THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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

Plaintiffs,

v.

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

Defendants.

No. C11-01100 RSL

PLAINTIFFS' OPPOSITION TO DEFENDANT CITIES' MOTION FOR SUMMARY JUDGMENT

Noted for Consideration: March 29, 2013

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

This Cities of Mount Vernon and Burlington ("Defendants" or "the Cities") continue to recklessly operate a public defense system in a manner that systematically denies indigent criminal defendants the right to counsel that they are entitled to under the U.S. and Washington State Constitutions. The undisputed evidence shows ongoing irreparable harm to the certified Class of indigent defendants, and it warrants a summary judgment order requiring the Cities to hire a supervisor to bring their public defense system into constitutional compliance. *See* Plaintiffs' Summary Judgment Motion, Dkt. No. 242 ("Plaintiff's Motion" or "Motion"). Plaintiffs respectfully request that this Court deny the Cities' Motion for Summary Judgment, Dkt. No. 235 (hereinafter "Mootness Motion"), on the grounds that it misrepresents the purported changes to the Cities' public defense system, it fails to carry the Cities' heavy legal burden on mootness, and it fails to address the statements and actions by the Cities that prove they will continue violating the constitutional rights of Plaintiffs unless this Court enjoins them.

II. STATEMENT OF FACTS

To avoid repetition, Plaintiffs incorporate by reference the facts outlined in their Motion for Summary Judgment, Dkt. No. 242, and supplement and highlight them as follows:[1]

A. After Almost Two Years of Litigation, It Is Indisputable That the Cities' Public Defense System Was Inadequate Before This Lawsuit Was Filed

From the outset of this case, Plaintiffs have demonstrated the various constitutional deficiencies in the Cities' public defense system, including a pattern and practice of appointing attorneys who failed to meet with or respond to indigent defendants; who failed to investigate charges filed against indigent defendants; who failed to spend sufficient time on indigent defendant cases; who failed to advocate on behalf of indigent defendants; and who effectively forced their clients to accept plea deals. Plaintiffs have also highlighted the Cities' previous claims that the

[1] Unless otherwise noted, all citations to exhibits herein refer to exhibits to the Declaration of James F. Williams in Support of Plaintiffs' Opposition to Defendants Cities' Motion for Summary Judgment filed concurrently with this Opposition.

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public defense system they operated prior to this lawsuit was more than constitutionally sufficient. Dkt. No. 242 at 26-27.

Now, for the first time, the Cities concede in their motion (as they must) that their "old" public defense system had problems and that City officials failed to closely monitor the Public Defender and caseloads.[2] Dkt. No. 235 at 6. Further, the Cities admit this lawsuit has brought "various shortcomings to the forefront." *Id.* at 7. To be clear, the pre-lawsuit public defense system was in need of a drastic overhaul because it failed to meet the requirements of the Sixth Amendment and Article I, Section 22 of the Washington State Constitution. While a few of the Cities' recent actions have positively moved in the direction of constitutional compliance, the Cities have much more work to do before meeting their right to counsel obligation and Plaintiffs submit that a court order is necessary to ensure that they get there.

B. The Cities Continue to Operate a Public Defense System that Deprives Meaningful Assistance of Counsel to Indigent Defendants

Motivated by this lawsuit, the Cities claim to have made "sweeping improvements" and have taken "extraordinary steps to improve" their public defense system. Dkt. No. 235 at 7. Arguing that these "improvements" have brought the system in compliance with the U.S. and Washington State Constitutions, the Cities present a distorted picture of the current system that misrepresents and ignores the actual evidence.

1. The Failure to Monitor Continues Because the Cities Have Abdicated Their Obligation to Oversee the Public Defense System and Have Designed a Complaint Process to Avoid Learning About Constitutional Violations

The Cities state that they have revised their Public Defense contract "to reflect the policy changes set forth in their new legislation." Dkt. No. 235 at 11. But, as discussed in Plaintiffs'

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[2] This "concession" in the Cities' brief is a last-ditch effort to appear contrite before the Court in the hopes of mooting this case. As explained in more detail below, the Cities' officials refuse to concede anything and continue to maintain that their old public defense system satisfied the constitutional rights of indigent defendants. Moreover, despite the assertion in the Cities' Mootness Motion that the old public defense system operated by Richard Sybrandy and Morgan Witt was deficient, the Cities considered awarding the current contract to Witt. In their Motion, the Cities state that the law firm of North Cascade Legal Services Group was one of the "frontrunners" for the current public defense contract Dkt. No. 235 at 10. The Cities, however, fail to mention that Witt was one of the firm's attorneys. *See* Dkt. No. 251 at 99.

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Motion, the Cities have recently stripped away even the limited protections of the public defense system that were in place. For example, the Cities deleted provisions from the 2013 Public Defender contract that—had they been followed—would have provided minimal protections for the constitutional rights of indigent defendants. Dkt. No. 242 at 28-29. These include provisions that required the use of investigative, paralegal, and clerical services by the Public Defender; reasonable Public Defender office hours in order to meet with clients prior to hearings or trials; proper and timely communication with clients; the means to reach the Public Defender for critical advice; availability to meet with clients in the jail or other locations that assure adequate privacy; visits to incarcerated inmates on a weekly basis; access to contact information for availability during office hours; maintenance of certain records; and cooperation with the City in evaluation of the Public Defender's performance. *Compare* Ex. A (2009 public defense contract) *and* Ex. B (2012 public defense contract), *with* Ex. C (2013 public defense contract).

Further, the legislation recently adopted by the Cities no longer requires oversight of the Public Defender. The Cities each enacted legislation in 2008 that obligated 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 Washington State Bar Association ("WSBA") Standards for Indigent Defense Services ("WSBA Standards"). *See* Ex. D (Burlington Resolution No. 15-2008, § 8); Ex. E (Mount Vernon Ordinance No. 3436, § 8); Ex. F at 8 (*see* Ex. V, WSBA Standards). After the Washington Supreme Court endorsed those Standards in 2012, the Cities enacted new legislation. Incredibly, under the newly-enacted legislation relied on by the Cities, the Cities no longer have any responsibility for monitoring or evaluating the Public Defender. *See* Ex. G (Burlington Resolution No. 02-2012, § 8); Ex. H (Mount Vernon Ordinance No. 3584, § 10). Instead, the burden is on the Public Defender to monitor and evaluate itself, and the Public Defender is not required to do so. Ex. G (Burlington Resolution No. 02-2012, § 8) ("It is not practical nor consistent with attorney/client privilege nor the constitutional rights of indigent defendants to establish a procedure for systematic monitoring and evaluation of attorney

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performance."); Ex. H (Mount Vernon Ordinance No. 3584, § 10) ("Candidates for Public Defender Services are encouraged, but not required, to comply with the provisions of [Standards Ten and Eleven of the WSBA Standards adopted by the Supreme Court].").

According to the Mount Vernon contract administrator, the Cities' oversight of the current Public Defender, Mountain Law, is limited to passively receiving closed case reports and processing any complaints that are made. *See* Ex. I (Oct. 2, 2012, Deposition of Mount Vernon Contract Administrator Eric Stendal ("Stendal Dep.") at 12:11-13:17).[3] Neither of these procedures results in any meaningful monitoring of the public defense system. For example, the Cities claim to be tracking case credits through "closed case reports" provided by Mountain Law, which, according to the Cities, are "more detailed" than those produced by Seattle public defenders. Dkt. No. 235 at 17. Yet Mountain Law itself has confirmed that those reports are derived from the case credit approach used in Everett by Mountain Law's sister firm—and not from the Cities' public defense contract. Ex. K (Jan. 10, 2013 and Feb. 8, 2013, Rule 30(b)(6) Deposition of Mountain Law, PLLC (Michael Laws) ("Mountain Law Dep.") at 153:23-154:23, 192:23-193:2). Further, Mountain Law was not even *aware* of the case credit system outlined in the contract, because no one from the Cities had ever discussed it with the firm. *Id.* at 144:9-147:24, 154:20-23. Recently, those reports became even more meaningless because the Cities instructed Mountain Law to stop reporting hours worked after Plaintiffs' expert issued a report stating that the average amount of time spent by Mountain Law attorneys on cases is insufficient. *Id.* at 251:18-22.

With respect to complaints, the Cities' new complaint system is grossly inadequate and fails to capture legitimate complaints about the Public Defender, which explains why there have been no complaints recently received by the Cities. As discussed in Plaintiffs' Motion, the Cities' new system disposes of any real responsibility by substantially limiting the Cities' legal obligations and

[3] Burlington's contract administrator testified that the Cities' "oversight" includes adopting new standards, hiring experts to recruit a new public defense contractor, visiting court, speaking with the Burlington court administrator, and two visits to Mountain Law's offices. Ex. J (Jan. 16, 2013, Rule 30(b)(6) Deposition of the City of Burlington (Bryan Harrison) ("Burlington Dep.") at 45:11-49:24).

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shifting the burden to others in several ways. First, the Cities flatly refuse to address all but 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. L. Second, the Cities will only respond to a complaint that meets the stringent "rules of the city complaint process." For example, if the defendant fails to submit a complaint within 15 days of the event giving rise to it, the Cities refuse to respond. *Id.* If the defendant fails to complete a complaint form, the Cities refuse to respond. *Id.* If the defendant submits the form to someone other than the Special Projects Administrator, the Cities refuse to respond. *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 refuse to respond. *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 refuse to respond. *Id.* Sadly, the Cities have actually designed a complaint process that virtually assures that they will never become aware of a constitutional violation. By doing so, the Cities continue to ignore their undisputed obligations to monitor the system, ensure the right to counsel, and manage the public defender caseload. *See* Ex. I (Stendal Dep. at 20:3-19, 21:23-23:9, 25:4-18, 27:15-28:23, 41:7-43:12); Ex. J (Burlington Dep. at 44:16-45:9).

