THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

v.

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

Defendants.

NO. 2:11-cv-01100 RSL

PLAINTIFFS' REPLY RE: MOTION FOR CLASS CERTIFICATION

Noted for Consideration: Dec. 9, 2011

Oral Argument Requested

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I. INTRODUCTION

The Cities of Mount Vernon and Burlington are constitutionally obligated to provide representation to indigent defendants charged with municipal crimes in those jurisdictions. The extensive facts presented in this case demonstrate that the Cities are failing to meet their obligation on a systemic and widespread basis. Contrary to the Cities' suggestions, Plaintiffs are not seeking retroactive relief to address the effects of particular conduct by counsel in particular cases. Rather, Plaintiffs are challenging the lawfulness of the entire indigent defense system created and maintained by the Cities. Because Plaintiffs seek prospective relief on behalf of all indigent defendants in Mount Vernon and Burlington, there is no need to show prejudice and thus no need to analyze claims on an individualized or case-by-case basis.

The record before the Court shows that the Cities utilize only two part-time public defenders to handle as many as 2,300 misdemeanor cases per year. The record also shows that because of their excessive caseloads, these attorneys regularly fail to meet or communicate with indigent defendants outside of court, including defendants who are sitting in jail. Likewise, these attorneys regularly fail to investigate charges against indigent defendants, regularly fail to provide counsel and advice to indigent defendants, and regularly fail to advocate on behalf of clients at hearings, among other things. The Cities have done nothing to address numerous complaints made about their public defense system. Indeed, the Cities admittedly do not monitor or evaluate the operations of their joint public defense system, despite being required to do so under the law and their own public defense contract.

Class certification is appropriate because the focal point of this suit is the lawfulness of the Cities' public defense system. Whether the Cities' deficient system results in a systemic deprivation of the right to counsel is a question that can be answered in one action for the entire Class. Likewise, an order requiring the Cities to make systemic changes to ensure that a framework exists for providing the basic right to counsel is an order that will benefit all indigent defendants who are charged with misdemeanors in Mount Vernon or Burlington.

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As Plaintiffs have demonstrated, they have standing to pursue injunctive relief on behalf of the proposed Class. Furthermore, Plaintiffs' claims are typical of the claims of the indigent defendants they seek to represent. Finally, Plaintiffs and their counsel will adequately represent the numerous other indigent defendants who are subject to the Cities' unconstitutional public defense system. For these reasons, Plaintiffs respectfully ask the Court to certify this case as a class action.

II. REPLY ARGUMENT AND AUTHORITY

A. Plaintiffs Have Standing

On June 10, 2011, the day they filed this lawsuit, all three Plaintiffs were sitting in the Skagit County Jail for criminal charges filed in the municipal courts of either Mount Vernon or Burlington. Dkt. No. 25 at 10:3-10; Dkt. No. 27 at 7:10-17; Dkt. No. 32 at 9:13 – 10:5; Dkt. No. 46 ¶¶ 16-20, 24; Dkt. No. 47 ¶¶ 10-12; Dkt. No. 48 ¶¶ 31-34. Each Plaintiff had been appointed one of the Cities' public defenders, and that public defender was continuing to appear for the Plaintiff. *Id*. Plaintiffs alleged in their complaint that the public defenders were failing to provide Plaintiffs and other indigent defendants with actual representation due to systemic deficiencies in the Cities' public defense system. *See generally* Dkt. No. 1-1. Because they were suffering an ongoing injury—namely, the deprivation of their right to counsel—at the time the lawsuit was filed, Plaintiffs meet the standing requirement and are entitled to pursue injunctive relief on behalf of themselves and all others similarly situated. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 50-52 (1991).

