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' MOTION FOR SUMMARY JUDGMENT

Noted for Consideration: March 29, 2013

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I. INTRODUCTION

Indigent defendants who are charged with misdemeanors in the municipal courts of Mount Vernon and Burlington have a fundamental right to the assistance of counsel under the Constitutions of the United States and the State of Washington. The mere formal appointment of attorneys is insufficient to satisfy this right. Rather, indigent defendants must receive actual representation at all critical stages of their criminal prosecutions.

For many years now, Defendants Mount Vernon and Burlington ("the Cities") have operated a public defense system that systemically deprives indigent defendants of their right to counsel. Among other things, the Cities have engaged in a pattern and practice of appointing attorneys who fail to meet with or respond to indigent defendants in or out of custody; fail to engage in confidential attorney-client communications with defendants; fail to investigate the charges against defendants; fail to spend sufficient time on the cases of defendants; fail to advocate on behalf of defendants; and effectively force defendants to accept plea deals. The Cities have had ample notice of the deficiencies within their public defense system, particularly in light of the numerous complaints voiced by governmental officials and indigent defendants, but the Cities have consistently turned a blind eye to ongoing constitutional violations.

The root cause of these violations has been the failure of the Cities to engage in any meaningful monitoring or oversight of their public defense system. Remarkably, at the time this suit was filed the Cities had a structure in place that could have allowed them to do this. A few years earlier, the Cities undertook efforts to ostensibly bring their system "up to date with its legal requirements."[1] The Cities enacted ordinances that included standards for the delivery of public defense services, drafted a public defense contract that included provisions designed to secure the right to counsel, and established caseload limits for their public defense attorneys. Once these changes were made, however, the Cities did nothing to ensure compliance with the standards, contractual provisions, or caseload limits. Instead, ignoring

[1] Ex. 1 at 15:2-23, 46:7-14, 51:16 – 52:5, 56:25 – 57:11.

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complaints and excessive caseload reports, the Cities continued to maintain an unconstitutional public defense system year after year.

Most troubling of all is the manner in which the Cities responded to this lawsuit. Rather than acknowledge their misconduct and take steps to correct it, the Cities chose to actively eliminate the very standards and provisions that, had they been utilized, could have allowed the Cities to meaningfully monitor their public defense system. Just a few months ago, the Cities repealed their prior ordinances and redrafted their public defense contract so as to omit numerous performance benchmarks and evaluation tools. And when an expert recently concluded that the current public defense attorneys are failing to devote sufficient time to cases, the Cities instructed the attorneys to stop reporting hours worked. It is clear that the Cities will continue on a path of refusing to monitor or oversee their public defense system. As a representative of Mount Vernon testified in January 2013: "The City does not agree that it has to ensure, secure, or guarantee anything."[2]

On behalf of the certified Class of indigent defendants who have been or will be charged with misdemeanors in the Cities' municipal courts,[3] Plaintiffs respectfully move the Court to rule that the Cities are liable under 42 U.S.C. § 1983 for having engaged in a persistent and systemic pattern of violating the constitutional right to counsel. Plaintiffs also respectfully move the Court to order injunctive relief to protect the Class from further violations of the right to counsel, violations that are fairly anticipated from the Cities' past and present actions and inactions. The injunctive relief Plaintiffs propose, which the Court has broad discretion to impose, is appropriate and modest. Plaintiffs respectfully request that the Court order the Cities to hire one public defense supervisor on a part-time basis and to charge that supervisor with doing what the Cities have long failed to do: meaningfully monitor and oversee the Cities' public defense system.

[2] Ex. 2 at 80:8 – 81:11 (emphasis added).

[3] Dkt. No. 143 at 7:16.

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For the reasons that follow, Plaintiffs' motion should be granted.

II. STATEMENT OF FACTS

A. For Years Before the Filing of This Lawsuit, the Cities Operated a Public Defense System that Failed to Provide Meaningful Assistance of Counsel to Indigent Defendants

The cities of Mount Vernon and Burlington jointly operate a public defense system for the purpose of providing assistance of counsel to indigent persons charged with misdemeanor crimes in the Cities' municipal courts. Ex. 3. At the time this lawsuit was filed in June 2011, the Cities maintained a contract with two attorneys (Richard Sybrandy and Morgan Witt) to provide all such public defense services except where there was an actual conflict of interest. Ex. 4 at 199 (§4(D)).[4] The contract referred to Sybrandy and Witt as the "Public Defender." Ex. 4 at 194. The attorneys had been serving in this position for many years. Ex. 5.

1. The Cities Maintained a Public Defense System that Failed to Provide Adequate Time for Actual Assistance of Counsel Due to Excessive Caseloads

The Washington State Bar Association ("WSBA") has long had established caseload standards, and those standards provide guidance on the maximum number of cases that will "allow each lawyer to give each client the time and effort necessary to ensure effective representation." Ex. 6 (Standard Three). Under WSBA standards applicable in June 2011, the acceptable caseload of a full-time public defense attorney was generally 300 misdemeanor cases per year and could not exceed 400 misdemeanor cases per year. *Id.*[5] A case was defined

[4] All exhibits are attached to the Declaration of Toby J. Marshall in Support of Plaintiffs' Motion for Summary Judgment. For the sake of brevity, preceding zeros have been deleted from pin cites.

[5] In September 2011, the WSBA adopted amended standards that similarly cap the number of misdemeanor cases at 300 per attorney per year in jurisdictions that have adopted a case weighting system as described in the standards, or 400 misdemeanor cases per attorney per year in jurisdictions that have not adopted a numerical case weighting system. Exs. 7 and 101. The amended WSBA standards provide that in jurisdictions with a case weighting system, "[s]erious offenses or complex cases that demand more-than-average investigation, legal research, writing, use of experts, use of social workers and/or expenditures of time and resources should be weighted upwards and counted as more than one case." *Id.* (emphasis added). In addition, the amended standards provide that "care must be taken" when weighting cases downward because "many" of the cases that may be considered for this type of adjustment "routinely involve significant work and effort and should be weighted at a full case or more." *Id.*

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"as the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide representation." *Id*. "In jurisdictions where assigned counsel or contract attorneys also maintain[ed] private law practices, the caseload [limit]" was required to be "based on the percentage of time the lawyer devote[d] to public defense." *Id*.

The Cities were well aware that Sybrandy and Witt served as the Cities' Public Defender on a part-time basis only. Ex. 8 at 105:13-17; Ex. 9 at 48:5-25, 49:13-19; Section II.C.3, *infra*. Between 2008 and 2011, Sybrandy's private practice generated more income than he made from the Cities' public defense contract. Ex. 8 at 118:21 – 119:15 and Exs. 10 and 11. Witt has testified that during the same period, he spent less than 40 percent of his professional time on public defense. Ex. 9 at 48:5-25, 49:13-19; Ex. 12. The remainder of his time was spent in private practice handling matters in the areas of family law, trusts and estates, business law, criminal law, and personal injury. Ex. 9 at 48:5-15, 49:1-19.

Under the WSBA standards, an attorney who devotes only 40 to 50 percent of his time to public defense services should handle no more than 160 to 200 misdemeanor cases per year for indigent clients. *See* Ex. 6. The caseloads of Sybrandy and Witt greatly exceeded these limits, as shown in records submitted to the Cities. Exs. 13-15. In 2009, for example, Sybrandy closed 1,206 cases and Witt closed 1,136 cases—a total of 2,342. Declaration of Jennifer J. Boschen in Support of Plaintiffs' Motion for Summary Judgment ("Boschen Decl.") ¶ 3; Exs. 13, 14.A, 15.A; Ex. 8 at 52:22 – 53:4. In 2010, Sybrandy closed 963 cases and Witt closed 1,165 cases—a total of 2,128. Boschen Decl. ¶ 3; Exs. 14.B and 15.B; Ex. 8 at 52:22 – 53:4; *see also* Ex. 16 (asserting "[t]he total number of misdemeanor cases filed for the City of Mount Vernon" was 1,436 in 2009 and 1,366 in 2010 and that "this data is not specifically maintained by the City of Burlington"); Exs. 2 at 91:18 – 93:5 and 17 (official records showing the Public Defender was assigned to more than 1,900 indigent defendants in 2009).[6] In 2011,

[6] As noted above, the WSBA standards applicable in 2009 and 2010 defined "a case" as "the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide

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Sybrandy closed 1,173 cases and Witt closed 1,098 cases—a total of 2,271.[7] Boschen Decl. ¶ 4; Exs. 14.C and 15.C.

The applicable WSBA standards provided that yearly caseloads of the magnitude handled by the Cities' Public Defender required the equivalent of five to six full-time attorneys and one part-time supervisor. *See* Ex. 6. The combined time that Sybrandy and Witt spent on public defense cases, however, was substantially less than two full-time attorneys. *See* Ex. 8 at 113:13 – 115:5; Ex. 9 at 48:5-25, 49:13-19. Time records submitted to the Cities show the Public Defender regularly reported spending only 30 minutes per case. Exs. 12 and 17.[8] Sybrandy has testified that these reports are "good reflections of the attorney time that was spent on [each] case." Ex. 8 at 44:17-23, 46:3-7 (asserting a simple "driving suspended 3rd" charge would typically take only "minutes" to resolve, and a more complex DUI charge would typically take "a half an hour to an hour").[9]

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representation." Ex. 6 at 5. With the exception of the 2009 caseload for Sybrandy, the yearly caseloads identified for 2009 and 2010 are simply based on a count of the unique case numbers set forth in the closed case reports that Sybrandy and Witt submitted to the Cities. Boschen Decl. ¶¶ 3-4; Exs. 13, 14.A, 14.B, 15.A, 15.B. Notably, this method results in a 2010 count that is more conservative than the counts appearing on the covers of Sybrandy's monthly reports. *See* 15.B. The 2009 caseload for Sybrandy is taken from Sybrandy's own monthly caseload counts. *See* Exs. 13 and 15.A.

[7] The 2011 caseload statistic for Witt is based on a count of the unique time entries Witt made in his reports, entries which often grouped together more than one unique case number. Boschen Decl. ¶ 4. Plaintiffs chose this approach because in September 2011, the WSBA modified the definition of "a case" as it applies to courts of limited jurisdiction. Ex. 7. In those courts, multiple citations from the same incident can be counted as one case. *Id*. With the exception of May 2011, which was counted in the same manner as Witt's records because Sybrandy's summary was missing, the 2011 caseload for Sybrandy is taken from Sybrandy's own monthly caseload counts. Boschen Decl. ¶ 5; Ex. 15.C.

[8] *See also* Exs. 14.C and 14.B at 33, 143, 169, 273, 303, 330. Interestingly, complaints by indigent defendants indicate these time records may be grossly overstated. *Compare* Ex. 18.B (Public Defender spent only minutes on case), *with* Ex. 15.B at 134 (Public Defender reported spending one hour on case); *compare also* Ex. 18.G (same), *with* Ex. 14.A at 285 (same).

[9] Witt also testified that the closed case reports reflect the amount of time spent on each case, but he later changed this testimony, first to say that it was only the amount of time spent in court, then to say that it may have been the time spent both in and out of court, and then to say that it was not a reflection of time at all. Ex. 9 at 65:10 – 66:13, 71:8-25, 72:16 – 84:8. Assuming Witt spent 1,800 hours per year handling legal matters, the percentage of time that he spent on public defense cases results in an average of approximately 38 minutes per case. Marshall Decl. ¶ 20.

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2. The Cities Maintained a Public Defense System that Lacked Confidential Attorney-Client Communication

With little time to devote to public defense, the Cities' Public Defender had a general practice of failing to talk to their assigned clients outside of court. Indeed, at his deposition Sybrandy admitted that a "majority" of the time, the "initial contact" with a defendant was "at the first pretrial [hearing]," and this was true throughout his service as Public Defender. Ex. 8 at 76:21 – 77:1, 149:4-9; Ex. 9 at 34:17 – 35:22. When asked whether he could "think of some circumstances where it would be appropriate . . . or necessary to meet with clients before their . . . first pretrial hearing," Mr. Sybrandy responded, "no." Ex. 8 at 78:14-17.

