. at 30:8-11. Martin generally used this initial conversation as a means to introduce himself and to obtain information about preliminary issues, such as bail and "any other pressing concerns that the client might have." Martin Depo. at 14:25-15:7. In Martin's discussion with Farrow on that morning, Farrow raised concerns about being in custody for "a couple of weeks without any representation." *Id.* at 15:9-14.

At the September 15, 2011 hearing, which was held before Contra Costa Superior Court Judge Clare Maeir, Martin was appointed to represent Farrow. TAC, ¶29. Prior to entering a plea for Farrow, Martin objected to the "bifurcated arraignment process," arguing

> I would like to object to the fact that Mr. Farrow has been in custody now 13 days without a lawyer. It's my understanding that he went through the bifurcated arraignment process and at his initial appearance he did not have a lawyer.

---

[5] These documents were produced by the Contra Costa County Conflict Panel pursuant to subpoena. Baker Decl., ¶6. Christopher Martin testified that the Conflict Panel would sometimes provide a copy of the complaint, if in its possession, to an attorney accepting a referral. Deposition of Christopher Martin ("Martin Depo.") at 11:7-9, Exhibit F to the Baker Decl.

> I would direct the Court to People v. Cox, 1987, 193 Cal.App.3d 1434, where the Court states, "Although arraignment is a critical stage of the proceeding entitling the defendant to an attorney, the absence of an attorney is not such a grievous error that it compels a reversal without a showing of prejudice."
>
> So it clearly is an error, and the issue of prejudice in this case is that he has been denied his speedy trial rights. And in that regard, if there's any question in the Court's mind, I would ask for an evidentiary hearing.

September 15, 2011 Hearing Transcript ("September 15, 2011 Transcript") at 3:15-4:1, Exhibit I to the Baker Decl.; *see also* Farrow Interrogatory Responses, Response to Special Interrogatory No. 18, Exhibit B to the Baker Decl.

Judge Maier overruled Martin's objection, stating:

> Mr. Martin, in a different case you've litigated this with me, you took it up on a writ, it was summarily denied by the First District Court of Appeal. So based on my prior ruling, my prior research in this matter, I do not find that your client's rights have been violated in any fashion; and, therefore, are you prepared to enter a plea on his behalf?

September 15, 2011 Transcript at 4:2-8. Martin then entered a plea on behalf of Farrow and did not waive time with respect to scheduling the preliminary hearing, which was set for September 27, 2011. *Id.* at 4:9-12, 18:5-20.

At the September 27, 2011 preliminary hearing, the only witness was Jessica Fakhimi, the complaining witness. Martin Depo. at 19:7-12. Fakhimi testified that she requested certain neighbors to contact the police and provided identifying information respecting those neighbors. *See* Farrow Interrogatory Responses, Response to Special Interrogatory No. 19 (identifying Fakhimi's preliminary hearing testimony respecting the location of the neighbors' house as the basis for his contention that the witnesses lived at 5303 Concerto Circle).

On November 7, 2011, 41 days after the preliminary hearing, Martin contacted an investigator (Kent Ringgenberg with Danville Investigations) regarding Farrow's case. Farrow Responses to Second Set of RFA's, Response to Request No. 11, Exhibit C to the Baker Decl. At Martin's deposition, in response to being asked why he waited until November 7, 2011, to contact Mr. Ringgenberg, he responded:

> Well, I can't tell you specifically why I waited until that specific date. I can say that I requested that he [Ringgenberg] do this based upon the testimony of Ms. Fakhimi, who said during the preliminary hearing, that she had requested help

> from two women that were outside of her residence and she decribed what those women looked like. So at that point they were identifiable people for the investigator to look for to see if, in fact, that occurred.

Martin Depo. at 19:24-20:11. One of Ringgenberg's tasks was to locate and interview the "neighbors" identified by Fakhimi at the preliminary hearing. *Id.* at 26:1-6.

Martin had to obtain authorization from the Conflict Panel to use Ringgenberg as an investigator in the Farrow case, which he did on November 9, 2011. Martin Depo. at 24:12-16; Deposition of Kent Ringgenberg ("Ringgenberg Depo.") at 11:25-12:10, Exhibit J to the Baker Decl. On November 14, Ringgenberg informed Martin via email that he got Martin's discovery packet and asked when the trial date was. Martin-Ringgenberg email chain, Deposition Exhibit 56, attached as part of Exhibit F to the Baker Decl.

The next morning, November 15, 2011, Martin responded to Ringgenberg stating that the pretrial hearing was set for November 16, that the case "may plead," and that Ringgenberg should go out "today if possible" to locate the neighbors. *Id.*; Martin Depo. at 26:1-6. Ringgenberg attempted to locate the neighbors the night of the 15th, but they weren't home so he left his card. Martin Depo. at 26:8-22; November 16, 2011 Ringgenberg email, Deposition Exhibit 41, attached as part of Exhibit J to the Baker Decl. The next day, Ringgenberg advised Martin via email that he had been unable to contact the neighbors. November 16, 2011 Ringgenberg email, Deposition Exhibit 41.

In the meantime, in an email to Devon Bell, the Deputy District Attorney assigned to Farrow's prosecution, dated noon November 15, Martin wrote: "We have our pretrial on Mr. Farrow tomorrow afternoon. I'm wondering if you had a chance to speak with your supervisor about 6 months or, possibly, 9 months as you suggested. I have an investigator in the field now, but I'd prefer to settle it." Martin November 15, 2011 email, Exhibit K to the Baker Decl. at 2. Twenty minutes later, Bell responded, "I talked with Rachel and she is willing to come down to 270. Let me know if that will resolve it." *Id.* Three minutes later, Martin replied "I will see him this afternoon or tomorrow morning and strongly recommend it." *Id.*

The following day, November 16, Farrow pled guilty and was sentenced to 270 days (9 months). Farrow Depo. at 47:10-14; Felony Advisement of Rights, Waiver and Plea Form,

Exhibit L to the Baker Decl. At the hearing, Farrow waived his rights to appeal any of the rulings made in his case. Farrow Depo. at 40:9-25; Response to Request No. 19, Farrow Responses to Second Set of RFA's. Because the case settled, Ringgenberg made no further efforts to contact the neighbors and they did not contact him. Response to Request No. 21, Farrow Responses to Second Set of RFA's; *see also* Deposition of K. Ringgenberg at 13:9-13.

On June 26, 2012, Farrow submitted a government claim to Contra Costa County respecting his claims. Farrow Government Claim, Exhibit M to the Baker Decl.. This claim was denied on July 24, 2012. *Id.* The denial specifically stated that it was being denied as untimely with respect to all events occurring prior to December 26, 2011. *Id.*

B. Criminal Prosecution of Jerome Wade

On November 14, 2011, Wade appeared without counsel for his initial appearance before Judge Stark in Department 20. *See* November 14, 2011 Clerk's Docket and Minutes, Exhibit N to the Baker Decl. At this hearing, Judge Stark asked Wade if he wanted an attorney and if he could afford an attorney. Deposition of Jerome Wade ("Wade Depo.") at 18:20-19:2, Exhibit O to the Baker Decl. After Wade responded to these questions, Judge Stark set Wade's bail[6] and scheduled a "Counsel & Plea" hearing for November 21, 2011. November 14, 2011 Clerk's Docket and Minutes. Wade does not know why Judge Stark scheduled the Counsel & Plea hearing for November 21, as opposed to another date. Plaintiffs' Response to Special Interrogatories to Plaintiff Jerome Wade, Set Two ("Wade Interrogatory Responses"), Response to Special Interrogatory No. 24, Exhibit P to the Baker Decl.

On November 17, 2011, the main Public Defender's Office determined that it had a conflict of interest with respect to representation of Wade because it was representing one of his co-defendants. Lipetzky Decl., ¶9; November 17, 2011 Conflict Memo, Exhibit D to the Lipetzky Decl. The case was therefore transferred to the ADO. Lipetzky Decl., ¶9. On November 18, 2011, the ADO determined that it also had a conflict of interest with respect to representation of Wade because it also was representing one of his co-defendants. *Id.*;

[6] Wade's bail was set at $4,350,000. Martin never formally requested that the Court lower that bail amount. Response to Request No. 21, Wade Response to Second Set of RFA's.