In their response brief, the Cities ignore these facts and continue to confuse the doctrines of standing and mootness. As to the former, the Cities maintain Plaintiffs are seeking injunctive relief based on the threat of future harm. In support of their position, the Cities rely on *Nelson v. King County*, 895 F.2d 1248 (9th Cir. 1990). The facts of that case, however, are distinguishable. There, two plaintiffs sought "injunctive relief . . . for alleged violations of their constitutional rights during their stays in [an alcoholic treatment] [c]enter." *Id*. at 1249. The

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first plaintiff had stayed in the center from April 2 to May 30, 1985, but he did not file suit until August 25, 1986—more than a year later. *Id*. The second plaintiff had stayed in the center from September 26 to November 24, 1986 but was not added to the lawsuit as a plaintiff until March 16, 1987. *Id*. Because both plaintiffs were not staying in the center "at the time the complaint was filed" and could only base their injunctive claims on a speculation of future harm, the court held they did not have standing to pursue such relief. *Id*. at 1251 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)).

Here, it is undisputed that all three Plaintiffs were in the Cities' public defense system and were continuing to have Sybrandy or Witt appear in their cases when the action was filed. Dkt. No. 25 at 10:3-10; Dkt. No. 27 at 7:10-17; Dkt. No. 32 at 9:13 – 10:5. Because "[s]tanding is determined as of the commencement of litigation," Plaintiffs meet this requirement. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1171 (9th Cir. 2002). The facts presented are analogous to the circumstances in *McLaughlin*. 500 U.S. 44, 50-52. At the time the complaint was filed there, the plaintiffs "had been arrested without warrants and were being held in custody without having received a probable cause determination, prompt or otherwise." *Id*. at 51. "Plaintiffs alleged in their complaint that they were suffering a direct and current injury as a result of [their] detention, and would continue to suffer that injury until they received the probable cause determination to which they were entitled." *Id*. The Supreme Court held that "plaintiffs' injury was at that moment capable of being redressed through injunctive relief." *Id*. (emphasis added). Thus, plaintiffs had standing. *Id*.[1]

B. Plaintiffs Continue to Present a Live Case and Controversy

To this day, all three Plaintiffs have matters pending in the municipal courts of Mount Vernon and Burlington and remain within the Cities' public defense system. Dkt. No. 122,

[1] The Cities also continue to rely on *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), but those cases are inapposite for the reasons set forth in Plaintiffs' Reply Re: Cross-Motion for Preliminary Injunction—that is, standing was not present in either at the time the complaint was filed. *See* Dkt. # 121 at 10-13. Similarly, this Court's decision not to add Ryan Osborne as a plaintiff because he was no longer in the Cities' public defense system at the time the order was entered is not on point. Dkt. No. 44 at 2:2-5.

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Exs. 6-9.[2] Moreover, Plaintiffs are members of the Class they seek to represent because they have been charged with crimes in the Cities' municipal courts, have been appointed a public defender, and continue to have that public defender appearing in their cases. *Compare* Dkt. No. 122, Exs. 6-9, *with* Dkt. No. 80 ¶20. The fact that Plaintiffs' attorney is the "Secondary Public Defender" for the Cities does not deprive Plaintiffs of the right to continue pursuing relief. Dkt. No. 57-1 at 16, 33, 35. At the end of the day, the Cities' public defense system—which employs two part-time attorneys and an occasional conflict attorney to handle over 2,300 cases per year—remains unconstitutional.

Even if Plaintiffs' claims were deemed moot by the appointment of the Secondary Public Defender, Plaintiffs are entitled to continue representing the proposed Class. "When the claim on the merits is 'capable of repetition, yet evading review,' the named plaintiff may litigate the class certification issue despite loss of his personal stake in the outcome of the litigation." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980). The same is true where the claims are "inherently transitory." *Wade v. Kirkland*, 118 F.3d 667, 669-70 (9th Cir. 1997) ("even after mootness of a named plaintiff's own claim, a plaintiff may continue to have a '"personal stake" in obtaining class certification'") (quoting *Geraghty*, 445 U.S. at 404)).

