SHARON L. ANDERSON (SBN 94814)
County Counsel
D. CAMERON BAKER (SBN 154432)
Deputy County Counsel
Deputy County Counsel
COUNTY OF CONTRA COSTA
651 Pine Street, Ninth Floor
Martinez, California 94553
Telephone: (925) 335-1800
Facsimile: (925) 335-1866
Electronic Mail cameron.baker@cc.cccounty.us

Attorneys for Defendant ROBIN LIPETZKY

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 PUBLIC DEFENDER ROBIN LIPETZKY, in her official capacity, and DOES 1 through 20, et a.,

Defendants.

No. C12-6495 JCS

DEFENDANT ROBIN LIPETZKY'S MOTION TO DISMISS SECOND AMENDED COMPLAINT; MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Date: July 26, 2013
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

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on July 26, 2013, at 9:30 a.m., in Courtroom G, 15th Floor, 450 Golden Gate Avenue, San Francisco, CA, 94102, defendant Contra Costa County Public Defender Robin Lipetzky ("Lipetzky") will move this Court, pursuant to Federal Rule of Civil Procedure §12(b)(6), to dismiss the Second Amended Complaint filed by plaintiffs John Farrow and Jerome Wade (collectively "Plaintiffs") on behalf of themselves and all others similarly situated. This motion is based on the following grounds:

1. Plaintiffs' complaint fails to state a claim against Ms. Lipetzky;

2. Plaintiffs' first claim, which is brought under 42 U.S.C. §1983 for violation of the Sixth Amendment's right to counsel, fails because there has been no violation of this Sixth Amendment right as a matter of law based on the matters alleged;

3. Plaintiffs' second and third claims, which are brought under 42 U.S.C. §1983 for violation of the Fourteenth Amendment's substantive due process and procedural due process protections for "denial of statutory speedy trial rights," are meritless as a matter of law because these claims rest on state "statutory speedy trial" rights, not federal constitutional or statutory violations, and because Plaintiffs have not pled facts demonstrating a violation of their state statutory speedy trial rights;

4. Plaintiffs' fourth claim, which is brought under 42 U.S.C. §1983 for violation of the Fourteenth Amendment's equal protection clause, is meritless as a matter of law where the alleged policy applies equally to all individuals who qualify for legal services provided by the Public Defender's Office; and

5. Plaintiffs' fifth and sixth claims are state law claims that should be dismissed due to lack of subject matter jurisdiction and because Plaintiffs' allegations fail to state a claim as to the alleged violations.

This motion shall be based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities, the complete files and records in this action, and oral argument at the hearing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Robin Lipetzky, the Public Defender of Contra Costa County, hereby moves this Court pursuant to Federal Rule of Civil Procedure §12(b)(6) to dismiss the Second Amended Complaint ("SAC") filed by Plaintiffs John Farrow and Jerome Wade on behalf of themselves and all others similarly situated, and each cause of action asserted therein against her. The SAC and each cause of action therein should be dismissed on the grounds that Plaintiffs have failed to state a cause of action as to which relief can be granted as to Ms. Lipetzky. Each of Plaintiffs' federal claims are meritless as a matter of law. Plaintiffs' two state claims are likewise meritless as a matter of law and should be dismissed for this reason as well as lack of subject matter jurisdiction. Plaintiffs have already made one attempt to amend around these defects and should not be granted further leave to amend. Accordingly, Plaintiffs' federal claims should be dismissed with prejudice and their state law claims without prejudice.

II. ISSUES PRESENTED

In this motion, Ms. Lipetzky raises the following five issues, which, with one exception (Issue No. 3), are the same issues raised in her prior motion to dismiss:

1. Can Plaintiffs assert a claim under 42 U.S.C. §1983 for violation of the Sixth Amendment's right to counsel where Plaintiffs appeared without counsel at the initial court appearance, requested counsel at that appearance, and had counsel at their next court hearing, which took place between seven (7) to thirteen (13) days later?

2. Can Plaintiffs assert claims under 42 U.S.C. §1983 for violation of the Fourteenth Amendment's substantive due process and procedural due process protections for "denial of statutory speedy trial rights," where those rights are provided by state law and Plaintiffs' allegations fail to demonstrate a violation of those state statutory speedy trial rights?

3. Can Plaintiffs assert a claim under 42 U.S.C. §1983 for violation of the Fourteenth Amendment's equal protection clause where the policy at issue applies equally to all those eligible for legal services from the Public Defender's Office?