2. The Failure to Ensure that the Public Defender Confidentially Meets with Indigent Clients Continues Because Mountain Law Uses the Same Old "Late Police Report" Excuse to Avoid Private Pre-Hearing Consultations

The Cities assert that Mountain Law is "regularly meeting with clients" and that the firm's assistant "schedules appointments the moment a client qualifies for a public defender." Dkt. No. 235 at 16. Despite this assertion, the initial messaging that discourages indigent defendants from having pre-hearing private consultations is virtually the same under Mountain Law as it was under the Sybrandy/Witt regime. For example, the Cities are fully aware that the first written communication from the Public Defender to indigent clients conveys the erroneous idea that it is pointless to meet without having the police report and that the clients should not worry if they do not meet with their attorney before the first hearing:

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SYBRANDY/WITT MEMORANDUM TO MOUNT VERNON/BURLINGTON PUBLIC DEFENDER DEFENDANTS

> 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 . . .
>
> Do not worry or be alarmed if your Pretrial Court date is coming up and you have not met with your attorney yet. We often do not receive police reports until the day prior to your first pretrial hearing.

Ex. M; *see also* Ex. N (Jan. 15, 2013, Rule 30(b)(6) Deposition of Mount Vernon (Eric Stendal) ("Mount Vernon Dep.") at 37:23-45:25).

MOUNTAIN LAW MEMORANDUM TO ALL ASSIGNED COUNSEL DEFENDANTS

> You may call our office to make an appointment to meet with your attorney. Often, however, we cannot schedule a meeting prior to your first pretrial hearing (there may not be enough time or we may not yet have information about your case). It should not concern you if we are unable to meet with you prior to your first pretrial hearing.

Ex. O; *see also* Ex. N (Mount Vernon Dep. at 49:17-52:13, 54:3-10); Ex. J (Burlington Dep. at 141:14-145:11).

Under both public defender regimes, the Cities have been aware of the fact that, after being appointed counsel, indigent defendants have to wait at least two or three weeks before a police report is delivered to the Public Defender; have been aware that the absent police report is the thing the Public Defender relies upon to avoid a confidential consultation and justify inaction on the case; and have been aware that those police reports often arrive the day before the pretrial hearings or after. *See* Ex. K (Mountain Law Dep. at 209:7-210:8); Ex. P (Sept. 26, 2012, Deposition of Richard Sybrandy ("Sybrandy Dep.") at 142:22-144:9); Ex. Q (Sept. 27, 2012, Deposition of Morgan Witt ("Witt Dep.") at 131:7-135:2); Ex. R (SKAGIT-PDR_000557-559). In the end, the Cities still tolerate a system designed to have clients meet their lawyers for the first time in open court to discuss the details of their cases. *See, e.g.*, Ex. P (Sybrandy Dep. at 149:4-9) ("Typically the

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majority of initial contact would have been at the first pretrial. I would say 75 percent of the time the first contact would have been at the first pretrial.").

Furthermore, Mountain Law's testimony contradicts the notion that clients are actually getting their private consultations. Mountain Law's assistant is able to schedule client appointments for Mount Vernon indigent defendants the moment they qualify for public defense because she is at Mount Vernon's arraignment calendar. Ex. K (Mountain Law Dep. at 44:20-46:6). The assistant, however, is not at Burlington's arraignments and, thus, is not able to schedule client meetings with Burlington indigent defendants the moment they qualify for a public defender. *Id.* at 45:24-46:5. Instead, Burlington indigent defendants must call Mountain Law and schedule an appointment. *Id.* at 221:2-8. Mountain Law also admitted that, even if Burlington clients call to request an appointment, there may not be a time slot available to meet with them prior to their next court hearing or the prosecutor may not have sent them the client's discovery yet, in which case a meeting "would be pointless." *Id.* at 221:2-15. Moreover, per Mountain Law's policies, lack of discovery (i.e., the police reports) is also grounds for canceling already scheduled meetings with Mount Vernon clients. *Id.* at 49:17-50:12. Accordingly, meetings with clients often do not occur until after the clients' first appearances, if at all. While it sounds good when the Cities say appointments are being made, the question that matters is whether private consultations are occurring prior to the first court appearance. The general answer to that question is still no, and the Cities continue to operate a "Meet 'Em, Greet 'Em, and Plead 'Em" system of public defense.

With respect to incarcerated clients, the Cities maintain that "Mountain Law is also meeting with its in-custody clients in Skagit jail at least weekly." Dkt. No. 235 at 21. Mountain Law's testimony, however, does not support this claim. Instead, Mountain Law attorneys block off Monday afternoons to visit incarcerated clients, but will only do so if: (1) the client is being held on a Mount Vernon or Burlington charge; (2) the client has an upcoming Tuesday hearing; (3) the client has not already been seen; *and* (4) Mountain Law has received the client's discovery. Ex. K (Mountain Law Dep. at 207:5-21). If any of these four requirements are not met, Mountain Law

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does not visit the client that week. *Id.* Moreover, Skagit County jail logs show that one Mountain Law attorney (Jesse Collins) visited the jail only ten times (to visit just 12 clients) over an eight month period, while another (Michael Laws) visited the jail only four times (to visit four clients) over the same period.[4] Mountain Law attorneys acknowledge the jail's sign-in policy and testified that they sign the logs whenever they visit the jail. Ex. K (Mountain Law Dep. at 206:7-18). Thus, the lack of entries on the jail logs confirm that the Public Defender is still not visiting their incarcerated clients on a weekly basis—and in fact is rarely visiting them at all.

3. The Failure to Ensure Compliance With Caseload Limits Continues Because the Cities Continue Playing Games With the Definition of a "Case," How Cases Are Counted, and the Number of Cases Being Handled

The Cities admit that their failure "to closely monitor the exact number of cases" handled by Sybrandy and Witt was a problem. Dkt. No. 235 at 6. The Cities claim that they have addressed "this earlier problem . . . through a global reduction in caseloads, legislation and a new contract, a detailed RFQ process echoing this requirement, a more workable definition of 'case,' and mandatory caseload standards that the Mountain Law attorneys must certify compliance with." *Id.* at 20. The Cities fail, however, to provide any documentary evidence demonstrating what the current caseload is and whether it has actually decreased. As discussed below, when the actual testimony is reviewed it becomes apparent that not much has changed.

First, the Cities claim that their global reduction in caseloads is a result of their recently enacted diversion programs: "There has also been a countervailing reduction in case filings due to the detailed deferral measures enacted by the Cities—which tangibly reduce the number of charges brought by the prosecutor." *Id.* at 21; *see also id.* at 15 ("[T]he Cities have also successfully reduced the number of cases being filed by enacting measures deferring criminal charges without a

[4] Collins visited on May 14 (one client), May 18 (one client), May 30 (two clients), June 12 (two clients), June 18 (two visits, each to one client), July 5 (two clients), July 17 (one client), July 27 (one client), and August 15 (one client). Ex. S (Skagit County Jail Logs, May 9, 2012 to Sept. 24, 2012, at 409, 411, 414, 419, 421, 426, 430, 433, 438). Laws visited on May 22 (no client specified), June 5 (one client), July 17 (one client), and on September 17 (one client). *Id.* at 412, 417, 430, 448. The third attorney (Sade Smith) was hired in September 2012, Ex. K (Mountain Law Dep. at 30:5-7), and is reflected only once in the logs. Ex. S at 448. If the Cities have hired a fourth attorney, it is too soon to tell whether she will comply with jail visit policies.

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formal filing."). On April 11, 2012, Mount Vernon passed an ordinance aimed at reducing the number of Driving with License Suspended filings. Ex. T (Mount Vernon Ordinance No. 3563). On December 13, 2012, Burlington enacted a resolution directing the prosecutor to enforce a "misdemeanor diversion program." Ex. U (Burlington Resolution No. 29-2012). But the Cities do not provide any evidence that these programs are in operation or that case filings have actually gone down as a result of these programs. Indeed, at a recent deposition, Mountain Law's managing attorney was unaware that diversion ordinances had been passed, Ex. K (Mountain Law Dep. at 116:18-20), and based on what little information they had heard, such programs were "on a hold." *Id.* at 46:16-21; *see also id.* at 46:24-47:1 ("Judge Gilbert wants to take a little bit of time apparently to think about the diversion program and what might be required of it."); *id.* at 116:8-17 ("Well, we don't have a whole lot of detail about [the diversion program] currently ... I don't even know exactly what their criteria are going to be for the diversion program."); *id.* at 117:8-10 (In response to whether there was a plan to put DWLS cases into a diversion program, Laws said "Not that I'm aware of."); *id.* at 290:24-291:5 (In response to whether there was a diversion program for Mount Vernon, Laws stated "Not in the same vein that I'm aware of. Nothing that has been proposed that's contemplated as a prefiling diversion or anything like that."). In sum, the evidence does not show that caseloads have been reduced on account of the Cities' diversion programs.

Second, the definition of a "case" in the current public defense contract remains enigmatic. Rather than define "case," the Cities decided that the term "shall be defined as provided in the Standards." Ex. C (2013 public defense contract). Per the Standards, a "case" is defined as a "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. In courts of limited jurisdiction multiple citations from the same incident can be counted as one case." Ex. V (Washington Supreme Court Standards at 2). Nevertheless, there are still questions regarding what qualifies as a case for counting purposes. For example, Mountain Law's representative speaks extensively about his confusion regarding how cases are counted:

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> The problem is in terms of understanding what any given number means, what counts as simply pending. Is a case that's in bench warrant a pending case? Nobody really knows. Nobody has really said that. A case that is opened in one month, does that count then? Then when does it stop counting if they go into bench warrant status? Does a case that's in bench warrant status where the person gets the warrant quashed in six months start counting the month it's quashed and then stop counting when it's closed?

