No. 20-

IN THE

Supreme Court of the United States

JOHN FARROW, ON HIS BEHALF, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; JEROME WADE, ON HIS BEHALF, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

CONTRA COSTA COUNTY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Over the course of 28 years, Contra Costa County denied counsel to all indigent detainees at their first appearance in court and automatically continued their cases to "counsel and plea" dates that were typically one to two weeks later. During this uncounseled period, detainees were unable to apply for bail, enter a plea, or demand a preliminary hearing within 10 court days as provided by California Penal Code § 859(b). Detainees with retained counsel were able to immediately assert these rights. The Ninth Circuit determined that this practice was constitutionally permissible.

The Questions Presented Are:

Is a detainee's first appearance in court a "critical stage" of the proceedings, when bail is set and statutory liberty interests are adjudicated, as the Second and Eighth Circuits and the highest courts of Connecticut, Maryland, New York and Pennsylvania hold, or are the Fifth, Ninth and Eleventh Circuits and the Supreme Courts of Alabama, Michigan, Mississippi and Missouri correct in holding that the first court appearance is not a "critical stage," enabling them to defer appointment of counsel until a "critical stage," which may occur weeks, months, or more than a year later?

Should this Court formulate a standard for determining when counsel must be appointed for indigent detainees under the Sixth Amendment, the Due Process Clause, or Equal Protection Clause given that the federal courts of appeals are irreconcilably divided on: (a) whether the Sixth Amendment permits indefinite denial of counsel

to detainees in the absence of prejudice; (b) whether due process requires a counseled, individualized bail hearing within 48 hours of arrest; and (c) whether delayed representation violates equal protection.

Should this Court exercise its supervisory power when: (a) the District Court announced the standards of review after the matter was submitted; (b) the District Court conducted a bench trial by affidavit; (c) the Ninth Circuit failed to conduct *de novo* review of the constitutional standards promulgated by the magistrate judge answering the question left open by this Court in *Rothgery v. Gillespie Cty., Tex.*, 554 U.S. 191 (2008) concerning what standards should apply in determining when delay in appointing counsel is unreasonably long; and (d) the Ninth Circuit avoided ruling on the potentially dispositive issue of whether the *Heck* preclusion doctrine would bar a civil rights action based upon denial of counsel at the "critical stage" of arraignment by erroneously claiming that the issue was not argued in appellant's opening brief and was, therefore, waived?

RELATED PROCEEDINGS

Farrow v. Lipetzky, No. 12-cv-06495-JCS (N.D. Cal. May 8, 2013) (first motion to dismiss).

Farrow v. Lipetzky, No. 12-cv-06495-JCS (N.D. Cal. August 7, 2013) (second motion to dismiss).

Farrow v. Lipetzky, No. 13-16781 (9th Cir. January 8, 2016) (first appeal).

Lipetzky v. Farrow, No. 15-1426 (U.S. Supreme Court, October 3, 2016) (denial of petition for writ of certiorari).

Farrow v. Lipetzky, No. 12-cv-06495-JCS (N.D. Cal. April 28, 2017) (third motion to dismiss).

Farrow v. Contra Costa County, No. 12-cv-06495-JCS (N.D. Cal. January 2, 2019) (summary judgment).

Farrow v. Contra Costa County, No. 19-15152 (9th Cir. March 30, 2020) (appeal from final judgment).

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OPINIONS BELOW

The Ninth Circuit's final memorandum is available at 799 Fed.Appx. 520 (2020). The District Court's summary judgment ruling is available at 2019 WL 78839. The District Court third motion to dismiss ruling is available at 2017 WL 1540637. This Court's denial of the County's Petition for a Writ of Certiorari is reported at 137 S.Ct. 82 (Mem) (2016). The Ninth Circuit's unpublished opinion is available at 637 Fed.Appx. 986 (2016). The District Court's second motion to dismiss ruling is available at 2013 WL 4042276. The District Court's first motion to dismiss ruling is available at 2013 WL 4042276.

JURISDICTION

The Ninth Circuit entered judgment on March 30, 2020. On April 3, 2020, it extended time for filing a Petition for Rehearing and Rehearing En Banc to May 13, 2020. On June 5, 2020, it denied Petitioner's timely motion for Rehearing and Rehearing En Banc. On March 19, 2020, this Court issued an order extending time for filing to 150 days from the date of the lower court judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Relevant portions of the Sixth and Fourteenth Amendment to the United States Constitution, 42 U.S.C. § 1983, and California Penal Code § 859b are reprinted verbatim at App. 263—66.

STATEMENT

Plaintiffs' Experiences

The Contra Costa County Public Defender described the policy of withholding counsel to indigent detainees thus:

> "Under this system, the first real opportunity that the charged person has to ask for a lower bail or an O.R. release is after they have been in custody at least two weeks. As a result, many people who could safely be released to the community while awaiting trial spend an unnecessary one to two weeks in custody taking up jail space simply because they cannot afford bail and do not yet have an attorney to represent them." Record, p. 235.

Plaintiffs were denied counsel at their initial appearances, and their cases were continued to future "counsel and plea" calendars as soon as they requested court-appointed counsel. At the initial appearance, bail was fixed according to a bail schedule. The County held Jerome Wade, a juvenile, for 6 days prior to his first appearance in court, in violation of *Riverside* v. *McLaughlin*, 500 U.S. 44 (1991). At his first appearance, his case was automatically continued until the next "counsel and plea" calendar 7 days later. John Farrow appeared in custody on his first court date, and his case was automatically continued until the "counsel and plea" calendar 13 days later. Neither Mr. Wade nor Mr. Farrow were advised of their right to bail, their right to immediately enter a plea or their right to a preliminary hearing within 10 court days as prescribed by California Penal Code § 859b.

District Court

Plaintiffs filed this putative class action lawsuit under 42 U.S.C. § 1983 alleging that the County denied them their right to counsel under the Sixth Amendment based upon its failure to provide counsel at a "critical stage" of the proceedings and within a reasonable period of time after attachment of the right to counsel. They also alleged violations of their due process and equal protection rights. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. In response, the County authorized funding for representation of felony detainees at their first appearance in court, while insisting that its policy of denying counsel to tens of thousands of felony detainees over the course of 28 years was constitutional. The County currently does not provide counsel for out of custody misdemeanor defendants at initial appearances in some courts, where judicial offers are made, and guilty pleas are accepted. Record 289—90. Plaintiffs seek injunctive relief, declaratory relief and nominal damages.

The District Court found that the delay was reasonable "because the delay was shorter than in other district court cases that found no violation, and because Plaintiffs did not adequately allege that they were prejudiced by the delay." App. 7. It held that the first appearance in a California court is not a "critical stage" of the proceedings; and it concluded that there were neither due process nor equal protection violations.

First Appeal

The Ninth Circuit affirmed the District Court's holding that the first appearance was not a "critical stage." It further concluded that there were neither due process nor equal protection violations. App. 150—51.

First New Constitutional Standard

The Ninth Circuit also held that,

> "The remaining question is whether Lipetzky appointed counsel within a "reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." Rothgery, 554 U.S. at 212, 128 S.Ct. 2578. In other words, how soon after the Sixth Amendment right attaches must counsel be appointed, and at what point does delay become constitutionally significant? Instead of addressing whether the delay in appointing counsel was unreasonable, the district court considered only whether the delay "impacted [plaintiff's] representation at subsequent critical stages of his proceedings." By framing the question in that way, the district court erroneously required the plaintiffs to allege actual prejudice. See *United States* v. *Wade*, 388 U.S. 218, 225, 236–37, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (finding a Sixth Amendment violation based on the "grave potential for prejudice"); *Hamilton* v. *Alabama*, 368 U.S. 52, 54, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) (finding a Sixth Amendment violation

> where the absence of counsel "may affect the whole trial"). We therefore remand for the district court to consider whether appointing counsel five to thirteen days and "sometimes longer" after the right attaches complies with the "reasonable time" requirement articulated in Rothgery." App. 151—53.