4. Should the Court retain jurisdiction over Plaintiffs' state law claims in the absence of any viable federal claims?

5. Can Plaintiffs assert state law claims, one of which is predicated upon the violation of their "statutory speedy trial rights" and the other of which is predicated upon Ms. Lipetzky's alleged breach of California Government Code section 27706,[1] where Plaintiffs' factual allegations fail to state a plausible violation of the applicable state statutes?

III. FACTUAL BACKGROUND

The following is a brief summary based on Plaintiffs' allegations in the Second Amended Complaint, including the new factual allegations made in that document. This summary is set forth solely for the purpose of this motion and Ms. Lipetzky does not concede the truthfulness of Plaintiffs' allegations.

Ms. Lipetzky is the duly appointed Public Defender for Contra Costa County. SAC, ¶23. Ms. Lipetzky allegedly has a policy of not providing counsel to criminal defendants at their first court hearing. *Id.*, ¶1. At this first court appearance, no plea is taken, bail is not examined and counsel is not appointed. *Id.*, ¶3. The criminal defendant is asked if he or she would like court-appointed counsel, and if so, whether he can afford counsel; where the criminal defendant requests counsel and asserts he/she cannot afford counsel, there is a "referral to the Public Defender" and an automatic continuance for "further arraignment." *Id.*, ¶¶4, 30 & 39. This continuance may last between five and 13 days "depending on the vagaries of where the case was filed within the county." *Id.,* ¶6.

Criminal defendants are not informed of their "speedy trial rights" prior to imposition of this automatic continuance. *Id.* Because Plaintiffs did not enter a plea at the initial hearing, there was no triggering of "California's statutory speedy rights as well as other protections." *Id.,* ¶10.

Both Plaintiffs are indigent criminal defendants who qualify for Court-appointed counsel. *Id.,* ¶¶32 & 44. Each Plaintiff had a first court appearance where he appeared

[1] With the exception of the reference to 42 U.S.C. section 1983, all statutory references are to the California state code. Thus, Penal Code section 988 refers to California Penal Code section 988.

without counsel. *Id.,* ¶29 (Farrow) and ¶36 (Wade). At that first court appearance, the state court asked if Plaintiff could afford counsel, and if not, whether he wanted counsel appointed by the state court. *Id.,* ¶30 (Farrow) & ¶39 (Wade). Each Plaintiff answered that he could not afford counsel and that he wanted counsel. *Id.* For each Plaintiff, the state court then "referred the matter to the Public Defender" and continued the matter for "further arraignment." *Id.* Both Plaintiffs were sent back to jail without being advised of their right to bail or the right to a speedy preliminary hearing and trial. *Id.* At the "further arraignment," each was appointed counsel. *Id.,* ¶32 & ¶44. At that time, Plaintiff Farrow entered his plea. *Id.,* ¶32. There is no allegation respecting when Plaintiff Wade entered his plea.

Plaintiffs have added the following new factual allegations:

1) Between the initial appearance and the "further arraignment," the Probation Department prepared a bail study for each Plaintiff. *Id.,* ¶31 & ¶40. This report was made without input from either Plaintiff's criminal counsel. *Id.*;

2) Plaintiff Wade's initial appearance was untimely under California Penal Code section 825. *Id.,* ¶37;

3) Plaintiff Wade's initial appearance was attended by a deputy district attorney. *Id.,* ¶38;

4) Between Plaintiff Wade's initial appearance and his second appearance, the District Attorney filed an amended complaint adding new charges, which filing was as of right due to the fact that Plaintiff Wade had not yet entered a plea. *Id.,* ¶43; and

5) In the course of reviewing documents after Plaintiff Wade's second appearance on November 21, his counsel became aware of a potential *Miranda* issue. *Id.,* ¶45. An investigator interviewed a potential witness, his high school principal, on this issue on November 28, at which time the principal "maintained that she could not remember when or how Mr. Wade was *Mirandized* during the encounter due to failure of memory." *Id.*

Plaintiffs purport to represent a class of similarly situated individuals. They have asserted five questions of law common to the class, including "whether [] a forced 5 to 13 day delay between an indigent in-custody defendant's first appearance in court and representation

by the Public Defender [] is unreasonable under the 6th Amendment to the United States Constitution when arraignment is a critical stage of the proceedings under California law." *Id.,* ¶52(1).