Ex. K (Mountain Law Dep. at 175:4-12).[5]

Finally, the Cities rely on the new Supreme Court Standards as evidence that they are maintaining reasonable caseloads, claiming that they are currently in compliance. Dkt. No. 235 at 15, 21. The Cities assured Plaintiffs they would be (or were) in full compliance with this standard by January 1, 2013. *See* Ex. I (Stendal Dep. at 216:12-16); Ex. J (Burlington Dep. at 46:14-16, 120:11-18). The Cities, however, do not provide any concrete numbers to verify this and the evidence provided by Mountain Law proves otherwise. For example, as of January 16, 2013, there were three public defenders[6] employed by Mountain Law and collectively these attorneys were handling 813 cases, which does not include the 343 cases that were in bench warrant status at the time. Ex. K (Mountain Law Dep. at 268:2-14). At that rate, Mountain Law attorneys will grossly exceed the annual 400 caseload limitation endorsed by the Washington State Supreme Court. Ex. V (Washington Supreme Court Standards at 2).

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[5] Indeed, when asked during a Rule 30(b)(6) deposition of Burlington, the Burlington contract administrator was unable to provide a concrete caseload number for 2012 or any other year. *See* Ex. J (Burlington Dep. at 83:3-87:13).

[6] The Cities claim that they currently have four public defenders. Dkt. No. 235 at 12, 21. But Mountain Law confirmed that only three attorneys were employed as of February 8, 2013. Although Mountain Law was in the process of hiring a fourth attorney, it had not then done so. Ex. K (Mountain Law Dep. at 253:24-257:5). On February 11, 2013, more than a week past the discovery deadline, Mountain Law provided Plaintiffs a letter indicating that it *intended* to bring on a fourth attorney by March 1, 2013. Ex. W (Letter from Brian Augenthaler, counsel for the Cities, to J. Camille Fisher, counsel for Plaintiffs (Feb. 11, 2013)). Plaintiffs have not received any supplemental information from either Mountain Law or the Cities regarding this fourth attorney, and thus have no indication of whether she was actually hired and/or what impact this has on the Cities' public defense system.

Regardless, the Cities' apparent concession that they require four attorneys to meet the caseload limitations demonstrates their lack of compliance; even if they had hired this fourth attorney by March 25, when they filed their Mootness Motion, they no doubt exceed a 400 cases per year pace for the first three months of 2013.

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4. The Failure to Address Claims of Constitutional Violations Continues Because the Cities Continue to Ignore Indigent Defendant Complaints

The Cities misleadingly state that "Mountain Law's clients have been overwhelmingly satisfied. There have been no written complaints at all." Dkt. No. 235 at 15. But as discussed above, that complaint policy places many roadblocks in the path of any client who wishes to formally file a complaint. Further, the Cities ignore the fact that a number of Mountain Law's clients have provided sworn declarations revealing many of the same problems that existed with Sybrandy and Witt. For example, clients have complained that, like the old Public Defender, the attorneys at Mountain Law rarely speak with them outside of court. Dkt. No. 200 (Declaration of Shawn Delacruz ("Delacruz Decl." ¶ 4) ("The only time I have spoken to Laws was at court on July 7, 2012."); Dkt. No. 199 (Declaration of Mark Reyna ("Reyna Decl." ¶ 6) ("I never spoke to Collins outside of court or on the telephone."); Dkt. No. 198 (Declaration of Steven Osborn ("Osborne Decl." ¶ 6) ("I have only been able to speak with Collins once, and that was right before a court hearing a few weeks ago."); Dkt. No. 201 (Declaration of Jacob C. Norman ("Norman Decl." ¶ 9) ("The public defenders should do these things instead of just talking to the clients at court where we cannot really have a conversation."). If a meeting does take place, it occurs at court and the interaction is usually limited to only a few minutes and in a public, non-confidential area. Dkt. No. 200 (Delacruz Decl. ¶ 4) ("We spoke very briefly outside the courtroom … I met with him for less than 5 minutes."). This lack of confidential consultations continues to leave the defendants uninformed about the status and progression of their cases, just as when Sybrandy and Witt were the Public Defender. *See id.* ¶ 3 ("Additionally, I'd like to have a sense of what is going to happen with my other charges. I would like to know if I am going to be eligible for work crew or if I will be sent back to jail after being released. I have no idea what to expect and would like to know what is going on."); Dkt. No. 198 (Osborn Decl. ¶ 8) ("[Collins] has never called me to ask questions or give me an update of my cases…."); Dkt. No. 201 (Norman Decl. ¶ 8) ("[The representation by Collins] contrasts with my public defenders on my county cases. The county defenders would visit

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me at the jail, and discuss my case and options with me."). It also forces these individuals to make uninformed and rushed decisions about important matters, often without any explanation or discussion of the charges against them, applicable defenses, available options, and attendant risks. *See* Dkt. No. 199 (Reyna Decl. ¶ 6) ("When I met Mr. Collins for the first time in court, I told him that I wanted to fight the theft charge against me. Instead of fighting the charge, Mr. Collins told me to plead guilty … I didn't want to plead guilty to this charge, but felt I had no choice."); Dkt. No. 200 (Delacruz Decl. ¶ 4) ("[Laws] was only interested in obtaining a continuance and did not want to hear my story or anything else I had to say about my case."); Dkt. No. 201 (Norman Decl. ¶ 6) ("Mr. Collins never brought up alternatives to a guilty plea or an alternative to jail. I had to ask about those things."); *id.* ¶ 7 ("I thought the guilty plea and sentencing would result in the case being closed, but actually there is also a fine owed. Mr. Collins never asked if I was able to pay the fine."). In sum, these more recent declarations literally mirror the types of complaints seen at the outset of this case and in doing so confirm that class certification and an injunction are as needed now as they were when this case started.

5. The Cities Have Even Failed to Fully Implement the Recommendations of Their Own System Reform Expert, James Feldman

As evidence of their compliance, the Cities tout their expert, James Feldman, whom they hired to independently investigate and provide recommendations regarding the criteria that should be considered when hiring a new Public Defender and when revising the old public defender contract. Dkt. No. 235 at 8. On December 16, 2011, Feldman issued a report with 13 proposed additions for the existing public defense contract, which were fully embraced by the Cities. *See* Ex. I (Stendal Dep. at 245:10-247:20); Ex. J (Burlington Dep. at 114:19-118:20). These proposed additions included the following:

- **Proposed Addition No. 1:** The Public Defender shall only "bill" (i.e., count towards caseload limits) once for each case assigned pursuant to the public defense services contract. Ex. X (Feldman's Dec. 20, 2011 Report).

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- **Proposed Addition Nos. 3-5:** Cases that result in a disposition should be counted as 1/3 case credits, and all other cases should count as a single case credit, for all charges arising out of a single incident. *Id.*
- **Proposed Addition No. 8:** The Public Defender shall search Skagit County Jail databases to determine whether or not the individuals have outstanding warrants. *Id.*
- **Proposed Addition No. 9:** The Public Defender shall be required to visit each incarcerated inmate on pretrial status or pending a court hearing on probation review on a weekly basis to provide an updated status of the case. *Id.*
- **Proposed Addition Nos. 11 and 13:** The Public Defender shall implement a program with the agency making a referral at the time of the appointment for a meeting between the individual and the Public Defender prior to that individual's next court date, and shall make every attempt reasonable to make appointments to meet with clients before the first appearance. *Id.*

The Cities claim that, in January 2012, they "adopted Mr. Feldman's recommendations legislatively." Dkt. No. 235 at 9. More than a year later, however, the Cities have failed to fully implement those requirements. For example, Proposed Addition No. 1 is not being followed by Mountain Law. Ex. K (Mountain Law Dep. at 175:4-12) (discussing confusion over case counting process). Proposed Addition Nos. 3-5 on assigning cases different credits depending on the complexity of the case are not being followed. For instance, Laws testified that the Cities never discussed weighing cases with Mountain Law and at least as of late the Cities do not weigh cases. *See id.* at 145:5-24, 147:10-24, 192:20-193:9, 318:20-23. The Cities, therefore, have not employed Feldman's case credit system. Proposed Addition No. 9 requires that the Public Defender visit incarcerated clients on a weekly basis. As discussed in Section II.B.2, *supra*, Mountain Law is not doing this. Finally, Proposed Addition Nos. 11 and 13 recommend that the Public Defender make every attempt to assign appointments with clients prior to their next court date, including implementing a program whereby a client is provided a meeting time the moment he/she is assigned

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counsel. As previously described, Mountain Law is doing this in Mount Vernon, but not Burlington; and even in Mount Vernon, Mountain Law will cancel appointments if the firm does not receive the defendant's police report beforehand. *See* Section II.B.1, *supra.*

III. AUTHORITY AND ARGUMENT

A. Applicable Legal Standards

1. To Prevail on Summary Judgment, the Cities Must Establish that There Is No Genuine Issue of Fact for Trial

The goal of summary judgment is to avoid the burden of an unnecessary trial when there is no dispute as to the material facts before the court. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348 (1986). 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 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.*, 475 U.S. at 587, or if a party fails to prove any essential element of a claim, *Celotex Corp.*, 477 U.S. at 322. The Court, however, need not adopt a party's resuscitation of the facts when it is "blatantly contradicted by the record, s[uch] that no reasonable jury could believe it." *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769 (2007).