Both exceptions to the mootness doctrine apply in this case. Indigent defendants charged with crimes in the municipal courts of Mount Vernon or Burlington will continue to be

[2] In discovery, the Cities asked questions designed to elicit admissions and other incriminating responses from Plaintiffs in relation to pending criminal charges. *See, e.g.*, Supp. Decl. of Toby J. Marshall in Support of Class Cert. ("Supp. Marshall Decl."), Ex. 1. Plaintiffs appropriately refused to answer these questions based on the Fifth Amendment. *Id.* The Cities argue that Plaintiffs' silence renders them "unable to factually support Article III standing," but the cases on which the Cities rely do not support this position. In *Baxter v. Palmigiano*, 425 U.S. 308, 317-18 (1976), the Court concluded it was appropriate for a prison disciplinary board to consider an inmate's silence, among other things, in determining whether a civil infraction occurred. In *Bilokumsky v. Tod*, 263 U.S. 149, 154 (1923), the Court concluded it was appropriate in a deportation proceeding for an immigration panel to consider a person's refusal to testify in regard to a matter that "could not have had the tendency to incriminate him." Here, the Court is not being asked to adjudicate Plaintiffs' unresolved, pending criminal charges, and the Cities do not explain what adverse inference could be drawn from Plaintiffs' refusal to answer questions that may incriminate them on such charges. Whether Plaintiffs' committed the charges is immaterial to whether they are entitled to actual legal representation. *See Hernandez-Montiel v. INS*, 225 F.3d 1084, 1098-99 (9th Cir. 2000) (any inference drawn from the silence of a witness "must be reasonable"), *overruled on unrelated grounds by Thomas v. Gonzales*, 409 F.2d 1177 (9th Cir. 2005). Documentary evidence shows Plaintiffs remain in the Cities' public defense system and therefore continue to present a live case and controversy. Dkt. No. 122, Exs. 6-9.

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subjected to the Cities' unconstitutional public defense system but may have their claims evade review through acquittal, conviction, or (in rare cases) appointment of substitute counsel. *Gerstein v. Pugh*, 420 U.S. 103, 111 n.11 (1975). In addition, the proposed Class—a constant, though revolving, group of indigent defendants suffering the same deprivation— is inherently transitory. *McLaughlin*, 500 U.S. at 52. Simply put, no member of the proposed Class is likely to have a live claim throughout the entire litigation. *See Gerstein*, 420 U.S. at 111 n.11.[3]

In the event the Court finds Plaintiffs are unable to continue on mootness grounds, Plaintiffs respectfully seek leave to substitute proposed Class members in their place. "As long as the proposed class satisfies the requirements of Rule 23, the court may certify the class conditioned upon the substitution of another named plaintiff." *National Fed. of Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1201 (N.D. Cal. 2007). Other indigent defendants with live claims have demonstrated a willingness to proceed as named Plaintiffs in this lawsuit. *See* Decl. of Allisha Barter ("Barter Decl.") ¶¶ 2-3; Decl. of Rose A. Martineau ("Martineau Decl.") ¶ 2; Supp. Marshall Decl., Ex. 2.

C. Plaintiffs' Claims Raise Common Issues of Fact and Law

This case involves a uniform public defender system that the Cities jointly established through a single contract. Plaintiffs have presented substantial evidence regarding the Cities' systematic failure to provide actual representation to indigent defendants.[4] Furthermore, in their response and pending motions for summary judgment, the Cities show there are numerous common questions at the heart of this case that are subject to Class-wide resolution. For

[3] The Cities continue to rely on inapposite cases in their discussion of the "capable of repetition, yet evading review" exception to the mootness doctrine. In *Murphy v. Hunt*, 455 U.S. 478, 481-82 (1982), the Supreme Court found that once the plaintiff's claim was mooted, he "no longer had a legally cognizable interest" because "he had not . . . sought to represent a class of pretrial detainees." Likewise, in *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), the court noted that the exception was not satisfied because the case was "not a class action."

[4] Plaintiffs have presented substantial evidence that the public defenders fail to provide even the most basic assistance of counsel, including, for example, the failure to stand with and advocate on behalf of defendants during court hearings. While it bears noting that the Cities have not rebutted or disputed this evidence (the same is true for Sybrandy (see Dkt. No. 120)), the crux of the claim is not where a public defender must stand but whether the Cities must address this basic lack of representation in their public defense system. The proof and answer to this and other important questions will be the same for all Class members.