The typical reason given by the Cities' Public Defender for refusing to meet with clients was that the attorneys did not have the police reports. Dkt. No. 51 ¶ 14; Exs. 18.B, 20 at 558, 21; Ex. 8 at 75:16 – 77:1. In fact, starting in 2009 the Public Defender regularly sent a one-page memorandum to indigent defendants that referenced this standard policy:

> You are free to make an appointment with our office to meet with your attorney. We will not, however, schedule an appointment with you until we have copies of all the police reports in your case, because without that information, a meeting is completely useless.

Exs. 23 and 24 (emphasis added); Ex. 25 at 147:14 – 149:2.

The Public Defender's failure to meet with witnesses outside of court is corroborated by numerous witnesses. *See, e.g.*, Dkt. No. 48 ¶¶ 16, 17, 20, 21, 24, 30; Ex. 26 at 234:7 – 235:13, 237:3-24; Dkt. No. 46 ¶¶ 7, 10, 11, 14, 18, 19, 22; Dkt. No. 47 ¶¶ 3, 11; Dkt. No. 51 ¶¶ 9-18, 28; Dkt. No. 50 ¶ 3; Ex. 27 at 18:17 – 19:1; Dkt. No. 49 ¶ 3; Ex. 28 at 38:2-16, 41:16-18, 50:24 – 51:13, 52:10-19. Indeed, witnesses have testified that the Public Defender's office personnel specifically stated the attorneys would not meet in private with indigent defendants. Dkt. No. 50 ¶ 3; Ex. 27 at 18:17 – 19:1; Dkt. No. 49 ¶ 3.

The Public Defender's practice of not meeting with indigent defendants outside of court was entirely at odds with the WSBA's established standards at the time, which provided that a public defender "shall make contact with the client at the earliest possible time." Ex. 29 at 3

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(emphasis added). Indeed, "[i]f the client [was] in custody, contact should [have been] within 24 hours of appointment and [was required to] be within no more than 48 hours unless there [was] an unavoidable extenuating circumstance." *Id.*; *see also* Ex. 30 at 56:5 – 57:13. Plaintiffs' expert has testified that "it is always best to see your client as soon as possible, and to talk to that person as soon as possible." Ex. 19 at 90:20 – 91:1. "[T]he client is the focus, and needs to be the focus." *Id*. at 88:19 – 89:23.

3. The Cities Knew or Should Have Known the Public Defender Failed to Meet with Indigent Defendants in Custody

The failure of the Public Defender to meet with or respond to clients extended to indigent defendants who were incarcerated at the Skagit County Jail. Dkt. No. 48 ¶¶ 11-13, 33; Ex. 26 at 71:2-6, 173:7-10, 234:7 – 235:13; Dkt. No. 46 ¶¶ 7, 16, 21; Dkt. No. 47 ¶¶ 3, 10; Dkt. No. 49 ¶ 3; Ex. 28 at 38:17 – 39:18, 69:14 – 71:18; Exs. 21 and 31.

"Public Defender Request Form[s]" (also known as kites) demonstrate that the Cities' Public Defender knew or should have known incarcerated defendants needed to meet with their appointed attorneys. Ex. 32. On January 12, 2010, for example, an incarcerated defendant sent a kite with the following complaint: "I have been here since December 25th [nearly three weeks] and have yet to speak to Sybrandy and Witt. I have sent countless kites and [have had] family members call them but to no use." Ex. 32.B at 260. In 2011, another incarcerated defendant wrote to the Public Defender: "I need either a global resolution or bail reduction hearing as soon as possible [because] I will be homeless [and] posse[ssi]onless and veh[icle]less [unless I can get out of jail and take care of my affairs]." Ex. 32.M at 85. Four days later, having still not heard from his appointed attorney, the defendant sent another request: "I have been here 20 days and you have yet to come to see me, call or write." Ex. 32.M at 82; *see also* Ex. 32.H at 46 ("I need to speak to you . . . . Please don't leave me hanging like last time."); Ex. 32.N at 96 ("[I] would appreciate you following up with me about the cases you are supposed to be representing me on."); Ex. 18.C (Public Defender "doesn't answer" kites).

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When he received kites from inmates, Witt's usual practice was not to respond; instead, he would "just wait until [he] saw them in court" at their next hearings. *Id*. at 124:9-23. Sybrandy has testified that he would not have signed the Cities' public defense contract if it required him to meet with clients in jail before their pretrial hearings. Ex. 8 at 89:2-9. Indeed, Sybrandy explicitly told the Cities that it would be "extraordinary for us to be directed to initiate contact with [incarcerated] defendants" at "the level of compensation" being paid by the Cities, particularly since he found contact before pretrial hearings to be "useless." Ex. 33.

Jail records show that for the entire year of 2010, the Cities' Public Defender made only six visits to the local jail, meeting with a total of seven clients.[10] Ex. 34. By contrast, the same records show that attorneys from the Skagit County Public Defender's Office (who handle district and superior court proceedings) made 750 visits to the jail and met with 1,551 clients. *Id*. The results were similar for 2009. Jail records show that the Cities' Public Defender made only five visits to the jail and met with eight clients, whereas the same records show that attorneys from the county defender's office made 691 visits and met with 1,232 clients. *Id*.

4. The Cities Maintained a Public Defense System in Which the Public Defender Failed to Advocate on Behalf of Indigent Defendants

In addition to having a well-known and proven practice of failing to meet with clients outside of court, the Cities' Public Defender regularly failed to advocate on behalf of indigent defendants who were appearing in court. *See* Dkt. No. 51 ¶¶ 19, 24-26; Dkt. No. 48 ¶¶ 36-38; Ex. 26 at 29:18 – 30:16, 163:6-12, 177:2-11, 216:10-16; Dkt. No. 49 ¶¶ 8-10; Ex. 28 at 41:19-23; Dkt. No. 50 ¶¶ 10-11; Ex. 27 at 25:12 – 26:7; Dkt. No. 52 ¶ 7; Ex. 30 at 14:20 – 15:20, 60:17 – 61:1, 61:9 – 62:10. Rather, while one defendant was standing before the court, the Public Defender was typically talking with other defendants. *See id*. Plaintiff Montague, for example, has stated that the Public Defender did not advocate on her behalf or explain her circumstances to the judge or prosecutor. Dkt. No. 48 ¶¶ 36, 38; Ex. 26 at 163:6-12, 177:2-11,

[10] It is not known whether those clients were indigent defendants or private clients.

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216:10-16. Jaretta Osborne has testified that the Public Defender failed to advocate on behalf of her developmentally disabled son when he appeared before the judge. Dkt. No. 51 ¶¶ 19, 24-26. The judge even reprimanded Ms. Osborne's son for laughing at one point, yet the Public Defender "failed to say anything on [the son's] behalf or explain the fact that [he] did not understand what was going on around him" due to his developmental disabilities and mental health conditions. *Id*. ¶ 26.

As Roy Howson, an attorney who has long practiced criminal defense in Skagit County, testified: "[o]ne of the most important things for any defense attorney to do—public or private—is to stand between the client and the judge or prosecutor and advocate on the client's behalf." Dkt. No. 52 ¶ 9; *see also* Ex. 30 at 6:13 – 11:15, 16:2 – 17:25, 26:16 – 28:9; Dkt. No. 54 ¶ 27. This "ensure[s] that the client does not say things that could harm him or her when answering the judge's questions, particularly when the attorney better understands the judge's question and can provide the necessary information in a manner that is helpful to the client." Dkt. No. 52 ¶ 9; *see also* Dkt. No. 54 ¶ 27. Like so many other witnesses, Mr. Howson personally observed "that Mr. Sybrandy and Mr. Witt regularly fail[ed] to stand next to or speak for [their] public defense clients while those clients [were] being addressed by the judge." Dkt. No. 52 ¶ 7; *see also* Ex. 30 at 14:20 – 15:20, 40:6 – 41:8, 61:9 – 62:10. Though Sybrandy and Witt were "present in the courtroom," they were off "doing other things" and not representing clients. Dkt. No. 52 ¶ 7; *see also* Ex. 25 at 61:20 – 62:20.

5. The Cities Constructively Deprived Indigent Defendants of the Right to Counsel by Maintaining a Systemically Deficient Public Defense System

When this lawsuit was filed in 2011, the Cities were systemically depriving indigent defendants of the right to counsel. The interactions indigent defendants had with the Cities' Public Defender were typically limited to a few minutes in a crowded courtroom. Dkt. No. 49 ¶ 4; Ex. 28 at 44:17 – 46:15, 76:22 – 77:5; Dkt. No. 47 ¶ 3; Dkt. No. 48 ¶ 18; Dkt. No. 50 ¶ 5; Ex. 27 at 21:9-25. During that short time, defendants were forced to make important decisions about their cases, often without any explanation or discussion of the elements of the charge, the

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applicable defenses, the options available, or the attendant risks. *See, e.g.*, Dkt. No. 48 ¶¶ 18, 19, 39, 40; Dkt. No. 47 ¶¶ 4, 5, 11; Ex. 35 at 80:1-16, 98:8-11, 99:2-14, 100:21 – 101:5; Dkt. No. 50 ¶ 9; Dkt. No. 51 ¶ 22-23; Dkt. No. 46 ¶¶ 8-9, 23; Ex. 28 at 46:21-25. Furthermore, witnesses have testified that the Cities' Public Defender did not investigate their cases or even have a meaningful discussion of the facts. Dkt. No. 47 ¶ 11; Dkt. No. 46 ¶ 23; Dkt. No. 48 ¶ 35; Dkt. No. 51 ¶ 14; Dkt. No. 50 ¶ 9. Sybrandy acknowledges that he failed to hire an investigator on any case in the 12 years he served as a public defender for one or both of the Cities. Ex. 8 at 193:22 – 194:1 ("I've never really seen the need for an investigator"). Witt similarly admits that he did not hire an investigator for his cases. Ex. 9 at 58:8-10.

The story of Bonifacio Sanchez illustrates the unconstitutional nature of the Cities' public defense system. *See generally* Dkt. No. 50. After he was arraigned, Mr. Sanchez was told that Sybrandy had been assigned to represent him. *Id*. ¶ 2. Mr. Sanchez called Sybrandy's office to discuss the charge but was told that Sybrandy "would not meet with [him] outside of court." *Id*. ¶ 3. When he showed up at his hearing, Mr. Sanchez met with Sybrandy at a table in the courtroom. *Id*. ¶ 4. They talked for only a couple of minutes, and Mr. Sanchez "never had a chance to fully explain [his] story." *Id*. ¶ 5. Moreover, the meeting lacked any privacy because others were standing around, and "the prosecutor was only six or seven feet away" from them. *Id*. Sybrandy did not go over the police report with Mr. Sanchez but, instead, told Mr. Sanchez that he had seen many cases like this and that there was "no way" Mr. Sanchez could win. *Id*. ¶ 7. This left Mr. Sanchez feeling that Sybrandy would not fight on his behalf. *Id*. ¶ 8. Having spent less than five minutes with his appointed attorney, Mr. Sanchez pleaded guilty. *Id*. ¶ 8; *see also* Ex. 27 at 18:17 – 19:1, 21:9-25, 25:12 – 26:7.

Sybrandy has admitted that indigent defendants pleaded guilty at the first pretrial hearing. Ex. 8 at 151:25 – 153:21. When asked how often that happened, Sybrandy responded: "I wouldn't say it's rare." *Id*. at 153:15-21. Sybrandy acknowledged that these hearings were usually the first time clients had an opportunity to converse with an attorney regarding their

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case, and the conversation took place in an open courtroom and typically lasted only a few minutes. *Id*. at 76:21 – 77:1, 149:4-9, 151:25 – 153:14. Emails from Sybrandy also corroborate witness testimony about being pressured to accept plea deals. Ex. 36. For example, in an email to the Mount Vernon prosecutor Sybrandy stated that while he understood the prosecution could not produce a witness against his client, Sybrandy "would certainly tell" the client to take a plea deal "regardless of [the] witness issue." *Id*. at 4439. In another email to the prosecutor, Sybrandy made the following statement about a defendant to whom he was assigned: "This is just a dumbass, and I am gonna twist his arm into pleading . . . ." *Id*. at 4452.