2. The Cities Bear a Heavy Burden to Establish That Plaintiffs' Claims are Moot

A court cannot decide a case that has become moot during the pendency of the litigation. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 162 (Tex. 2012); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 120 S. Ct. 693 (2000); *Pub. Utils. Comm'n v. Fed. Energy Regulatory Comm'n*, 100 F.3d 1451, 1458 (9th Cir. 1996). But, a case only becomes moot if, since the time of filing, there has ceased to exist a justiciable controversy between the parties. *Heckman*, 369 S.W.3d at 162. That is, if the issues presented are no longer "live" or if the parties lack a legally cognizable interest in the outcome, the action is moot. *Id.; Cnty. of Los*

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Angeles v. Davis, 440 U.S. 625, 631, 99 S. Ct. 1379 (1979); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998). The action is only moot "when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 133 S. Ct. 1017, 1019 (2013) (*citing Knox v. Serv. Emps.*, 132 S. Ct. 2277, 2287 (2012)). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id.* Indeed, the U.S. Supreme Court has recently confirmed that a case can remain live and justiciable "for the possibility of some remedy for a proven past violation." *See Decker v. Nw. Envtl. Def. Ctr.*, No. 11-338, 2013 WL 1131708, at *9 (U.S. Mar. 20, 2013) (refusing to dismiss on mootness grounds despite the change of law where "the District Court might order some remedy for their past violations"). The burden of establishing mootness "is a heavy one" and falls on the party asserting the defense. *Cnty. of Los Angeles*, 440 U.S. at 631; *Rosemere Neighborhood Assoc. v. E.P.A.*, 581 F.3d 1169, 1173-74 (9th Cir. 2009). In this case, the Cities' own statements about their old public defense system concede past violations and, at a minimum, contradict any theoretical merit they could have claimed in their Mootness Motion.

B. Because the Cities Continue to Deprive Indigent Defendants of Their Right to Counsel, the Class Continues to Need Relief From This Court

The Cities misleadingly argue that they have made dramatic improvements to their public defense system sufficient to guarantee indigent defendants constitutional representation. For example, the Cities claim that they have, among other things, (1) reduced the Public Defender's caseload, (2) ensured that the Public Defender regularly meets with clients, and (3) monitored the public defense system. The Cities, however, cannot provide any evidence to support these broad assertions because the Cities' Public Defender, Mountain Law, contradicts a number of the Cities' claims of reform. *See* Section II.B.3, *supra*, for a discussion of the evidence.

The Cities fail to meet their burden to establish, as a matter of law, that their public defense system has operated and is currently operating in a constitutional manner. For this reason alone, this Court should deny the Cities' Mootness Motion.

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C. Because the Cities Have Not Voluntarily Ceased Their Illegal Conduct, They Cannot Meet Their Heavy Burden of Proving Mootness

The Cities assert that Plaintiffs' claims are moot because the Cities "have completely overhauled their public defense system," Dkt. No. 235 at 4, and "intervening standards, legislation, contracts, and policy changes" address Plaintiffs' problems, *id.* at 5. Even if that statement were true, a defendant's voluntary cessation of illegal conduct generally does not render a case moot. *United States v. W.T. Grant, Co.*, 345 U.S. 629, 632, 73 S. Ct. 894 (1953); *Friends of the Earth*, 528 U.S. at 189; *Cnty. of Los Angeles*, 440 U.S. at 631; *Rosemere Neighborhood Assoc.*, 581 F.3d at 1173. Courts are reluctant to moot a case due to voluntary cessation because the "defendant [would be] free to return to his old ways. This together with a public interest in having the legality of the practice settled, militates against a mootness conclusion." *W.T. Grant*, 345 U.S. at 632; *Friends of the Earth*, 528 U.S. at 189; *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1179 (9th Cir. 2010). As recently stated by the U.S. Supreme Court, "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013).

For a defendant to demonstrate mootness due to voluntary cessation, "[t]he burden is a heavy one," *W.T. Grant*, 345 U.S. at 633, and the requirements are "stringent," *Friends of the Earth,* 528 U.S. at 189. As a threshold matter, the Cities must show that their changes are *not* the result of this litigation. *Pub. Utils. Comm'n of the State of Calif.*, 100 F.3d at 1460. Further, the defendant must show that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely eradicated the illegal or harmful activity. *W.T. Grant*, 345 U.S. at 633; *Cnty. of Los Angeles*, 440 U.S. at 631; *Halet v. Wend Inv. Co.*, 672 F.2d 1305, 1308 (9th Cir. 1982); *Lindquist v. Idaho State Bd. of Corrections*, 776 F.2d 851, 854 (9th Cir. 1985); *Fenlon v. Riddle*, 34 F. App'x 265, 266 (9th Cir. 2002).[7] For the reasons discussed below, the Cities fail on each of these requirements.

[7] The Cities attempt to shift this burden to Plaintiffs, citing dicta from the Tenth Circuit *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1117 (10th Cir. 2010). Dkt. No. 235 at 20. But that case

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1. The "New" Public Defense System Was Created by the Cities Specifically Because of this Class Action Litigation

In their Mootness Motion, the Cities concede that this lawsuit brought "various shortcomings to the forefront," and as a result of these shortcomings they undertook steps to improve their public defense system. Dkt. No. 235 at 7. The Cities, therefore, effectively concede that their changes occurred as a result of this litigation.

While admitting these public defense shortcomings, the Cities claim their changes were "primarily motivated" by the Washington State Supreme Court's Standards for Indigent Defense. *Id.* Their claim, however, rings hollow because virtually all of the changes that the Cities recite in their Mootness Motion occurred *after* this lawsuit was filed and *before* the Washington Supreme Court's adoption of the recommended caseload Standards. The Court adopted the Standards on June 15, 2012; yet by this time, the Cities had already hired W. Scott Snyder,[8] retained James Feldman,[9] legislatively adopted Feldman's recommendations,[10] sent out their request for qualifications,[11] compared and interviewed potential Public Defenders, selected Mountain Law as the new Public Defender,[12] and revised their public defense contract.[13] The remaining changes—

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acknowledged the "heavy burden" held by a defendant asserting mootness. *Rio Grande Silvery Minnow*, 601 F.3d at 1116. And it did not shift that burden; it merely discussed contexts in which the heavy burden "has not prevented government officials from discontinuing practices and mooting a case," stating that "'[m]ost cases that deny mootness rely on *clear showings* of reluctant submission [by government actors] and a desire to return to the old ways.'" *Id.* (emphasis in original and citing 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3533.6, at 311 (3d ed.2008)). Regardless, recent Ninth Circuit law makes it abundantly clear that the burden lies with the party asserting mootness—even when that party is a government entity. *See, e.g., Bell v. City of Boise*, 709 F.3d 890, 2013 WL 828485, at *5 (9th Cir. 2013) ("The 'heavy burden' lies with the party asserting mootness to demonstrate that, after a voluntary cessation, 'the challenged conduct cannot reasonably be expected to start up again.' . . . "This heavy burden applies to a government entity that voluntarily ceases allegedly illegal conduct.") (citing *Friends of the Earth*, 528 U.S. at 189, and *White v. Lee*, 227 F.3d 1214, 1243-44 (9th Cir. 2000)).

[8] Snyder was hired by the Cities in October 2011. *See* Dkt. No. 238 (March 4, 2013, Declaration of W. Scott Snyder ("Snyder Decl." ¶ 5).

[9] Feldman was retained by the Cities in December 2011. *See* Dkt. No. 126 (Dec. 1, 2011, Declaration of James A. Feldman ("Feldman Decl.")).

[10] Feldman's recommendations were legislatively adopted by the Cities in January 2012. *See* Dkt. No. 237 at 38-45 (Mount Vernon Ordinance No. 3556); Ex. G (Burlington Resolution No. 02-2012). Mount Vernon Ordinance. No. 3556 was repealed in November 2012 and replaced with Ordinance No. 3584. *See* Ex. H.

[11] The deadline to submit to the Cities proposals to provide public defender services was February 24, 2012. *See* Ex. Y (Request for Proposal for Public Defender Services).

[12] Mountain Law signed the Cities' Public Defender Contract in early April 2012 with a commencement date of April 16, 2012. *See* Ex. B (Public Defense Services 2012-2013 Contract for Services).

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increase in public defense funding,[14] hiring of a fourth attorney,[15] and enactment of a new complaint process[16]—occurred in the months leading up to the discovery deadline.

Furthermore, the new Supreme Court Caseload Standards, which supposedly triggered such feverish efforts to change the public defense system, is the exact same caseload standard that the WSBA Indigent Defense Standard Three has made mandatory since 2007. *Compare* Ex. F (Sept. 20, 2007, WSBA Standards for Indigent Defense Services No. 3 at 157) (stating that "caseload of a full-time public defense attorney *shall* not exceed" 400 misdemeanor cases per year) *with* Ex. V (June 15, 2012, Wash. Supreme Court Order No. 3.4 at 2) (stating that the "caseload of a full-time public defense attorney or assigned counsel *should* not exceed" 400 misdemeanor cases per year). The irony of the Cities' position is that, although WSBA's mandatory caseload limit is specifically imposed by RCW 10.101.030 and specifically recognized as a requirement the Cities must meet, *see* Ex. D (Burlington 2008 Resolution 15-2008); Ex. E (Mount Vernon 2008 Ordinance No. 3436), the Cities decided they had the discretion to ignore it before this litigation began. *See* Ex. I (Stendal Dep. at 41:7-43:12, 43:22-44:25, 45:16-22, 47:5-24, 50:17-24); Ex. Z (Oct. 1, 2012, Deposition of Jon Aarstad ("Aarstad Dep.") at 20:6-25). But now with the Supreme Court's imposition of the same standard on a discretionary basis, the Cities' argue it is mandatory and therefore the catalyst for change. Suffice it to say, the Cities are again playing games with the caseload standards and in this instance they are trying to use the Supreme Court's discretionary order as a way to escape liability.