Plaintiffs initially filed this case on December 21, 2012. Ms. Lipetzy filed a motion to dismiss the initial complaint on January 31, 2013. The Court granted Ms. Lipetzky's motion on May 8, 2013, with leave to amend. May 8, 2013 Order, Docket No. 47 ("May 8 Order"). On May 14, 2013, Plaintiffs filed their First Amended Complaint. Pursuant to a Stipulation and Order, Plaintiffs filed the SAC on May 31, 2013.

For the reasons discussed more fully below, the SAC fails to state a plausible claim against Ms. Lipetzky and therefore, this action should be dismissed.

IV. LEGAL ARGUMENT

This Court previously held that Plaintiffs' initial allegations failed to state a cognizable federal claim. Plaintiffs' new factual allegations do not change this result. In fact, Plaintiffs' claims largely fail due to the defects previously identified and discussed in the Court's May 8 Order. Plaintiffs' failure to rectify these same defects via amendment demonstrates that any further amendment would be futile. The Court should dismiss Plaintiffs' federal claims with prejudice and their state claims without prejudice.

A. There Has Been No Denial Of Plaintiffs' Right To Assistance of Counsel Under the Sixth Amendment

In the SAC, Plaintiffs do not specify which of the new factual allegations support their Sixth Amendment claim. *See* SAC, ¶¶9, 56-58. However, these new factual allegations are insufficient to resurrect this claim. To the contrary, this claim remains moribund for the reasons articulated by the Court in its May 8 Order.

Before proceeding to the analysis, Ms. Lipetzky wishes to alert the Court to Article I, section 14 of the California Constitution, which governs arraignments in felony prosecutions. This constitutional provision states in relevant part: "The magistrate shall immediately give the defendant a copy of the complaint, inform the defendant of the defendant's right to counsel, **allow the defendant a reasonable time to send for counsel,** and on the defendant's request

read the complaint to the defendant." Cal. Const., Art. I §14 (emphasis added). This provision gives additional support to Ms. Lipetzky's position and the Court's May 8 Order.

Plaintiffs' Sixth Amendment claim is based on an alleged failure to provide counsel at a non-critical stage. SAC, ¶9. To prevail on this type of alleged violation of the right to counsel, Plaintiffs must establish that there was prejudice to Plaintiffs' substantive rights as a result of the absence of counsel. *See McNeal v. Adams,* 623 F.3d 1283, 1288 (9th Cir. 2010); *see also* May 8 Order at 13 (plaintiffs failed to plausibly allege that their subsequent representation by counsel was prejudiced by the delay in appointing counsel following attachment). Plaintiffs cannot demonstrate that they suffered any such prejudice.

The only new factual allegations common to both Plaintiffs concern bail studies purportedly performed by the Probation Department. Plaintiffs allege that these bail studies "contained no favorable information concerning ... [Plaintiffs'] ties to the community, job status, etc. in absence of counsel who could supply such information." SAC, ¶31 & ¶40. Despite this Court's prior comments respecting the need for Plaintiffs to adequately allege the underlying facts relating to their bail, Plaintiffs again fail to provide this Court with any detailed factual allegations that plausibly suggest that lack of counsel's input into these bail studies caused prejudice to Plaintiffs. *See* May 8 Order at 30.[2]

Putting this aside, Plaintiffs' bail study allegations fall squarely within the Court's May 8 Order. Notably, Plaintiffs in their opposition to the prior motion to dismiss made essentially the same argument respecting their bail amounts, specifically that Ms. Lipetzky's policy "restricted the flow of information to the [state] court regarding any favorable information concerning Plaintiffs' circumstances in violation of California Penal Code §1270.1." May 8 Order at 10 (summarizing Plaintiffs' opposition brief). In rejecting that argument, the Court held that Plaintiffs were not prejudiced because they had not lost the opportunity to seek lower bail (and present favorable information) via a subsequent bail hearing. *Id.* at 13. Significantly,

[2] In the May 8 Order, the Court pointed out Plaintiffs' failure to allege"when bail was set or that bail was not set, the amount of bail that was set, any facts showing that the amount was excessive, the conclusion that the amount was excessive, or whether they took any action to reduce bail." May 8 Order at 30.

California law not only provides for such a bail hearing but (a) specifically requires the appointment of counsel for any unrepresented criminal defendant for purposes of the bail hearing and (b) specifically tasks the criminal defendant with the responsibility for submitting evidence of his or her ties to the community. *See* Penal Code § 1270.1(b)-(c).