As the evidence before the Court demonstrates, the Cities' public defense system long ago devolved to a state of "'meet 'em, greet 'em and plead 'em' justice." *State v. A.N.J.*, 168 Wn.2d 91, 98, 225 P.3d 956 (Wash. 2010) (quoting Deborah L. Rhode, *Access to Justice*, 69 Fordham L. Rev. 1785, 1793 and n.42 (2001)). Indeed, according to governmental records, no trials were held in Burlington's municipal court in 2010, and only five were held in Mount Vernon's municipal court. Ex. 37. In 2011, no trials were held in Burlington and only two were held in Mount Vernon. Ex. 38; *see also* Ex. 8 at 83:4 – 84:14, 99:5-14, 251:25 – 252:16 (Mount Vernon's prosecutor started taking less cases to trial at Sybrandy's request in 2008); Ex. 9 at 166:24 – 167:12 (agreeing trials were "relatively uncommon"). It is not known how many of these trials involved indigent defendants but even if they all did, the five trials in 2010 would represent less than three-tenths of one percent of the more than 2,000 misdemeanor cases filed that year. Marshall Decl. ¶ 41. By comparison, there were 24 jury trials held in the municipal court of Anacortes, which had 931 misdemeanor cases filed in 2010. Exs. 37 and 39. Plaintiffs' expert notes that it is important to set cases for trial and regularly try them because this helps keep the pressure on the prosecution to allow defendants to obtain better plea offers. Ex. 19 at 154:3 – 155:12, 187:2 – 188:2; *see also* Ex. 30 at 44:10 – 45:23.

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B. The Cities Knew or Should Have Known Their Public Defense System Was Depriving Indigent Defendants of the Right to Counsel

1. The Cities Were on Notice Because of Numerous Complaints by Governmental Officials and Indigent Defendants

At the time this lawsuit was filed, the Skagit County Office of Assigned Counsel ("OAC") conducted indigency screenings for criminal defendants charged with crimes in Mount Vernon and Burlington, and the Cities' Public Defender was assigned to those defendants who were found to be indigent. Ex. 40. For years the director of the OAC, Letty Alvarez, fielded complaints from indigent defendants about the Cities' Public Defender. Ex. 25 at 19:17 – 20:4, 28:3-13, 53:21 – 54:7, 63:14 – 65:1, 131:8 – 132:16, 133:15 – 134:6, 134:20 – 135:2, 155:3 – 156:24, 159:6-18. Among other things, indigent defendants complained that the Public Defender failed to meet with them in or out of custody; that the Public Defender failed to respond to their telephone calls or the kites they sent from jail; that the Public Defender failed to appear in court on their cases; that the Public Defender failed to discuss the facts of their cases with them; that the Public Defender failed to explain jail alternatives and plea consequences or discuss immigration consequences with them; and that the Public Defender forced them to accept plea deals. *Id*. Ms. Alvarez estimates that the OAC received more than 100 complaints per year. *Id*. at 20:23 – 23:11.

On numerous occasions during the period from 2008 (or earlier) to 2011, Ms. Alvarez brought these complaints directly to the attention of the Public Defender and various municipal and judicial officials within the Cities. Ex. 25 at 19:17 – 20:22, 23:23 – 24:19, 25:4 – 26:5, 28:3-13, 57:22 – 58:16, 60:8-12, 91:25 – 93:24, 138:10 – 140:20, 141:12-25, 154:19 – 155:19, 156:25 – 160:19, 172:11-22; Exs. 22, 31, 41. These officials included the Cities' public defense contract managers, four of the Cities' municipal court judges/commissioners, three of the Cities' municipal court administrators, and the mayor of Mount Vernon. *See id*. Ms. Alvarez spoke in person with these officials and wrote to them. *See id*. In the case of Eric

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Stendal, Mount Vernon's public defense contract manager, she even sent indigent defendants directly to his office to complain to him in person. *See id.*; *see also* Ex. 2 at 185:8-18.

Ms. Alvarez was not the only person who voiced concerns to the Cities about the Public Defender. In August 2008, for example, the Assistant Chief of the Burlington Police Department wrote to the city administrator, city attorney, and mayor of Burlington and criticized the attorneys for "playing crossword puzzles and other games while at the defense table on at least 7 different occasions while defending their clients." Ex. 42. The Assistant Chief added that "the judge has had to get their attention on occasion while they are doing this" and that the attorneys' conduct "seems very unprofessional and unfair to their clients." *Id.* The Assistant Chief concluded by stating that he hoped "[the attorneys'] contract is coming up soon." *Id.* Shortly thereafter, the court administrator of Mount Vernon wrote to the city attorney and similarly suggested that it was time for the Cities to hire new attorneys to serve as the Public Defender. Ex. 43; *see also* Ex. 44.

At another point in time, Mount Vernon's Chief of Police wrote to officials for the Cities to complain that his officers were not able to reach the Public Defender at designated phone numbers, particularly when assisting defendants who had been arrested for driving under the influence. Ex. 45. The officers noted that this "[w]asn't an isolated case"; rather, "[there] has been a pretty consistent inability to contact them after hours." *Id.* More than a year earlier, the administrator of the Burlington municipal court wrote to the Public Defender about a similar issue, saying: "On the evening of 8/19/08, the Burlington Police department tried to reach both of you as a DUI suspect wanted to talk to an attorney. Apparently they tried all the numbers they have," but they could not get through. Ex. 46.

In 2009, at Ms. Alvarez's request, the Cities initiated a process by which indigent defendants could submit written complaints about public defense services. Ex. 25 at 143:3 – 144:2, 153:2 – 154:18; Ex. 47. The Cities received several of these written complaints but only addressed the complaints in a perfunctory manner. *See* Ex. 18; *see also* Ex. 2 at 190:21-25. On

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May 11, 2009, for example, Mount Vernon received a complaint from an indigent defendant who stated that he visited the Public Defender's office and left contact information, but the Public Defender never called. Ex. 18.D. Moreover, the Public Defender failed to appear at the defendant's first hearing. *Id.* When the Public Defender eventually spoke to the defendant, the Public Defender asked the defendant whether he was guilty. *Id.* The defendant said no, and the Public Defender responded, "come on . . . ." *Id.* The defendant then told the Public Defender that he felt as though the Public Defender was "on the side of [the] Mount Vernon Police Department." *Id.* The Public Defender responded by saying, "I['ll] see you in the court house," and then hung-up. *Id.* The complaint was processed by Eric Stendal, the Mount Vernon contract manager. Ex. 48; Ex. 2 at 12:11-20. In a responsive letter to Mr. Stendal, the Public Defender stated: "Overall, I just do not see anything to substantively respond to in his complaint." Ex. 49. Mr. Stendal did nothing to follow up on this. Ex. 2 at 28:24 – 29:20, 165:2-6, 223:12-22.

In another case, an indigent defendant complained that his assigned attorney refused to meet with him outside of court and only gave him three minutes of time in court. Ex. 18.B. Mr. Stendal forwarded the complaint to the Public Defender and in his response, the Public Defender did not deny that he only meets with clients on the day of their court appearance. *Id.* Furthermore, the Public Defender blamed the defendant, saying "I don't think I really have to explain to anyone why it is that we were unable to make [the defendant] happy," and "I hope . . . this demonstrates why [the defendant's] complaint should be directed at himself, not me." *Id.*[11] Upon receiving this, Mr. Stendal wrote: "I am satisfied with [the Public Defender's] response and will not be taking further action." *Id.*

[11] Sybrandy's attitude toward and treatment of indigent defendants went far beyond indifference shown here. In email exchanges with Mount Vernon prosecutor Patrick Eason, for example, Sybrandy regularly referred to indigent defendants as "dumbass." Exs. 50-52. In another exchange with Mr. Eason, Sybrandy referred to a defendant as "bat shit nuts," adding "but she did sign a plea form today." Ex. 53. In a separate email exchange with Burlington prosecutor Craig Cammock, Sybrandy said of a client: "That bitch got what she deserved." Ex. 54.

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In January 2011, Ms. Alvarez wrote to Mr. Stendal and said that she "continues to receive complaints" about the Cities' Public Defender, "especially from clients who are in custody." Ex. 31. Ms. Alvarez has testified that she is not aware of anything Mr. Stendal did to address these ongoing complaints. Ex. 25 at 154:19 – 155:19. Indeed, Mr. Stendal has testified that he never took any action in regard to complaints (other than ask the Public Defender for a response). Ex. 2 at 28:24 – 29:20, 165:2-6, 223:12-22; *see also* Ex. 9 at 163:2-21. This is not surprising given that Mr. Stendal "never found any complaint by any criminal indigent defendant to be meritorious" but instead disregarded the complaints as merely "a difference of opinion between the person making the complaint and [the Public Defender]." Ex. 2 at 29:18-24, 221:18-22 (emphasis added).

The complaints that the Cities received highlighted numerous deficiencies in the public defense system and demonstrated a systemic deprivation of the right to counsel. *See* Exs. 18 and 21. As one defendant succinctly stated: "I basically represented myself." Ex. 18.L.

2. The Cities Were on Notice Because of the Information Contained in the Public Defender's Closed Case Reports

Starting in 2009, the Public Defender began submitting monthly reports to the Cities that listed each of the cases closed in the prior month, the disposition of the case, and the amount of attorney time spent on the case. Exs. 14.A and 15.A; Ex. 9 at 62:11-17. According to Plaintiffs' experts, the information in these reports revealed that the Cities were systemically depriving indigent defendants of the right to counsel. Dkt. No. 56 ¶ 20; Dkt. No. 55 ¶ 6. As Professor John Strait has concluded: "[t]he excessive caseload carried by Mr. Sybrandy and Mr. Witt ma[de] it impossible for them to provide reasonably competent criminal defense representation." Dkt. No. 56 ¶ 20. Expert Christine Jackson has similarly testified that "[e]ven a highly experienced misdemeanor criminal defense lawyer cannot provide minimally adequate representation with the public defender caseloads reflected in the documents [submitted to] the cities of Mount Vernon and Burlington." Dkt. No. 55 ¶ 6. In addition, Ms. Jackson has stated:

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"It is not possible that a majority of misdemeanor cases can be adequately handled in 30 minutes, 60 minutes, or even two hours." *Id*. ¶¶ 6, 23.

The Cities have long been on notice of the issue of excessive caseloads. In 1992, the Washington Court of Appeals concluded in a published opinion that the public defenders in Mount Vernon "were operating with caseload levels in excess of those endorsed by the ABA, by the [WSBA], and by the Skagit County Code." *City of Mount Vernon v. Weston*, 68 Wn. App. 411, 415, 844 P.2d 438 (Wash. Ct. App. 1992).

C. The Cities Failed to Address the Deficiencies in Their Public Defense System and Engaged in Acts and Omissions that Allowed Those Deficiencies to Continue

Despite the serious complaints made about the Cities' public defense system and the mounting evidence of that system's deficiencies, the Cities failed to take steps to protect indigent persons, secure their constitutional rights, or even enforce the very contractual obligations the Public Defender was paid to perform. The impact of the Cities' actions and inactions was real and substantial: indigent defendants were deprived of the right to counsel.

1. <u>The Cities Continued to Recommend and Hire Sybrandy and Witt as the Public Defender in the Face of Numerous Complaints</u>

As noted above, Sybrandy and Witt began serving as the public defenders in Mount Vernon in 2000 and in Burlington in 2005. Ex. 5. By 2008, the administrators who oversaw the Cities' public defense contracts had received many complaints about the attorneys. Exs. 41 and 44; Ex. 25 at 19:10-20:22, 160:6-11. Despite these complaints, Mr. Aarstad and Mr. Stendal recommended that the Cities enter into a new public defense services contract with the attorneys for 2009 and 2010. Ex. 2 at 97:1-13, 103:6-8, 147:23 – 148:1; Ex. 1 at 58:15 – 59:3, 85:12 – 87:7. The administrators made this recommendation to their respective city councils, which voted to approve the contract. Exs. 55 and 56. Neither administrator informed the city councils about the complaints the administrators had received with regard to Sybrandy and Witt. *See* Ex. 2 at 159:14-160:23, 13:18-21; Ex. 1 at 74:5 – 75:17.

