The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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 DEFENDANT CITIES OF MOUNT VERNON AND BURLINGTON'S RESPONSE TO THE COURT'S ORDER FOR FURTHER BREIFING

Defendants, the Cities of Mount Vernon and Burlington ("the Cities"), respectfully submit the following memorandum in response to the Court's Order for further briefing.

1. Have any federal courts taken over supervision of a public defense agency, either directly or through appointment of a supervisor/monitor, anywhere in the United States?

No. After making a diligent search, the Cities were unable to find any indication that a federal court has ever taken over a public defense agency through its equitable powers—either by monitor or directly.

The Cities found one federal case where the court *declined* to do so, however. In *Farrow v. Lipetzky*, 12-CV-06495-JCS, 2013 WL 1915700 (N.D. Cal. May 8, 2013), the

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plaintiffs sought to certify a class of indigent defendants, claiming that criminal defendants were denied counsel at arraignment, and then left in jail for between five and thirteen days. Labeling this a "brief period," the court refused to find a violation, certify a class, or issue an injunction. *Id*.

2. Have any state or federal courts held a municipality liable under *Monell* for constitutional defects in its public defense system?

Yes, where there are extreme circumstances and clear indicia of governmental "control" over the attorneys. *Miranda v. Clark County*, 319 F.3d 465 (9th Cir. 2003), is perhaps the leading case. There, the Director of the Office of Public Defender promulgated a mandatory policy in which criminal defendants were administered a mandatory polygraph—and their success determined the experience of their public defender and resources apportioned to their case. *Id.* at 467. This led to the plaintiff being assigned an attorney "fresh out of law school" to defend his capital case, a conviction, and the plaintiff serving 14 years in prison before it was overturned. *Id.* The Ninth Circuit found that the polygraph policy was "deliberately indifferent" to the constitutional rights of criminal defendants, and could support a *Monell* claim against the county. *Id* at 471.

Similarly, in *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 617 (6th Cir. 2007), the public defender had a regular practice of failing to ask for indigency hearings when the defendant was subject to incarceration for failure to pay a fine—in contravention of Supreme Court precedent.[1] *Id.* at 608. The Sixth Circuit found that this gave rise to a potential *Monell* issue, but reversed the district court in light of equivocal evidence on the question of "pattern and practice." *Id.* at 616-17.

In contrast, to the Cities' knowledge, more generalized allegations about inadequate "funding" or "supervision" generally do not support a *Monell* claim. *Gausvik v. Perez*, 239 F. Supp. 2d 1047, 1063 (E.D. Wash. 2002), provides a helpful illustration and survey of the

[1] *See Bearden v. Georgia*, 461 U.S. 660, 667 (1983) (the state may not "impose a fine as a sentence and then automatically convert it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.")

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case law. In *Gausvik*, like our case, the claim was that the public defender was under-funded and not subject to clear state law standards. The evidence was that the county's contract public defender was the "low bidder" and required to expend its own money for conflict counsel—creating a financial conflict of interest and motive to expeditiously. *Id.* at 1064. The court found this insufficient to establish *Monell* liability:

> … if plaintiff did not receive effective assistance of counsel, it was because of Barker & Howard and not because of Chelan County. Barker & Howard had an ethical obligation to provide the best defense possible to plaintiff, regardless of who was paying it to provide that defense and how much was being paid. If Barker & Howard made decisions about plaintiff's criminal representation based on economic self-interest, that was a violation of its ethical obligation to their client.[17] The blame cannot be passed to Chelan County.

Id. at 1065. Funding and failure to abide by RCW 10.101 do not implicate *Monell* unless they reach levels so extreme that the public defender is effectively by "controlled" them.[2]

Absent such control, the rule is that "a public defender does not act under color of state law when performing a lawyer's traditional functions such as entering not guilty pleas, moving to suppress state's evidence, objecting to evidence at trial, cross-examining state's witnesses, and making closing arguments." *Id.* at 1061-62 (quoting *Polk County v. Dodson*, 454 U.S. 312, 381-19 (1981)); *see also Walker v. Cnty. of Santa Clara*, C 04-02211 RMW, 2005 WL 2437037 (N.D. Cal. 2005) (agreeing that absent evidence of conspiracy or "administrative actions beyond the actual representation of [the] client… public defenders are private individuals for purposes of section 1983, and thus do not act under color of state law.").[3]

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[2] Notably, every single public defender in our case squarely rejected the claim that they were "under-funded." Neither Christine Jackson, nor John Strait, claimed otherwise.

[3] In *Polk*, the Supreme Court explained its reasoning. First, it emphasized that the public defender is not a typical "employee of the state," inasmuch as he or she is not similarly amenable to administrative direction. *Id.* at 321-22. While funding decisions may dictate the "quality of his law library or the size of his caseload," the defense attorney "by the nature of his function, cannot be the servant of the administrative superior." *Id.* Furthermore, the court acknowledged that the state has a countervailing obligation to "respect the professional independence of the public defenders whom it engages." *Id.* Absent "an attempt to control their actions in a manner inconsistent with the principles on which *Gideon* rests," *Monell* is not implicated. *Id.*

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3. Has any state or municipality adopted "hard" caseload standards like those that Washington is contemplating?