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[13] *See* Ex. B.

[14] The 2012 public defense contract compensation was $17,500 per month. For the 2013 contract, the Cities increased compensation to $31,200 per month. Ex. B (Indigent Defense Public Defense Services 2012-2013 Contract for Services); Ex. C (2013 for Contract Services).

[15] On February 11, 2013, Mountain Law advised Plaintiffs that it intended to "bring on fourth attorney as of March 1, 2013). Ex. W (Letter from Brian Augenthaler, counsel for the Cities, to J. Camille Fisher, counsel for Plaintiffs (Feb. 11, 2013)).

[16] The new complaint form was first issued in October 2012. Ex. N (Mount Vernon Dep. at 82:13-17) (testifying that new complaint form was first delivered in October 2013).

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2. Because of the Cities' Actions and Statements, There Is a Reasonable Expectation that the Alleged Constitutional Violations Will Recur

To prove mootness, it must be "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222, 120 S. Ct. 722 (2000); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S. Ct. 361 (1968). "Where there is a reasonable possibility that the unlawful conduct will recur, the mere cessation of that conduct will not render the challenged conduct immune from judicial scrutiny." *Armster v. U.S. Dist. Court for Cent. Dist. of Cal.*, 806 F.2d 1347, 1358-59 (9th Cir. 1986); *see, e.g., Equal Emp't Opportunity Comm'n v. Fed. Express Corp.*, 558 F.3d 842, 848 (9th Cir. 2009) (denying defendant's mootness claim because it "has given no assurance" and gave "equivocal representations" that the disputed conduct would not recur).

Where a defendant has voluntarily ceased illegal activity in response to litigation, there exists a presumption of future injury. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109, 118 S. Ct. 1003 (1998); *see also Friends of the Earth*, 58 U.S. at 191. This "presumption can be used to refute the assertion of mootness by a defendant who, when accused of present or threatened injury, ceases the complained-of activity." *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1177-78 (D. Idaho 2001); *see also Steel*, 523 U.S. at 109. In this case, the Cities admit that they made changes to their public defense system after "this case [brought] various shortcomings to the forefront." Dkt. No. 235 at 7. The Cities' voluntary changes, which are a result of this litigation, are sufficient to defeat the Cities' Mootness Motion. But those post-litigation changes, coupled with the following actions and statements by the Cities, prove that the old system will return unless this Court enters an order enjoining the Cities.

a. The Cities have operated a criminal misdemeanor system for over 50 years without tracking or managing public defender caseload levels.

According to the Cities' own representative, a criminal misdemeanor system has been in place since the 1960s but they "just started a real solid approach of counting" the public defender caseloads in May of 2012. *See* Ex. N (Mount Vernon Dep. at 93:18-22, 105:3-106:5); Ex. J

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(Burlington Dep. at 83:3-87:13) (expressing inability to testify regarding caseload in any given year). Furthermore, the Cities concede that before 2009, there were no caseload limits imposed by the public defender contract and that, even with those 2009 limits contractually in place, no one was actually monitoring the system to ensure compliance or counting cases to determine the actual caseload. Ex. I (Stendal Dep. at 28:18-23, 66:7-18, 69:24-71:5, 75:8-76:15, 80:10-81:14, 82:6-24, 98:1-19); Ex. P (Sybrandy Dep. at 92:3-21); Ex. Q (Witt Dep. at 84:4-12, 85:16-19, 90:3-91:3, 92:8-18, 144:23-145:13, 149:13-23); Ex. Z (Aarstad Dep. at 31:10-13); Ex. AA (Dec. 14, 2013, Deposition of James A. Feldman ("Feldman Expert Dep.") at 18:16-23).

b. The Cities truly believe that the old system operated by Sybrandy and Witt satisfied the Constitution's right to counsel requirement and fully endorsed their practices.

The Cities have testified that, in their opinion, Sybrandy and Witt always provided indigent clients with more than the minimum standard of representation required by the WSBA, that they provided all of the necessary representation required by the U.S. Constitution, and that there was no reason to change any of the practices that Sybrandy and Witt engaged in as the Public Defender. *See* Ex. I (Stendal Dep. at 34:2-21, 34:23-35:2, 35:13-22, 216:22-24). The Cities took that position despite undisputed evidence that, for over 20 years, the Cities have appointed attorneys who have operated with caseloads greatly exceeding the Standards; who failed to meet with and/or respond to indigent defendants in or out of custody; who failed to form confidential attorney-client relationships with defendants; who failed to investigate the charges against defendants; who failed to spend sufficient time on the cases of defendants; who failed to advocate on behalf of defendants; and who effectively forced defendants to accept plea deals. *See City of Mount Vernon v. Weston*, 68 Wn. App. 411, 415-16 (1993) ("The evidence was undisputed, however, that the public defenders here were operating with caseload levels in excess of those endorsed by the ABA, by the Washington State Bar Association and by the Skagit County Code."); Dkt. No. 242 at 9. The Cities even hired an expert witness to offer the opinion that "it does not appear there are any problems in

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the first place in Mount Vernon and Burlington" when it comes to their public defense system. *See* Ex. AA (Feldman Expert Dep. at 73:18-74:4).

Notably, despite the purported change of heart in their Mootness Motion, the Cities have consistently claimed that their public defense system has always been constitutional, Ex. I (Stendal Dep. at 33:24-34:8, 34:22-35:22); Ex. J (Burlington Dep. at 89:3-90:23), and that they had no obligation to monitor the Public Defender with which they contract, Ex. I (Stendal Dep. at 80:8-81:11.); Ex. BB (Responses to Plaintiffs' First Set of Interrogatories and Requests for Production of Documents).[17] "One element that has been considered in evaluating permanence is a defendant's continuing assertion that the abandoned policy was legal." 13C Charles A. Wright et al., *Federal Practice & Procedure: Jurisdiction and Related Matters* § 3533.7 & n.26 (3d ed. 2012). "Assertions that the challenged conduct was legal may have an effect similar to an express suggestion that it may be resumed." *Id.* at n.26. Indeed, "[w]hen defendant public officials vigorously assert the legality of challenged conduct, it is legitimate for the plaintiff and court to project repetition of that conduct." *Id*; *see E.E.O.C. v. Recruit U.S.A., Inc.*, 939 F.2d 746, 751 n.5 (9th Cir. 1991) (finding that "EEOC argues that it is entitled to make such disclosures," and "[a] repeat of the issue is thus quite likely to recur"); *Porter v. Bowen*, 496 F.3d 1009, 1017 (9th Cir. 2007) ("[T]he Secretary has maintained throughout the nearly seven years of litigation in this case that Jones had the authority under state law" to act as he did.); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 309-11 (10th Cir. 2008) (finding university's voluntary revision to policy did not moot claims for equitable relief where the school "defended and continues to defend not only the constitutionality of its prior [allegedly unlawful] policy, but also the need for the former policy"); *United States v. Gov't of Virgin Islands*, 363 F.3d 276, 285 (3d Cir. 2004) (finding government's "continued defense of the validity and soundness of the [allegedly unlawful] contract prevents the mootness argument from carrying much weight"). The Cities' continued stance that their public

[17] These claims are not, as the Cities' Motion implies, limited to their "earlier briefing." Dkt. No. 235 at 23.

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defense system is and always has been constitutional is reason to assume that they will revert to their old system unless this Court enters an order enjoining the Cities.

c. The Cities believe that the Washington Supreme Court's Order limiting misdemeanor caseloads is arbitrary and they have engaged expert witnesses and public defenders who do not believe caseload limits are necessary or legitimate.

Despite staking their Mootness Motion before this Court on the purportedly transformative effects of the Washington Supreme Court's Order on caseload standards, the truthful testimony by the Cities and their witnesses paints a clear picture of disrespect and disdain for the very same order. *See* Ex. I (Stendal Dep. at 49:6-50:8) (calling WSBA and Supreme Court caseload limits ridiculous); Ex. K (Mountain Law Dep. at 122:10-123:9) (discussing long-standing opposition to caseload limits and questioning the constitutionality of the Supreme Court's order); Ex. AA (Feldman Expert Dep. at 16:6-15, 17:1-6, 105:20-25, 108:14-21) (stating that the Washington Supreme Court's caseload standards for misdemeanor cases are "arbitrary, capricious and have no bearing on reality" and approving of a public defender handling "thousands" of cases per year); Ex. CC (Jan. 29, 2013, Deposition of Cities' Expert John Ladenburg, Sr. ("Ladenburg Expert Dep.") at 74:1-7, 88:9, 89:13-17) (challenging the testimony of Supreme Court's caseload limits, stating "there is no right number" for handling misdemeanors and stating that the constitutionally required right to counsel can be provided with a caseload of 2,000 misdemeanors per year). Given these views, and the Cities' recent documented reduction in monitoring and oversight, Plaintiffs have good reason to suspect that the Cities will ignore the caseload standards unless this Court enters an order enjoining the Cities.

d. Shortly after the class was certified by this Court, the Cities approved a new public defender contract where two attorneys would be responsible for handling 1,735 cases.

The Court's class certification order was issued on February 23, 2012, and the Cities selected Mountain Law as the new and improved Public Defender on April 6, 2012. The Cities, however, continued their old ways when they issued the RFP for a "new" public defender and

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actually entered into a contract with Mountain Law that required only two lawyers to handle 1,735 cases. *See* Ex. B; Ex. K (Mountain Law Dep. at 94:2-10); Ex. N (Mount Vernon Dep. at 126:1-20, 129:9-131:10); Ex. JJ (Addendum for Public Defender Contract).

e. The Cities have always had the financial resources to improve the public defense system but consciously chose to underfund and understaff the public defender.