November 18, 2011 Conflict Memo, Exhibit E to the Lipetzky Decl. The ADO, therefore, refused to represent Wade. Lipetzky Decl., ¶9; *see also* Headley Affidavit of Conflict, Exhibit Q to the Baker Decl. As a result, Wade's case was referred to the Conflict Panel. Lipetzky Decl., ¶9.

On November 18, 2011, at approximately 10:22 a.m., a representative of the Conflict Panel had a telephone conversation with Martin about representing Wade, in the course of which Martin agreed to represent Wade. Martin Depo. at 31:23-32:19; Deposition Exhibit 59, attached as part of Exhibit F to the Baker Decl. Shortly thereafter, the Conflict Panel confirmed the referral to Martin via email and attached copies of the crimetime report and complaint. Deposition Exhibit 59; Martin Depo. at 32:21-33:5.

Martin commenced working on Wade's case that same day by reviewing the complaint and other materials and doing some legal research re Juvenile Court. Martin Depo. at 37:16-25; Wade Timesheets at 1, Exhibit R to the Baker Decl. The following day, November 19, Martin interviewed Wade at Contra Costa County's Juvenile Hall and conducted further research into the Juvenile Court issue. Martin Depo. at 37:16-38:12; Wade Timesheets at 1; Wade Interrogatory Responses, Responses to Special Interrogatory No. 25, Exhibit P to the Baker Decl. During Martin's interview of Wade, they discussed whether Wade was *Mirandized* prior to confessing. Martin Depo. at 38:13-39:4; Wade Interrogatory Responses, Response to Special Interrogatory No. 13. At the time, Martin was unaware that Wade's interview by the Antioch police was recorded. Martin Depo. at 40:15-22, 49:14-50:8.

Martin appeared to represent Wade at the November 21 Counsel & Plea hearing. November 21, 2011 Clerk's Docket and Minutes, Exhibit S to the Baker Decl. The Court appointed Martin to represent Wade. TAC, ¶41. Wade was not arraigned on that date and Martin waived time with respect to the preliminary hearing.[7] Martin Depo. at 39:24-40:6.

On November 28, Martin contacted Ringgenberg for the first time with respect to

[7] Martin testified that he likely agreed to continue arraignment and waive time as part of an agreement with counsel representing Wade's four co-defendants. Martin Depo. at 39:24-40:6. Wade's preliminary hearing took place over several days in June 2012. Wade Depo. at 27:12-17; *see also* Wade Timesheets at 4-5, Exhibit R to the Baker Decl.

working on Wade's case. Plaintiffs' Response to Request for Admission No. 11, Defendant's Request for Admission for Jerome Wade, Set Two ("Wade Responses to RFA's"), Exhibit T to the Baker Decl. The following day, Martin obtained authorization to use Ringgenberg as an investigator in the Wade case. Martin Depo. at 42:9-23. Ringgenberg's principal task was to investigate whether Wade had been properly *Mirandized*. *Id.* at 43:1-4. On November 30, Martin requested that Ringgenberg interview Wade's principal, who witnessed the Antioch police questioning Wade, prior to December 12, 2011, which was the date of the next hearing. *Id.* at 44:7-20 (referencing Deposition Exhibit 64, a November 30, 2017 email from Martin to Ringgenberg).

Ringgenberg interviewed the principal on December 6 and sent Martin a summary of the interview. Martin Depo. at 45:6-14. In his December 7th email, Ringgenberg reported that the principal "remembered it well" and provided Martin with many details from the principal about the interview. December 7, 2011 Ringgenberg email, Deposition Exhibit 65, attached as part of Exhibit F to the Baker Decl. However, she could not recall when the Miranda warning was read, only that it was read. *Id.* Ringgenberg's summary does not mention anything about whether Wade wore a particular sweatshirt during the questioning. *Id.* Ringgenberg does not recall being asked to look into what Wade was wearing at the time. Ringgenberg Depo. at 22:10-13.

On the morning of December 8, Martin emailed Ringgenberg requesting that he do a follow-up interview of the principal to "pin her down on the Miranda issue in terms of, did it happen immediately, or was it after D confessed?" Deposition Exhibit 46 at 2, which is attached as part of Exhibit J to the Baker Decl. Martin's email does not mention any need to investigate what Wade was wearing at the time. *Id.* In response, Ringgenberg agreed to make a further effort to interview the principal but he never did. *Id.* at 1; Wade Responses to RFA's, Response to RFA No. 12, Exhibit T to the Baker Decl.

At some point in this time period, Martin learned that the Antioch police had recorded their interview of Wade. Martin Depo. at 50:12-20. At his deposition, Martin acknowledged that it was a "reasonable inference" to conclude the second interview did not occur as a result

of Martin becoming aware of the existence of the recording of the interview and this aborted second interview of the principal might have resulted in obtaining more information from the principal. *Id.* at 50:17-51:6, 74:4-10.

Martin raised the *Miranda* issue and other issues during Wade's preliminary hearing. Martin Depo. at 72:22-25. Martin based the motions on the recording of the interview. *Id.* at 73:22-74:3. Judge Cheryl Mills denied those motions. *Id.* at 73:1-20.

Subsequently, Martin raised the *Miranda* issue and other issues via 995 motions. *Id.* at 58:1-4. Martin withdrew those motions in response to threats by the District Attorney's Office. *Id.* at 58:5-8.

On December 6, 2012, Wade pled guilty to three counts. Wade Depo. at 24:21-25:17. Wade has acknowledged that he committed those crimes. *Id.* at 29:12-14. As part of his guilty plea, Wade waived his appellate rights. Martin Depo. at 57:15-17; *see also id.* at 15:7-9. Following his sentencing, Wade received credit for time served. Wade Depo. at 71:24-72:6.

C. History of Public Defender Staffing at the Initial Appearance

Lipetzky was appointed Public Defender in January 2010. Lipetzky Decl., ¶2. At that time, the Public Defender was under severe budget constraints and a hiring freeze. *Id.* As a consequence of these issues, the Public Defender had to reject cases due to ethical issues relating to excessive case loads and could not staff the initial appearances. *Id.*

At the time of Plaintiffs' initial appearances, the Court would refer criminal defendants who requested appointment of counsel to the Public Defender's Office and set the matter over to a subsequent Counsel & Plea date. *Id.* at ¶3. The Court determined the amount of time between the initial appearance and the Counsel & Plea date. *Id.* Lipetzky understood that the Court at that time had regular Counsel & Plea calendars, generally once or twice per week, and that the arraignment would generally be scheduled for the next Counsel & Plea calendar. *Id.*; Lipetzky Depo. at 44:5-45:13.

During this time period, the Public Defender generally commenced the process of determining whether her office could represent the criminal defendant within a day or two of receiving the "referrals" from the Court. Lipetzky Decl., ¶4. A paralegal would interview the

defendant to determine eligibility and obtain other case information, including identification of any urgent issues. *Id.*

After determination of financial eligibility, the Public Defender would evaluate whether her office, including the ADO, could ethically represent the defendant. *Id.*, ¶5. The evaluation included 1) a check to prevent conflicts of interests due to representation of one or more co-defendants and witnesses, and 2) an evaluation of her attorneys' existing case loads to ensure that they did not become excessive. *Id.* The conflicts check was performed sequentially by the main office and then the ADO. The excessive case load evaluation was often performed by the Public Defender herself and would be based on the then-current case load information, the nature of the criminal defendant's case as well as the cases also set for that Counsel & Plea calendar. *Id.*, ¶8.