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Complaints about the Public Defender continued through 2009 and 2010. Ex. 18; Ex. 25 at 20:11-20:22, 160:6-14. Near the end of 2010, however, the Cities' councils voted to extend the contract of Sybrandy and Witt for another two years. Ex. 57. This extension was again done at the recommendation of Mr. Stendal, the administrator who oversaw the Cities' public defense contracts. Ex. 2 at 202:12 – 203:25.[12]

2. The Cities Continued to Underfund the Public Defense System and Assign Excessive Caseloads to the Public Defender Despite Knowing the "Legal Requirements" for the Constitutional Right to Counsel

In October 2005, a Washington Superior Court issued an order on summary judgment in a lawsuit in which a class of indigent defendants alleged that Grant County was violating the Sixth Amendment right to counsel. Ex. 59 at 2. In its order the court found that the class had established a well-grounded fear of immediate invasion of the right to counsel. *Id*. Within a few weeks, Grant County entered into a settlement with the class that, among other things, required the County to allow an independent "Monitor" to oversee the County's public defense system for a minimum of five years. *Id*. at 12-17.

As a result of the Grant County case, the Cities decided in 2008 to make certain changes to their public defense system for the ostensible reason of bringing the system "up to date with its legal requirements." Ex. 1 at 15:2-23, 46:7-14, 51:16 – 52:5, 56:25 – 57:11. Among other things, the Cities enacted new ordinances on public defense in accordance with RCW 10.101.030, drafted a public defense contract that was nearly four times the length of the Cities' prior contracts, and established caseload limits for public defense attorneys. *Id*.; *compare generally* Ex. 98, *with* Ex. 4. Almost as quickly as these changes were made, however, the Cities began taking steps to undo them.

For example, in a Request for Proposal for Public Defender Services that was issued in late 2008, the Cities informed prospective applicants that "all attorneys providing services shall

[12] Mr. Aarstad retired in March 2009, and the position of city administrator for Burlington remained open until August 2011. Ex. 58 at 11:21 – 12:4.

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maintain a caseload of no more than 450 misdemeanors, or any combination of misdemeanors and [private] matters that result in an equivalent workload." Ex. 60 at 525. There was no mention of case weighting; instead, a case was to be "counted" at the time of "first appointment." *Id*. at 522. Within a couple of months, however, the Cities abandoned this caseload approach in favor of the case credit approach found in the 2009-2010 contract. *Compare* Ex. 60, *with* Ex. 4.[13]

The Cities also chose not to reduce the maximum number of public defense cases that attorneys may handle based on private caseloads. *See generally* Ex. 4. This violated state law and the Cities' own ordinances. *See* RCW 10.101.030 (requiring public defense systems to include "limitations on private practice of contract attorneys"); Exs. 61 and 62 (Section 3) ("the caseload ceiling [of a public defender] should be based on the percentage of time the lawyer devotes to public defense").

Before finalizing the 2009 contract, the Cities made several other changes for the purpose of modifying or removing altogether provisions that are basic requirements of public defense services, particularly requirements for client contact. *Compare* Ex. 33 at 1801 and 1803, *with* Ex. 4 at 201 and 203. These changes resulted from the following email that Sybrandy wrote to the Burlington city manager, Jon Aarstad:

> There is much in the proposed contract which is not possible for us to comply with, at least at the level of compensation we have proposed . . . . [This] include[s] our communication with clients . . . . It would be extraordinary for us to be directed to initiate contact with [indigent] defendants . . . . [W]e may know we represent a person in custody, but we have no idea what the nature of their charges are or their criminal history . . . . Contact is useless at that point . . . . [Likewise, we] rarely have any information that would be of use in any contact with [non-

[13] By going from 450 "cases" to 400 "caseload credits," the Cities falsely implied that their public defense system was in compliance with WSBA caseload standards at the time. *See* Ex. 60. The WSBA standards in place at the time did not address case weighting. Ex. 6. The revised standards from 2011, however, make clear that jurisdictions with case weighting should cap misdemeanor caseloads at 300 per attorney per year, not 400. Ex. 7. In addition, the standards make clear that certain cases must be weighted upwards and counted as more than one case. *Id*.

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> incarcerated defendants] prior to pretrial . . . . Initiating any contact prior to that . . . would serve no purpose . . . .

Ex. 33.

At his deposition, Mr. Aarstad was asked: "Did this e-mail from Mr. Sybrandy cause you to have any concerns regarding his abilities to be the public defender for Burlington?" Ex. 1 at 70:8-19. Mr. Aarstad simply replied, "No." *Id*. Plaintiffs' expert has testified that client-contact requirements like those that were removed from the contract are "an essential part" of a public defense system because the reality is that meetings will not occur without those requirements. Ex. 19 at 88:19 – 90:6, 90:20 – 91:1.

Remarkably, the compensation that the Cities paid to the Public Defender in the 2009 contract was lower than prior years despite significant increases in attorney caseloads. Ex. 8 at 93:3-24. In 2005, for example, Mount Vernon paid $120,000 to the Public Defender, and the primary assigning entity referred 702 cases to the Public Defender for that jurisdiction. Exs. 63 and 64. In 2009, Mount Vernon paid $117,400 (or $2,600 less) to the Public Defender, and the primary assigning entity referred 1,128 cases for that jurisdiction, an increase of approximately 61 percent.[14] Exs. 4, 66, 67. During the same period, Burlington likewise reduced the amount of compensation paid to the Public Defender from $63,600 per year to $60,750. Exs. 4, 68, 69.

3. The Cities Chose a Policy of Failing to Monitor the Public Defender and Failing to Enforce the Terms of Their Own Laws and Joint Defense Contract

In late 2008, as noted above, the Cities enacted ordinances with public defense standards for the stated purpose of "ensur[ing] that indigent criminal defendants receive high quality legal representation through a public defense system that efficiently and effectively protects the constitutional [right to counsel]." Exs. 61 and 62. The Cities also substantially revamped their public defense contract. Ex. 4. On the face of it, the Cities' new laws and

[14] The failure of Mount Vernon to adequately fund the Public Defender was nothing new. In 1984, Mount Vernon's finance director acknowledged "that the Public Defender is underpaid," but Mount Vernon nevertheless chose to pay less than the amount of compensation recommendation by the city attorney. Ex. 65.

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public defense contract included many provisions necessary for ensuring that assistance of counsel was provided to indigent defendants. *See generally* Exs. 4, 61, 62. The Cities, however, have a longstanding practice of failing to undertake any meaningful actions to enforce these provisions.

For example, the Cities' contract capped the caseload of each attorney at "400 caseload credits per year." *See* Ex. 4 at 197. The Cities' ordinances further provided the Cities "shall ensure that the Public Defender shall not be required to accept more cases than can be reasonably managed." Exs. 61and 62 (Section 3) (emphasis added); Ex. 2 at 39:2 – 40:10. But the Cities failed to discuss caseload limits with the Public Defender, and the Cities failed to put any mechanism in place to count caseload credits or otherwise ensure compliance with caseload limitations. Ex. 8 at 58:10-13, 61:11-18, 92:3-13; Ex. 9 at 145:4-13, 147:19 – 148:1, 148:19-23; Ex. 2 at 44:13-25, 63:4 – 65:18, 66:14-18, 82:16-19, 104:1 – 105:1. Neither the Cities nor the attorneys know how many public defense cases were being handled at any point in time. Ex. 8 at 92:3-13; Ex. 9 at 149:24 – 150:11; Ex. 1 at 20:6-25, 28:19-21, 30:3 – 32:18; *see also* Ex. 70 (Rog. Resp. No. 3); Ex. 71 (Rog. Resp. No. 3); Ex. 72.

The Cities' ordinances (not to mention state law) also required "the caseload ceiling" of each public defense attorney to be "based on the percentage of time the lawyer devotes to public defense." Exs. 61 and 62 (Section 3); *see also* RCW 10.101.030. Though the Cities deleted this requirement from the 2009 contract, the contract nevertheless stated that any private work performed by Sybrandy and Witt shall not be "to the exclusion or detriment" of public defense services. Ex. 4 at 201-02. The Cities knew the Public Defender had a "heavy" private practice and was only working for the Cities on a part-time basis, but the Cities never followed up with the attorneys on this point. Ex. 5 at 48, 52; Ex. 8 at 105:13-20, 106:3-6; Ex. 9 at 110:19 – 111:7, 149:13-23; *see also* Ex. 2 at 28:18-23, 47:3-4, 70:7 – 71:3; Ex. 1 at 21:1-14.

The Cities' ordinances also required the performance of the Public Defender to include "support services associated with legal representation," such as "secretarial and office support,

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paralegals, mental health services, and investigators." Exs. 61 and 62 (Section 5.B). The Cities' contract likewise provided that the Public Defender "shall provide adequate investigative, paralegal, and clerical services . . . necessary for representation of indigent defendants." Ex. 4 at 198. The Cities failed to ensure compliance with these obligations. Ex. 9 at 150:12-17; Ex. 2 at 38:16 – 39:1.

The Cities' contract provided that the Public Defender shall "be available to talk and meet in person with indigent defendants in the Skagit County Jail and/or an appropriate location in either the City of Burlington or the City of Mount Vernon that provides adequate assurances of privacy." Ex. 4 at 200. The Cities' contract further provided that the Public Defender shall "return phone calls or other attempts to contact the public defender within 48 hours, excluding weekends." Ex. 4 at 201. The Cities failed to ensure compliance with these obligations. Ex. 9 at 151:20 – 153:8, 153:12-24; Ex. 1 at 49:3-19, 54:22 – 55:16, 56:4-24, 68:23 – 69:24; Ex. 2 at 105:6 – 106:23, 113:12 – 114:2, 114:18 – 115:4.

The Cities' contract provided that the Public Defender shall comply with "the ordinances of The City of Mount Vernon and The City of Burlington," in addition to all applicable laws of the United States and the State of Washington. Ex. 4 at 208. The Cities failed to ensure compliance with this obligation. Ex. 9 at 155:20 – 156:7.

Even when the public defense contract with Sybrandy and Witt was extended after the filing of this lawsuit, the Cities failed to follow up with the attorneys to ensure they were in compliance with the contract's provisions. Ex. 9 at 159:8-19. Likewise, the Cities failed to ask the Public Defender to change its practices in any way. Ex. 8 at 210:16-19.

The ordinances that were enacted in 2008 required the Cities to "establish a procedure for systematic monitoring and evaluation of attorney performance based upon published criteria." Exs. 61 and 62 (Section 8). The only thing the Cities did in terms of monitoring, however, was to passively receive closed case reports. Ex. 1 at 54:4-21; Ex. 2 at 14:17 – 15:7, 26:7-14, 65:3–10, 66:14-18, 223:1-11; Ex. 58 at 52:19 – 53:5, 53:23 – 54:25, 55:6-22, 56:14-

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20; *see also* Ex. 73 at 85:19 – 87:20, 90:20 – 96:15 (Cities' expert unable to identify anything the Cities did to ensure compliance with standards on indigent defense services). There is simply no evidence to show the Cities engaged in any meaningful evaluation of the Public Defender or followed up on the numerous red flags that were raised over the years. Moreover, the contract managers of both Cities have asserted that in the absence of information to the contrary, they merely assumed that the rights of indigent defendants were being met. *See* Ex. 2 at 12:11-20, 224:10 – 225:12; Ex. 1 at 8:24 – 9:22, 11:19-24, 18:18 – 19:25.

D. Since the Lawsuit Was Filed, the Cities Have Continued to Operate a Public Defense System that Systemically Fails to Provide Meaningful Assistance of Counsel to Indigent Defendants

1. The Cities Chose to Continue Their Practice of Underfunding the Public Defense System

In late 2011, Sybrandy and Witt informed the Cities that they were going to terminate the public defense contract effective December 31, one year early. Ex. 74. The Cities asked the attorneys to stay on for another four months, which would allow the Cities to search for replacements. Ex. 75. Sybrandy and Witt agreed to do so. *Id*.

The Cities issued a request for proposals. Ex. 76. In response, the Cities received bids from six interested law firms or associations. Ex. 77. The bids ranged from $15,000 per month to $62,500 per month. Ex. 78. Among these bids was one from James Feldman, an expert retained by the Cities. Exs. 77.C and 102. Mr. Feldman stated that it would cost between $30,500 and $32,500 per month ($366,000 to $390,000 per year) to provide constitutionally appropriate services. *Id.* at 598; Ex. 78.

The Cities chose to hire Mountain Law PLLC, which submitted the second lowest bid at $17,500 per month or $210,000 per year.[15] Exs. 3, 77.A, 78. This was an increase of only $32,000 annually over the compensation paid to Sybrandy and Witt each year since 2009 and

[15] The Mountain Law bid was actually submitted under the name of Baker, Lewis, Schwisow & Laws, PLLC ("Baker Lewis"). Ex. 77.A; Ex. 79 at 23:22-24:5. The members of Baker Lewis, who also happen to be the members of Mountain Law, chose to form Mountain Law after the bid was submitted. Exs. 3 and 77.A; Ex. 79 at 27:6-14.