The County's Petition for a Writ of Certiorari

The County petitioned for a writ of certiorari, arguing that the Ninth Circuit's standard, *supra*, is constitutionally unsound because it recognizes that the Sixth Amendment may be violated by a policy of delaying provision of counsel for an unreasonably long period of time as determined by when "the grave potential for prejudice" becomes constitutionally intolerable. Petition for Writ of Certiorari, p. 7. This Court denied that petition.

Post-Remand

Pleading Stage

Second New Constitutional Standard

In its ruling on the County's third motion to dismiss, the District Court reformulated the standard, stating,

> "With the exception of Grogen, which is not consistent with the Ninth Circuit's decision here, this Court is not aware of any decision articulating a standard by which to examine whether a delay in appointing counsel is reasonable within the meaning of Rothgery. In

> the absence of such guidance, the Court holds for the purpose of the present motion that the reasonableness of a delay in appointing counsel after attachment depends on the *totality of the circumstances*, including the time needed to prepare for an upcoming critical stage—but not limited to that factor." Emphasis added. App. 138.

The District Court also held that,

> "[A]ssuming for the sake of argument that Plaintiffs are correct that their first appearances were critical stages based on their rights to enter pleas, then Hamilton, White, and Cronic all indicate that failure to provide counsel at that appearance would be a structural error requiring per se reversal. Success on this theory would necessarily imply the invalidity of Plaintiffs' convictions, and to the extent that Plaintiffs' § 1983 claim relies on that theory, it must therefore be dismissed under Heck." App. 132.

Summary Judgment Stage

Plaintiffs relied upon the Ninth Circuit's legal standard and established that the County delayed representation for an unreasonably long period of time through the report of Professor Robert Boruchowitz, who listed 55 reasons why the delay was unreasonably long because it posed a "grave potential for prejudice" to all detainees. Record, pp. 355—81. They also demonstrated that providing counsel at the first appearance would result in "across the board

savings to other County departments as well as provide the long-term benefit of reduced recidivism." Record, p. 324. The County blamed its own failure to provide adequate funding for its policy of delaying provision of counsel and concealed its policy from its expert, who stated, "I was not asked to look at the entire system. I was asked to take a microscopic look at two cases and render my opinion on that. …. I don't know what's the overall Policy in Contra Costa on a Monday through Friday." Record, p. 405.

In its 34-page opinion, the District Court disagreed with the California Court of Appeal's decision in *People* v. *Cox*, 193 Cal.App.3d 1434, 1440 (1987), which states that "arraignment is a critical stage of the proceeding entitling the defendant to an attorney [but] the absence of an attorney at the arraignment is not such a grievous error that it compels a reversal without a showing of prejudice." The District Court stated, "This Court is not bound by California state court decisions on issues of federal law, and respectfully disagrees with Cox as inconsistent with White and Hamilton, if not also with Cronic." App. 132, fn. 12.

The District Court avoided answering the question posed by the Ninth Circuit's mandate on two grounds:

Third New Constitutional Standard

(1) The District Court stated that, "Derived from the federal Constitution, such a rule would presumably apply nationwide, in jurisdictions with a wide range of resources, caseloads, and current practices." App. 77. Based upon this assessment, it promulgated a completely different standard, stating,

> "The evidentiary record before the Court … provides no basis to determine how much time a generic, competent public defender's office (or other system for appointing counsel) would need to provide a defendant with an attorney—or in other words how much delay is reasonable, and thus tolerable, under the Constitution in a typical case." App, 78.

And, in footnote 16 of its opinion, it stated that,

> "Even if Plaintiffs had established the existence of such a policy, the record is not conducive to determining its reasonableness, for much the same reasons that, as discussed above, this record would not allow the Court to develop a per se rule of how much time is permissible. The lack of evidence regarding *broad topics* like, for example, logistical challenges to appointing counsel, processes for resolving conflicts and caseload constraints, and accepted practices and timelines in other jurisdictions would still leave the finder of fact without sufficient facts to justify a conclusion that the policy, on its face, was constitutionally unreasonable." Emphasis added. App. 79, fn. 16.

Neither the Ninth Circuit nor the District Court mentioned administrative concerns or assigned this evidentiary burden to Plaintiffs before summary judgment motions were submitted.

(2) The District Court also held that there was no evidence establishing a policy of denying counsel

for one to two weeks, in spite of the public defender's explicit statements to the contrary, because paralegals conducted financial eligibility interviews between the initial appearance and the counsel and plea appearance. It stated that, "The evidence that the paralegal interview would have revealed any issues requiring attention before the second appearance, and that it in fact revealed no such issues, is uncontroverted." App. 91. It did not mention that the County made this assertion in a declaration of convenience submitted after discovery had closed, on the day the summary judgment motions were due. ECF No. 131. It did not consider whether the unlicensed paralegals were qualified to practice law in this manner or whether it was appropriate for them to discuss privileged matters with detainees the public defender did not represent. It did not mention that the public defender stated that, "In Contra Costa County, poor people accused of criminal offenses spend up to two weeks in custody ***just waiting to be represented by an attorney***." Emphasis in original. Record, p. 329.

The District Court added that it did not purport to hold that "an interview by a paralegal before counsel is appointed can necessarily substitute under the Sixth Amendment for providing an attorney." App. 94.

Fourth New Constitutional Standard

Having relegated the Ninth Circuit's mandate to footnote 16, the District Court promulgated another test, stating:

> "In the context of Rothgery, the *appropriate test* is therefore whether counsel was provided

> within a period of time after attachment that was reasonable under the circumstances of a defendant's case, as such circumstances were apparent at the time of attachment and during the intervening period before counsel was provided." Emphasis added. App. 94.

With respect to John Farrow, the District Court stated that "there is essentially no evidence in the record explaining a reason for the longer delay of twelve days between attachment of his right to counsel and Martin's assignment to represent him," but found that, "The totality of the circumstances ... is not limited to merely the length of the delay." It went on to opine that the delay in appointing counsel to him was reasonable because a paralegal had conducted a financial eligibility interview in the interim between his first and second court appearances. App. 90.

With respect to Jerome Wade, it found that the delay in his case was reasonable based upon assessment of hypothetical difficulties in appointing counsel in multi-defendant cases that were not supported by the record. Record, pp. 349—50.

Second Appeal

The Ninth Circuit summarily affirmed in an unpublished memorandum, stating that,

> "Whether framed as a policy or practice, the Plaintiffs do not establish the District Court erred by ruling that there was insufficient evidence the County violated the Sixth Amendment rights of criminal defendants by

> failing to provide counsel "within a 'reasonable time after attachment to allow for adequate representation at any critical stage before trial.' " App. 3.