Cases that the Public Defender could not accept due to one or more ethical bars would be referred to the Conflict Panel. *Id.*, ¶7. The referral would include a copy of the complaint. *Id.* The referral would be made in sufficient time for the Conflict Panel to notify possible counsel and obtain representation for the defendant in advance of the scheduled Counsel & Plea date. *Id.* The Public Defender never received any complaints respecting an untimely referral. *Id.*

From the commencement of her tenure and even before, Lipetzky was dissatisfied with this process and worked to increase staffing levels so as to enable her office to staff the initial appearance of both misdemeanor and felony defendants. *Id.*, ¶10; *see also* September 2010 County Clips, attached as Ex. F to the Lipetzky Decl. At some point in time in 2012, prior to Farrow submitting his government claims, Lipetzky implemented a pilot project in one of the branch courts, developed the Arraignment Court Early Representation ("ACER") program, and began the process to obtain the necessary funding for that program. *Id.*, ¶¶11-12. Lipetzky's decision to develop and implement the ACER program was unrelated to this litigation or any other litigation. *Id.*, ¶18.

On June 7, Lipetzky made a formal presentation respecting the ACER program to the Community Corrections Partnership ("CCP"), the entity responsible for allocating AB 109

funds in Contra Costa County. *Id.,* ¶12; Office of the Public Defender, Proposed Realignment Funding for FY 2012-2013 submitted to Community Corrections Partnership (June 7, 2012) at 1-3, Exhibit G to the Lipetzky Decl. The CCP thereafter discussed the ACER program in its monthly meetings. *Id.*, ¶13. On September 6, 2012, Lipetzky made a formal funding proposal for this program to the CCP. *Id.* and Exhibit I thereto. In November 2012, the CCP adopted an Operations Plan that included "[p]rovid[ing] for early representation of arrestees at the first Court appearance." *Id.* and Exhibit J thereto at 3 (November 9, 2012 Operations Plan, CCPD0397-405m at CCPD0399). A month later, on December 7, 2012, the CCP adopted a proposed budget that funded ACER positions for the Public Defender and District Attorney. *Id.* and Exhibit K thereto at 2 (January 15, 2013 CCP Memorandum).

Subsequently, on January 15, 2013, the Contra Costa County Board of Supervisors approved the CCP proposed budget and operational plan. *Id.*, ¶14 and Exhibit L thereto. In addition to approving the ACER funding, the Board specifically authorized a Position Adjustment Request to create three new positions in the Public Defender's Office for the ACER program. *Id.*, ¶14 and Exhibit M thereto. Since 2013, the Board has annually authorized funding for the ACER program and there is no expectation that it will not continue to do so. *Id.*, ¶17.

Since January 9, 2013, the Public Defender has staffed the initial appearance of all in-custody defendants.[8] *Id.*, ¶15. An attorney and a legal assistant from the Public Defender's office are present in the courtroom for this initial appearance. *Id.* After the legal assistant ascertains whether a particular defendant wants representation by the Public Defender and is financially eligible for representation, an attorney from that office interviews the defendant immediately prior to the appearance to obtain arraignment, bail eligibility and other relevant information. *Id.* After the in-court interview, the attorney from the Public Defender's Office represents the defendant at the arraignment. *Id.*

[8] There have been instances where Lipetzky knew that the Public Defender's Office would not be able to accept any new cases due to excessive case loads. Lipetzky Decl., ¶16. In those instances, rather than have her staff cover the initial appearance, Lipetzky contacted the Conflict Panel in advance of the initial appearance date and arranged for it to staff the initial appearance calendar. *Id.*

Lipetzky has committed to continue staffing the initial appearances of in-custody criminal defendants even if the Board of Supervisors were, contrary to her expectations, to cut off funding for the ACER program. *Id.*, ¶17.

D. Procedural Background

Plaintiffs initially filed this action on December 21, 2012. ECF No. 1. After this Court ruled on two motions to dismiss, *see* ECF Nos. 47 and 69, the Court dismissed the action and entered judgment for then-defendant Lipetzky. ECF No. 75.

Plaintiffs appealed to the Ninth Circuit. The Ninth Circuit affirmed this Court's rulings except with respect to the Sixth Amendment claim. *Farrow v. Lipetzky,* 637 F. App'x 986, 988-89 (9th Cir. 2016). As to the Sixth Amendment claim, the Ninth Circuit concurred with this Court's determination that the initial appearance was not a "critical stage" but held that this Court applied the incorrect standard for determining whether appointment of counsel took place in compliance with *Rothgery v. Gillespie County,* 554 U.S. 191 (2008). *Id.* at 988. In its decision, the Ninth Circuit indicated that this Court should consider whether the delay posed a grave potential for prejudice to Plaintiffs' ability to defend their cases as well as any actual prejudice. *Id.* (citing *United States v. Wade,* 388 U.S. 218 (1967) and *Hamilton v. Alabama,* 368 U.S. 52 (1961)).

Following the Ninth Circuit's remand, Plaintiffs filed a Third Amended Complaint. ECF No. 91. The County filed a further motion to dismiss, which the Court granted in part and denied in part. *See* April 28, 2017 Order re Motion to Dismiss Third Amended Complaint ("April 28, 2017 Order"), ECF No. 107. In the part of its Order addressing the *Heck* bar, the Court held "[e]ach of those types of claims – ineffective assistance demonstrated to be prejudicial under *Strickland* [and] structurally ineffective assistance under *Cronic* . . . would likely be barred by *Heck*." *Id.* at 18. The Court distinguished claims "where a Sixth Amendment violation only affected the procurement of evidence." *Id.* at 19. The Court then held that *Heck* barred Plaintiffs' Sixth Amendment claim to the extent that it was based on the initial appearance being a "critical stage." *Id.* at 23.

Following the Court's Order, there are only two claims remaining in this litigation: 1) a

section 1983 claim that the County[9] violated Plaintiffs' Sixth Amendment rights when they were not represented at their initial appearance, as limited by the Court; and 2) the claim that because the Public Defender's Office did not staff Plaintiffs' initial appearances, the County violated Government Code section 22706. *See* ECF No. 107. The County now moves for summary judgment on these two remaining claims.

IV. LEGAL ARGUMENT

A. Legal Standard

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex*, 477 U.S at 322. The movant's uncontradicted factual allegations are ordinarily accepted. *John v. City of El Monte,* 515 F.3d 936, 941 (9th Cir. 2008). A "genuine" issue of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A fact is "material" if it is relevant to an element of a claim or a defense, the existence of which may affect the outcome of the suit. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987). Uncorroborated allegations and "self-serving testimony" will not create a genuine issue of material fact. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). The non-moving party must set forth "significant probative evidence tending to support the complaint." *T.W. Elec.*, 809 F.2d at 630-31.

Where the moving party does not bear the burden of proof on an issue at trial, the moving party may discharge its burden of showing that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving

[9] Pursuant to stipulation and order, the County was substituted as defendant for Lipetzky, who was sued solely in her official capacity. ECF No. 116.

party's case." *Celotex*, 477 U.S. at 325. The moving party is not required to produce evidence showing the absence of a material fact on such issues, nor must the moving party support its motion with evidence negating the non-moving party's claim. *Id.*; *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991). The burden then shifts to the opposing party to produce "specific evidence, through affidavits or admissible discovery material, to show that the dispute exists." *Bhan*, 929 F.2d at 1409. This requires more than the "mere existence of a scintilla of evidence in support of the plaintiff's position;" there must be "evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. "The more implausible the claim or defense asserted by the non-moving party, the more persuasive its evidence must be to avoid summary judgment." *Id.* A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 323.

While all inferences must be resolved in favor of the non-moving party, inferences cannot be drawn from broad generalities. *Goodworth Holdings, Inc. v. Suh*, 239 F. Supp. 2d 947, 955 (N.D. Cal. 2002). An inference may be drawn in favor of the nonmoving party, but "only if it is 'rational' or 'reasonable,'" i.e. if the inference is "reasonable in view of the other undisputed background or contextual facts." *T.W. Elec.*, 809 F.2d at 631. Inferences "are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn." *Grant v. Palomares*, 2014 U.S. Dist. LEXIS 16748, *25-26 (E.D. Cal. Feb. 5, 2014).