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nearly half of what the Cities' own expert said would be required to operate a constitutionally adequate public defense system. Exs. 4, 77.A, 77.C, 78. The Cities selected Mountain Law even though the firm explained that it would provide only two attorneys to handle more than 1,700 cases. Ex. 77.A at 622; Ex. 78; Ex. 80 at 59:4-15. By contrast, the Cities' own expert stated that it would take up to five attorneys to meet the requirements of the contract. Exs. 77.C and 78.

2. The Cities Chose to Continue Their Practice of Assigning Excessive Caseloads to the Public Defender

Within ten weeks of taking over the Cities' public defense contract from Sybrandy and Witt, the two attorneys from Mountain Law opened a combined total of more than 1,200 cases. Ex. 81 at 2851; Ex. 79 at 179:6 – 180:4.[16] During that same period, they closed 143 cases. *Id.* Thus, as of late June 2012, each attorney had more than 500 open misdemeanor cases, and the Cities were well aware of this. *Id.*; Ex. 82; Ex. 2 at 253:23 – 255:16. From that point forward, the two attorneys continued to open a combined average of 140 new cases per month, which is the functional equivalent of an additional 840 cases per attorney on an annual basis. Ex. 83; Marshall Decl. ¶ 87.

In late September 2012, Mountain Law added a third attorney. Ex. 79 at 30:2-7. By the end of 2012, Mountain Law's attorneys had opened a total 2,070 public defense cases in relation to their contract with the Cities. Exs. 81 and 83. Under applicable WSBA standards, the maximum combined number of cases that the attorneys should have handled over this period of time was approximately 700.[17] Ex. 7 (Standard Three). Consequently, the caseloads of Mountain Law's attorneys vastly exceeded the limitations set forth by applicable WSBA

[16] This further confirms that the caseloads of Sybrandy and Witt were excessive and well beyond WSBA standards. Jackson 2d Suppl. Decl. ¶ 10.

[17] Mr. Collins and Mr. Laws each worked for approximately eight and a half months, and Ms. Smith worked for just over three months. Ex. 79 at 29:18-21, 30:2-7. Thus, the combined working time of the attorneys was approximately 21 months or 1.75 years. At a maximum of 400 misdemeanor cases per year, 1.75 years results in 700 total cases.

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standards. Second Suppl. Decl. of Christine Jackson ("Jackson 2d Suppl. Decl.") ¶¶ 9-12. The caseloads "are particularly excessive when you consider that [attorneys] Jesse Collins and Sade Smith had no experience with criminal defense at the time they started and that [attorney] Michael Laws was the only person responsible for supervising the two of them." *Id*. ¶ 13; Ex. 79 at 106:20-107:8; Exs. 74 and 75; *see also* Ex. 7 (Standard Three) ("The experience of a particular attorney is a factor in the composition of cases in the attorney's caseload."); Ex. 73 at 88:10-15 (Cities' expert acknowledging that experience affects caseload abilities); Ex. 19 at 47:16-51:7 (Plaintiffs' expert explaining the importance of substantial training for new public defenders).

In August 2012, Mountain Law informed the Cities that they would need to employ at least 4.3 attorneys to comply with the WSBA's maximum caseload standard of 400 misdemeanors per attorney. Ex. 86. This assertion was based on data that resulted in a projection of 1,722 cases annually, not the 2,070 cases that the Cities ultimately assigned to Mountain Law. Exs. 81 and 83. During 2012, long after this lawsuit was filed, the Cities should have been employing more than five full-time attorneys to provide public defense services but ended up employing the equivalent of just over two.[18]

As of January 16, 2013, Mr. Collins was carrying 362 open cases, Ms. Smith was carrying 241 open cases, and Mr. Laws was carrying 210 open cases. Ex. 79 at 268:2-14; Ex. 87. This does not include any of the 343 cases that were in bench warrant status at the time. Ex. 87.

3. Mountain Law Is Merely a New Face on the Same Old Meet 'Em, Greet 'Em, and Plead 'Em System

Like Sybrandy and Witt, the attorneys at Mountain Law rarely conduct investigations and rarely go to trial. Ex. 79 at 100:10-15, 262:6-18. Though they opened more than 2,000

[18] 2,070 cases divided by a maximum of 400 cases per attorney equals 5.175 attorneys. As described in note 17, *supra*, Mountain Law had the equivalent of 1.75 attorney years. As for Sybrandy and Witt, the two worked only 3.5 months at half-time (if not less), which is the equivalent of 0.29 attorneys (3.5 months x 2 attorneys x 50 percent / 12 months = .29 attorney years). Thus, the Cities had the equivalent of 2.04 attorneys for all of 2012.

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cases during an eight-month period in 2012, the attorneys utilized the services of an investigator only four times. Ex. 79 at 262:6-18. Over that same period, Mr. Laws spoke with only "three or four witnesses," and he has testified that the frequency with which Mr. Collins and Ms. Smith interview witnesses is "basically consistent" with his. Ex. 79 at 182:18-23, 183:20 – 184:2. Finally, Mountain Law's attorneys tried only seven cases in 2012. Ex. 79 at 100:10-15.

Like Sybrandy and Witt, Mountain Law informs each new client that its attorneys usually "cannot schedule a meeting prior to [the] first pretrial hearing" because "there may not be enough time, or we may not yet have information about your case." Ex. 88 at 4570. And like Sybrandy, Mr. Laws has stated that it is "fairly pointless" to meet with clients, including incarcerated clients, unless he "ha[s] police reports and/or an offer to go over with them." Ex. 89; Ex. 79 at 209:7-15, 221:2-15. Plaintiffs have jail logs from May to September 2012, and those logs indicate that Mr. Laws visited incarcerated clients on only four occasions. Ex. 90; *see also* Ex. 79 at 206:7-18.

According to their closed case reports, the attorneys at Mountain Law are spending an average of less than two hours per misdemeanor case. Jackson 2d Suppl. Decl. ¶ 14; Ex. 91. Plaintiffs' expert has testified that this "is insufficient to meet minimum Sixth Amendment requirements for assistance of counsel." Jackson 2d Suppl. Decl. ¶ 16. Remarkably, the time written on the closed case reports is overstated because the reports include "staff time" and also duplicate time entries that double, triple, or quadruple the number of actual hours spent on a given case. Ex. 79 at 161:20-23, 296:18-299:11; Ex. 92.

Plaintiffs' expert reviewed 50 randomly selected case files from Mountain Law and "did not see that any investigation was conducted (even for cases where such investigation may have resulted in the development of exculpatory information)." Jackson 2d Suppl. Decl. ¶ 20. Plaintiffs' expert also "did not see evidence of any legal research into issues that were apparent from the discovery." *Id.* ¶ 20. Mr. Laws has testified that Mountain Law's attorneys filed only

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one suppression motion in the more than 2,000 cases that they opened during 2012. Ex. 79 at 72:13 – 73:9.

Plaintiffs' expert states that "[i]nvestigation of possible defenses beyond the evidence provided by the prosecution, and consideration and research of possible legal defenses, is required by case law interpreting the constitution and established professional standards and performance guidelines." Jackson 2d Suppl. Decl. ¶ 20 (citing cases). In her review of the 50 randomly selected case files from Mountain Law, however, Plaintiffs' expert found "a consistent lack of the elements that you need to provide effective assistance of counsel over a very large sample. These aren't just isolated incidents, it's not just one or two or three cases in a sample of 50, it's the entire 50." Ex. 19 at 140:10 – 141:5.

E. The Cities Continue to Refuse to Take Steps that Will Ensure Their Public Defense System Provides Meaningful Assistance of Counsel

1. <u>The Cities Maintain They Have No Obligation to Monitor or Supervise Their Public Defense System</u>

From the outset of this lawsuit, the Cities have consistently maintained that they have no obligation to monitor, supervise, or evaluate their public defense system. For example, when asked to produce documents that show the Cities have taken steps to ensure the Public Defender is fulfilling its contractual obligations, both Mount Vernon and Burlington have responded by stating that "[t]he question improperly presupposes that the City has a constitutional duty to 'monitor or supervise' the independent lawyers serving as public defenders . . . ." *See* Ex. 71 (Rog. Resp. No. 37). The Cities provided this answer in response to no less than 64 discovery requests. Marshall Decl. ¶ 97.

In January 2013, Plaintiffs deposed each of the Cities pursuant to Rule 30(b)(6). At one point in the Mount Vernon deposition, Plaintiffs posed the following question to the city's designated representative, Eric Stendal: "Historically, what has Mount Vernon done to ensure that the public defender does what the U.S. and Washington constitutions require?" Ex. 93 at

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80:8-10. In response, Mr. Stendal stated: "The City does not agree that it has to ensure, secure, or guarantee anything." Ex. 93 at 80:8 – 81:11 (emphasis added).

Notably, the Cities' own expert has testified to the contrary, stating the Cities do have an obligation to monitor and oversee the public defense system: there "ought to [be] some way for you to track what your attorneys are doing and to evaluate how they're doing it, how good they're doing it, how well they're doing it." Ex. 73 at 76:6-14. He says that "[o]ne of the ways to do that is to require in the contract the types of things you want done and then to inquire of the attorneys that they are doing that, to make assurances that they are doing that." *Id.* at 77:5-10. The Cities failed to do this with Sybrandy and Witt and, as shown below, the Cities are also failing to do this with the current Public Defender.

2. The Cities Do Not Meaningfully Monitor or Supervise Their Public Defense System

As with Sybrandy and Witt, the Cities' oversight of Mountain Law is essentially limited to passively receiving closed case reports and passively processing any complaints that are made. Ex. 2 at 12:11 – 13:17; Ex. 79 at 144:9-24. Neither of these procedures results in any meaningful monitoring of the public defense system.

Consider, for example, the case credit system that the Cities had in place with Mountain Law's 2012 contract. Under that contract, there were three potential units of credit that could be assigned to a case: 0.33, 1.0, or 2.0. Ex. 94 at 208-09. The total amount of case credits that any one attorney could have was 400. *Id.* at 211.

When he was deposed in October 2012, Eric Stendal claimed that the Cities were "now tracking" these case credits through the closed case reports. Ex. 2 at 216:2-11. Several of the reports that Mountain Law submitted, however, included credit unit designations not called for in the contract, such as 0.20 or 0.25. Ex. 91.C at 1120, 1122. When questioned about this discrepancy, the managing partner of Mountain Law, Michael Laws, testified that he was not aware that the public defense contract had a provision on case credits and that nobody from the Cities ever discussed that with him. Ex. 79 at 144:9 – 147:24, 154:20-23 ("there wasn't a case

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credit cap or anything that was considered or ever part of our contract as far as credits are concerned"). Mr. Laws further stated that the case credits listed in Mountain Law's closed case reports were "meaningless" because they derived from the case credit approach used in Everett by Mountain Law's sister firm. *Id*. at 153:23 – 154:23, 192:23 – 193:2.

Furthermore, Mr. Laws has admitted that Mr. Collins and him each had more than 400 cases within a few weeks of serving as the Cities' public defense attorneys and thus did not comply with the contract's caseload limitation. Ex. 79 at 179:6 – 180:4, 193:3 – 194:5. Nobody from the Cities, however, followed up with Mountain Law to address the fact that the attorneys were violating this provision of the contract (and the WSBA caseload standards). *Id*. at 193:20-23.

Even more troubling is the fact that the Cities have been actively eliminating provisions and standards that will allow for the meaningful monitoring of Mountain Law's attorneys. This can be seen by comparing the 2013 Mountain Law contract with both the 2012 Mountain Law contract and the 2009 Sybrandy and Witt contract. For example, each of the following provisions was included in either the 2009 and 2012 contracts (or in most instances both), but the Cities chose to omit these provisions from the 2013 contract:

- "The Public Defender shall establish reasonable office hours in which to meet with defendants prior to the day of hearing or trial." Ex. 4 at 198 and Ex. 94 at 212.
- "The Public Defender will be available to talk and meet in person with indigent defendants in the Skagit County Jail and/or an appropriate location in either the City of Burlington or the City of Mount Vernon that provides adequate assurances of privacy." Ex. 4 at 200 and Ex. 94 at 215.
- "The Public Defender shall visit each inmate incarcerated, including inmates incarcerated in the Skagit County Jail, either in pretrial status or pending a court hearing on a probation review matter on a weekly basis and furnish that individual with an updated status of the case." Ex. 94 at 212.
- "The Public Defender . . . shall maintain contemporaneous records of all legal services provided on a specific case. The records shall

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provide a factual description of the work done and shall be sufficiently detailed to allow monitoring of legal service activity by the Contract Administrator." Ex. 4 at 200-01 and Ex. 94 at 216.