Ironically, this case has never been about the money to pay for public defense services. The Cities have testified that the Municipal Court system actually generates revenue from fines and that this revenue has been a line item within the Cities' budgets since the 1980s. *See* Ex. I (Stendal Dep. at 55:20-24, 70:4-14, 71:2-9, 72:9-14, 134:19-135:9). In 2012, for example, the City of Mount Vernon alone anticipated generating $304,500 in Municipal Court-related revenue. Ex. N (Mount Vernon Dep. at 71:13-72:14). In fact, the Cities admit that additional pay and more attorneys for the public defender is required to get the caseloads within the Supreme Court's standards, and they agree that this could have been done at any time. *See* Ex. I (Stendal Dep. at 236:14-22); Ex. J (Burlington Dep. at 125:8-24). Despite that fact, the Cities consistently sought a Public Defender who they knew would handle over 1,700 cases per year with two attorneys and who would accept the same level of compensation for 11 straight years even though those attorneys made it known that their costs and overhead had significantly increased. *See* Ex. Q (Witt Dep. at 109:9-22).

f. The Cities are still <u>not</u> auditing public defender case reports or monitoring compliance with the public defender contract.

In a recent deposition, Mountain Law testified that the Cities have not done anything to audit case reports that Mountain Law submitted for review and have not done anything to verify Mountain Law's compliance with the public defender contract. *See* Ex. K (Mountain Law Dep. at 179:6-180:24, 190:9-196:12). Moreover, as noted above, the Cities have recently acted to do even *less* auditing than before, since the Cities instructed Mountain Law to stop reporting hours worked after Plaintiffs' expert issued a report stating that the average amount of time spent by Mountain Law attorneys on cases is insufficient. Mountain Law Dep. at 251:18-22. Additionally,

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the Cities have chosen *less* monitoring of significant public defender tasks necessary for compliance with the standards and contract in their current contract. Section II.B.1 above.

The reckless disregard shown now is exactly the same conduct engaged in before the lawsuit was filed. *See* Ex. I (Stendal Dep. at 35:23-36:9; 38:16-39:1, 43:22-44:25; 66:7-18, 69:24-71:5); Ex. Z (Aarstad Dep. at 54:4-56:24).

3. The Cities Have Not Completely Eradicated the Harmful Activity

A defendant seeking to establish mootness must also prove that it has "completely eradicated" the illegal harmful activity. As discussed above, the Cities have not established, as a matter of law, that they have stopped their harmful activity.

Further, whether voluntary cessation moots a case generally depends on the *effects* of the cessation, and not necessarily only the cessation itself.[18] *Friends of the Earth*, 528 U.S. at 193-94 (holding that the closure of an infringing facility alone did not moot the case because the effects of the closure was still a disputed factual matter); *United States v. Brandau*, 578 F.3d 1064, 1067 (9th Cir. 2009) (refusing to moot the case because the government had offered no information "regarding the practical effect of the new [order]"). For example, in *Brandau*, a plaintiff challenged a district court order instituting a policy requiring that all criminal defendants wear shackles while in court. 578 F.3d at 1065-66. After the district court amended the policy to remove the shackling requirement, the government moved to dismiss the case as moot. *Id.* at 1067. On review, the Ninth Circuit refused to moot the case because the government had offered no information "regarding the practical effect of the new [order]." *Id.* at 1067. The court found that "[d]espite the fact that the law has changed . . . there is reason to think that the *actual state of affairs has not*," citing evidence that courts were still fully shackling defendants. *Id.* at 1068 (emphasis added); *see also Halet*, 672

[18] The Cities argue that there must be "a baseline showing of 'imminent harm,'" Dkt. No. 235 at 25, and attempt to shift the burden of proof of their own Mootness Motion to Plaintiffs. Plaintiffs have the burden to show irreparable injury—and indeed they have done so, as demonstrated in Plaintiffs' Motion. Dkt. No. 242 at 42-43. But to prevail on summary judgment on mootness grounds, it is the Cities' burden to show that they have completely eradicated the effects of their past harmful activity and that there is no reasonable expectation that this harmful activity will recur. *W.T. Grant*, 345 U.S. at 633; *Friends of the Earth*, 528 U.S. at 170; *Cnty. of Los Angeles*, 440 U.S. at 631; *Rosemere Neighborhood Assoc.*, 581 F.3d at 1173 (2009).

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F.2d at 1307-08 (rejecting mootness challenge because it was "not clear" that illegal practices had completely been eradicated despite a change in written policy).

Because the Cities' cosmetic changes have not affected the actual state of affairs, the Cities have failed to meet their heavy burden.

4. The Public Interest Favors Continued Jurisdiction Over Plaintiffs' Claims

"A court may continue to exercise jurisdiction over such a case where the balance of interests favor such continued authority." *Quest Corp. v. City of Surprise*, 434 F.3d 1176, 1181 (9th Cir. 2006); *see also Coral Const. Co. v. King County*, 941 F.2d 910, 927 (9th Cir. 1991). As stated by the U.S. Supreme Court, the "public interest in having the legality of the practice settled, militates against a mootness conclusion." *W.T. Grant*, 345 U.S. at 632. In *Armster*, for example, the Administrative Office of the U.S. Courts suspended civil jury trials due to budget shortfalls. 806 F.2d at 1349-51. In response, multiple lawsuits were filed challenging the suspension. *Id.* When Congress promptly approved supplemental appropriations, the trials were resumed and the Justice Department sought to moot the claims. *Id.* The court refused to moot the claims because the issue was of "great importance." *Id.* at 1360. It noted:

> [W]e should be careful not to preclude effective judicial review of conduct that is arguably unconstitutional unless it is *abundantly clear* that such a result is required. Indeed, our Circuit has long held that there is a strong public interest in the court's resolving important precedential issues, a public interest that *militates against a finding of mootness* in cases presenting such issues.

Id (emphasis added).

Here, the public interest strongly militates against a finding of mootness. There is a strong public interest in providing constitutionally adequate assistance of counsel to indigent defendants. *See Gideon v. Wainright*, 372 U.S. 335, 344, 83 S. Ct. 792 (1963). Plaintiffs' requested relief will help ensure that every individual indigent criminal defendant is afforded the procedural and substantive safeguards they are entitled to. The Cities have not established that it is "abundantly

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clear" that its case is moot. Therefore, the Court should decline to apply the mootness doctrine here.

D. The Cities Cannot Meet Their Heavy Burden to Show that Statutory Changes Have Mooted Plaintiffs' Claims

A controversy does not cease to exist by mere virtue of a change in the applicable law. *Pub. Serv. Co. of Colo. v. Shoshone-Bannock Tribes*, 30 F.3d 1203, 1205 (9th Cir. 1994) (*citing Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct. 1249 (1990)). Where the threatened harm still exists, or the changes in the law do not resolve the conflict, the case remains alive and suitable for judicial determination. *Id.* (*citing Lewis*, 494 U.S. at 479). Here, the Cities rest their intervening law argument on their newly enacted ordinances, legislation, and caseload limitations adopted by the Washington State Supreme Court.

To support their mootness claim the Cities cite *Native Village of Noatak v. Blatchford*, 38 F.3d 1505 (9th Cir. 1994), and *Smith v. Univ. of Washington, Law School*, 233 F.3d 1188 (9th Cir. 2000). In *Native Village of Noatak*, the court deemed the plaintiffs' case moot after the statute giving rise to the allegedly discriminatory state action had been repealed. 38 F.3d at 1508. Similarly, in *Smith*, the court found that the plaintiffs no longer had a live controversy after the law school discontinued an allegedly discriminatory admissions practice. 233 F.3d at 1193-95. In this case, however, it is the policies, customs, actions, and inactions of the Cities that are at issue, not any written law. *See Heckman*, 369 S.W.3d at 167 ("[D]efendants' bald assertion that they are now in compliance with the law is simply not enough to establish that the claims of the putative class are now moot. The focus of plaintiffs' complaint is on defendants' actions and behaviors, not their written policies.") The only law on point is the Sixth Amendment right to counsel, and that law remains unchanged. Thus, changes in the law do not resolve the conflict, and the case remains alive and suitable for judicial review.

The Cities' enactment and amendment of ordinances also falls short of establishing mootness. Plaintiffs have never asserted any concerns with the prior ordinances. *Heckman*, 369

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S.W.3d at 167. In fact, the old ordinances were better than those currently in place. The issue, therefore, is not with the ordinances, but with the fact that the Cities have had a policy and custom of refusing to follow and enforce the U.S. and Washington State Constitutions, their own public defender contracts, and their own ordinances.

Finally, the Cities rely on the Washington State Supreme Court's Standard regarding caseload limitations as a means to moot this case. But those standards existed in their current form as WSBA's mandatory standards long before the Supreme Court formally adopted them. *See* Ex. F (2007 WSBA Standards, Standard Three) (stating that "caseload of a full-time public defense attorney *shall* not exceed" 400 misdemeanor cases per year). Moreover, Plaintiffs' claims go far beyond excessive caseloads. In particular, Plaintiffs assert that the Cities have disavowed any obligation to meaningfully monitor their public defense system so as to ensure that assistance of counsel is being provided to indigent defendants. Even if the Public Defender's caseload is capped at 400 misdemeanors per year, the Public Defender may nonetheless fail to spend sufficient time on cases, fail to investigate the facts of cases, and fail to meet with clients outside of court—all of which would result in the same systemic violations of the right to counsel from which Plaintiffs seek relief. Because the Cities deny any obligation to monitor and have admittedly made no significant changes in that respect, it is reasonable to assume that constitutional violations will continue.