Finally, partial summary judgment may also be granted as to the individual claims and defenses or a "part of each claim or defense." Fed. R. Civ. P. 56(a). The Court may also adjudicate individual facts not genuinely in dispute. Fed. R. Civ. P. 56(g) ("If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact . . . that is not genuinely in dispute and treating the fact as established in the case."). *Id.*

B. The Court Should Grant Summary Judgment on the Sixth Amendment Claim in Favor of the County

Because the County is the defendant in this action, Plaintiffs must satisfy the four

element *Monell* test, namely: 1) a violation of their Sixth Amendment right to counsel; 2) the County had a policy or custom; 3) the County policy or custom amounted to deliberate indifference to Plaintiffs' Sixth Amendment rights; and 4) the County's policy or custom was the moving force behind the constitutional violation. *Plumeau v. Sch. Dist. No. 40 Cnty. of Yamhill,* 130 F.3d 432, 438 (9th Cir. 1997); Order Granting Defendant's Motion to Dismiss the Second Amended Complaint, ECF No. 69, at 14. As discussed below, Plaintiffs cannot prove the first, third and fourth elements.[10]

1. There Was No Violation of Either Plaintiff's Sixth Amendment Right to Counsel

Plaintiffs cannot establish that the absence of counsel at their initial appearances resulted in a violation of their Sixth Amendment right to counsel where, as here, the undisputed material facts establish that Plaintiffs were provided with the assistance of counsel within a reasonable time after attachment (their initial appearances). Consequently, Plaintiffs cannot meet either prong of the Ninth Circuit's proposed test; not only did they not suffer any actual prejudice from the absence of counsel, the absence of counsel did not pose a grave potential for prejudice.

a. The Applicable Legal Standard

In this case, the Court must determine whether Plaintiffs received assistance of counsel "within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Rothgery,* 554 U.S. at 212; *see also Farrow v. Lipetzky,* 637 F. App'x 986, 988 (9th Cir. 2016) (quoting *Rothgery*). Under both *Rothgery* and the Ninth Circuit's decision, this "reasonableness" determination focuses on the consequences, if any, of the delay on the criminal defendant's ability to defend the charges against her/him. *Rothgery*, 554 U.S. at 212-3 ("the accused at least is entitled to the presence of appointed counsel during 'any critical stage' of the postattachment proceedings"). The Ninth Circuit indicated that this Court should consider both whether the delay caused actual prejudice to that

[10] With respect to the second element, the County concedes for the purposes of this motion that it had a policy or custom. However, it is not a written policy of withholding representation as alleged in the TAC. *See* Lipetzky Decl., ¶19.

ability as well as whether the delay posed a grave potential for prejudice to that ability. *Farrow,* 637 F. App'x at 988 (citing *Wade,* 388 U.S. 218 and *Hamilton,* 368 U.S. 52). The undisputed facts preclude Plaintiffs from establishing any actual prejudice or any grave potential for prejudice.

In determining prejudice, the Court starts with the purpose of the Sixth Amendment. As the Supreme Court has made clear in numerous decisions, the Sixth Amendment right to counsel "exists, and is needed, in order to protect the fundamental right to a fair trial." *United Strickland v. Washington,* 466 U.S. 668, 684 (1984); *United States v. Cronic,* 466 U.S. 648, 656 (1984). Consequently, it does not protect against prejudices unrelated to, or unnecessary for, that purpose. *United States v. Gonzalez-Lopez,* 548 U.S. 140, 147 (2006) (right to effective representation serves purpose of ensuring a fair trial and is limited by that same purpose); *Rothgery,* 554 U.S. at 216-17 (concurring opinion of Alito, J.; citing *United States v. Gouveia,* 467 U.S. 180, 190 (1984) and *United States v. Ash,* 413 U.S. 300, 309 (1973)). For example, in *Gerstein v. Pugh,* 420 U.S. 103 (1975), the Supreme Court declined to require counsel at the probable cause determination where the criminal defendant's liberty interests are at issue. *Id.* at 122.

As the Court is aware, the County believes the Court should use an analytical framework based on *Strickland,* 466 U.S. 668, and *Cronic,* 466 U.S. 648. In its April 28, 2017 Order, the Court held that the "Ninth Circuit's determination that prejudice is *not* required in this case, which is based on delayed appointment, is not consistent with the prejudice requirements that the Supreme Court set forth in *Strickland* and *Cronic."* ECF No. 107 at 24-25. Since then, the Court has indicated it may be reconsidering this issue. *See* July 14, 2017 Transcript, ECF No. 117, at 23:16-24:3 (statement of Court).

The County respectfully urges the Court to revisit this issue. As the Court noted elsewhere in its April 28, 2017 Order, the Ninth Circuit held that it was error for this Court to require Plaintiffs to allege "actual prejudice." ECF No. 107 at 25:4-5 (quoting *Farrow,* 637 F. App'x at 988). "Actual prejudice" is required under *Strickland* but not under the presumed prejudice discussed in *Cronic* and its progeny. *Cronic,* 466 U.S. at 659; *see also Gallegos v.*

Ryan, 820 F.3d 1013, 1034 (9th Cir. 2016) (quoting *Florida v. Nixon,* 543 U.S. 175, 190, 125 S. Ct. 551 (2004), quoting *Cronic,* 466 U.S. at 658); *Workman v. Blades,* 2016 U.S. App. LEXIS 5428, *2 (9th Cir. March 23, 2016) ("In *Cronic*, the Supreme Court fashioned an exception to the prejudice requirement in *Strickland*"). Citing *Hamilton,* the *Cronic* Court held that the "constitutional error [has uniformly been found] without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id.* at 659 n.25. Further to the point, Justice Alito cited *Wade* in his *Rothgery* concurrence as an example of a Sixth Amendment critical stage. 554 U.S. at 217. The Ninth Circuit recently held likewise. *Sanders v. Cullen*, 2017 U.S. App. LEXIS 20080, *65 (9th Cir. October 13, 2017). Accordingly, the Ninth Circuit's decision is consistent with *Cronic* and *Strickland.*

The County's position is supported by the testimony of Plaintiffs' expert, Professor Robert Boruchowitz. During his deposition, Professor Boruchowitz testified as follows:

> Q: ... And I'm wondering where in [the Cronic-Strickland] continuum does this - - the present case we're looking at, the case whether there was denial of the right to counsel in Contra Costa County, [fall?]
> A: Well, I think the question is, was it reasonable to wait five to thirteen days to appoint counsel. I think that's the question. And certainly during the period of no counsel, it's a Cronic problem.
> Q: And after counsel is appointed, it's a Strickland problem?
> A: Well, it depends on whether counsel is doing anything. Simply having counsel doesn't get past Cronic.
> Q: Okay. Did you - - a part of your responsibility in this case, were you asked to express an opinion as to whether Mr. Martin performed adequately under the Strickland test?
> A: No.
> Q: . . . After Mr. Martin was appointed, did you do any analysis to see whether there was any constructive denial of counsel?
> A: No.
> Q: So you're solely looking at sort of under Cronic, whether there was a denial of counsel in that period before Mr. Martin became involved[?]
> A. Yes.

Deposition of R. Boruchowitz at 14:22-15:23, Exhibit U to the Baker Decl.; *see also The Right to Counsel in Utah: An Assessment of Trial-Level Indigent Defense Services* (2015) ("*Utah* Report")[11] at 8-14, Exhibit V to the Baker Decl. (using the *Cronic/Strickland* continuum to

[11] Professor Boruchowitz had a substantial role in the preparation of the *Utah* Report. Boruchowitz Depo. at 12:23-13:17 (testimony regarding Professor Boruchowitz's role in preparing the *Utah* Report).

evaluate Utah's compliance with the Sixth Amendment's right to counsel).

Because Plaintiffs must rely on the *Cronic* test to establish a grave potential for prejudice, for the reasons discussed in this Court's April 28, 2107 Order, *Heck* bars Plaintiffs from making this contention.[12] ECF No. 107 at 17-18. Consequently, Plaintiffs are limited to an actual prejudice to their individual cases, which they cannot establish.