Maybe, but it is far from a "prevailing professional norm."

A 2010 DOJ study found that nine (9) states had some "formal policy regarding the maximum number of cases an attorney can carry at one time." *See* http://www.jrsa.org/events/conference/presentations-10/Donald_Farole.pdf (last visited August 2, 2013). Of the nine, seven (7) had mandatory compliance, with two (2) purportedly setting caseloads by "state law" and one (1) by "State Supreme Court rule." [4] The vast majority of states have no "hard caseload limits."

And of the jurisdictions considered "mandatory" by the DOJ study, many are not. Colorado, for example, was listed as a "mandatory compliance" state, but a diligent search of its statues uncovered no express limitation on caseloads. Upon further scrutiny, it appears that a case-weighting study was performed in 1996,[5] which the legislature has since used informally for budgeting. As a practical matter, it does not appear to be binding.[6]

Similarly, Massachusetts had no state law setting caseloads. It instead had commission to set caseloads. Mass. Gen. Laws, 211.D (c). The Commission of Public Counsel sets caseload limits for "District Court" cases at 250. http://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2010/MANUALChap5links3.pdf (last visited August 2, 2013). But this count specifically excludes "bail only," "bail review," and defaulted cases. *Id.*[7]

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[4] Where not mandated by state law, the caseloads were a function of "oversight boards," "office policy," or bar associations.

[5] Keeping Defender Workloads Manageable, by the Spangenberg Group, https://www.ncjrs.gov/pdffiles1/bja/185632.pdf, at 9 (last visited August 8, 2013) (citing The Spangenberg Group, *Weighted-Caseload Study for the Colorado State Public Defender* (November 1996)).

[6] *See, e.g.*, Jessica Fender, "Colorado public defenders' workload growing even though criminal filings have fallen," THE DENVER POST (2011) (last visited August 8, 2013).

[7] Attorneys who exceed the Committee's caseload limits without approval are not compensated. *Id.*

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In its brief, the United States identified part of Arizona, part of Georgia, Montana, New Hampshire, Virginia, and New York City.

Stated succinctly, there is an abundance of reports, presentations, articles, and contentions about caseloads. But most of it is conflicting, misleading, or wholly inaccurate.[8] Caseloads that one publication reports as "mandatory" are in reality permissive. There is huge variation in both the numbers and their flexibility.

And it is equally clear that "hard" caseload numbers are a rarity—and relatively new. Indeed, when introduced in New York City (not the state as a whole) for the first time in mid-2009, they were hailed as landmark legislation that "could serve as a model for the rest of the state and, hopefully, other large urban centers." John Eligon, State Law to Cap Public Defenders' Caseloads, But Only In The City, http://www.nytimes.com/2009/04/06/nyregion/06defenders.html. The new regulations contemplated no specific numbers, and allowed four years to "phase in the caseload limits." *Id.*

In short, Washington's newly-contemplated (but not yet implemented) Supreme Court rule is unique. It does not represent a national consensus, nor a "prevailing norm." [9]

4. Is the issue of the constitutionality of the representation afforded by Messrs. Sybrandy and Witt moot? If so, what impact does that have on the available remedy, including an award of attorney fees?

Yes, that issue is moot and not amenable to relief.

Plaintiffs made a conscious decision not to seek retrospective relief arising out of Sybrandy and Witt's representations. If plaintiffs believed that these attorneys caused them even minimal harm, they could have sought money damages—which would have preserved the issue of their representation as a live dispute. *See, e.g., Bernhardt v. County of Los*

[8] For example, that same 2001 DOJ Report cites 300 misdemeanor cases as the "maximum public defender workload" in Washington. This is, of course, inaccurate. This confusion only serves to underscore how caseloads are anything *but* a "prevailing norm."

[9] Parenthetically, the Cities would agree with the United States' assessment that caseload limits are too blunt an instrument to measure attorney effectiveness. Workload—which takes into account experience, complexity, and the like—is a better measure.

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Angeles, 279 F.3d 862, 871 (9th Cir. 2002) ("A live claim for nominal damages will prevent dismissal for mootness."); *Wilson v. Nevada*, 666 F.2d 378, 380-81 (9th Cir. 1982) ("a plaintiff's claims as to money damages survive regardless of the mootness of any claim for declaratory or injunctive relief").

They did not, presumably, because they could not establish prejudice to any case or defense. *See Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Cronic*, 466 U.S. 648, 657-58 (1984) ("the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."). Sybrandy and Witt were undeniably effective; the outcomes they secured for their clients were not subject to serious argument.

Accordingly, plaintiffs instead sought only prospective relief, and survived summary judgment based upon the more forgiving legal standard. *See, e.g.*, Dkt. 45 (Mot. at 45) ("In this civil suit seeking prospective relief, the question is not whether the plaintiff has been prejudiced by counsel's errors…"). The Court accepted their position. Dkt. 142 (Order) ("Plaintiffs are seeking only prospective equitable relief..."). This was doubtless an informed decision predicated upon the risks and benefits of pursuing a damages case.