In sum, if Plaintiffs' community ties were such as to warrant a reduction from the amount prescribed by the County's bail schedule, something that Plaintiffs do not allege, they were not prejudiced by not having counsel at the initial hearing because they retained the opportunity to present favorable information (with the assistance of counsel) to the state court judge (not the Probation Department) in connection with the bail hearing. *See* May 8 Order at 16-17 (holding that Plaintiffs had suffered no prejudice to their ability to obtain a lower bail due to the temporary delay in appointment of counsel, citing *In re Weiner,* 32 Cal.App.4th 441, 444 (1995)).

In *State of New Jersey v. Anthony Fann,* 239 N.J. Super. 507, 571 A.2d 1023 (1990), the New Jersey Superior Court faced almost the identical situation. In that case, like the present, the criminal defendants were not represented by counsel at the initial appearance, where the judge set initial bail and "advise[d] defendants of their rights, including the right to counsel and the right of indigent defendants to have counsel appointed." *Id.,* 239 N.J. Super. at 517, 571 A.2d at 1029. As here, a third party prepared a bail report, using, *inter alia,* "[b]asic information [] obtained from each defendant who, in most cases, is not yet represented." *Id.,* 239 N.J. Super. at 516, 571 A.2d at 1029. The judge reviewed the bail reports either before or during the judicial review of the previously set bail amount. *Id.,* 239 N.J. Super. at 517-18, 571 A.2d at 1029.

The New Jersey Superior Court held that under the Sixth Amendment, the criminal defendant's right to counsel did not come into play until the judicial review of the previously set bail amount. The Court's reasoning in that case is particularly apt:

> It is therefore apparent that a defendant has a right to counsel in connection with bail proceedings. ... However, the stage at which bail setting requires the presence of counsel, absent a waiver of the right, must be subject to certain practical considerations if the rights of defendants are to be protected properly.

> The moment a defendant is arrested surely is "critical" but counsel can rarely be present. In most cases immediate arrangements for representation, for example, in connection with the setting of bail, are impossible. As to indigent defendants, it is necessary that a determination of indigency be made and that counsel be assigned. This takes time. The same is true in the proceedings to and including the time of the first appearance. ... It is impractical, inappropriate and contrary to the interest of defendants to require the appearance of counsel for bail purposes until *after* the first appearance has been held. For present purposes the "critical stage" in bail-setting proceedings, the time when representation must be available, if not knowingly and intelligently waived, is at the first bail review held after the first appearance.

Id., 239 N.J. Super. at 520-21, 571 A.2d at 1030-31.

In light of this ruling, the Court's prior May [8] Order and Plaintiffs' own obligation to provide the Court with evidence of their ties to the community, Plaintiffs cannot assert a Sixth Amendment violation based on their new bail study allegations.

Plaintiffs also assert new factual allegations that pertain only to plaintiff Wade. None of these new factual allegations support any claimed violation of Plaintiff Wade's right to counsel.

Plaintiffs first allege that Mr. Wade's first appearance was untimely under California law. SAC, ¶37. Under Penal Code section 825(a), an arrestee must be taken before a magistrate without undue delay. Penal Code §825(a). However, a violation of this section does not require reversal or dismissal unless the violation deprived the defendant of a fair trial or otherwise prejudiced the defendant. *People v. Mesaris,* 201 Cal.App.3d 1377, 1384 (1988). Plaintiffs do not allege any such prejudice and could not do so under the circumstances. *People v. Valenzuela,* 86 Cal.App.3d 427, 431-32 (1978).

Plaintiffs next allege that a deputy district attorney was present at plaintiff Wade's first appearance, "making this an adversarial encounter." SAC, ¶38. However, Plaintiffs do not allege that the deputy district attorney did anything other than observe the limited proceedings that occurred. *Id.* Contrary to Plaintiffs's allegations, the mere presence of a deputy district attorney at the initial appearance does not convert the initial hearing, at which "[n]othing happened ... other than a determination that Plaintiffs desired the appointment of counsel" (May [8] Order at 17), into a "legal confrontation" that could prejudice Plaintiffs' substantial rights. In *United States v. Benford,* 574 F.3d 1228 (9th Cir. 2009), the Ninth Circuit held that

although the government attorney was present at the pretrial status conference, there was "no 'legal confrontation'" at that conference and "no 'loss of significant rights.'" 574 F.3d at 1230 & 1233.

Plaintiffs also allege that the prosecution was able to amend the complaint against Mr. Wade as of right because Mr. Wade was unable to enter a plea at the initial appearance. SAC, ¶43. Under Penal Code section 1009, the prosecution would have obtained leave of court for this amendment even if Mr. Wade had already entered a plea. *People v. Arevalo-Iraheta,* 193 Cal.App.4th 1574, 1580-81 (2011). At that juncture, there was no prejudice to Mr. Wade in granting leave. *People v. Brown,* 35 Cal.App.3d 317, 322-23 (1973).