Regardless of the Court's resolution of this foundational issue, the undisputed evidence establishes that the absence of counsel at Plaintiffs' initial appearances did not cause actual prejudice or pose any grave potential for prejudice. Notably, to establish a grave potential for prejudice, Plaintiffs must present facts showing that "[a]vailable defenses may be irretrievably lost, if not then and there asserted," *Hamilton,* 368 U.S. at 54, or a pretrial confrontation "which might determine the accused's fate," *Wade*, 388 U.S. at 235. Before proceeding to this analysis, the County outlines California's general criminal process because it is the necessary background on which to commence the prejudice analysis.

b. California's Criminal Process

Under California law, specifically Penal Code section 859, an individual charged by a written complaint must be brought before a magistrate "without unnecessary delay." Penal Code § 859. At this initial appearance, the magistrate informs the individual of the charges and of his/her right to counsel. *Id.* "If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him or her." *Id.*; *see also* Penal Code § 987.

The next stage in the process is arraignment, which includes the Court "asking the defendant whether the defendant pleads guilty or not guilty to the accusatory pleading." Penal Code § 988. Arraignment, by itself or together with the entry of the plea, triggers statutory deadlines respecting the preliminary hearing and trial. Under Penal Code section 859b, the defendant is entitled to a preliminary hearing "within 10 court days of the date the defendant is arraigned or plead, whichever occurs later." Penal Code § 859b. Other California statutes require that the defendant be brought to trial within so many days depending on whether he or

[12] In that Order, the Court indicated that *Heck* did not bar claims where "a Sixth Amendment violation only affected the procurement of evidence." ECF No. 107 at 19. In making this ruling, the Court relied on *Wade* where counsel was absent at a post-indictment lineup. *Id.*

she is charged with felonies or misdemeanors. Penal Code §§ 1049.5, 1050, 1382.

c. Plaintiffs' Claims and The Facts of Their Individual Proceedings

The TAC's prejudice allegations focus on the effect (actual or potential) that delay allegedly had on their ability to obtain evidence from witnesses. *See* TAC, ¶¶31, 42-43. In particular, Farrow alleges that the delay impeded his ability to locate and interview some witnesses. *Id.,* ¶31. Wade alleges that the delay impeded his ability to obtain corroborating testimony from a witness (his principal) due to an alleged memory loss. *Id.*, ¶42-43. Plaintiffs do not allege that the delay impaired the ability of their appointed counsel to adequately represent them at their arraignments, their preliminary hearings or during plea bargaining. Likewise, the current allegations do not assert that the delay precluded their counsel from invoking legal rights otherwise accorded under federal or California law.[13] As discussed below, the undisputed facts demonstrate that the delay caused no prejudice with respect to these witnesses and posed no grave potential for such prejudice.

i. Farrow

Farrow's case was a garden-variety domestic violence case and presented no unusual issues warranting immediate appointment of counsel. Farrow contends that the delay in appointment of counsel impaired his ability to locate witnesses who might have been able to establish that the complaining witness "lied to the police and lied under oath at the preliminary hearing." TAC, ¶31. The material undisputed facts demonstrate the contrary.

First, it is undisputed that Farrow was interviewed by the Public Defender's Office on September 6, 2011, the following court day after his initial appearance, and disclosed no urgent issues -- only a desire to obtain a copy of the police report. Applicant Interview Packet at 3, Exhibit B to the Lipetzky Decl.; *see also* Plaintiff's Response to Request for Admissions to Plaintiff John Farrow, Set Two ("Farrow Responses to Second Set of RFA's"), Response to Request for Admission No. 7, Exhibit C to the Baker Decl. This interview provided an opportunity for Farrow to disclose, and the Public Defender to learn of, any urgent issues.

[13] To be sure, Plaintiffs have in the past made such allegations. However, this Court has held that the delay did not preclude the assertion of any such rights. ECF No. 47 at 17, 21-22; ECF No. 69 at 25.

Lipetzky Decl., ¶4. In Farrow's case, there were none.

Second, although Martin was notified about representing Farrow at 1:57 p.m. on September 14, and had a copy of the criminal complaint, he "didn't do anything" on Farrow's case until he met with Farrow shortly before the second hearing. Martin Depo. at 11:25-12:7; Farrow Responses to Second Set of RFA's, Response to Request No. 9; *see also* Farrow Timesheets, Exhibit H to the Baker Decl. (no entry for September 14, 2011). Martin's actions confirm that he saw no need for urgent action at the time.[14]

Third, the importance of the witnesses' testimony, if any, did not become evident until the preliminary hearing on September 27, after Martin's appointment, and even then, Martin did not start the investigation until November 7, and gave up that investigation after only one attempt to locate those witnesses as a result of Farrow entering a guilty plea on November 16. Martin Depo. at 19:24-20:11; Farrow Responses to Second Set of RFA's, Response to Request Nos. 11 and 21.

Simply put, under these facts, the delay neither caused Farrow any actual prejudice nor any grave potential for prejudice.

ii. Wade

The facts of Wade's criminal proceedings similarly demonstrate that there was no violation of his Sixth Amendment right to counsel. The TAC alleges the delay in appointment potentially led to a possible diminution of his principal's ability to recall when Wade was *Mirandized* by the Antioch police in her office and what Wade was wearing at the time. TAC, ¶¶42-43. However, the undisputed evidence establishes the delay had no actual impact on, and posed no grave potential to impact, Wade's criminal proceedings.

Wade was arrested on November 8 and had his initial appearance on November 14. At that initial appearance, the Court scheduled his Counsel & Plea date for November 21, a mere seven days later. Because Wade had four co-defendants, some of which also sought

[14] Martin's conduct speaks not just to the complexity of Farrow's case but also to the fact that an attorney can conduct an arraignment without any preparation other than a brief in-court meeting with the criminal defendant. To be sure, that is exactly how the Public Defender handles arraignments today. Lipetzky Decl., ¶15; *see also* Boruchowitz Depo. at 28:7-16 ("If you get appointed right there in the courtoom, you try to take as much time as the judge will give you.").

representation from the Public Defender's Office, that office promptly engaged in a conflicts check and, by November 18, determined that neither the main office nor the ADO could represent Wade and referred the matter to the Conflict Panel. Lipetzky Decl., ¶9. The Conflict Panel contacted Martin at 10:22 a.m. on November 18. Martin Depo. at 31:23-32:19 and Deposition Exhibit 59. Martin agreed to represent Wade and started working on Wade's case that day. Martin Depo. at 37:16-25; Wade Timesheets, Exhibit R to the Baker Decl. at 1. The following day, November 19, Martin interviewed Wade in Juvenile Hall and learned about the potential *Miranda* issue. Martin Depo. at 38:13-39:4; see also Wade Timesheets at 1; Wade Interrogatory Responses, Responses to Special Interrogatory Nos. 13 and 25.[15] Thus, by the time Wade made his second court appearance on November 21, his attorney (Martin) had met with him and identified the potential *Miranda* issue.

However, although Martin knew about the *Miranda* issue on November 19, he did not contact Ringgenberg until November 28 and only gave Ringgenberg a hard deadline of December 12, when there was another court hearing. Wade Responses to RFA's, Response to Request No. 11; Martin Depo. at 44:7-20 (referencing Martin Exhibit 64, a November 30, 2017 email from Martin to Ringgenberg). If Martin were concerned about a potential diminution of the principal's memory due to the delay in interviewing her, he would have acted more promptly and would have given Ringgenberg an earlier deadline to interview the principal, i.e. immediately. He did not and, thus, it was not until December 6, roughly one month after the date of the Antioch police's questioning of Wade, that Ringgenberg interviewed the principal. Martin Depo. at 45:6-14. Notably, even with that delay, the principal remembered the incident "well" but could not recall precisely when Wade was *Mirandized.* Deposition Exhibit 65 at 1, Exhibit F to the Baker Decl. It is rank speculation to assert that the principal's inability to recall this one detail resulted from the short delay

[15] There is an internal inconsistency in Wade's interrogatory responses. The response to Interrogatory No. 13 identifies the interview as taking place on November 19. The response to Interrogatory No. 25 states the interview took place on November 20. The County uses the November 19 date, which is also consistent with Martin's time sheet entries and because Wade has admitted the meeting took place on that date in his Response to RFA No. 6. *See* Wade Time Sheets at 1; Wade Responses to RFA's, Response to Request No. 6, Exhibit T to the Baker Decl.

between November 14 and November 19 as opposed to the much longer delay imposed by Martin between November 19 and December 6.