- "The Public Defender shall maintain records and accounts . . . including records of the time spent by the Public Defender on each case. The Public Defender must ensure that the City has full access to materials necessary to verify compliance with all terms of this Contract." Ex. 4 at 210 and Ex. 94 at 226.
- "The Public Defender agrees to cooperate with the City or its agent in the evaluation of the Public Defender's performance under this Contract and to make available all information reasonably required by any such evaluation process or ongoing reporting requirements established by the City." Ex. 4 at 210-11 and Ex. 94 at 227.

See also Ex. 4 at 198, 201 and Ex. 94 at 212, 216 (prior contracts also included terms on providing adequate investigative services "necessary for representation of indigent defendants," ensuring proper communication with defendants, ensuring access by police departments for critical stage advice, and ensuring proper communication with defendants).

In addition, the Cities have repealed the public defense ordinances enacted in 2008 and replaced them with ordinances that no longer require oversight, monitoring, or supervision of the Public Defender. The 2008 ordinances, for example, required the Cities to "establish a procedure for systematic monitoring and evaluation of attorney performance based upon published criteria," which accords with Standard Eleven of the WSBA Standards for Indigent Defense Services. Exs. 61 and 62 (Section 8); Ex. 7 at 8. Under the newly enacted ordinances, the Cities no longer have any responsibility for monitoring or evaluating the Public Defender. Exs. 95 and 96 (Section 10). Instead, the burden is on the Public Defender to monitor and evaluate itself, and the Public Defender is merely "encouraged, but not required" to do so. *Id*.

Finally, less than two weeks after Plaintiffs' expert issued a report stating that the average amount of time spent by Mountain Law attorneys on cases is insufficient, the Cities instructed Mountain Law to stop reporting hours worked. Jackson 2d Suppl. Decl. ¶ 14; Ex. 79 at 251:18-22.

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As for the new complaint system, the Cities are further disposing of any real responsibility by attempting to substantially limit their own legal obligations and shifting the burdens to others. First, the Cities will only address two specific types of complaints by indigent defendants: (1) being denied a meeting with the Public Defender; and (2) entering into a plea agreement involuntarily or without understanding. Ex. 97. All other complaints must be lodged with the WSBA or the municipal courts. *Id*.

Second, the Cities will only respond to a complaint that meets the "rules of the city complaint process." *Id*. For example, if the defendant fails to submit a complaint within 15 days of the event giving rise to it, the Cities will refuse to address the complaint. *Id*. If the defendant fails to complete a complaint form, the Cities will refuse to address the complaint. *Id*. If the defendant submits the form to someone other than the Special Projects Administrator, the Cities will refuse to address the complaint. *Id*. If the defendant "stop[s] being a public defender client any time within the 30 day period" for the Cities to act, the Cities will refuse to address the complaint. *Id*. Finally, if the defendant is the subject of an active arrest warrant "issued anywhere in the State of Washington or issued by the Federal Government," the Cities will refuse to address the complaint. *Id*.

If a defendant satisfies all of the rules and artificial hurdles imposed by the Cities and the complaint is about being denied a meeting, the Cities "will attempt to set up a meeting [in person or by phone] with [the] public defender to occur within 30 days of receiving the complaint." *Id*. If the complaint is about entering into a plea agreement involuntarily or without understanding, the Cities "will ask the prosecutor to file a motion to vacate [the] plea of guilty within 30 days of receipt of [the] complaint." *Id*. "If the Public Defender declines a meeting or the prosecutor refuses to file a motion to vacate," the Cities will note take further action other than to "forward [the] complaint to the Washington State Bar Association and the Municipal Court." *Id*.

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Based on a review of this and other evidence, Plaintiffs' expert has concluded that the Cities "have failed to conduct any meaningful monitoring or systematic oversight and evaluation of Mountain Law and its attorneys to ensure that the public defenders are in compliance with their contractual requirements or applicable standards for indigent defense, including caseload limitations." Jackson 2d Suppl. Decl. ¶ 17. As such, the Cities "have failed and are continuing to fail" to operate a public defense system "that meets the minimum Sixth Amendment requirements for assistance of counsel." *Id*. ¶ 9.

F. Indigent Defendants Will Continue to Suffer Harm as a Result of the Cities' Failure to Ensure the Operation of a Constitutional Public Defense System

As thoroughly demonstrated above, the Cities have long abdicated the obligation of monitoring and overseeing their public defense system and have instead chosen a persistent policy of maintaining a system that fails to provide actual assistance of counsel to Class members. In addition to abandoning their responsibility for ensuring the operation of a constitutional public defense system, the Cities remain steadfast in their refusal to acknowledge the overwhelming evidence of systemic deficiencies. Mount Vernon contract manager Eric Stendal, for example, continues to maintain the Cities' public defense system as it existed before this lawsuit "provided all of the necessary representation that was required by the U.S. Constitution to all of the indigent defendants" who were charged with crimes. Ex. 2 at 34:9 – 35:22. As for Sybrandy and Witt, Mr. Stendal states: "The practices [in which they engaged while] perform[ing] their duties as attorneys on behalf of the cit[ies] for [indigent] defendants, no, I would have nothing to change there. I – I think their service was adequate and more than adequate." *Id*. at 34:9 – 35:22; *see also id*. at 19:11-24, 52:22 – 53:13, 166:14-22, 213:18 – 214:17.

The evidence before the Court demonstrates that "the cities of Mount Vernon and Burlington continue to operate an unconstitutional public defense system in violation of the Sixth Amendment." Jackson 2d Suppl. Decl. ¶ 36. "The Cities knew or should have known that excessive caseloads, inadequate client contact, and lack of individual investigation and

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representation were occurring" before this lawsuit was filed. *Id*. Since the filing of the lawsuit, the Cities have only continued their "fail[ure] to monitor [the Public Defender's] compliance with contractual and constitutional requirements and applicable standards for indigent defense, which has the result of those constitutional deficiencies continuing to plague the Cities' public defense system." *Id*.

As Plaintiffs' expert has concluded: "Some form of monitoring, audit or oversight of contract and constitutional compliance by the [C]ities with respect to the public defense function is essential in order to have a constitutional system." *Id*. ¶ 38; Ex. 19 at 103:20 – 104:7. The Cities not only refuse to monitor and oversee their public defense system but also have actively worked to eliminate objective standards and information that would allow them to evaluate the services of the Public Defender. *See* Sections II.C.3 and II.E, *supra*. In addition, the Cities have demonstrated they are unable or unwilling to recognize and respond to systemic violations. *Id*. Accordingly, "there is a grave risk that this harm to the indigent defendants will continue unless [the] Court orders the [C]ities to submit to a monitoring and audit system designed to ensure compliance with the Constitution." Jackson 2d Suppl. Decl. ¶ 40.

III. AUTHORITY AND ARGUMENT

A. Legal Standards

1. Standard for Summary Judgment

A "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). There is no genuine issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), or if a party fails to prove any essential element of a claim, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Foster v. Arcata Assoc., Inc.*, 772 F.2d 1453, 1459 (9th Cir. 1985). "When opposing parties tell two different stories,

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one of which is blatantly contradicted by the record, so that no reasonable [trier of fact] could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

2. Standard for Liability under 42 U.S.C. § 1983

Plaintiffs bring this suit against the Cities under 42 U.S.C. § 1983 for systemic violations of the Sixth Amendment resulting from the Cities' operation of their public defense system. To establish a claim under section 1983, a plaintiff must show: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of State law. *Long v. Cnty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)). As the Supreme Court recognized in *West*, the Cities are not relieved of liability simply by delegating a constitutionally required function to professionals under contract. 487 U.S. at 53-54. Furthermore, the Ninth Circuit in *Long* held that section 1983 applies to a municipality's use of "trained professionals" to carry out a constitutional duty, citing a case involving a constitutionally deficient public defense system, *Miranda v. Clark County*, 319 F.3d 465 (9th Cir. 2003). *Long*, 442 F.3d at 1187.

Here, the Cities are liable under section 1983 if their policymaking decisions and actions have systemically deprived Class members of the Sixth Amendment right to counsel. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). The Cities are also liable if they "ha[ve] a policy of inaction and such inaction amounts to a failure to protect constitutional rights." *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) (citing *City of Canton v. Harris*, 489 U.S. 378, 389 (1989)).

"Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011). A policy "promulgated, adopted, or ratified by a local governmental entity's legislative body

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unquestionably satisfies *Monell*'s policy requirement." *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443 (9th Cir. 1989), *overruled on other grounds by Bull v. City & Cnty. of San Francisco*, 595 F.3d 964 (9th Cir. 2010) (en banc). Moreover, a policy of inaction may be a municipal policy within the meaning of *Monell*. *See Waggy v. Spokane Cnty. Wash.*, 594 F.3d 707, 713 (9th Cir. 2010); *Long*, 442 F.3d at 1185; *Fairley v. Luman*, 281 F.3d 913, 918 (9th Cir. 2002) (per curiam); *Lee v. City of Los Angeles*, 250 F.3d 668, 681 (9th Cir. 2001); *Oviatt*, 954 F.2d at 1474.

Even if there is not an explicit policy, a plaintiff may establish municipal liability upon a showing that there is a permanent and well-settled practice by the municipality which gave rise to the alleged constitutional violation. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988); *Navarro v. Block*, 72 F.3d 712, 714-15 (9th Cir. 1996). Once the plaintiff has demonstrated that a custom existed, the plaintiff need not also demonstrate that "official policy-makers had actual knowledge of the practice at issue." *Navarro*, 72 F.3d at 714-15.

3. Standard for Injunctive Relief

District courts have broad discretion to grant equitable relief, including permanent injunctions. *eBay Inc. v. MercExchange LLC*, 547 U.S. 388, 391 (2006). Injunctive relief is particularly "appropriate in cases involving challenges to governmental policies that result in a pattern of constitutional violations." *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (emphasis added); *see also Allee v. Medrano*, 416 U.S. 802, 815 (1974); *Walters v. Reno*, 145 F.3d 1032, 1048 (9th Cir. 1998). "[A] district court has 'broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may be fairly anticipated from the defendant's conduct in the past." *Orantes-Hernandez*, 919 F.2d at 564 (quoting *N.L.R.B. v. Express Pub'g Co.*, 312 U.S. 426, 435 (1941)).

To obtain a permanent injunction, a plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are

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inadequate to compensate for their injury; (3) that, considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *eBay Inc,* 547 U.S. at 390; *see also Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010); *Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1174 (9th Cir. 2010); *Stormans, Inc. v. Selecky*, 854 F.Supp.2d 925, 991-992 (W.D. Wash., 2010).

B. The Cities Have Engaged in a Persistent Pattern and Practice of Violating the Constitutional Right to Assistance of Counsel, and the Class Is Entitled to Injunctive Relief

For the reasons that follow, the Cities are liable under section 1983 for systemically depriving Class members of the right to assistance of counsel, and the Class is entitled to injunctive relief.

1. Class Members Have a Constitutional Right to Assistance of Counsel

The United States and Washington State Constitutions guarantee a criminal defendant the right to the assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I § 22. In *Gideon v. Wainwright*, 372 U.S. 335 (1963),[19] the United States Supreme Court described the guarantee of counsel as a fundamental right and formally extended it to state court indigent defendants, exclusively at the government's expense. Nine years later, the Court clarified that this right is afforded not only to those charged with felonies, but also to those facing misdemeanor and petty offenses. *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972). Central to these decisions and constitutional provisions is the prevailing notion that the assistance of counsel is an essential element of a just and fair trial. *Id.* ("We must conclude, therefore, that the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial."); *see also Gideon*, 372 U.S. at 344 ("[We] recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor

[19] As this Court has already noted, *Gideon* provides the proper standard in this case, rather than the standard articulated for individual ineffective assistance of counsel claims in *Strickland v. Washington*, 466 U.S. 668 (1984). Dkt. No. 142 at 4:17 – 7:11.