In this holding the Ninth Circuit recognized that there was a policy or practice of delaying provision of counsel to criminal defendants. In determining that Plaintiffs failed to prove that the District Court erred by concluding that there was insufficient evidence to establish that the County violated the Sixth Amendment rights of criminal defendants, it also necessarily sanctioned the District Court's "*broad topics*" test, as this is the test the District Court applied when it determined that there was insufficient evidence to conclude that the County's policy was unconstitutional. ***The Ninth Circuit analyzed this as a factual question, without asking whether the District Court applied the correct legal standard.***

The Ninth Circuit also stated that Plaintiffs did not challenge the District Court's holding that they were not personally injured by the delay. However, Plaintiffs stated on page 70 of their opening brief that they were injured through denial of their constitutional rights, which are valuable in themselves. See *New York State Rifle & Pistol Ass'n, Inc.* v. *City of New York, New York*, 140 S. Ct. 1525, 1535 (2020) (Kavanaugh, J., concurring). Here, the Ninth Circuit necessarily sanctioned the District Court's "*appropriate test*," which steered the inquiry away from the County's policy of arbitrarily delaying appointment of counsel in every case to piecemeal analysis of actual prejudice in the named Plaintiffs' cases.

It also cited *Bucklew* v. *Precythe*, 139 S.Ct. 1112 (2019), a death penalty case holding that the appellant had failed to establish the prejudice necessary to support an as-applied challenge to Missouri's lethal injection protocol because, *inter alia*, his suggested change in protocol would not have reduced his personal risk of unnecessary suffering. In this regard, the panel grafted the Eighth Amendment's actual prejudice requirement onto the Sixth Amendment issues in this case.

In their opening brief, Plaintiffs argued that the *Heck* preclusion doctrine would not bar a 42 U.S.C. § 1983 action based upon denial of counsel at the "critical stage" of arraignment because that Sixth Amendment violation would constitute harmless error. The County acknowledged this argument, stating on page 33 of its answering brief that, "Farrow and Wade contend here that their "critical stage" claim is subject to the harmless error doctrine and, thus, not barred by *Heck*. AOB at 8-11." Plaintiffs also argued this issue on pages 74 and 75 of their opening brief. The County devoted five pages of its answering brief to rebutting this argument.

The Ninth Circuit claimed that Plaintiffs had waived this issue by failing to argue it in their opening brief. Plaintiffs called the panel's attention to this error in their petition for rehearing. The panel allowed its erroneous ruling on this potentially dispositive issue to stand.

REASONS FOR GRANTING THE PETITION

1. Introduction.

A. Unnecessary Pretrial Detention Caused By Delay In Appointing Counsel Is An Urgent Matter Of National Importance.

Senator Grassley stated,

> "[M]any states are not providing counsel as the Constitution requires. It is a widespread problem. In reality, the Supreme Court's Sixth Amendment decisions regarding misdemeanor defendants are violated thousands of times every day. No Supreme Court decisions in our history have been violated so widely, so frequently, and for so long.
>
> "Consider what is happening just in some of the states represented on this Committee. Defenders are not present at arraignments. Large numbers of misdemeanor defendants plead guilty without lawyers. Defendants who have been locked up pending their first appearance are told that they can plead guilty and be sentenced to time served. But if they choose to be represented by counsel, they will wait in jail until one is appointed." Senator Grassley, Statement at a Committee Hearing on Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors, May 13, 2015. Available at www/judiciary.senate.gov/imo/media/doc/05-13-15.

Senator Grassley's observations describe a nationwide crisis that undermines the legitimacy of the Judiciary. The failure to appoint counsel to indigent detainees at the initial appearance or within a reasonable period of time thereafter results in the unnecessary pretrial detention of tens of thousands of detainees annually, with catastrophic consequences for the detainees, their families, their communities, and the counties that pay the exorbitant cost of housing detainees. Unnecessary incarceration also breeds resentment in the people and communities that are subjected to it, contributing to widespread civil unrest and lack of trust in the judicial system.

The problem stems from ambiguities in the legal framework that enable lower courts to interpret constitutional standards in an arbitrary manner—resulting in immediate appointment of counsel in some jurisdictions and delays in appointing counsel for weeks, months, or over a year in other jurisdictions. Only this Court can clarify the standards on this matter of national importance, and it is vital that the Court do so now. As Justice Gorsuch observed in his dissent in *June Med. Servs. L. L. C.* v. *Russo*, 140 S. Ct. 2103, 2179 (2020), "[J]udicial responsibility to avoid standardless decisionmaking is at its apex in the most heated partisan issues."

B. This Case Is The Ideal Vehicle For Resolving The Intractable Splits Among The Federal Courts Of Appeals And State Supreme Courts Because It Is Before The Court Now And Is Exclusively Concerned With The Legal Standards Governing When Counsel Must Be Appointed To Indigent Detainees.

Plaintiffs alleged that denial of counsel at the first appearance in court and for a period of 5 to 13 days, and sometimes longer, after attachment violated their right to counsel at a "critical stage" of the proceedings and their right to counsel within a reasonable period of time after attachment. They also alleged that this practice violated their due process and equal protection rights. The first Ninth Circuit panel held that the first appearance was not a "critical stage" and that neither due process nor equal protection were violated. It also remanded for the District Court to address the question left open by this Court in *Rothgery, supra,* concerning when delay in appointing counsel becomes constitutionally unreasonable based upon assessment of "the grave potential for prejudice," as opposed to realized prejudice. Thus, this case encompasses all of the legal doctrines and concepts related to the timing of provision of counsel to indigent detainees.[1]

There are no meaningful factual disputes in this case. Public Defender Lipetzky stated,

> "Under this system, the first real opportunity

1. See *Christianson* v. *Colt Indus. Operating Corp.,* 486 U.S. 800, 817 (1988) ("A petition for writ of certiorari can expose the entire case to review.").

> that the charged person has to ask for a lower bail or an O.R. release is after they have been in custody at least two weeks. As a result, many people who could safely be released to the community while awaiting trial spend an unnecessary one to two weeks in custody taking up jail space simply because they cannot afford bail and do not yet have an attorney to represent them." Record, p. 235.

The County and District Court contradicted the existence of this policy by observing that detainees were interviewed by paralegals in advance of their second court appearances. The District Court's statement that it did not purport to hold that "an interview by a paralegal *before counsel is appointed* can necessarily substitute under the Sixth Amendment for providing an attorney," however, begs the pertinent question, which is whether a paralegal interview before counsel is appointed can ever substitute under the Sixth Amendment for providing an attorney? The answer is, emphatically, no, as paralegals assessing evidence preservation, misidentification, settlement, and mental health concerns would be practicing law without a license and discussing privileged matters with detainees the public defender did not represent. Once the legal question of whether paralegals could provide representation by counsel in the interim between court appearances is removed from the equation, the existence of the policy of delaying provision of counsel to all detainees is beyond dispute.

Also, while the Superior Court set the date for the second appearance, the County failed to provide representation at the first appearance and for the duration

between the first and second court appearances. In this regard, Public Defender Lipetzky stated, *"Under the current system, incarcerated persons who request the public defender services (the vast majority of people charged) must wait a period of time—between 7 and 14 days—in custody before their next court date when they will have an attorney to represent them."* Record, pp. 298, 299, 346. The fact that conflict counsel in a small percentage of cases were appointed on the court day before the second court appearance, often on a Friday afternoon, does not meaningfully alter this situation.

C. These Issues Need Not Percolate Further. Over the Past Dozen Years, At Least 25 Different Courts Have Addressed The Question Of When Counsel Must Be Appointed To Indigent Detainees, And No Clarity Has Emerged.

As shown below, the Circuit Courts, District Courts, and state Supreme Courts are in intractable conflict with respect to all of the legal doctrines related to the timing of provision of counsel to indigent detainees.

2. The Question Of Whether The First Appearance In Court Is A "Critical Stage" Of The Proceedings Is The Subject Of A Persistent And Acknowledged Split Among The Circuit Courts, District Courts, And State Courts Of Last Resort.