In addition to this point, Wade cannot claim that the principal's testimony was material on the *Miranda* issue, which turned on whether Wade was *Mirandized* before his confession, because there was an audio-recording of the Antioch police interview of Wade. Once Martin learned about the audio-recording, he discontinued Ringgenberg's effort to interview the principal a second time. Martin Depo. at 50:12-51:6, 74:4-10. In fact, Martin relied on the audio-recording to raise the *Miranda* issue via motion, which the state court denied. *Id.* at 73:12-74:3.

Finally, Wade cannot base his claim on the alleged sweatshirt issue. *See* TAC, ¶43. In addition to the points made above, it is unclear when Martin became aware of this issue. Further, it appears that Ringgenberg never questioned the principal about this issue. He does not recall being asked to investigate this issue and his December 7 email summarizing the principal's interview makes no mention of what Wade was wearing at the time. Ringgenberg Depo. at 22:10-13; Deposition Exhibit 46 at 2-4, attached as part of Exhibit J to the Baker Decl. Further to the point, Martin's December 8 emails relating to the follow-up interview make no mention of, and do not complain about, the absence of any information respecting what Wade was wearing at the time of his questioning. *See* Deposition Exhibit 46 at 2.

These undisputed facts establish that the short, four-day delay between Wade's initial appearance on November 14 and Martin's agreement to represent Wade on November 18, had no impact on Martin's ability to represent Wade adequately.

2. There Was No Deliberate Indifference to Plaintiffs' Sixth Amendment Rights

In this case, there is no written policy that mandated withholding of representation at the initial appearances. Lipetzky Decl., ¶19. Rather it was the inability of the Public Defender (due to budgetary issues and a hiring freeze) to provide attorneys at those initial appearances. *Id.,* ¶2. For the reasons discussed above, the Sixth Amendment does not require the Public Defender to staff those initial appearances. Further to the point, the policies and procedures

adopted by the Public Defender are constitutional on their face. Accordingly, Plaintiffs allege the County policy at issue "amounted to a failure to protect constitutional rights as described in *Oviatt by and through Waugh v. Pearce,* 954 F.2d 1470 (9th Cir. 1992)." TAC, ¶9 at 4; Order Granting Defendant's Motion to Dismiss the Second Amended Complaint, ECF No. 69, at 14. This form of claim requires that Plaintiffs establish that the County was deliberately indifferent to the risk of harm to Plaintiffs' Sixth Amendment rights. They cannot do so.

In *Oviatt v. Pearce,* 954 F.2d 1470 (9th Cir. 1992), a jail detainee was not arraigned until 114 days had elapsed. *Id.* at 1473. The jail lacked procedures for keeping track of whether detainees received an arraignment or attended other scheduled court appearances. *Id.* The Ninth Circuit noted that the county involved in that case could only be held liable "for failing to act to preserve a constitutional right," where the plaintiff demonstrated "deliberate indifference to his constitutional rights." *Id.* at 1477. The deliberate indifference standard is met "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 v. Harris,* 489 U.S. 378, 390 (1989)). The Ninth Circuit concluded that this standard was met where the Sheriff "knew of at least 19 incidents between 1981 and 1989 in which individuals sat in jail for period of undetermined length after they missed arraignment" and failed to take corrective action. *Id.* at 1478.

Notably, because this case is factually distinct from *Oviatt*, Plaintiffs cannot show that the County was on actual or constructive notice that its omission would likely result in a constitutional violation. *Gibson v. County of Washoe,* 290 F.3d 1175, 1186 (9th Cir. 2002). As a starting point, California criminal procedure is such that it is extremely unlikely that the absence of counsel at the initial appearance will have any impact, or could have any impact, on the subsequent proceedings. *See infra* at 21. Additionally, unlike in *Oviatt,* Plaintiffs cannot point to any known prior instances where a Sixth Amendment violation occurred as a result of the Public Defender's policies and practices. Indeed, in Farrow's own criminal proceeding, the state court expressly held that there was no such violation, referring to her earlier decision,

which was affirmed by a state court of appeal. September 15, 2011 Transcript at 3:14-4:8, Exhibit I to the Baker Decl. Further, these polices and practices were not the subject of prior litigation against the Public Defender and she did not receive any complaints from the Conflict Panel or any assigned attorneys respecting untimely referrals. Lipetzky Decl., ¶¶7, 18.

The County's continuation of the then-current policies and procedures until it could provide additional funding under AB 109 did not manifest any "deliberate indifference" to the risk of harm to Plaintiffs' Sixth Amendment rights.

3. The County did not Cause any Violation of Plaintiffs' Sixth Amendment Rights

Additionally, it cannot be said that the County caused any Sixth Amendment violations. First, the length of the delay was determined solely by the state court. Lipetzky Decl., ¶3. Second, it is not foreseeable that the Public Defender's then-existing practices and procedures could result in any loss of evidence. Those practices included an interview of referred individuals designed to identify urgent issues and prompt referrals to the Conflict Panel when the Public Defender was unable to represent the referred individuals. Additionally, generally speaking, a week or even two weeks is not likely to result in destruction of critical evidence.

C. Farrow is Collaterally Estopped from Asserting A Violation of the Sixth Amendment

As recounted above, Farrow challenged the "bifurcated arraignment" as violative of his Sixth Amendment rights in state court. The state court denied this challenge, holding that Farrow's rights were not violated. Because Farrow waived his appellate rights, Judge Maier's holding is collateral estoppel and bars Farrow's Sixth Amendment claim here.

At the September 15, 2011 hearing in his criminal case, Martin on behalf of Farrow formally objected to the "bifurcated arraignment" process and having appeared at his September 2, 2011 hearing without counsel.

> I would like to object to the fact that Mr. Farrow has been in custody now 13 days without a lawyer. It's my understanding that he went through the bifurcated arraignment process and at his initial appearance he did not have a lawyer.
>
> I would direct the Court to People v. Cox, 1987, 193 Cal.App.3d 1434, where the Court states, "Although arraignment is a critical stage of the proceeding entitling the defendant to an attorney, the absence of an attorney is not such a

grievous error that it compels a reversal without a showing of prejudice."

So it clearly is an error, and the issue of prejudice in this case is that he has been denied his speedy trial rights. And in that regard, if there's any question in the Court's mind, I would ask for an evidentiary hearing.

September 15, 2011 Hearing Transcript at 3:14-4:1, Exhibit I to the Baker Decl.; *see also* Farrow Interrogatory Responses, Response to Special Interrogatory No. 18 (Martin moved to have Farrow's case dismissed based upon denial of counsel and his speedy trial rights). The Contra Costa Superior Court (Judge Maier) overruled Martin's objection on the grounds that "based on my prior ruling, my prior research in this matter, I do not find that your client's rights have been violated in any fashion. . . ." September 15, 2011 Transcript at 4:5-7.

All the elements of collateral estoppel are met here: 1) Judge Maier's holding is a final ruling on this issue; 2) Farrow was a party to the prior criminal case; and 3) the issues are the same. *See Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383 (9th Cir. 1978) (setting forth three part test). On the last point, Farrow relied on *People v. Cox*, a Sixth Amendment case, in both his criminal case and here.

Farrow cannot escape collateral estoppel by contending that the initial ruling occurred in criminal court or that the County was not a party to that action. *Hinkle Northwest, Inc. v. Securities & Exchange Comm'n,* 641 F.2d 1304, 1308-09 (9th Cir. 1981). As the Ninth Circuit stated succinctly in *Hinkle Northwest,* "we are not troubled that petitioners wish to import the finding of a criminal case into civil litigation [citation omitted] . . . or that the petitioners, who seek to use estoppel, were not parties to the previous litigation." *Id.*; *see also Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.,* 58 Cal. 2d 601, 603-04 (1962) (California decision applying collateral estoppel to finding in criminal proceeding in subsequent civil case).