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to hire a lawyer, cannot be assured a fair trial unless counsel is provided to him. This seems to us to be an obvious truth.").

"The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 22 (N.Y. 2010) (quoting *Avery v. Alabama*, 308 U.S. 444, 446 (1940)). Rather, the appointed attorney must actually represent the client—through presence, attention, and advocacy—at all critical stages of the defendant's criminal prosecution. *United States v. Cronic*, 466 U.S. 648, 654-56 (1984); *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979); *Avery*, 308 U.S. at 446. Critical stages include, among others, initial court appearances, *Rothgery v. Gillespie Cnty, Tex.*, 554 U.S. 191, 212 (2008); certain arraignments, *Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961), *White v. Maryland*, 373 U.S. 59, 60 (1963); preliminary hearings, *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970); and plea negotiations, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *White*, 373 U.S. at 60; *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (U.S. 2010).

If an accused is denied the actual assistance of counsel at any critical stage, there can be no other conclusion than that representation was not provided. *Cronic*, 466 U.S. at 659. A criminal defendant whose appointed counsel is unable to provide actual representation is in no better position than one who has no counsel at all. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985).

2. The Cities Are Persons Acting Under the Color of State Law

Congress "intend[ed] municipalities and other local governmental units to be included among those persons to whom § 1983 applies." *Monell*, 436 U.S. at 690. A municipality or other local governmental unit acts "under the color of state law" when it exercises power "possessed by virtue of state law and made possible only because [it] is clothed with the authority of state law." *West*, 487 U.S. at 49 (*quoting United States v. Classic*, 313 U.S. 299, 326 (1941)).

The Cities have prosecuted and continue to prosecute criminal charges against indigent defendants in their municipal courts. As such, the Cities have had and continue to have a

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responsibility under state law to provide assistance of counsel to Class members. *See* RCW 10.101.030; *In re Michels*, 150 Wn.2d 159, 174, 75 P.3d 950 (Wash. 2003) ("Each county or city operating a criminal court holds the responsibility of adopting certain standards for the delivery of public defense services, with the most basic right being that counsel shall be provided."); *A.N.J.*, 168 Wn.2d at 110 ("[E]ach county or city providing public defense . . . [shall be] guided by standards endorsed by the Washington State Bar Association."). Because they are persons acting under the color of state law, the Cities may be held liable for policies and customs that have caused deprivations of the right to counsel.

3. The Cities Have Violated the Constitutional Right to Assistance of Counsel Held by Class Members, Causing Irreparable Injury

a. *The Cities' Policies and Customs Have Deprived Class Members of Their Sixth Amendment Right to Counsel*

As this Court has already concluded, the decisions that the Cities make regarding the "funding, contracting, and monitoring" of their public defense system are decisions that "serve as 'policymaking'" for purposes of *Monell*. Dkt. No. 142 at 10:1-6. Over the past several years, these decisions have directly and predictably deprived indigent defendants of their constitutional right to counsel.

First, the Cities repeatedly chose to underfund and understaff their public defense system, which resulted in grossly excessive caseloads, leaving far too little time for the Public Defender to provide actual representation to each indigent defendant. From 2009 through 2011, for example, the Cities hired only two part-time attorneys to handle more than 2,100 cases per year. *See* Section II.A.1, *supra*. Though caseload assignments had increased by more than 60 percent leading up to this period, the Cities paid the Public Defender less on an annual basis than they paid in 2005. *See* Section II.C.2, *supra*. In April 2012, well after this lawsuit was filed, the Cities knowingly chose to hire only two attorneys (one of whom had no criminal defense experience) to handle what was estimated at the time to be more than 1,700 cases annually and what turned out to be more than 2,000 cases in an eight-month period. *See*

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Section II.D.1-2, *supra*. Moreover, the Cities chose to pay the Public Defender more than 40 percent less than what the Cities' own expert said was necessary and appropriate. *See* Section II.D.1, *supra*. Due to being underfunded and understaffed, the Public Defender did not have sufficient time to devote to the cases of indigent defendants and, as explained in more detail below, this led to a systemic deprivation of the right to counsel. *See* Section III.B.3.c, *infra*.

Second, the Cities chose to enter into public defense contracts that failed to ensure the right to counsel was being met. For example, the Cities were aware of the WSBA standard that limited caseloads, yet the Cities chose to go with a "caseload credit" approach that would ostensibly allow them to get around that limitation and assign excessive caseloads. *See* Section II.C.2, *supra*; *see also* Section II.E.2, *supra*. Likewise, the Cities knew that state law required caseloads to be proportional to the amount of time spent on public defense, yet the Cities purposefully failed to include a provision in their contracts that would limit the Public Defender attorneys' caseloads in accordance with their part-time status. *See* Section II.C.2, *supra*. And when a Public Defender attorney told the Cities that he would not comply with proposed provisions requiring contact with indigent defendants both in and out of custody, the Cities removed those provisions from the final contract. *See id.*

Third, the Cities chose to severely limit their oversight of the public defense system to passively accepting closed case reports. *See* Section II.C.3, *supra*. Numerous complaints were made to the Cities about indigent defendants not receiving actual assistance of counsel, yet the Cities failed to monitor caseloads; failed to ensure that the private practices of Public Defender attorneys were not to the detriment of public defense services; failed to ensure the Public Defender was visiting incarcerated defendants; failed to ensure that the Public Defender was meeting with defendants in private settings; and failed to ensure that the Public Defender was complying with city ordinances, state laws, and federal laws, among other things. *See* Sections II.B.1 and II.C.3, *supra*. In sum, the Cities failed to "establish a procedure for systematic

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monitoring and evaluation of attorney performance based upon published criteria," as was required by the Cities' own laws. Exs. 61 and 62 (Section 8); *see also* Section II.C.3, *supra*.

In addition to being held liable under section 1983 for their policymaking decisions, the Cities may be held liable for an unconstitutional custom where (1) the custom is so "well settled and widespread that the policymaking officials . . . can be said to have either actual or constructive knowledge of it yet did nothing to end the practice" and (2) the custom was "the cause and the moving force behind the deprivation of constitutional rights." *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989); *see also Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1233 (9th Cir. 2011) (liability may be established by showing longstanding practices or customs that constitute the "standard operating procedure" of the local government entity).

For years, the Cities knew or should have known of the unconstitutional nature of their public defense system. Indeed, the Cities had notice of this as far back as 1992, when the Washington State Court of Appeals concluded in a published opinion that the public defenders in Mount Vernon "were operating with caseload levels in excess of those endorsed by the ABA, by the [WSBA], and by the Skagit County Code." *Weston*, 68 Wn. App. at 415. More recently the Cities had monthly caseload reports that demonstrated the Public Defender was not giving sufficient time to indigent defendants. *See* Section II.B.2, *supra*. Nevertheless, the Cities continued to allow the Public Defender to carry excessive caseloads, including for a period of at least eighteen months after this lawsuit was filed. *See* Sections II.A.1 and II.D.2, *supra*. Simply put, the Cities had a longstanding custom of assigning excessive caseloads and, as demonstrated below, that custom was a moving force behind the systemic deprivation of the right to counsel. *See* Section III.B.3.c, *infra*.

In the years leading up to this lawsuit, the Cities also received numerous complaints from the director of the Skagit County Office of Assigned Counsel, from police officials, and from indigent defendants regarding the lack of actual assistance of counsel. *See* Section II.B.1,

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supra. These complaints detailed a public defense system that lacked actual representation at every step of the process, including a failure of the Public Defender to respond to inquiries of indigent defendants, a failure of the Public Defender to meet with defendants in or out of custody, a failure of the Public Defender to investigate the facts of cases, a failure of the Public Defender to explain jail alternatives and plea consequences to defendants, a failure of the Public Defender to advocate on behalf of defendants in court, and pressure the Public Defender placed on defendants to accept plea deals. *See* Section II.A.1-5, *supra*. The Cities, however, did not take any meaningful action in regard to the complaints. *See* Section II.B.1, *supra*. Indeed, the official in charge of handling complaints has testified that he "never found any complaint by any criminal indigent defendant to be meritorious" but instead disregarded the complaints as merely "a difference of opinion between the person making the complaint and [the Public Defender]." Ex. 2 at 29:18-24, 221:18-22.

The failure of the Cities to take any remedial steps in response to years of complaints and this lawsuit is further evidence of a custom of operating an unconstitutional public defense system. *See Larez v. City of Los Angeles*, 946 F.2d 630, 647 (9th Cir. 1991); *see also Hunter*, 652 F.3d at 1235 ("a recurring failure to investigate . . . constitutional violations" is evidence of "the existence of an unconstitutional practice or custom"). As demonstrated below, that custom was a moving force behind the systemic deprivation of the right to counsel. *See* Section III.B.3.c, *infra*.

b. *The Cities Have Been Deliberately Indifferent to the Sixth Amendment Right of Class Members*

In addition to being held liable for affirmative policies and customs that cause constitutional violations, "a local governmental body may be liable if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights." *Oviatt*, 954 F.2d at 1474. To impose liability on the Cities for failing to act to preserve constitutional rights, Plaintiffs must show (1) a constitutional right that was deprived; (2) that the Cities had a policy; (3) that the Cities' policy "amounts to deliberate indifference" to the constitutional right; and

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(4) that the policy was the "moving force behind the constitutional violation." *Id*. (quoting *City of Canton*, 489 U.S. at 389-91).

A "decision not to take any action to alleviate [a] problem" resulting in constitutional violations "constitutes a policy for purposes of § 1983 municipal liability." *Id*. at 1477. Such a policy "evidences a 'deliberate indifference'" to constitutional rights "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*, 489 U.S. at 389-90).

The contract managers of both Cities have asserted that in the absence of information to the contrary, they merely assumed that the rights of indigent defendants were being met. *See* Ex. 2 at 12:11-20, 224:10 – 225:12; Ex. 1 at 8:24 – 9:22, 11:19-24, 18:18 – 19:25. This "policy was one of inaction: wait and see if someone complains." *Oviatt*, 954 F.2d at 1477. When complaints were made, however, the Cities failed to address the substance of those objections. *See* Section II.B.1, *supra*. Moreover, there was overwhelming evidence of excessive caseloads and insufficient time being spent on the cases of indigent defendants, yet the Cities failed to take any action to address those problems. *See* Sections II.A.1-5 and II.B.1-2, *supra*. Instead, the Cities continued to rehire the same public defense attorneys in both 2009 and 2011. *See* Section II.C.1, *supra*.

Even after this suit was filed, the Cities continued to allow the Public Defender to maintain excessive caseloads and to operate without necessary monitoring and oversight. *See* Sections II.A.1, II.C.3, II.D.2, II.E.1-2, *supra*. Rather than address the deficient nature of their public defense system, the Cities affirmatively chose to do away with standards and procedures necessary to ensuring that the right to assistance of counsel is satisfied. *See* Section II.E.2, *supra*. Evidence of the Cities' reaction to the lawsuit is both "admissible for purposes of proving the existence of a municipal defendant's policy or custom" and "highly probative with

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respect to that inquiry." *Henry v. Cnty. of Shasta*, 132 F.3d 512, 519 (9th Cir. 1997). Indeed, the Cities' "failure even after being sued to correct a blatantly unconstitutional course" of conduct "is even more persuasive evidence of deliberate indifference" than the Cities' failure to correct the problem before the lawsuit. *Id*. at 520.

The evidence before the Court demonstrates that the Cities had "a policy to keep [a] system that obviously did not work." *Oviatt*, 954 F.2d at 1477. The need for changes to the Cities' public defense system—such as additional funding, lower caseloads, and meaningful monitoring and oversight—have been so obvious that the Cities' refusal to take action has amounted to a deliberate indifference to the Class members' constitutional right to counsel. As demonstrated below, the Cities' policies of inaction were a moving force behind the systemic deprivation of the right to counsel. *See* Section III.B.3.c, *infra*.

c. *The Cities' Violations of the Right to Counsel Have Caused Irreparable Injury to Class Members*

In order for an indigent defendant to receive actual assistance of counsel, the attorney appointed to represent the defendant must do the following: (1) assess the facts of the defendant's case; (2) discuss and explain the rights, charges, potential defenses, and legal options with the defendant; (3) hold confidential consultations with the defendant; (4) investigate the facts and question witnesses as appropriate; (5) maintain a reasonable level of responsiveness to the defendant's inquiries; (6) form a meaningful relationship with the defendant; and (7) develop a plan of action based on the defendant's requests and informed consent. Dkt. No. 53 ¶¶ 10, 12; Dkt. No. 56 ¶¶ 19, 21, 23, 24, 27; Dkt. No. 55 ¶¶ 10, 11-15, 17, 18; Ex. 19 at 56:11-21, 57:4-10, 57:16-23.