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example, the Cities contend that they do not have a duty to supervise or monitor the public defender system they have implemented. Similarly, the Cities disagree that they must impose reasonable caseload limits to ensure that their public defenders are able to provide actual representation to Class members. The answers to such central questions will be identical for all class members. As the Supreme Court has explained, "even a single [common] question will do" to satisfy the commonality requirement. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2451, 2556 (2011) (internal marks and citation omitted).

The Cities' comments regarding the alleged diversity of indigent defendants (or people in general) are misplaced. Where, as here, a public defense system is structured in such a way as to provide no meaningful opportunity for indigent defendants to meet in private with their counsel so that they can establish a confidential attorney-client relationship, that system is unconstitutional. The fact that some indigent defendants may not choose to take advantage of such an opportunity once the system is properly restructured is irrelevant. It is the failure to provide for meetings in the first place that establishes a violation.

This lawsuit is based on the facts of this case. Plaintiffs are not asking the Court to direct all public defense attorneys in Washington to handle their cases in cookie-cutter fashion; rather, Plaintiffs are asking the Court to enter an order that requires two cities, Mount Vernon and Burlington, to establish a constitutional framework for their public defense system, one that ensures the basic elements of the right to counsel are being met. Because Plaintiffs are seeking systemic relief on a prospective basis, an individualized analysis of prejudice is neither appropriate nor necessary.[5]

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[5] *See Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (*case dismissed on abstention grounds sub. nom., Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992) (holding the standard in *Strickland v. Washington*, 466 U.S. 668 (1984), "is inappropriate for a civil [class action] suit seeking prospective relief" to address the systemic denial of the right to counsel); *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 22, 24, 27 (N.Y. 2010) (same); *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895, 907 (Mass. 2004) ("The harm involved here, the absence of counsel, cannot be remedied in the normal course of trial and appeal because an essential component of the 'normal course,' the assistance of counsel, is precisely what is missing here."); *Rivera v. Rowland*, No. CV-95-0545692S, 1996 WL 636475, at *5 (Conn. Super. Ct. Oct. 23, 1996), attached as App. A to Dkt. No. 45 ("In [class action] cases involving alleged deprivations of constitutional rights, such as the instant one, the element of injury may be established by alleging the deprivation of the right itself."); *Best v. Grant County*, No. 04-2-00189-0

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"The rights of the poor and indigent are the rights that often need the most protection. Each county or city operating a criminal court holds the responsibility of adopting certain standards for the basic delivery of public defense services, with the most basic right being that counsel shall be provided." *In re Michels*, 150 Wn.2d 159, 174, 75 P.3d 950 (2003). Plaintiffs seek nothing more here. Whether the Cities have a duty to provide Class members with assistance of counsel, whether the Cities are systemically failing to meet that duty, and whether Class members are entitled to preliminary and permanent injunctive relief are common questions that can be adjudicated and answered for all in one action. Thus, the commonality requirement of Rule 23(a)(2) is satisfied.

D. Plaintiffs' Claims Are Typical of the Class Members' Claims

Plaintiffs' claims are typical of the claims of the proposed Class members because they all arise from a common course of conduct by the Cities: the establishment and maintenance of a public defense system that constructively deprives indigent defendants of the right to counsel. The Cities challenge typicality based on proposed defenses to Plaintiffs' claims, but those defenses are either meritless or applicable to the claims of all Class members.[6]

The first defense the Cities allege is standing. As demonstrated above, Plaintiffs had standing at the time this lawsuit was filed and continue to present a live case and controversy. *See* Section II.A-B, *supra*. The second defense the Cities allege is "unclean hands." This doctrine is unsuitable for constitutional violations because its application would substantially frustrate the public interest. *See* Dkt. No. 45 at 49:29 – 50:35. Moreover, the assertions underlying the Cities' claims of uncleanliness are tenuous at best. *See* Section II.E, *infra*. The third defense the Cities allege is "fugitive disentitlement." This doctrine does not apply for the simple reason that Plaintiffs are not fugitives. *See* Dkt. No. 45 at 50:37 – 51:25. The final