Finally, Plaintiffs allege that there was a potential *Miranda* issue in Mr. Wade's case and that a witness, Mr. Wade's high school principal, could not recall details when interviewed on November 28, 2011, one week after Mr. Wade's second court appearance. SAC, ¶45. Plaintiffs do not provide any details respecting this alleged *Miranda* issue, such as whether Plaintiff Wade ever raised it with the state court or the length of time between when the principal witnessed the underlying events and November 28, 2011 when the principal was interviewed. Plaintiffs instead assert that the principal "maintained she could not remember when or how Mr. Wade was *Mirandized* during the encounter due to failure of memory. Had appointment of counsel not been delayed due to Defendant's policy it is possible that the high school principal would have remembered the details of Mr. Wade's interrogation which may have been helpful in his defense." *Id.,* ¶45.

These allegations are insufficient. First, Plaintiffs essentially concede that they have no basis other than speculation to tie the principal's lack of memory to the delay. Second, Plaintiff Wade would be the best source of information on this issue. At most, the principal would be a corroborating witness. Plaintiffs' allegations do not provide this Court with any basis to assess whether the inability of the principal to recall was prejudicial to Plaintiff Wade, particularly where Plaintiffs do not allege that the principal in fact had material information on this issue. Since Plaintiffs' allegations on this point are at best consistent with a possible claim of prejudice and do not plausibly state a claim of prejudice, these allegations fail under the

Twombly standard. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 556-57 (2007).

In sum, Plaintiffs' allegations fail as a matter of law to establish a violation of Plaintiffs' Sixth Amendment right to counsel.

B. Plaintiffs' Claims Respecting Their "Statutory Speedy Trial Rights" Lack Merit

Plaintiffs again assert two parallel claims under the Fourteenth Amendment respecting their "statutory speedy trial rights." SAC, ¶57 & ¶60. In response to the Court's May [8] Order, Plaintiffs now clarify that the asserted "statutory speedy trial rights" are those set forth in Penal Code §§825, 859b and 1050. *Id.,* ¶10. As the Court previously recognized, analysis of these claims is a two-step analysis: (1) do Plaintiffs' state "speedy trial" rights convey a liberty interest protected by the Fourteenth Amendment? and (2) has there been any violation of the asserted state rights? May [8] Order at 23. To state a viable claim, Plaintiffs must demonstrate that both issues are resolved in the affirmative. Plaintiffs still cannot do so.

Notably, the Court has already rejected the use of Penal Code §859b and §1050 in the May [8] Order . With respect to §859b, the Court squarely held that Plaintiffs failed to sufficiently allege any violation of that section because Plaintiffs did not allege "that a preliminary examination was not held 'within 10 court days of the date [Plaintiffs were] arraigned or [pled] whichever occurs later.'" *Id.* at 27 (paraphrasing Penal Code §859b). Plaintiffs provide the Court with no new factual allegations showing that their preliminary examinations were not held timely. With respect to Penal Code §1050, the Court held that this section is "'directory only and does not mandate dismissal of an action by its terms.'" May [8] Order at 24 n.3 (quoting Penal Code §1050(l)). Accordingly, this statute does not convey the requisite liberty interest.

This leaves only Penal Code §825. Plaintiffs cannot predicate their Fourteenth Amendment section 1983 claims on this section because a) there was no violation of §825 and b) §825 does not mandate dismissal in the event of a violation.

Section 825 requires that a criminal defendant be brought before a magistrate within 48 hours of arrest. Penal Code § 825(a). Plaintiffs do not and cannot allege that Ms. Lipetzky has

any role in determining when either of them made their first appearance before the state court. Presumably, Plaintiffs assert that the absence of counsel at that first appearance precludes arraignment from being concluded at the initial hearing. *See* May [8] Order at 26. However, section 825 does not mandate that arraignment be completed within 48 hours. Accordingly, there has been no violation of this section by Ms. Lipetzky.

Even if there were, Plaintiffs cannot predicate their Fourteenth Amendment claim upon this section because this section does not convey the requisite liberty interest because the section lack "explicitly mandatory language specifying the outcome that must be reached if the substantive predicates are met." *See* May [8] Order at 23. Section 825 does not "contain any language authorizing or requiring dismissal of a prosecution by reason of delay in arraignment." *See People v. Valenzuela, supra,* 86 Cal.App.3d at 430 (§825 does not contain any language authorizing or requiring dismissal by reason of delay).