E. Plaintiffs' Expert, Christine Jackson, Will Offer Clearly Admissible and Methodologically Sound Opinions at Trial

The Cities end their Mootness Motion with a gratuitous rebuttal of "Plaintiffs' anticipated responses" that attacks the opinion of Plaintiffs' expert Christine Jackson. As discussed above, the Cities' Mootness Motion fails for factual and legal reasons that are totally unrelated to Jackson's opinions. Nonetheless, Plaintiffs provide an overview of Jackson's opinions here for the benefit of the Court.

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Jackson has worked at The Defender Association providing public defense services for King County, the City of Seattle, and other municipalities for over 20 years. Ex. DD (Decl. of Christine Jackson ("Jackson Decl.") ¶ 1). She has been a Supervisor for the Misdemeanor and Appeals Unit since January 2007, and is responsible for supervising and training up to 10 staff attorneys who represent indigent defendants charged with misdemeanors in Seattle Municipal Court and King County District Courts. *Id.* ¶ 2.

Plaintiffs' counsel asked Jackson to offer opinions on whether the public defense system in Mount Vernon and Burlington comply with the Sixth Amendment and Article I, Section 22, right to counsel. *Id.* ¶ 4. In forming her opinion, Jackson reviewed 50 randomly selected case files from Mountain Law; correspondence from the Cities regarding the public defense system; Mountain Law case credit reports; declarations of indigent defendants describing problems with the public defense system; declarations of other witnesses and experts in this case; depositions of Mountain Law, Sybrandy, Witt, and other witnesses in this case, and other relevant documents. Ex. EE (Second Supp. Decl. of Christine Jackson ("Jackson Second Supp. Decl."), Ex. A).[19]

Jackson conducted a review based on her experience as a supervisor and her familiarity with the process that the City of Seattle uses to monitor its public defense contractors and ensure compliance with its contracts. There is no novel "scientific" methodology at issue. The City of Seattle monitors by reviewing open and closed case reporting, quarterly caseload numbers, monthly meetings with indigency screeners, complaint monitoring, and input from other stakeholders. *See* Ex. FF (February 1, 2013, Deposition of Christine Jackson ("Jackson Dep.") at 88:11-89:5). It also conducts an annual audit that includes attorney performance reviews, a review of 30 random case files (that maintains client confidentiality), a report of case assignments and client contact, and a site visit.[20] *Id.* at 78:6-80:15.

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[19] Notably, none of the Cities' experts have reviewed *any* public defender case files. Ex. AA (Feldman Expert Dep. at 15:8-13, 113:7-11); Ex. CC (Ladenburg Expert Dep. at 62:20-23).

[20] Jackson's testimony also illustrates the importance of monitoring. As she noted, monitoring ensures that even the most diligent defenders comply with their contract requirements. Ex. FF (Jackson Dep. at 89:12-23).

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Based on her review of this and other evidence, Jackson opined that the Cities "continue to operate an unconstitutional public defense system in violation of the Sixth Amendment." Ex. EE (Jackson Second Supp. Decl. ¶ 36); *see also* Ex. FF (Jackson Dep. at 219:16-221:25). She has provided four declarations that detail the support for this opinion with particular examples from case files and other documents. *See, e.g.*, Ex. DD (Jackson Decl.); Ex. GG (Rebuttal Decl. of Christine Jackson); Ex. HH (Supp. Decl. of Christine Jackson); Ex. EE (Jackson Second Supp. Decl.). The Cities attack Jackson's opinion on two grounds. First, they argue that her methods are "unreliable." Second, they argue that her opinion is based on erroneous assumptions. Both arguments are groundless.

1. The Cities' Ill-Timed *Daubert* Challenge Is Meritless

The Cities argue that Jackson's opinions fail under *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 113 S. Ct. 2786 (1993), and Evidence Rule 702 because they are "unreliable." Dkt. No. 235 at 32-35. At the outset, the Cities argue, without any support, that considering the attorney time spent on cases is not "accepted methodology" of evaluating attorneys. *Id. at* 33. But, as noted above, this is one method by which the City of Seattle evaluates its public defense contractors. Ex. FF (Jackson Dep. at 77:24-80:15, 80:24-82:24) (describing closed case reports that reflect total and average attorney hours, paralegal hours, social work hours, and investigator hours). And Jackson considered a number of factors in addition to the average time per case. Nonetheless, the average time of *less than two hours per case* is particularly concerning.[21] As Jackson stated:

> When you—when you look at what is required for Constitutional representation of counsel, you've got to meet the prevailing professional norms, and you need to just even do the very basic things. You meet with the client, you review the police report, get

[21] In fact, the evidence supports that Mountain Law attorneys are actually *overstating* the amount of time they spend on cases. Mountain Law testified that the time written on the closed case reports not only includes "staff time," but also duplicate time entries that double, triple, or quadruple the number of actual hours spent on a given case. Ex. K (Mountain Law Dep. at 161:20-23, 296:18-299:11). For example, before withdrawing as counsel, Collins represented Jeremiah Moon on two DV Assault 4° cases, one DWLS 3° case, and one Vehicle Prowling 2° case. In the closed case report provided to the Cities, Collins recorded 4.2 hours for each of these four cases, totaling 16.8 hours. During his deposition, Laws stated he "would be very surprised if in fact it was 4.2 hours on each case" and it was more likely 4.2 hours total for all four cases. *Id.* at 297:20-299:9.

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> their understanding, you do a case analysis, and individual to that case a legal and factual case analysis. To do all that consistently in less than two hours does not seem credible to me. There doesn't seem any evidence that would support that that's a credible claim. In my experience, in my training and experience, which is substantial, five hours is a pretty decent average.

Id. at 243:9-23.

The Cities also claim that Jackson overlooked the "sheer quantity of variables" at play in public defense cases. Dkt. No. 235 at 33. But, as demonstrated below, none of the examples the Cities provided were "overlooked" by Jackson. First, the Cities argue that "the clients' absolute right to accept a plea may extend or shorten time spent on any given case," implying that two cases cited by Jackson—*Speilman* and *Crawford*—involved clients who preferred to plea than pursue trial. *Id.* at 33. But Jackson made clear that she did not ignore this possibility; she was merely not persuaded by this claim because a client's "absolute right to accept a plea" does not trump the lawyer's duty to make sure that the client is making an *informed decision*:

> [I]t always depends on what the client wants, but the clients decision needs to be—your job as a lawyer is to make sure the client is making a fully informed decision having the benefit of, you know, a good factual and legal analysis of the case and testing of the government's evidence, the types of things that ANJ talks about, that investigation. I mean ANJ was a plea case and what the court found is that the lawyer did not do the kinds of things that would allow the client to make a decision to enter into a plea in that particular case.

Ex. FF (Jackson Dep. at 160:10-161:11) (referring to *State v. ANJ*, 168 Wn.2d 91 (2010)); *see also id.* at 147:6-148:3 (discussing the importance of ensuring that the client is fully advised). And indeed, when questioned about the *Speilman* and *Crawford* cases in particular, Jackson noted that even if, as Mountain Law claims, the clients wanted to plea, the Mountain Law files lacked any evidence that the clients were so informed in those cases. *Id.* at 222:22-224:10 (discussing *Speilman* case), 248:19-249:18 (testifying regarding *Crawford*).

Second, Jackson did not, as the Cities claim, "assum[e] perfect time-keeping" in her review of case files. Dkt. No. 235 at 33. In fact, she took into account that public defenders (both in and out of Seattle) tend to under-report their time, but *nonetheless* found the time reported in the closed

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case reports troubling. For example, with respect to the *Crawford* case (on which two attorneys each reported 0.70 hours on a single day), she testified:

> It's possible, but that was a pretty short conversation in this case. And there was a plea taken in this case. So that's the amount of time that the legal analysis took, the conversation took, and the guilty plea took? That's pretty darn short. And that's—doesn't appear to be very credible to me. And that's assuming lawyers under-report their time. I look at these, our lawyers under-report their time, something I have to work on. I assume all lawyers under-report their time. But this is really super low.

Ex. FF (Jackson Dep. at 249:7-18); *see also id.* at 222:22-223:17 (stating that claims that defenders were fully advising clients were just "not credible" given the time spent with the client). Moreover, if these closed case reports are as unreliable as the Cities claim, they can hardly be a basis for the Cities' monitoring the public defense system. *See* Section II.B.1, *supra* (discussing Cities' lack of monitoring).

Third, the Cities state that the "correlation between time spent and effective outcome is entirely variable." Dkt. No. 235 at 34. But they ignore the fact that Jackson considered numerous variables in addition to the time spent on cases—and one of those variables was the outcome of cases for indigent defense clients. For example, her opinion includes observations about the troubling outcomes of certain of the cases she reviewed. *See, e.g.*, Ex. EE (Jackson Second Supp. Decl. ¶¶ 21, 22, 25); Ex. FF (Jackson Dep. at 219:16-220:20).