For far too long, the Cities operated a public defense system that systemically failed to provide actual assistance of counsel to indigent defendants. The caseloads of the Public Defender were so excessive that there was insufficient time to devote to any one case. *See* Section II.A.1-5, *supra*. Among other things, this resulted in the Public Defender failing to respond to inquiries of indigent defendants and failing to have adequate confidential client

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communication; failing to visit incarcerated defendants; failing to meet with indigent defendants in private settings before pretrial hearings; failing to investigate the facts of cases and possible legal defenses; and failing to advocate on behalf of clients in court. *Id*. The interactions that indigent defendants had with the Public Defender were typically limited to a few minutes in a crowded courtroom. *See* Section II.A.5, *supra*. During that short time, defendants were forced to make important decisions about their cases—including whether to plead guilty. *Id*.

Plaintiffs and Class members have suffered an irreparable injury because they have been systemically deprived of their constitutional right to the assistance of counsel. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) (the denial of the right to counsel itself demonstrates a constitutional violation, and court swill not "indulge in nice calculations as to the amount of prejudice" that results from that denial) (summarizing *Glasser v. United States*, 315 U.S. 60 (1942)); *Bery v. City of New York*, 97 F.3d 689, 694 (2nd Cir. 1996) (When "an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."); Dkt. 142 at 6:16-19 (where there is a lack of representation, "there is . . . no requirement that the indigent defendant plod on towards judgment in order to establish harm: the constitutional violation is clear and a remedy is available").[20] The evidence demonstrates that these violations occurred as a result of the Cities' policies and customs. The Cities' deliberate indifference to the constitutional rights of indigent defendants was also a moving force behind the systemic deprivation of assistance of counsel. Simply put, the Cities "convert[ed] the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Avery*, 308 U.S. at 446.

[20] Of course, it cannot be forgotten that myriad harms can and do flow freely from the lack of meaningful representation. Jackson 2d Suppl. Decl. ¶ 39. These harms include being convicted of a crime for which one is innocent or not legally guilty, being subjected to increased imprisonment or supervision, being debt ridden as a result of excessive fines, being deported, and suffering the consequences of a criminal record. *Id*.; *see also* Ex. 30 at 26:16 – 28:9.

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4. The Cities' Past and Present Misconduct Indicates a Strong Likelihood of Future Violations of the Constitutional Right to Assistance of Counsel

The evidence before the Court demonstrates that the Cities' past and present misconduct is very likely to result in future violations of the right to counsel. For years (if not decades) leading up to this lawsuit, the Cities failed to address extensive evidence of the unconstitutional nature of their public defense system. *See* Section II.A-B, *supra*. Moreover, to this day the Cities maintain there was nothing wrong with the public defense system. *See* Sections II.E.1 and II.F, *supra*. To the contrary, the Cities believe the representation provided to indigent defendants was "more than adequate," and the Cities "would have nothing to change there." Ex. 2 at 34:9 – 35:22.

Since this lawsuit was filed, the Cities have remained strident in asserting that they are under no obligation "to ensure, secure, or guarantee anything." Ex. 2 at 80:8 – 81:11 (emphasis added). Indeed, the Cities have actively chosen to eliminate provisions and standards that would allow for the meaningful monitoring and oversight of the current Public Defender. *See* Section II.E.2, *supra*. The purposeful omission of objective data and other critical information is of important significance considering the Cities' long history of failing to monitor the public defense system. Moreover, there is evidence that deprivations of the right to counsel are continuing. Similar to the system that was in place at the time this lawsuit was filed, the current Public Defender spends insufficient time on cases, discourages client contact prior to the first pretrial hearing, rarely investigates facts, and takes few cases to trial. *See* Section II.D.3, *supra*. Finally, the Cities are making it more difficult for indigent defendants to complain. *See* Section II.E.2, *supra*.

As Plaintiffs' expert has concluded, "the Cities are failing to do anything to stop the unconstitutional practices that have been occurring for years with the Cities' knowledge." Jackson 2d Suppl. Decl. ¶ 37. In particular, the Cities are failing to monitor "compliance with contractual and constitutional requirements and applicable standards for indigent defense," which has the result of "constitutional deficiencies continuing to plague the Cities' public

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defense system." *Id.* ¶ 36. There is a "grave risk" that systemic deprivations of the right to counsel "will continue unless [the] Court orders the cities to submit to a monitoring and audit system designed to ensure compliance with the Constitution." *Id.* ¶ 40.

5. Remedies Available at Law Are Inadequate to Compensate Class Members for the Deprivation of the Right to Assistance of Counsel

Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages. *Am. Trucking Assocs., Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058-59 (9th Cir. 2009). Moreover, "[t]he 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." *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895, 907 (2004); *see also* Dkt. No. 142 at 6:1-3 ("case-by-case requests for new counsel, appeals, and/or malpractice actions would not resolve the systemic problems identified by plaintiffs"). Because any remedies that are available to Class members at law are inadequate to compensate for the deprivation of the right to assistance of counsel, an award of permanent injunctive relief is appropriate.

6. The Balance of Hardships Warrants Injunctive Relief

The balance of hardships also weighs in favor of the Class. Absent a permanent injunction, the Cities will continue to shirk their duty to meaningfully monitor and oversee their public defense system, and Class members will continue to be denied the assistance of counsel. The right to assistance of counsel, which is fundamental and essential to a fair trial,[21] greatly outweighs any hardship, including financial burdens, that a permanent injunction would cause the Cities. Indeed, the Supreme Court has long held that financial concerns are not a justification for the infringement of a criminal defendant's constitutional right. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 392 (1992).

[21] *See Argersinger*, 407 U.S. at 36-37; *Gideon*, 372 U.S. at 344.

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Moreover, the likely cost to the Cities of the injunctive relief proposed by Plaintiffs is insignificant in relation to the overall budgets of the Cities. Mount Vernon's budget for 2013 is $47 million, and Burlington's budget for 2013 is $36 million. Exs. 99 and 100. Based on what they are currently paying Mountain Law, the Cities should be able to get a part-time, 20-hours-per-week public defense supervisor for less than $50,000 per year. Ex. 79 at 203:5-15. Thus, while the proposed injunction will require the Cities to restore their public defense system to constitutional standards by spending a relatively small amount of money each year for two to three years, this expenditure pales in comparison to the loss of liberty of indigent defendants. *See Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 659 (9th Cir. 2009) ("A budget crisis does not excuse ongoing violations of federal law, particularly when there are no adequate remedies available other than an injunction."), *vacated on other grounds*, *Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012).

7. A Permanent Injunction Will Serve the Public Interest

It is in the public interest to ensure that every individual indigent criminal defendant is afforded the procedural and substantive safeguards designed to assure a fair trial. *See Gideon*, 372 U.S. at 344. "This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him." *Id.* In fact, in order for justice to be served, both the government and the indigent defendant must have access to representatives who can zealously and effectively articulate their positions. Dkt. No. 53 ¶ 8. If the legal process no longer entails a confrontation between adversaries, the right to counsel becomes illusionary and the criminal system loses its legitimacy in the eyes of the public. *See Cronic*, 466 U.S. at 656; Dkt. No. 53 ¶ 9.

The unconstitutional nature of the Cities' public system has been and continues to be directly attributable to the Cities' failure to meaningfully monitor and oversee the Public Defender. As Plaintiffs' experts have concluded, the Cities "failed to implement, monitor, evaluate, [and] supervise a public defense system that met the minimum Sixth Amendment

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Requirements for assistance of counsel." Jackson 2d Suppl. Decl. ¶ 8. "Some form of monitoring, audit or oversight of contract and constitutional compliance . . . with respect to the public defense function is essential in order have a constitutional system." Jackson 2d Suppl. Decl. ¶ 38.

The injunctive relief that Plaintiffs respectfully request on behalf of the Class is narrowly tailored to address the root cause of the constitutional violations: the Cities' failure to meaningfully monitor and oversee their public defense system. Plaintiffs propose the hiring of one part-time public defense supervisor who will work at least 16 hours per week for two to three years. *See* [Proposed] Order Granting Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Proposed Order") at ¶¶ A, G. This complies with the applicable WSBA standard regarding the ratio of supervisors to public defense attorneys, which is one half-time supervisor for every five lawyers. *See id.*; *see also* Ex. 7 (Standard 10). The supervisor will be part of the attorney-client confidential relationship between the Public Defender and its clients but will not be part of the Public Defender's firm. *See* Plaintiffs' Proposed Order ¶ B. For a period of twenty-four to thirty months, the supervisor will report to the Court on the Cities' and Public Defender's compliance with the constitutional right to counsel, applicable WSBA standards, applicable ordinances, and the public defense contract. *Id.* ¶¶ D, G. These reports will be submitted every six months. *Id.* ¶ D.

Among other things, the public defense supervisor will monitor and evaluate various aspects of the work of the Public Defender, including: whether the Public Defender is making efforts to contact and meet with indigent defendants in advance of their first court hearings; whether the Public Defender is meeting regularly with in-custody defendants; whether the Public Defender is reviewing discovery and identifying avenues of further inquiry for investigation and legal defenses; whether the Public Defender is analyzing and informing clients of treatment and other services; whether the Public Defender is fully advising indigent defendants of their options regarding plea offers, conviction consequences, and sentencing

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alternatives; whether the Public Defender is advocating on behalf of indigent defendants in Court; and whether the Public Defender is maintaining contemporaneous records of work performed. *See* App. A to Plaintiffs' Proposed Order.

The supervisor will also monitor and evaluate the allocation of cases among public defense attorneys; conduct random file reviews; collect data on investigations, dispositions, and trials; and review closed case reports. *See id.* The supervisor will develop checklists of the tasks that need to be accomplished for the most frequent types of cases handle by the Public Defender and recommend training for the attorneys to improve their criminal defense skills. *See id.* Finally, the supervisor will handle complaints and will establish a process for an indigent defendant to pursue a complaint if the supervisor is unable to resolve the complaint to the defendant's satisfaction. *See* Plaintiffs' Proposed Order ¶ C.

Because the relief Plaintiffs seek will help ensure that every individual indigent criminal defendant is afforded the procedural and substantive safeguards designed to assure a fair trial, a permanent injunction is warranted and a proposed order is attached.

IV. CONCLUSION

On the eve of the 50th anniversary of the Supreme Court's decision in *Gideon v. Wainwright*,[22] the Sixth Amendment continues to stand—perhaps more strongly than ever—"as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done."[23] Actual assistance of counsel is essential to the fair resolution of any criminal charge. It is also essential for avoiding the unintended collateral consequences that may attend a misdemeanor conviction, such as deportation, the inability to obtain public housing and benefits, the inability to find gainful employment, and the loss of a driver's license, among other things.

[22] The Court's decision in *Gideon* was handed down on March 18, 1963. 372 U.S. at 335.

[23] *Gideon*, 372 U.S. at 343 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)) (internal marks omitted).

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The evidence before the Court demonstrates that for many years now, the Cities of Mount Vernon and Burlington have systemically deprived indigent defendants of the most basic and fundamental of rights: the right to the assistance of counsel. This pattern of deprivation has been a direct result of the Cities' policies and customs, particularly the Cities' refusal to meaningfully monitor and oversee their own public defense system. Because their actions and inactions have resulted in constitutional violations, the Cities are liable under 42 U.S.C. § 1983. Furthermore, permanent injunctive relief is warranted because the Cities' past and present misconduct indicates a strong likelihood of future violations of the right to counsel.

For these reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment and order the Cities to hire a part-time supervisor to monitor and oversee the Cities' public defense system and, in turn, ensure that Class members are afforded actual assistance of counsel.

RESPECTFULLY SUBMITTED AND DATED this 5th day of March, 2013.

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I, Toby J. Marshall, hereby certify that on March 5, 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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