A. Federal Circuit Courts.

A (1) The Second And Eighth Circuits Hold That An Initial Appearance, Where Bail Is Set, Is A "Critical Stage."

The Second Circuit in *Higazy* v. *Templeton*, 505 F.3d 161, 172 (2007), stated, "In the Sixth Amendment context, the Supreme Court found that a bail hearing is a 'critical stage of the State's criminal process at which the accused is as much entitled to such aid (of counsel) ... as at the trial itself.'"

The Eighth Circuit reached the same conclusion in *Smith* v. *Lockhart*, 923 F.2d 1314, 1319 (1991).

A (2) The Fifth, Ninth and Eleventh Circuits hold to the Contrary.

The Fifth Circuit held in *United States* v. *Portillo*, No. 18-50793, 2020 WL 4497236, at *5 (5th Cir. Aug. 5, 2020) that the first appearance is not a "critical stage" of the proceedings. Accord, *Lucio* v. *Davis,* 751 F. Appx 484, 491 (5th Cir. 2018).

The Ninth Circuit affirmed the District Court's conclusion in this case that,

> "The fact that, had counsel been appointed at or closer to the initial appearance, counsel might have applied for release on bail, caused a plea to be entered, or triggered statutory speedy trial rights, does not change this analysis. Nothing happened at the initial appearance other than a determination that Plaintiffs desired the appointment of counsel. The first appearance was not, therefore, a critical stage."[2] App. 236. *Farrow* v. *Lipetzky*, 637 Fed.Appx. 986 (2016); Accord, *Robinson* v. *San Bernardino Cty.*, 815 F. Appx 218, 219 (9th Cir. 2020).

The Eleventh Circuit held in *United States* v. *Mendoza-Cecelia*, 963 F.2d 1467, 1473 (11th Cir. 1992) that the initial appearance is not a critical stage of the proceedings, in spite of the fact that "the court in the initial appearance must consider the weight of the evidence against the defendant as one of many factors in setting bail."

A (3) Federal District Courts Holding That An Initial Appearance, Where Bail Is Set, Is A "Critical Stage."

J.B. v. *Onondaga Cty.*, 401 F. Supp. 3d 320, 337 (N.D.N.Y. 2019); *Booth* v. *Galveston Cty.*, No. 3:18-CV-00104, 2019 WL 3714455, (S.D. Tex. Aug. 7, 2019), *report and recommendation adopted as modified*, No. 3:18-CV-00104, 2019 WL 4305457 (S.D. Tex. Sept. 11, 2019).

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2. Some things did happen: Bail was set without an opportunity to be heard. The right to enter a plea was denied, and the right to assert mandatory statutory speedy trial rights was denied.

A (4) Federal District Courts Holding To The Contrary.

Dominick v. *Stone*, No. CV 19-0503, 2019 WL 2932817, at *4 (W.D. La. June 14, 2019); *Robinson* v. *San Bernardino Cty.*, No. 518CV00906VAPADS, 2019 WL 2616941, (C.D. Cal. May 3, 2019); *Pickett* v. *Woods*, No. 16-CV-10699, 2016 WL 1615742, at *2 (E.D. Mich. Apr. 22, 2016); *Grogen* v. *Gautreaux*, No. 12-0039-BAJ-DLD, 2012 U.S. Dist. LEXIS 120411, WL 12947995 (M.D. La. July 11, 2012); *Franklin* v. *Abston*, No. 7:09-CV-01340-LSC, 2010 WL 11614573, at *7 (N.D. Ala. Mar. 23, 2010); *Hawkins* v. *Montague County*, No. 7:10-CV-19-O, 2010 WL 4514641 (N.D. Tex. Nov. 1, 2010).

B. State Courts.

B (1) The Highest Courts Of Connecticut, Maryland, New York, And Pennsylvania Hold That An Initial Appearance, Where Bail Is Set, Is A "Critical Stage" Of The Proceedings.

The Connecticut Supreme Court determined in *Gonzalez* v. *Commissioner of Corrections,* 308 Conn. 463 (2013), that arraignment is a critical stage of the proceedings because, at that proceeding, counsel is required to assert rights affecting custody credits.

The Maryland Supreme Court held that counsel is required at the first appearance in court because liberty issues are adjudicated at that appearance, basing its opinion on the Due Process Clause of its state Constitution. *DeWolfe, Jr.* v. *Richmond*, 434 Md. 444 (2013).

The New York Court of Appeals determined in *Hurrell-Harring* v. *State*, 15 N.Y.3d 8 (2010), that arraignment is a critical stage of the proceedings, stating that, "There is no question that "a bail hearing is a critical stage of the State's criminal process."

The Pennsylvania Supreme Court determined in *Kuren* v. *Luzerne County*, 146 A.3d 715, at 723 (2016) that the initial arraignment is a "critical stage" of the proceedings.

The California Court of Appeal stated in *People* v. *Cox*, 193 Cal.App.3d 1434, 1440 (1987) that, "arraignment is a critical stage of the proceeding entitling the defendant to an attorney [but] the absence of an attorney at the arraignment is not such a grievous error that it compels a reversal without a showing of prejudice." See also *Gardner* v. *Appellate Div. of Superior Court*, 6 Cal. 5th 998, 1005 (2019); *In re Smiley*, 66 Cal.2d. 606, 615 (1967).

B (2) The Highest Courts Of Alabama, Michigan, Mississippi And Missouri Hold To The Contrary.

The Alabama Supreme Court *in Ex parte Cooper*, 43 So.3d 547, 550 (Ala. 2009), stated that a defendant's initial appearance is not a critical stage of the proceedings and that a defendant is not entitled to the assistance of counsel at the initial appearance. Pretrial release conditions, pursuant to Alabama Rules of Criminal Procedure, Rule 4.4 (a)(4) are set at the initial appearance.

The Michigan Supreme Court held in *People* v. *Crawford*, 429 Mich. 151 (1987), that arraignment is not

a critical stage of the proceedings. In *Pickett* v. *Woods*, No. 16-CV-10699, 2016 WL 1615742, at *2 (E.D. Mich. Apr. 22, 2016), the District Court observed that, "Decisions by Michigan courts following *Rothgery* have held, consistent with *Rothgery*, that initial arraignment is the time at which the Sixth Amendment right to counsel attaches but it is not a "critical stage" requiring counsel." Bail is set at the initial arraignment pursuant to Michigan Rules of Criminal Procedure, Rule 6.106.

The Mississippi Supreme Court held in *Beard* v. *State*, 369 So.2nd. 769 (Miss. 1979) that counsel is not required at the first appearance in court or at the preliminary hearing but is required at arraignment. However, arraignment in felony cases does not occur until a grand jury has indicted the defendant, and the grand jury may not meet for many months.

In Mississippi, "There are no standards for the timing of counsel appointment, nor is there any oversight mechanism to enforce existing constitutional and ethical standards for appointed counsel. In this void, many districts wait until an arrestee is indicted to appoint counsel." B. Buskey, Escaping the Abyss: The Promise of Equal Protection To End Indefinite Detention Without Counsel, St. Louis U. L. J., Vol. 61:665 (2014). When interviewed by the New York Times concerning this practice, Mississippi District Court Judge Marcus Gordon stated that, "The reason is, that public defender would go out and spend his time and money and cost the County money in investigating the matter ... And then sometimes, the defendant is not indicted by the grand jury. So I wait until he's been indicted." C. Robertson, In a Mississippi Jail, Convictions and Counsel Appear Optional, N.Y. Times, § A, P15 (Sept. 25, 2014).