D. The Court Should Dismiss Plaintiffs' State Law Claim Based on an Alleged Violation of Government Code Section 27706 due to Lack of Subject Matter Jurisdiction or Grant Summary Judgment as to that Claim

Because the Court should grant summary judgment as to Plaintiffs' Section 1983 claim for the reasons stated above, the Court should dismiss their state law claim based on Government Code section 27706 due to lack of subject matter jurisdiction. *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343, 350 n.7 (1988) ("in the usual case in which all federal-law

1 claims are eliminated before trial, the balance of factors to be considered under the pendent
2 jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward
3 declining to exercise jurisdiction over the remaining state-law claims."); *Sanford v.*
4 *MemberWorks, Inc.,* 625 F.3d 550, 561 (9th Cir. 2010) (same). Dismissal is particularly apt
5 where, as here, there is a dearth of state court decisions addressing the specific question at
6 issue here, whether the Public Defender must provide representation between the first and
7 second appearances under Government Code section 27706. *See Moor v. County of Alameda,*
8 411 U.S. 693, 714 (1973) (unsettled nature of state law is legitimate basis to decline exercise
9 of pendent jurisdiction over state law claim). If the Court elects to retain jurisdiction over this
10 state law claim, it should grant summary judgment on it for three reasons: 1) the Public
11 Defender never had a duty to represent either Farrow or Wade under section 27706 because
12 neither Plaintiff made a direct request for representation to that office and the court never
13 appointed that office to represent either defendant; 2) the Public Defender could not represent
14 either plaintiff in light of the ethical conflicts in doing so; and 3) the Public Defender took the
15 only actions she could, namely refer Plaintiffs' cases to the Conflict Panel.

16 Government Code section 27706 provides in relevant part: "Upon request of the
17 defendant or upon order of the court, [the Public Defender] shall defend, without expense to
18 the defendant . . . ." Government Code §27706(a). The California Supreme Court construes
19 the "upon request" language to mean that the defendant "appl[ied] directly to the public
20 defender." *Ingram v. Justice Court for Lake Valley Judicial Dist.,* 69 Cal. 2d 832, 837 (1968);
21 *In re Brindle,* 91 Cal. App. 3d 660, 678 (1979) (following *Ingram*); *see also Joshua P. v.*
22 *Superior Court*, 226 Cal. App. 4th 957, 962, 964 (2014) (prior to arraignment, minor made
23 oral request for representation to deputy public defender).

24 In this case, there was no direct request for representation made by either Farrow or
25 Wade to the Public Defender's Office, nor did the Court appoint the Public Defender to
26 represent either defendant. Lipetzky Decl., ¶¶8-9. Indeed, the TAC specifically alleges that
27 the Superior Court merely "referred the matter to the Public Defender" and that Martin was
28 subsequently appointed to represent them at the following hearing. TAC, ¶¶27, 29, 36, 41. In

the absence of a direct request for representation and appointment by the state court, the Public Defender never had a duty under section 27706 to represent Farrow or Wade at any point.

Additionally, the Public Defender could not represent either Plaintiff due to a conflict of interest. The state court cannot appoint the Public Defender to represent a defendant until that office conducts a conflicts check and ensures that representation was ethically permitted. *In Re Edward S.,* 173 Cal. App. 4th 387, 414 (2009) ("Under the Penal Code, a public defendant may not be assigned to represent an indigent defendant in a case in which he or she has a conflict of interest" (citing Cal. Penal Code §987.2(a)(3), (d), (e))). Likewise, if appointed, the Public Defender can decline appointment where s/he cannot ethically represent an otherwise eligible defendant. *Uhl v. Municipal Court,* 37 Cal. App. 3d 526, 535 (1974); *Joshua P., supra,* 226 Cal. App. 4th at 513-14 (under California law, specifically section 27706 and Penal Code section 987.2, a court must first utilize the services of the public defender if available to try the matter; a conflict of interest would make the Public Defender unavailable); *see also In Re Brindle, supra,* 91 Cal. App. 3d at 678-79 ("it is more appropriate for the statutory, professional and ethical responsibilities of the public defender" to be determined by the public defender than by law enforcement). Indeed, before accepting representation, the Public Defender, like every other attorney, is entitled to determine whether there is an ethical bar to representation prior to commencing to represent a client. *See* California State Bar Rule of Professional Code 3-310(a).

With respect to Farrow, Lipetzky properly concluded that her office could not ethically represent Farrow in light of the then-existing case loads of its attorneys. Lipetzky Decl., ¶8. This is a legitimate basis to refuse representation. *In re Edward S., supra,* 173 Cal. App. 4th at 414; *see also id.* at 414 n.11.

With respect to Wade, both the main office and the ADO determined that representation of Wade was barred because each office was representing a co-defendant. Lipetzky Decl., ¶9. This is also a legitimate basis to refuse representation. *Uhl, supra*; *see also Joshua P., supra,* 226 Cal. App. 4th at 513-14.

Significantly, the Public Defender did not rest on its determination, but notified the

Conflict Panel and obtained private counsel for both plaintiffs in time for adequate representation at the second hearing and thereafter. This was the only act the Public Defender could ethically perform between the first and second appearances. Thus, to the extent that there was a "stage" between Plaintiffs' first and second appearances, Plaintiffs can point to nothing that the Public Defender was required to do under section 27706 that wasn't done.

While there does not seem to be a case directly on point, *Roswall v. Municipal Court,* 89 Cal. App. 3d 467 (1979), a case that analyzed Government Code sections 27706 and 27707, implicitly supports the County's position. In *Roswall*, it appears that the criminal defendants did not have counsel at their initial appearance, but did have counsel present at the second appearance. *See id.* at 470. Notably, when referring to when the state court should evaluate the financial eligibility of the criminal defendant if it so desired, the *Roswall* Court noted that any such evaluation should occur "in almost all instances before or during the *first court appearance of counsel.*" *Id.* at 475 (emphasis added). The *Roswall* Court would not have needed to distinguish between the first appearance of counsel and the first appearance of the defendant if section 27706 mandated counsel to be present at the defendant's first appearance.

Additionally, the relevant sentence of section 27706 speaks to the Public Defender's duty to "defend." California case law interprets that term, in this context, to mean "the right to have counsel 'act on [his] behalf', i.e., to appear for and represent him." *People v. Mattson,* 51 Cal. 2d 777, 792 (1959) (agreeing with the People's definition of this term as used in Penal Code §859). The Public Defender had no opportunity to "defend" Farrow or Wade between their initial appearance and their second appearance.

For these reasons, there was no violation of Government Code section 27706.

E. Plaintiffs' Claims For Injunctive and Declaratory Relief Are Moot and Should be Dismissed

In this case, Plaintiffs request that the Court issue an injunction mandating that the Public Defender staff the arraignments of all in-custody criminal defendants in Contra Costa County Superior Court. TAC, ¶13. Presumably, Plaintiffs intended to require staffing the initial appearances because it is undisputed, and the Court has already ruled, that Plaintiffs had

counsel at their arraignments as required by California law. May 8, 2013 Order at 15, ECF No. 47 (holding that Plaintiffs had counsel at the "further arraignment," which is when they were asked to enter a plea). Plaintiffs also seek declaratory relief as to the legality of the Public Defender's acts respecting their initial appearances. Setting aside that the requests are overbroad and not constitutionally mandated, Plaintiffs' claims for injunctive and declaratory relief are moot as it is undisputed that since January 9, 2013, the County has funded, and the Public Defender has staffed, the initial appearance of in-custody defendants. And no exceptions to the mootness doctrine apply.