But plaintiffs cannot have it both ways. They chose to limit this case to the *existing system*, as both they and the Court repeatedly recognized. *See, e.g.*, Dkt. 218 (Order at 1) ("Plaintiffs seek injunctive relief and will bear the burden at trial of showing that the ***then-existing systems*** warrant such an extraordinary remedy.") (emphasis added). Accordingly, a ruling or determination about the *prior* system and its attorneys would be an inappropriate, advisory opinion. *See* U.S. Const. Art. III, Section 2; *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (citing *O'Shea v. Littleton*, 414 U.S. 488 (1974)) ("[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief if unaccompanied by any continuing, present adverse effects."); *see also*

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Eclavea, et al., 5 Am. Jur. 2d Appellate Review § 557 (2013) ("the case or controversy requirement is not satisfied where the parties merely desire an abstract declaration of the law…"). Absent compelling proof that the Cities ***will*** undo their contracts and legislation, absent an injunction, Sybrandy and Witt are moot. *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) ("The government's change of policy presents a special circumstance in the world of mootness. Of course there is always the possibility of bad faith and a change of heart. But, unlike in the case of a private party, we presume the government is acting in good faith."); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010) (requiring, to deny mootness, "clear showings " of governmental "desire to return to the old ways"); *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1328-29 (11th Cir. 2004) ("[G]governmental entities and officials have been given considerably more leeway than private parties in the presumption that they are unlikely to resume illegal activities."); *Amax, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003) (noting that cessation of conduct by the government is "treated with more solicitude... than similar action by private parties").

This reasoning fully comports with the law governing fee-shifting. Under 42 U.S.C. § 1988, a prevailing party on a civil rights claim is generally entitled to an award of reasonable attorneys' fees. The U.S. Supreme Court has interpreted this to require two showings: **First**, a resolution that "materially changes the legal relationship between the parties," *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist*., 489 U.S. 782, 792 (1989). And **second**, that change must be "judicially sanctioned." *Buckhannon Bd. & Care Home v. W.Va. Dep't of Health & Human Res*., 532 U.S. 598, 605 (2001).

"A material alteration of the legal relationship occurs when the plaintiff… can force the defendant to do something the defendant would otherwise not have to do." *Farrar v. Hobby*, 506 U.S. 103, 113 (1992). An advisory ruling about a nonexistent system and its participants is, in contrast, immaterial under *Buckhannon* and § 1988:

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> … a judicial pronouncement that the defendant has violated the Constitution, unaccompanied by an enforceable judgment on the merits, does not render the plaintiff a prevailing party. Of itself, "the moral satisfaction that results from any favorable statement of law" cannot bestow prevailing party status. No material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.

Farrar v. Hobby, 506 U.S. 103, 112-13 (1992) (internal citations omitted); *see also Peter v. Jax*, 187 F.3d 829, 837 (8th Cir. 1999) ("a judicial pronouncement that the defendant has violated the Constitution, without more, does not make a plaintiff a prevailing party."); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) (interlocutory rulings are "not the stuff of which legal victories are made").[10]

So too, here. If the Court were to find that Sybrandy and Witt engaged in unconstitutional conduct, it would not permit plaintiffs to "force" anybody to do anything. *Farrar*, 506 U.S. at 113. Those representations are over, and those attorneys are no longer under contract with the Cities. Indeed, the entire system no longer exists by virtue of new standards, legislation, and contracts.

The question of prospective, injunctive relief turns on *Mountain Law*, not Sybrandy or Witt. And plaintiffs did not come close to establishing that Jon Lewis, Mike Laws, Jesse Collins, Sade Smith, and Stacy DeMass are so incompetent or unscrupulous that extraordinary relief should issue to prevent them from "immediately" and "irreparably harming" their clients. Mountain Law has been complaint-free for almost a year (despite an open-invitation), well-within the bounds of the most recent caseload standards, and exceedingly effective according to prosecutors, judges, and court staff. Absent proof that the Cities will fire all of these attorneys, undo legislation, breach contracts, ignore

[10] This is consistent with the broader principle that plaintiffs who "win an interim battle, but ultimately lose the war"—that is, do not secure their ultimate relief—are not entitled to a fee award. *See Sole v. Wyner*, 551 U.S. 74, 86 (2007); *Northern Cheyenne Tribe v. Jackson*, 433 F.3d 1083, 1085-86 (8th Cir. 2006) (refusing to award fees when preliminary injunction was subsequently mooted); *Singer Management Consultants, Inc. v. Milgram*, 650 F.3d 223 (3d Cir. 2011) (en banc) (preliminary injunction that did not lead to permanent injunction did not support prevailing party status).

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standards, and re-hire former counsel, the old system is not the issue. Its constitutionality is moot.

In sum, the Court cannot award attorney fees unless it finds an *existing* constitutional violation, which, if not remedied through an exercise of equitable authority, will cause irreparable harm. Plaintiffs had their day in Court; the Cities respectfully submit that they did not make this extraordinary showing.

A defense verdict should be entered.

DATED: August 14, 2013

KEATING, BUCKLIN & McCORMACK, INC., P.S.

By: */s/ Andrew Cooley*

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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