According to the Sixth Amendment Center, "A large amount of time can pass between an indigent felony defendant being arrested and/or bound over and a grand jury returning an indictment, and Mississippi law does not impose any limits on the amount of time that can take. On average, the delay between arrest and grand jury indictment in the ten studied counties ranges from two months to over a year." The Right to Counsel in Mississippi: Evaluation of Adult Felony Trial Level Indigent Defense, Publication Number: 2018.001 (2018) at IX. Available at www.sixthamendment.org.

The Missouri Supreme Court held in *McClain* v. *State*, 448 S.W.2d 599, 601 (1970) that arraignment is not a critical stage of criminal proceedings. Counsel, therefore, is not required, and does not appear at arraignment, in spite of the fact that bail is set at arraignment. *Dalton* v. *Barrett*, No. 2:17-CV-04057-NKL, 2019 WL 3069856, at *10 (W.D. Mo. July 12, 2019).

Denial of counsel under the Sixth Amendment claims were extensively litigated in *Church* v. *Missouri*, 268 F. Supp. 3d 992 (W.D. Mo. 2017), where the District Court found that Missouri violated the Sixth Amendment rights of indigent detainees by failing to provide counsel. The Eighth Circuit reversed on Eleventh Amendment grounds in *Church* v. *Missouri*, 913 F.3d 736 (8th Cir. 2019). *According to allegations in a new complaint filed on February 27, 2020, indigent detainees in Missouri are placed on a waiting list for court appointed counsel, where they wait in jail for counsel for up to six months. David* v. *State of Missouri*, Circuit Court of Cole County, docket number 20AC-CC00093.

3. New Studies Establish That An Initial Appearance, Where Bail Is Set And Liberty Interests Are Adjudicated, Should Be Considered A "Critical Stage" Of The Proceedings.

A. Unnecessary Pretrial Detention Poses A "Grave Potential For Prejudice" To Pretrial Detainees.

Justice Alito stated in his concurring opinion in *Rothgery*, *supra*, at 217, that, "[W]e have recognized that certain pretrial events may so prejudice the outcome of the defendant's prosecution that, as a practical matter, the defendant must be represented at those events in order to enjoy genuinely effective assistance at trial." This recognition was based largely upon studies establishing the "grave potential for prejudice" in pretrial lineups. *United States* v. *Wade*, 388 U.S. 218, 229—36 (1967).

Recent studies establish that unnecessary pretrial detention poses a "grave potential for prejudice." The Fifth Circuit observed that,

> "[T]he expected outcomes for an arrestee who cannot afford to post bond are significantly worse than for those arrestees who can. In general, indigent arrestees who remain incarcerated because they cannot make bail are significantly more likely to plead guilty and to be sentenced to imprisonment. They also receive sentences that are on average twice as long as their bonded counterparts. Furthermore, …. pretrial detention can lead to loss of job, family stress, and even an increase in

> likeliness to commit crime." *Odonnell* v. *Harris County*, 892 F.3d 147, 155 (2018)."

B. Detainees Represented At Initial Appearances Have Dramatically Better Outcomes.

Represented detainees are released on recognizance more than two-and-a-half times as often as unrepresented detainees; and, when bail is imposed, bail for represented detainees is reduced to affordable levels two-and-a-half times as often as it is for unrepresented detainees. D. Colbert et al., Do Attorneys Really Matter? The Empirical And Legal Case For The Right Of Counsel At Bail, 23 Cardozo L. Rev. 1719, 1720 (2002). See, L. Pilnik, A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency, February 2017, NIC Accession Number 032831. Available at www.nicic.gov.

Another study observed that,

> "The takeaway from this new generation of studies is that pretrial detention has substantial downstream effects on both the operation of the criminal justice system and on defendants themselves, causally increasing the likelihood of a conviction, the severity of the sentence, and, in some jurisdictions, defendants' likelihood of future contact with the criminal justice system." P. Heaton, The Expansive Reach of Pretrial Detention, 98 N.C. L. Rev 369, 370-71 (2020).

C. Black People Are Disproportionately Impacted By Unnecessary Pretrial Detention.

Another study concluded that, "Racial disparities are particularly prominent in the setting of bail: in our data, black defendants are 3.6 percentage points more likely to be assigned monetary bail than white defendants and, conditional on being assigned monetary bail, receive bail amounts that are $9,923 greater." (Internal citations omitted.) D. Arnold et al., Racial Bias in Bail Decisions, Q.J. Econ., Vol. 133, Issue 4, p. 1886 (2018).

D. This Court Should Conform "Critical Stage" Analysis To The New Understanding of the "Grave Potential For Prejudice" In Unnecessary Pretrial Detention.

Given the new understanding of the way in which pretrial detention affects the outcome of criminal cases, and the fact that counsel can help avert prejudice in this context, this Court's reasoning in *Wade*, *supra*, suggests that the time has come for recognition that the initial appearance in court, where bail is set and other liberty interests are adjudicated, is a "critical stage" of the proceedings. This is especially so given that ours "is for the most part a system of pleas, not a system of trials." *Missouri* v. *Frye*, 566 U.S. 134, 143 (2012).

E. The Staggering Cost Of Unnecessarily Detaining Low Risk Defendants Harms Counties.

The National Association of Counties observed that,

> "The pretrial release decision affects counties. The size of the pretrial population in County jails is largely the result of judicial decision-making. Pretrial detention imposes significant costs to counties. *According to the U.S. Attorney General, County governments spend around 9 billion annually on jailing defendants while they are awaiting their trial.* In addition to direct County costs, detaining the pretrial population produces indirect costs. Pretrial detention may result in defendant's losing employment, adversely affecting family relationships and creating economic hardships for the defendant's financial dependents, increasing the family's dependence on the County safety net." Emphasis added. N. Ortiz, County Jails At A Crossroads. An Examination Of The Jail Population And Pretrial Release, NACo, Issue 2 (2015). Available at www.naco.org/resources/ County-jails-crossroads#full-report.

Based upon the use of validated risk measurement tools, this study also concluded that the majority of the nation's pretrial jail population is "low risk." Ibid.

4. The Ninth Circuit Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

This Court confronted the question of when the right to counsel attaches 12 years ago in *Rothgery* v. *Gillespie Cty.*, *Tex.*, 554 U.S. 191, 212 (2008), where it stated that, "[C]ounsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as trial itself." It also stated, "We do not decide whether the 6–month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, and have no occasion to consider what standards should apply in deciding this." Justice Alito explained, "The Court expresses no opinion on whether Gillespie County satisfied that obligation in this case. Petitioner has asked us to decide only the limited question whether his magistration marked the beginning of his "criminal prosecution" within the meaning of the Sixth Amendment." *Rothgery*, *supra*, at 218 (Alito, J., concurring).

A. The Ninth Circuit Sanctioned The District Court's Flawed Constitutional Standards Answering The Question Left Open By *Rothgery*.

The Ninth Circuit correctly remanded "for the District Court to consider whether appointing counsel five to thirteen days and 'sometimes longer' after the right attaches complies with the "reasonable time" requirement articulated in Rothgery," guided by the question of whether there is "grave potential for prejudice" inherent in a policy that imposes such delay. In other words, the Ninth

Circuit and the District Court had "occasion to consider what standards should apply in deciding" when delay in appointment of counsel becomes unreasonably long.