Fourth, the Cities claim that the sample size of the 50 Mountain Law case files that Jackson reviewed is "arbitrary in terms of size and mix," ignoring that Mountain Law itself selected the files in accordance with this Court's order. Dkt. No. 235 at 34. On June 27, 2012, this Court ordered Mountain Law to "produce [to Plaintiffs] 50 randomly-selected public defense files that were closed after April 6, 2012." Dkt. No. 226, at 2. This Court had already stated these files are "relevant in that they would provide a snapshot of the number of cases [Mountain Law] was handling at a given time, the complexity of those cases, and/or the level of attention [Mountain Law] was able to give to each case." *Id.* at 2; *see also* Dkt. No. 179 at 2 (ordering Sybrandy to produce a similar sample of

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files). In response to this Order, Mountain Law selected 50 files using a random generator, dividing the 50 files between Mount Vernon and Burlington files in proportion to Mountain Law's caseload. Ex. II (Dec. 10, 2012 Memorandum from Michael Laws to Anthony Gipe). The City of Seattle uses a similar sampling approach to audit its public defenders. Ex. FF (Jackson Dep. at 78:6-80:15).

Finally, the Cities' argument that Jackson "completely ignores the size and complexity of the jurisdictions," Dkt. No. 235 at 34, is nonsensical and ignores that the ultimate issue in this case is whether the Cities' are providing constitutionally adequate public defense. The same constitutional standard applies, whether an indigent defendant is charged in an urban or rural area. Moreover, Jackson testified that the Cities' caseloads are diverse and includes "a pretty wide breadth of more serious misdemeanors." Ex. FF (Jackson Dep. at 220:21-221:25).

2. Jackson Did Not Rely on Erroneous Assumptions in Forming Her Opinions

The Cities also attempt to invalidate Jackson's opinions by claiming that she relied on assumptions that are "demonstrably wrong." Dkt. No. 235 at 29. But, like their recitation of the facts about their system, their analysis cherry-picks selected testimony and ignores testimony that squarely supports Jackson's opinions.

For example, the Cities attack Jackson's observation that Mountain Law case files did not include criminal history reports, legal research, and Department of Licensing files claiming that these are done electronically and therefore are not in the paper files. Dkt. No. 235 at 29-30. The Cities produced, and Jackson reviewed, Mountain Law's electronic as well as paper case files. Ex. FF (Jackson Dep. at 133:4-25) (describing documents reviewed, including "the corresponding electronic files I got that had the discovery and other documents from the file"). The lack of written documentation in Mountain Law's 50 case files indicating that they reviewed and considered the impact of a client's criminal history, electronically or by other means, which creates "cause for concern." *Id.* at 240:6-19. As Jackson noted, "[T]here's a difference between isolated incidences and a complete lack of any of those things across [Mountain Law's] practice as demonstrated by the sample of 50 cases." *Id.* at 271:5-272:15. Further, "[w]hen you take [the lack of attorney notes] . . .

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in conjunction with the very low number of hours that were actually spent in consultation with the client, it does not seem credible that these issues were analyzed and raised." *Id.* at 240:20-241:17.[22]

Similarly, the Cities argue that Jackson failed to take into account Mountain Law's testimony that legal and factual analysis is provided "verbally as a matter of course." Dkt. No. 235 at 30. There is no such testimony, however. Rather, Laws stated that the legal research and analysis is "not necessarily typed out as a thought process in the notes in the client case field [sic]. Even if it's mentioned, it might not be flushed out." Ex. K (Mountain Law Dep. at 366:24-367:1). Further, Jackson did not "ignore" this claim; rather, she took it into account, but determined that it was simply "not credible" given the attorney files and time spent on cases:

> But for example in some of these cases, just the amount of time spent with the client, it seems—it was not credible that had this issue been identified it could have been relayed to the client and discussed and a strategy and advice given within that period of time. It just did not seem credible or possible. And there was certainly no indication, because there was some indication from the file that other issues were identified and factors were discussed . . . .

Ex. FF (Jackson Dep. at 222:22-223:17); *see also id.* at 240:6-19 ("But generally these people were making affirmative representations in their case files about what was happening, so when you saw that may files without an consideration in any of these issues in any of these cases, as I stated in my declaration, that gives you cause for concern.").[23]

With respect to immigration issues, the Cities claim that Mountain Law public defenders "always ask" their clients about these issues. Dkt. No. 235 at 30. This claim is not supported by the record. When asked if Mountain Law inquires about a client's immigration status in all cases, Laws replied that "[i]t's not something that is asked in every single case." Ex. K (Mountain Law Dep.

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[22] With respect to criminal history specifically, there are instances where Mountain Law's clients plead guilty at their first court appearance and Mountain Law does not have time to obtain and review the client's criminal history. For example, one client plead guilty to disorderly conduct at his arraignment. Ex. FF (Jackson Dep. at 246:25-249:18). There was no indication that Mountain Law obtained this client's criminal history and reviewed it prior to advising the client to take the deal—this is not surprising considering there was very little time to complete these tasks. *Id.*

[23] Moreover, as Jackson noted in her deposition, blanket statements such as "'I meet with my clients,' 'I talk with my clients,' those are the tasks that need to be done, but the tasks need to be done competently. So simply saying I do these tasks does not meet the Constitutional standard." Ex. FF (Jackson Dep. at 215:4-216:12).

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at 75:16-17). Instead, the attorneys "usually find out" if clients are not legally in the U.S. when they review the plea agreement with the clients, which "indicate[] that if you are not a citizen of the United States, a plea to a crime can have consequences." *Id.* at 75:17-21. Further, Laws indicated that Mountain Law is aware of the Washington Defenders Association's ["WDA"] immigration advisors, but that no Mountain Law attorney has every discussed immigration issues with anyone at WDA." *Id.* at 76:3-77:3.[24]

The Cities and Mountain Law claim that the In Custody Response Assessment Profile ("ICRAP") is for internal tracking purposes only and therefore cannot be used as a means to assess the adequacy of client advice. Dkt. No. 235 at 30. Yet when asked why Mountain Law only uses this form for in-custody clients, but not for out-of-custody clients, Laws responded: "I want to demonstrate that we are in fact meeting with clients at the jail." Ex. K (Mountain Law Dep. at 289:1-5). This response indicates that he wants to show others *outside* of Mountain Law that its attorneys are meeting with incarcerated clients.

The Cities attack Jackson's assessment that Mountain Law attorneys take cases to trial too infrequently by asserting that "Mountain Law attorneys regularly go to trial, sometimes collectively setting upwards of 15 cases per week for trial in each city." Dkt. No. 235 at 15, 31. This claim is misleading: Laws actually testified that "[i]t's not at all unusual on any given week or any given trial setting calendar for there to be 15 case that are on that calendar potentially." Ex. K (Mountain Law Dep. at 280:5-16). But even if Mountain Law attorneys *set* a number of cases for trial, they do not necessarily take the cases to trial. Indeed, Mountain law had only seven public defense trials in 2012, all in Mount Vernon. *Id.* at 100:10-15.[25] Further, they have taken no cases to trial in 2013.

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[24] Mountain Law's Rule 30(b)(6) designee contradicted himself on these points at the second day of his deposition. Ex. K (Mountain Law Dep. at 340:14-21) ("We are all aware of the resources that are available from the [WDA], the website the Immigration Project, the offense reference sheets that are available and that are updated. Now there are three attorneys there, I believe, that can be called for consultation. We've utilized them."). But there is no written documentation that Mountain Law has actually consulted WDA immigration counsel, and therefore his about-face in the second day of his deposition is not credible. *See* Ex. FF (Jackson Dep. at 222:22-223:17).

[25] Laws originally testified that Mountain Law had only five jury trials in 2012, *id.* at 65:10-15, with a bench trial in either Mount Vernon or Burlington, *id.* at 65:17-21. He later changed his testimony to reflect that Mountain Law had handled seven trials total. *Id.* at 100:10-15.

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Id. at 64:24-65:7. Considering Mountain Law has served as the Cities' Public Defender for nearly a year, seven trials does not constitute a regular trial practice—and is certainly not evidence of 15 trials per week. Mountain Law's trial record, of course, is of critical importance. As Jackson testified:

> [I]f you never go to trial and the prosecutors know it, then setting cases for trial is no threat because the prosecutors go oh, they're going to come in and plead their client as charged because that's what they always do. They're playing witness roulette. They never go to trial and I know it, or when they do go to trial they are so bad at it that it doesn't matter to me. When you have a reputation for trying cases and trying cases that, you know, perhaps have no discernible factual defense, and you try them hard and you try them well and you try them often, you will eventually wear your prosecutors out and they will start offering you better resolutions and better deals because they can't – you just wear them down.

Ex. FF (Jackson Dep. at 187:10-188:2).

Finally, as discussed above, Jackson considered under-reporting of time in her review of closed case reports and addressed the Cities' claims regarding the *Speilman* case. *See* Section III.E.1, *supra.*

The Cities' claims that Jackson based her opinions on incorrect "assumptions" and used unreliable methods are nothing more than bravado. Jackson has conducted a more intensive review of the public defense system than the Cities' experts, and her conclusion that the Cities continue to operate a constitutionally deficient public defense system is sound. Moreover, the Cities' own expert witness confirmed that Jackson has the qualifications and expertise to offer opinions about indigent misdemeanor representation and has agreed with many of the opinions she has expressed in this case. *See* Ex. CC (Ladenburg Dep. at 34:18-20, 35:17-18, 53:2-13, 54:6-13, 56:15-57:2, 59:3-14).

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IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Cities' Mootness Motion.

RESPECTFULLY SUBMITTED this 25th day of March, 2013.

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CERTIFICATE OF SERVICE

CAROL KNESS states as follows:

1. I am a litigation secretary at the firm of Perkins Coie LLP, one of the counsel for plaintiffs herein, have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I certify that on the 25th day of March, 2013, I made arrangements to electronically file the foregoing Plaintiffs' Opposition to Defendant Cities' Motion for Summary Judgment 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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I CERTIFY UNDER PENALTY OF PERJURY under the laws of the United States of America that the foregoing is true and correct.

DATED this 25th day of March, 2013.

By: *s/ Carol Kness*
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