There must be an active case or controversy at all times during the course of a civil action. *Native Village of Noatak v. Blatchford,* 38 F.3d 1505, 1509 (9th Cir. 1994) (quoting *United States Parole Comm'n v. Geraghty,* 445 U.S. 388, 397 (1980)). Intervening events can moot a case where they preclude the Court from issuing an injunction to remedy the alleged ill. *Church of Scientology of California v. United States,* 506 U.S. 9, 12 (1992). Here, it is undisputed that the Public Defender has staffed all initial appearances of in-custody defendants since January 9, 2013, and will continue to do so. Lipetzky Decl., ¶¶15, 17; *see also* Farrow Supplemental Response to Special Interrogatory No. 11, Plaintiffs' Supplemental Response to Defendant's Special Interrogatories to Plaintiff John Farrow, Set One, at 5-6, Exhibit W to the Baker Decl. This change in County practice and Lipetzky's stated intentions to continue this practice moot Plaintiffs' claims for injunctive and declaratory relief.

Plaintiffs will undoubtedly argue that this case falls within two exceptions to the mootness doctrine, specifically the "capable of repetition yet evading review" exception and the "voluntary cessation" exception. However, this case fits neither exception.

1. "Capable of Repetition Yet Evading Review"

In the "capable of repetition yet evading review" exception, Plaintiffs have the burden of proof to establish that they or absent class members are likely to be subject to the challenged policy in the future. *United States v. Sanchez-Gomez,* 859 F.3d 649, 657 (9th Cir. 2017)(*en banc*). They cannot do so here.

In *Noatak,* the Ninth Circuit found that this exception did not apply where the statute

giving rise to the allegedly discriminatory state actions had been repealed.

> [T]here is no reasonable expectation that the alleged injury will recur. . . . Even if the Commissioner has discretion under the new statute to create new regulations to which Noatak might also object, that in itself is not sufficient to create a reasonable expectation of recurrence. Noatak fears only the *possibility* that the state's allegedly discriminatory policy will manifest itself under the new statute. Federal courts are not authorized to address such theoretical possibilities.

38 F.3d at 1510.

The Eastern District held similarly in *Tuleberg Auto Body Garage & Tow v. City of Stockton,* 2008 U.S. Dist. LEXIS 23683 (E.D. Cal. March 28, 2008). That case involved a franchise towing program. The Court concluded there was no reasonable expectation that plaintiffs would be subject to a franchise program in the future.

> Defendant abandoned this program two years agon and has continued rotational towing since. Moreover, the recent changes in city personnel make it uncertain what course of action defendant will pursue in the future. The *mere possibility* that defendant might sometime in the future authorize a franchise program is not sufficient.

Id. at *12 (italics in original; citing *Noatak, supra*).

These cases preclude Plaintiffs' ability to meet their burden on this exception. First, the County has enacted annual budgets authorizing the ACER program and also enacted permanent changes to position classifications with the Public Defender's Office. Lipetzky Decl., ¶¶14, 17 and Exhibit M thereto. These legislative actions are akin to the legislative action in *Noatak.* Further, Lipetzky has clearly stated under oath her intention to continue to staff initial appearances even if, contrary to her expectations, the County elected not to fund those positions. *Id.*, ¶17. As the Seventh Circuit has aptly noted, comity requires the federal courts "to give some credence to the solemn undertakings of local officials." *Chi. United Indus. v. City of Chicago,* 445 F.3d 940, 947 (7th Cir. 2006) (citing *inter alia Bulding & Construction Dept. v. Rockwell Int'l Corp.,* 7 F.3d 1487, 1491-92 (10th Cir. 1993); *Chamber of Commerce of United States of America v. U.S. Dept. Of Energy,* 627 F.2d 289, 291-92 (D.C. Cir. 1980); *see also* 13A Wright et al., *Federal Practice and Procedure* §3533.7, at 354 (2d ed. 1984) ("Courts are more apt to trust public officials than private defendants to desist from

future violations." Citing *Preiser v. Newkirk,* 422 U.S. 395, 402-03 (1975)); *Jimmy v. Buscemi,* 2013 U.S. Dist. LEXIS 31541, *27 (D.S.C. March 7, 2013) ("courts often give considerable credence to a government's indication that it will not repeat the challenged conduct."). Indeed, some courts have concluded that government actors, such as Lipetzky, "receive the benefit of a rebuttable presumption that the objectionable behavior will not recur."[16] *Sheely v. MRI Radiology Network, P.A.,* 505 F.3d 1173, 1183 (11th Cir. 2007); *Chi. United Indus.,* 445 F.3d at 947 (quoting *Troiano v. Supervisor of Elections in Palm Beach County,* 382 F.3d 1276, 1283 (11th Circ. 2004); emphasis in original).

More importantly, to paraphrase what the Supreme Court stated in an analogous situation, "there is no reason to believe [the County and Lipetzky] would replace their present [initial appearance] procedures with procedures that they regarded as unsatisfactory even before the commencement of this litigation." *County of Los Angeles v. Davis,* 440 U.S. 625, 632-33 (1979) (discussing "voluntary cessation" exception).

Consequently, Plaintiffs have, at best, the conjectural possibility that the County might at some point in the future elect not to fund the ACER program and, in that unlikely event, that Lipetzky would, contrary to her stated intentions, elect not to staff the initial appearances. For the reasons stated in *Noatak* and *Tuleberg,* this is insufficient to meet Plaintiffs' burden of proof on this exception and, therefore, it cannot apply here.

2. "Voluntary Cessation"

The "voluntary cessation" exception is also inapplicable to this case. First, this exception applies to cases where the change in policy occurs "*because of* the litigation." *PUC v. FERC,* 100 F.3d 1451, 1460 (9th Cir. 1996) (italics in original; citing *Nome Eskimo Community v. Babbitt,* 67 F.3d 813, 816 (9th Cir. 1995); *see also Noatak,* 38 F.3d at 1510 (case not moot "if the defendant voluntarily ceases the allegedly improper behavior in response to a suit"). Second, the undisputed facts, particularly the Board's legislative actions and

[16] The Seventh Circuit cited *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 289 (1982), as an example where the presumption was rebutted by the "city's stating that it intended to reenact the ordinance that had been enjoined." 445 F.3d at 947; *compare City of Mesquite,* 455 U.S. at 289 n.11; *see also ForestKeeper v. Benson,* 108 F.Supp.3d 917, 927-28 (E.D. Cal. 2015) (finding reasonable expectation of similar future litigation based, in part, on contrary public statements by Forest Service).

Lipetzky's stated intent to continue staffing the initial appearances, establish that "there is no reasonable expectation that the illegal action will recur." *Noatak, supra,* 38 F.3d at 1510. Accordingly, this exception does not apply.

On the first point, the record establishes that since January 2010, Lipetzky has been interested in staffing the initial appearances. *See* Lipetzky Decl., ¶10. Significantly, she developed the ACER program and had already commenced the process of implementing it no later than June 7, 2012, which is before Farrow had even submitted a government claim to the County and well before the December 21, 2012 date of filing for this case. *Id.*, ¶11-12. Given this, it cannot be disputed that Lipetzky's development and implementation of the ACER program was not in response to this litigation or any other litigation. *Id.*, ¶18.

In addition, there is no reasonable expectation that the Public Defender would return to not staffing the initial appearances. First, the Board has annually funded the ACER program and enacted a permanent change to the Public Defender's staffing by adding the two ACER positions. *Id.*, ¶17. These legislative acts alone, even where the Board has the ability to change its mind later, are "usually enough to render a case moot." *Noatak,* 38 F.3d at 1510. However, in addition, there is Lipetzky's stated intention to continue staffing the initial appearances even if the Board were to decline to continue funding. Lipetzky Decl., ¶17. As noted above, her stated intentions are entitled to credence, particularly where she found the prior initial appearance procedures unsatifactory. *See supra* at 33-34.

The undisputed facts establish the "voluntary cessation" exception is not applicable and, thus, the Court should find Plaintiffs' claims for declaratory and injunctive relief moot.

V. CONCLUSION

For the reasons stated above, the Court should grant the County's motion for summary judgment in its entirety and enter judgment in favor of the County, or, in the alternative, summary adjudication on each claim.

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DATE: November 22, 2017

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