B. Three Of The Four New Constitutional Standards Are Wrong.

On remand, the District Court stated that it was "not aware of any decision articulating a standard by which to examine whether a delay in appointing counsel is reasonable within the meaning of Rothgery," in spite of the correct standard provided by the first Ninth Circuit panel. It further held that, "[I]n the absence of such guidance . . . the reasonableness of a delay in appointing counsel after attachment depends on the *totality of the circumstances*, including the time needed to prepare for an upcoming critical stage—but not limited to that factor." Emphasis added. App. 138. This standard is meaningless because it is does not specify the factors the parties are required to address. See *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436, (1971) ("It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.").

In its summary judgment opinion the District Court added two additional standards, stating for the first time that a finder of fact could not conclude that a policy of delayed representation was unconstitutional on its face in the absence of "evidence regarding *broad topics* like, for example, logistical challenges to appointing counsel, processes for resolving conflicts and caseload constraints, and accepted practices and timelines in other jurisdictions." Emphasis added. App. 79, fn. 16.

And it held that,

> "In the context of Rothgery, the *appropriate test* is therefore whether counsel was provided within a period of time after attachment that was reasonable under the circumstances of a defendant's case, as such circumstances were apparent at the time of attachment and during the intervening period before counsel was provided." Emphasis added. App. 83.

The Ninth Circuit summarily affirmed the District Court's ruling that the delay in appointing counsel to all detainees was reasonable based upon the District Court's application of its *"broad topics"* standard to the evidence adduced on summary judgment; it also affirmed its finding that the delay was reasonable in the named Plaintiffs' cases based upon the District Court's application of its *"appropriate test."* Without scrutinizing either standard, the Ninth Circuit summarily affirmed and, therefore, sanctioned the standards promulgated by the District Court addressing the question left open by this Court in *Rothgery*. See S. Shapiro, Supreme Court Practice § 4.29 (11th ed. 2019) ("[T]he true conflict is established by the summary appellate action, not by the district court ruling; one simply ascribes to the court of appeals the rationale employed by the district court.").

This court should settle this important question, as a national standard is needed, and the Ninth Circuit's, post-remand standards are wrong: The **"***broad topics*" standard determines *"how much delay is reasonable, and thus tolerable, under the Constitution in a typical case,"* by reference to "how much time a generic, competent

public defender's office ... would need to provide a defendant with an attorney," without regard for when the "grave potential for prejudice" becomes intolerable for a typical detainee; and the "*appropriate test*" does not specify the relevant "circumstances"; it does not elucidate to whom the "circumstances" must be "apparent"; and it does not explain how the "circumstances" would become "apparent" to anyone in the absence of representation by counsel.

Also, the County stated that public entities depend upon "this Court's prejudice requirement … to defeat any such litigation at the motion to dismiss stage." Petition for Writ of Certiorari, p. 7. Indeed, every case seeking prospective relief for policies of delaying provision of appointed counsel for an unreasonably long period—except this one—has been defeated at the motion to dismiss stage because the lower courts have uniformly conflated the "actual prejudice" standard, required for the remedy of reversal of a criminal conviction, with the distinct question of whether there is a cognizable civil cause of action for denial of the right to counsel under the Sixth Amendment when counsel is not appointed within a reasonable period of time after attachment, before the delay ripens into wrongful conviction, loss of child custody, suicide, or other forms of prejudice. See *United States* v. *Morrison* 449 U.S. 361 (1981); *United States* v. *Wade*, 388 U.S. 218 (1967) (actual prejudice not required to state a Sixth Amendment violation). This pervasive and harmful misunderstanding in the lower courts indicates that further clarification of the appropriate prejudice standard by this Court is necessary.

C. Circuit Courts and District Courts Widely Misconstrue This Court's Opinion In *Rothgery* For The Proposition That A 6-Month Delay In Appointing Counsel To Indigent Detainees Is Presumptively Reasonable.

The District Court in this case originally "held that the delay in appointing counsel between the time of attachment and the second appearance … did not violate the Supreme Court's instruction that counsel must be provided within a reasonable time after attachment, because the delay was shorter than in other district court cases that found no violation, and because Plaintiffs did not adequately allege that they were prejudiced by the delay." App. 103. In reaching this determination, it relied upon *Grogen* v. *Gautreaux*, *supra*. App. 137. *Grogen* noted that this Court declined to decide whether a 6-month delay in appointing counsel after attachment was unreasonable. Construing the *Rothgery* 6-month delay as a benchmark—without acknowledging that Walter Rothgery was in custody for a total of three weeks—it found that a 40-day in-custody delay was reasonable in the absence of a showing of actual prejudice. The District Court in this case also relied upon *Hawkins* v. *Montague County*, *supra*, which found "that an approximate two-month delay in receiving court-appointed counsel fails to rise to the level of a constitutional violation." The District Court's reliance on the misinterpretation of this Court's holding in *Rothgery* in multiple unpublished District Court decisions resulted in the first appeal, first reversal, and first petition for a writ of certiorari in this case.

Following the same logic, the Fifth Circuit stated that,

> "The Supreme Court has expressly declined to determine the appropriate standard for when a delay alone violates the Sixth Amendment right to counsel. Rothgery involved a six-month delay, thus jurists of reason could not debate the potential for fairminded disagreement as to whether Lucio's three-month delay violated her Sixth Amendment right to counsel." *Lucio* v. *Davis,* 751 F. Appx 484, 491 (5th Cir. 2018).

In *Dominick* v. *Stone*, No. CV 19-0503, 2019 WL 2932817, at *4 (W.D. La. June 14, 2019), the District Court relied upon *Lucio, supra*, and extended its logic to obliterate the requirement that counsel be appointed within a reasonable period of time after attachment, stating,

> "Notably, the Fifth Circuit added that, "to be entitled to a COA, [the applicant's] unreasonable delay claim must be based on denial of counsel at a critical stage of the proceedings. … Even assuming an unreasonable delay in appointing counsel, alone, can violate the Sixth Amendment, Plaintiff's alleged 55-day delay was reasonable."

Also, in *Franklin* v. *Abston*, No. 7:09-CV-01340-LSC, 2010 WL 11614573, at *7 (N.D. Ala. Mar. 23, 2010), the District Court stated,

> "The question before the Court is not, however, whether Plaintiff had a right to counsel, but rather whether he had an immediate right to counsel such that the twenty-two day delay he experienced in receiving appointed counsel was

> a violation of a clear constitutional right. In Rothgery, the Court explicitly refused to decide whether a six-month delay "in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights, and [we] have no occasion to consider what standards should apply in deciding this." *Rothgery*, 128 S. Ct. at 2592. The Eleventh Circuit has not touched on this issue, and neither party has pointed this Court to any authority on this point."

However, Justice Alito stated, *"That question lies beyond our reach, petitioner having never sought our review of it." Rothgery, supra*, at 216 (Alito, J., concurring). Thus, this Court did not "refuse to decide" whether a 6-month delay in appointing counsel is acceptable. Nor did it authorize 6-month delays in appointing counsel to indigent detainees. However, in the absence of further clarification by this Court, the lower courts will persist in misconstruing *Rothgery* for the proposition that it endorses 6-month delays in appointing counsel to detainees in the absence of actual prejudice.

5. The Ninth Circuit Is In Square Conflict With The Fifth And Eleventh Circuits On The Question Of Whether Due Process Is Violated When Counsel Is Not Provided To Protect Bail And Statutory Speedy Trial Interests.

The Ninth Circuit held that the County delayed Plaintiffs' arraignments and pleas, but did not violate California Penal Code § 859b, which requires a preliminary hearing within 10 court days of entry of plea, because pleas were not entered at the initial appearance due

to the absence of counsel. The right to enter a plea at arraignment, however, is in *pari materia* with California Penal Code § 859b. *Ng* v. *Superior Court*, 4 Cal.4th 29, 36-37 (1992).