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(Wash. Super. Ct. Oct. 14, 2005), attached as App. C to Dkt. No. 45 (holding that where "only prospective relief is sought to fix the system . . . class plaintiffs do not have to demonstrate individual prejudice"); *White v. Martz*, No. CDV-2002-133 (Mont. Jud. Dist. Ct. July 24, 2002), attached as App. B to Dkt. No. 45 (holding *Strickland* was inapplicable to pre-conviction Sixth Amendment claims).

[6] The Cities also challenge typicality on the same grounds for challenging commonality and adequacy. Plaintiffs' responses to those arguments are set forth in Sections II.C (commonality) and II.E (adequacy) of this brief.

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defense the Cities allege is promissory estoppel. The Cities maintain that when Plaintiff Moon entered a guilty plea on a charge in 2009, he certified he understood his rights. *See* Dkt. 29 at 75. This defense, which the Cities ostensibly could raise with respect to any indigent defendant who signed a guilty plea, is unavailing because it flows from the Cities' denial of the right to counsel. *See, e.g.*, *Morris v. State of Cal.*, 966 F.2d 448, 453 (9th Cir. 1991) ("a defendant may not default a constitutional claim through conduct that occurs as a result of the [defendant's] constitutional violation"); *see also* Dkt. 45 at 48:38 – 49:17.

Because the claims of the Plaintiffs and Class members all arise from the same injurious course of conduct by the Cities and are based on the same legal and equitable theories, the typicality requirement of Rule 23(a)(3) is satisfied.

E. Plaintiffs and Their Counsel Will Adequately Represent the Class

The Cities do not claim that the named Plaintiffs have interests antagonistic to the Class. Likewise, the Cities do not challenge the qualifications and experience of Plaintiffs' counsel to represent the Class. Instead, Defendants resort, yet again, to personal attacks on Plaintiffs and their counsel. Those attacks are unfounded.

Nobody disputes that Plaintiff Moon was inaccurate when he referenced the incorrect charge in certain statements regarding Witt. Mr. Moon has made clear, however, that his statements were otherwise accurate and true, and the Cities' have not presented evidence to the contrary. Dkt. No. 122, Ex. 1 at 44:21 – 45:7. As for Plaintiff Montague, there is no dispute that she spoke to Lee Martin, who is the father of a friend, and gave him her resume. *Compare* Dkt. No. 122, Ex. 2 at 16:19 – 20:18, *with* Dkt. No. 127 ¶ 5. Ms. Montague came away from that conversation believing she had a job that would start around the end of October. Dkt. No. 122, Ex. 2 at 16:19 – 20:18. Whether Ms. Montague was mistaken or Mr. Martin misspoke is irrelevant. Ms. Montague was concerned that a trip to Seattle for a full-day deposition would cause her a hardship by disrupting the new job she believed she had. Dkt. No. 63 ¶ 5.

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Moreover, there is no dispute that Ms. Montague could not afford a ticket to Seattle. *See id*. The Cities' efforts to attack her credibility on these minor, immaterial points are without merit.

Also without merit is the suggestion that Plaintiffs cannot act as Class representatives in this matter because they have been charged with or convicted of crimes.[7] Incarcerated felons have long been certified as class plaintiffs in numerous cases. *See, e.g.*, *Dean v. Goughlin*, 107 F.R.D. 331, 332, 334 (S.D.N.Y. 1985) (finding "inmates" at correctional facility adequate because they "do not have interests divergent from the rest of the prisoners"); *Arrango v. Ward*, 103 F.R.D. 638, 640 (S.D.N.Y. 1984) (same); *Montcravie v. Dennis*, 89 F.R.D. 440, 443 (W.D. Ark. 1981) (same). Even in lawsuits that do not involve constitutional violations occurring in penal systems, courts have held that criminal charges and convictions do not disqualify an individual from acting as a class representative. *See Randle v. Spectran*, 129 F.R.D. 386, 392 (D. Mass. 1988) (holding class representative adequate despite for indictments for arson, a misdemeanor conviction, and an admitted failure to file tax returns); *Haywood v. Barnes*, 109 F.R.D. 568, 579 (E.D.N.C. 1986) (holding adequacy determination is "not based on a subjective evaluation of [plaintiffs'] personal qualifications as allegedly and tenuously evidenced by their prior criminal record").