Thus, Plaintiffs again have failed to adequately allege a viable Fourteenth Amendment claim based on any alleged violation of their state "speedy trial" rights.

C. Plaintiffs Cannot Assert a Section 1983 Claim Under the Fourteenth Amendment Based on the Equal Protection Clause

Plaintiffs' fourth and final federal claim rests on a purported violation of their rights to equal protection under the Fourteenth Amendment. SAC, ¶66. Plaintiffs essentially assert that Ms. Lipetzky discriminates against Plaintiffs and others similarly situated due to their indigence as "similarly situated criminal defendant's [sic] who could afford private counsel were furnished 'prompt' arraignments, were permitted to enter pleas at their first appearance in Court," etc. *Id.,* ¶11 & ¶66. This claim makes absolutely no sense and is completely meritless.

First and foremost, it should go without saying that Ms. Lipetzky does not represent individuals who can afford private counsel with one minor exception, capital defendants. This is made clear in Government Code §27706, pursuant to which Ms. Lipetzky generally only represents persons who are "not financially able to employ counsel." Government Code §27706 (this limitation applies to all Ms. Lipetzky's clients with the exception of capital cases under sub (f)).

Second, Plaintiffs do not allege that Ms. Lipetzky has two policies with respect to representation of individuals at the initial appearance, i.e. one for indigent defendants and one for non-indigent defendants. A single policy that does not distinguish between classes of individuals cannot support an equal protection clause claim. "The equal protection guarantee of the Fourteenth Amendment only applies to governmental actions which classify individuals for different benefits or burdens under the law; it does not govern actions which do not classify individuals." *James v. City of Chester,* 852 F.Supp. 1288, 1297 (D.S.C. 1994); *see also Barbier v. Connolly,* 113 U.S. 27, 32 (1885) ("legislation, which, in carrying out a public purpose, is limited in application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the [Fourteenth] amendment.").

D. Plaintiffs' State Law Claims Should Be Dismissed Without Prejudice Due to Lack of Subject Matter Jurisdiction

As stated above, Plaintiffs have no plausible federal law claims. In the absence of such claims, this Court does not have subject matter jurisdiction over this case. *See* SAC, ¶20. Accordingly, the Court should dismiss Plaintiffs' state law claims without prejudice.

E. Plaintiffs' State Law Claims Lack Merit

Assuming *arguendo* the Court were to conclude that one or more of Plaintiffs' claims under section 1983 were viable, the Court should still dismiss Plaintiffs' state law claims as they lack merit as a matter of law.

Plaintiffs' fifth claim asserts a violation of Civil Code §§52 and 52.1 based on the alleged denial of Plaintiffs' "statutory speedy trial rights." SAC, ¶69. For the reasons stated above and in the Court's May [8] Order, Plaintiffs have failed to allege any violation of their statutory speedy trial rights under California law and cannot do so.

Plaintiffs' sixth claim seeks a writ of mandate requiring Ms. Lipetzky to comply with California Government Code §27706. SAC, ¶72. Ms. Lipetzky complies fully with that section. As stated in §27706(a), Ms. Lipetzky as Public Defender is obligated to defend "[u]pon request of the defendant or upon order of the court." Plaintiffs' own allegations establish that once Plaintiffs as criminal defendants make the request for counsel, the state

court makes the order of referral to Ms. Lipetzky and continues the hearing until counsel is present. SAC, ¶¶30-32 (Farrow) & ¶35-36 (Wade). Thus, Plaintiffs have no basis for contending that Ms. Lipetzky has not complied with §27706.

F. The Court Should Not Grant Leave to Amend

The defects in Plaintiffs' claims detailed above are not capable of being cured by amendment. To be sure, Plaintiffs have already been given leave to amend once and failed to rectify these problems. The Court should not grant further leave to amend. *Guevara v. Marriot Hotel Svcs, Inc.,* 2013 U.S. Dist. LEXIS 38847 at *28-29 (N.D. Cal. March 20, 2013).

V. CONCLUSION

For the foregoing reasons, the Court should grant this motion to dismiss in its entirety.

DATE: June 13, 2013

SHARON L. ANDERSON
COUNTY COUNSEL

/S/

By:_____
D. CAMERON BAKER
Deputy County Counsel
Attorneys for Defendant
ROBIN LIPETZKY