> "The arraignment "is the defendant's first court appearance. [Citations.]" (Cal. Criminal Law: Procedure and Practice (Cont.Ed.Bar 2016) § 6.1, p. 126. Although the court at the arraignment must afford the defendant the opportunity to enter a plea (see § 988), the entry of a plea may be postponed. (See §§ 990 [where the defendant at arraignment so requires, he or she "must be allowed a reasonable time to answer." *People* v. *Figueroa*, 11 Cal. App.5th 665, 677 (2017).

Therefore, denial of the right to enter a plea at the first appearance violated California's statutory speedy trial scheme, and the Ninth Circuit erred by determining that there was no due process violation.

The Fifth Circuit in *Odonnell* v. *Harris*, 892 F.3d 147, 159-60 (2018), found that Harris County's bail procedures violated due process because bail was denied at the first appearance in court without notice, a hearing at which the arrestee had an opportunity to be heard and present evidence, and an impartial decision maker. It reached this conclusion not because the right to bail itself was violated but because the procedure for assuring compliance with the right was inadequate; and it did so in spite of the fact that the arrestees were able to invoke a bail hearing on a later date. It also concluded that federal due process entitles detainees to a counseled bail hearing

within 48 hours of arrest, in conformity with the 48-hour presentment requirement articulated in *Riverside* v. *McLaughlin*, 500 U.S. 44 (1991). See also *Jauch* v. *Choctaw Cty.*, 874 F.3d 425, 435 (5th Cir. 2017) (due process violated when factually innocent, unrepresented detainee cut off from judicial officers for 96 days).

The Eleventh Circuit in *Walker* v. *City of Calhoun, GA.*, 901 F.3d 1245, 1266 (11th Cir. 2018), concluded that denial of counsel at an initial appearance, where bail is set, violates due process.

6. The Ninth And Eleventh Circuits Are In Conflict With The Fifth Circuit Concerning The Question Of Whether Equal Protection Is Infringed When Indigent Detainees Are Denied The Ability To Assert Pretrial Rights At The Initial Appearance When The Affluent Are Permitted To Immediately Assert These Rights.

The Fifth Circuit stated in *Odonnell*, *supra*, at 163, that,

> "One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart. The District Court held that this state of affairs violates the equal protection clause, and we agree."

The Ninth Circuit concluded that the County did not violate Plaintiffs' equal protection rights because they had an adequate opportunity to apply for bail a week or two after the initial appearance. Thus, the Ninth Circuit and the Fifth Circuit are in square conflict.

The Eleventh Circuit concluded that equal protection does not apply to bail hearings in *Walker* v. *City of Calhoun, GA.*, *supra*, at 1266.

7. There Were Departures From The Normal Course Of Judicial Proceedings Calling For This Court To Exercise Its Supervisory Powers.

The District Court stated that it would assess the reasonableness of the delay in appointing counsel according to a "*totality of the circumstances*" test, without identifying the factors in the test. With respect to such tests, Justice Scalia wrote in *Crawford* v. *Washington*, 541 U.S. 36, 67—68 (2004) that, "By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design. Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault prosecutions like this one, the Framers had an eye toward politically charged cases like Raleigh's—great state trials where the impartiality of even those at the highest levels of the judiciary might not be so clear."

The "totality of the circumstances" test was grossly unfair to Plaintiffs as they had no opportunity to meet the standards that were announced for the first time after the matter had been submitted; and it gave the District Court license to rule according to its whim based upon unreviewable standards.

This radical departure "from the accepted and usual course of judicial proceedings" dictated the outcome of the case. The second Ninth Circuit panel exacerbated this problem by failing to question the District Court's application of its previously unannounced standards of review and by failing to analyze the standards to see if they correctly state the law. *"A District Court by definition abuses its discretion when it makes an error of law." Koon* v. *United States*, 518 U.S. 81, 100 (1996).

In *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018), this Court stated that, "when applying the law involves developing auxiliary legal principles of use in other cases—appellate courts should typically review a decision de novo." Also, in *Salve Regina College* v. *Russell,* 499 U.S. 225, 238 (1991), this Court stated that, "When de novo review is compelled, no form of appellate deference is acceptable." Additionally, this Court stated in *Guerrero-Lasprilla* v. *Barr*, 140 S. Ct. 1062, 1070 (2020), that, "we can reasonably interpret the statutory term "question of law" to encompass the application of law to undisputed facts." This Court has also stated that applying the wrong standard of review requires reversal when the standard of review may affect the outcome of the case. *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 443 (2001). Treating questions of law as questions of fact and applying the plain error standard instead of the required *de novo* review standard unquestionably affected the outcome of this case.

At a minimum this Court should exercise its supervisory powers, grant certiorari, vacate, and remand so that the Ninth Circuit can: (1) correct the constitutional standards on *de novo* review; (2) address the question of

whether a California arraignment is a "critical stage" of the proceedings as pled; (3) determine if the *Heck* doctrine would bar civil actions for violation of the right to counsel at a California arraignment; (4) give the District Court clear, reviewable standards to uphold; and (5) give Plaintiffs a fair opportunity to meet the appropriate, known constitutional standards.

In *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2182 (2020), a case in which the appropriate legal standards were hotly contested, Justice Kavanaugh stated in his dissent that, "I agree with Justice ALITO that the Court should remand the case for a new trial and additional factfinding under the appropriate legal standards." See also *Ayestas* v. *Davis*, 138 S.Ct. 1080, 1085 (2018) (certiorari granted, lower court opinion vacated, and case remanded because lower courts applied the wrong legal standard).

8. Conclusion

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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October 19, 2020

APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, FILED MARCH 30, 2020

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 19-15152

JOHN FARROW, ON HIS BEHALF, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; JEROME WADE, ON THEIR BEHALF, AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

CONTRA COSTA COUNTY,

Defendant-Appellee,

and

ROBIN LIPETZKY, CONTRA COSTA COUNTY PUBLIC DEFENDER,

Defendant.

Submitted March 26, 2020*
San Francisco, California
FILED March 30, 2020

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Appendix A

Appeal from the United States District Court
for the Northern District of California,
Joseph C. Spero, Magistrate Judge, Presiding,
D.C. No. 3:12-cv-06495-JCS

Before: GOULD, CHRISTEN, and BRESS, Circuit Judges.

MEMORANDUM[**]

Appellants John Farrow and Jerome Wade appeal from the district court's order granting Contra Costa County's motion for summary judgment in a § 1983 action alleging Sixth Amendment violations based on the failure to provide counsel. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.[1]

1. The district court dismissed the plaintiffs' § 1983 claim premised on a Sixth Amendment violation for failure to provide counsel at a critical stage because the court determined it was barred by *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The plaintiffs waive their challenge to this ruling by not arguing this issue in their opening brief. *See Austin v. Univ. of Oregon*, 925 F.3d 1133, 1138-39 (9th Cir. 2019).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. Because the parties are familiar with the facts and procedural history of this case, we do not recite them here.

2. Whether framed as a policy or practice, the plaintiffs do not establish the district court erred by ruling that there was insufficient evidence the County violated the Sixth Amendment rights of criminal defendants by failing to provide counsel "within a 'reasonable time after attachment to allow for adequate representation at any critical stage before trial.' " ***521** *Farrow v. Lipetzky*, 637 F. App'x 986, 988 (9th Cir. 2016) (quoting *Rothgery v. Gillespie County*, 554 U.S. 191, 212, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008)). The plaintiffs also do not challenge the district court's ruling that they did not show they suffered a Sixth Amendment violation based on their own experiences with delayed provision of counsel. *See generally Bucklew v. Precythe*, ––– U.S. ––––, 139 S. Ct. 1112, 1127, 203 L.Ed.2d 521 (2019).