Challenges to adequacy are not relevant unless they bear on the existence of conflicts and antagonisms among class members or plaintiffs' ability to vigorously prosecute their case. *Johns v. Rozet*, 141 F.R.D. 211 (D.D.C. 1992); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Plaintiffs Moon and Montague were questioned at great length in their depositions, and they responded in good faith. All three Plaintiffs have also answered written discovery regarding their resolved charges. No conflicts have been shown, and Plaintiffs' efforts at responding to discovery demonstrate their ability and willingness to vigorously prosecute this case. The Cities continue to complain about not taking the deposition of Plaintiff Wilbur, but Plaintiffs have made clear that Mr. Wilbur is available for deposition at

[7] If this were true, no indigent defendant would be qualified to seek systemic relief on behalf of a class.

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the Skagit County Jail. Dkt. No. 93 at 5:5 – 6:3. It is the Cities that have declined the opportunity to schedule Mr. Wilbur's deposition. *Id.*

As for the Cities' continued personal attacks on Plaintiffs' counsel, counsel acted appropriately and lawfully in obtaining non-privileged kites through a legitimate public disclosure request that was vetted by the Skagit County Public Records Act Officer. *See* Dkt. Nos. 96–106. Likewise, counsel acted appropriately in conveying the understanding that Plaintiff Montague had recently (so she believed) obtained a job and would face hardship if not given advance notice to appear for a deposition in a distant county. The Cities' reliance on *Coyle v. Hornell Brewing Co.*, No. 08-2797, 2011 WL 3859731 (D.N.J. Aug. 30, 2011), is misplaced. There, the court held that despite a "repeated" and "serious" error by the plaintiff's counsel regarding a material fact in the case, the error "d[id] not overbalance the efforts taken by Plaintiff's counsel to investigate claims in this action, counsel's experience in litigating class actions, counsel's knowledge of the applicable law, and the resources Plaintiff's counsel has demonstrated they are willing to commit to representing the putative class." *Coyle*, 2011 WL 3859731, at *6. Thus, the court rejected defendant's challenge to counsel's adequacy. *See id.*

Plaintiffs have demonstrated that their interests do not conflict with the interests of other indigent defendants in the Cities' public defense system. Thus, Plaintiffs satisfy the adequacy requirement of Rule 23(a)(4). Likewise, because Plaintiffs' counsel satisfy the adequacy requirement of Rule 23(g)(1)(A) because they are experienced with complex litigation, knowledgeable in the applicable law, and committed to representing the Class.

F. Certification Under Rule 23(b)(2) Is Appropriate

Rule 23(b)(2) was specifically designed for civil rights cases challenging a common problem. *See* Fed. R. Civ. P. 23 advisory committee's note to 1966 Amendment, Subdivision (b)(2); *Pigford v. Glickman*, 182 F.R.D. 341, 350-51 (D.D.C. 1998) (Rule 23(b)(2) was added as "a mechanism for certifying classes in civil rights cases"). In their brief discussion of the rule, the Cities ignore the crux of this lawsuit, which is a challenge to the unconstitutional

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public defense system created and maintained by the Cities. Instead, the Cities divert attention to the effects that system has on indigent defendants, asserting these effects may be varied. The evidence before the Court, however, is to the contrary, for the underlying primary injury to each indigent defendant is a lack of basic representation.[8]

Nevertheless, "[t]he fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2009). Certification under this subsection "does not require [the Court] to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Id*. Rather, "'it is sufficient' to meet the requirements of Rule 23(b)(2) that 'class members complain of a pattern or practice that is generally applicable to the class as a whole.'" *Id*. (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)).

Here, Plaintiffs and Class members complain that the framework of the Cities' public defense system is broken. An injunction that obligates the Cities to ensure the system's structure supports the basic constitutional right to counsel is an injunction that will provide relief to the Class as a whole. Certification under Rule 23(b)(2) is appropriate.

G. The Proposed Class Is Identifiable and Coherent

"The requirement that a class be clearly defined is designed primarily to help the trial court manage the class . . . . It is not designed to be a particularly stringent test, but plaintiffs must at least be able to establish that the general outlines of the membership of the class are determinable at the outset of the litigation." *Pigford*, 182 F.R.D. at 346 (emphasis added). "The fact that the classes may include persons who are not identifiable at the present, or that class membership may change by the end of the trial, is no impediment" to certification.

[8] *See, e.g.*, Dkt. No. 46 ¶¶ 21-23; Dkt. No. 47 ¶¶ 3, 11; Dkt. No. 48 ¶¶ 16-17, 35; Dkt. No. 49 ¶¶ 3-4; Dkt. No. 50 ¶¶ 3, 9; Dkt. No. 51 ¶¶ 11-19; Martineau Decl. ¶¶ 4-7; Barter Decl. ¶ 3-4; Decl. of Miranda Hasty ¶¶ 4-6, 11; Decl. of Evan Robert Fowkes ¶¶ 1-5.

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Johnson v. Brelje, 482 F. Supp. 121, 123 (N.D. Ill. 1979) (certifying Rule 23(b)(2) class defined as "all male persons who have been and/or may be hospitalized pursuant to the Illinois Mental Health Code after being found not fit to stand trial"); *see also* 7A Charles Alan Wright et al., *Federal Practice & Procedure* § 1760 (3d ed. 2011) ("Nor is the fact that specific members may be added or dropped during the course of the action important.").

Because Plaintiffs are seeking prospective relief on behalf of indigent defendants charged with crimes in the municipal courts of Mount Vernon and Burlington, the proposed Class is logically defined as being comprised of indigent defendants that are (or will be, as the case moves forward) within the Cities' public defense system. To the extent necessary, it is not difficult to identify a Class member. The individual must (1) be charged with a crime in one of the municipal courts of Mount Vernon or Burlington, (2) be appointed one of the Cities' public defenders (whether primary of secondary), and (3) continue to have the public defender appearing in his case. Because this inquiry "[does] not depend on subjective criteria or the merits of the case or require an extensive factual inquiry to determine who is a class member," the Class definition is appropriate. 7A *Federal Practice & Procedure* § 1760 n.11.[9]

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court certify the proposed Class pursuant to Rule 23(b)(2); appoint Angela Montague, Jeremiah Moon, and Joseph Wilbur as Class representatives; and appoint Terrell Marshall Daudt & Willie PLLC, The Scott Law Group P.S., the ACLU of Washington Foundation, and Perkins Coie LLP as Class counsel.

[9] The Cities maintain that Article III standing must be demonstrated for every absent class member, but this assertion finds no support in the Ninth Circuit. As the court recently noted in *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1021 (9th Cir. 2011), "our law keys on the representative party, not all of the class members, and has done so for many years." *See also Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements . . . . Thus, we consider only whether at least one plaintiff satisfies the standing requirements for injunctive relief."); *Hayes*, 591 F.3d at 1125 ("The fact that some class members may have suffered no injury . . . does not prevent the class from meeting the requirements of Rule 23(b)(2)."); *Bruno v. Quten Research Inst., LLC*, __ F.R.D. __, 2011 WL 5592880, at *5 (C.D. Cal. Nov. 14, 2011) (rejecting case on which the Cities rely as not according with Ninth Circuit authority).

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DATED this 9th day of December, 2011.

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CERTIFICATE OF SERVICE

I, Toby J. Marshall, hereby certify that on December 9, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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