3. The plaintiffs separately challenge the district court's exclusion of expert evidence at summary judgment pursuant to Federal Rule of Evidence 702, but they do not establish that the court abused its discretion. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 143, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED JANUARY 2, 2019

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

Case No. 12-cv-06495-JCS

2019 WL 78839

JOHN FARROW, *et al.*,

Plaintiffs,

v.

CONTRA COSTA COUNTY,

Defendant.

January 2, 2019, Decided;
January 2, 2019, Filed

JOSEPH C. SPERO, Chief Magistrate Judge.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT AND MOTION TO EXCLUDE EXPERT TESTIMONY

Re: Dkt. Nos. 125, 126, 128

Appendix B

I. INTRODUCTION

Plaintiffs John Farrow and Jerome Wade brought this putative class action asserting a number of claims based on the alleged failure of Defendant Contra Costa County (the "County") to provide appointed counsel at Plaintiffs' first court appearances, or within a reasonable time thereafter, in criminal proceedings in state court. After multiple motions to dismiss, an appeal to the Ninth Circuit, and remand to this Court, Plaintiffs' remaining claims are for failure to provide counsel as required by the Sixth Amendment within a reasonable time after the right attached, and for a writ of mandamus to enforce Contra Costa Public Defender Robin Lipetzky's obligations under section 27706 of the California Government Code. In accordance with the case schedule set by the Court, the parties now bring cross motions for summary judgment on Plaintiffs' individual claims before the question of class certification has been addressed, and the County moves to exclude the opinions of Plaintiffs' expert witness. The Court held a hearing on January 19, 2018. For the reasons discussed below, the County's motion to exclude expert testimony is GRANTED IN PART, Plaintiffs' motion for summary judgment is DENIED, the County's motion for summary judgment is GRANTED as to Plaintiffs' Sixth Amendment claim, and Plaintiffs' state law claim is DISMISSED for lack of jurisdiction.[1]

1. The parties have consented to the jurisdiction of the undersigned magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c).

II. BACKGROUND

A. Procedural History and Allegations

1. May 2013 Order

Plaintiffs' original complaint included six claims against Robin Lipetzky, the Contra Costa County Public Defender: (1) violation of Plaintiffs' right to counsel under the Sixth Amendment; (2) violation of Plaintiffs' right to a speedy trial under substantive due process protections of the Fourteenth Amendment; (3) violation of Plaintiffs' right to a speedy trial under procedural due process protections of the Fourteenth Amendment; (4) violation of Plaintiffs' procedural due process rights under the Fourteenth Amendment with respect to the timing of Plaintiffs' bail hearings; (5) violation of California Civil Code sections 52 and 52.1; and (6) a claim for a writ of mandate to enforce California Government Code section 27706. *See* Order Granting Def.'s Mot. to Dismiss Compl. ("May 2013 Order," dkt. 47) at 5-6.[2]

The Court held that Plaintiffs' right to counsel attached at their first court appearances, but that neither that appearance nor the waiting period before the second appearance was a "critical stage" at which counsel was required. *Id.* at 14-20.. The Court also held that the delay in appointing counsel between the time of

2. *Farrow v. Lipetzky*, No. 12-cv-06495-JCS, 2013 U.S. Dist. LEXIS 65824, 2013 WL 1915700 (N.D. Cal. May 8, 2013). Citations herein to this Court's previous orders refer to page numbers of the versions filed in the Court's ECF docket.

attachment and the second appearance—which, unlike the first, was a critical stage—did not violate the Supreme Court's instruction that counsel must be provided within a reasonable time after attachment, because the delay was shorter than in other district court cases that found no violation, and because Plaintiffs did not adequately allege that they were prejudiced by the delay. *Id.* at 20-22 (citing *Rothgery v. Gillespie County*, 554 U.S. 191, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008)). The Court therefore dismissed Plaintiffs' Sixth Amendment claim with leave to amend. *Id.* The Court also dismissed Plaintiffs' other federal claims with leave to amend, for reasons that are not relevant to the present motion because Plaintiffs did not renew those claims. *Id.* at 23-31. With no federal claims remaining, the Court declined to exercise supplemental jurisdiction over Plaintiffs' state law claims. *Id.* at 31-32.

2. August 2013 Order

After the Court dismissed the initial complaint, Plaintiffs amended their complaint twice, and Lipetzky moved to dismiss the second amended complaint. *See generally* Order Granting Def.'s Mot. to Dismiss 2d Am. Compl. (dkt. 69).[3] The Court granted that motion and dismissed all claims, although it allowed Wade leave to amend his Sixth Amendment claim. *Id.* at 1-2.

With respect to the Sixth Amendment claim, the Court reaffirmed its previous holdings that neither the

3. *Farrow v. Lipetzky*, No. 12-cv-06495-JCS, 2013 U.S. Dist. LEXIS 111493, 2013 WL 4042276 (N.D. Cal. Aug. 7, 2013), *rev'd in part*, 637 F. App'x 986 (9th Cir. 2016).

first appearance nor the waiting period before the second appearance was a critical stage at which Plaintiffs were entitled to counsel, but the second appearance was a critical stage. *Id.* at 22-26 (citing *Lopez-Valenzuela v. County of Maricopa*, 719 F.3d 1054 (9th Cir. 2013), *subsequently superseded sub nom. Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc)[4]). Turning to the question of whether the challenged policy failed to provide counsel within a reasonable time after attachment of the right, the Court held that although Plaintiffs added allegations regarding the effect of the delay, the allegations did not sufficiently identify any actual prejudice that Plaintiffs suffered as a result. *Id.* at 26-27. Because Plaintiffs came closer to plausibly alleging prejudice to Wade than to Farrow, the Court dismissed Wade's Sixth Amendment claim with leave to further amend but dismissed Farrow's claim with prejudice.

The Court dismissed Plaintiffs' remaining federal claims with prejudice, for reasons that are not relevant to the present motion, and again declined to exercise supplemental jurisdiction over Plaintiffs' state law claims. *Id.* at 28-35. Wade declined to further amend his Sixth

4. The initial Ninth Circuit panel to hear *Lopez-Valenzuela* affirmed the district court's grant of summary judgment for the defendants on claims under multiple constitutional theories. *See generally Lopez-Valenzuela v. County of Maricopa*, 719 F.3d 1054. This Court's August 2013 order relied on that panel's Sixth Amendment holding. Later, an en banc panel reached a different outcome, reversing the holding as to substantive due process and finding the Arizona laws at issue facially invalid on that basis, but declined to address the plaintiffs' Sixth Amendment claims. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d at 791-92.

Amendment claim, and Plaintiffs instead appealed to the Ninth Circuit.

3. Ninth Circuit Decision and Denial of Certiorari

The Ninth Circuit affirmed this Court's dismissal of Plaintiffs' due process and equal protection claims. *Farrow v. Lipetzky*, 637 Fed. Appx. 986, 987-88 (9th Cir.) (dkt. 81), *cert. denied*, 137 S. Ct. 82, 196 L. Ed. 2d 36 (2016). As for Plaintiffs' Sixth Amendment claims, the panel affirmed this Court's conclusion that, on the facts alleged, Plaintiffs' first court appearance was not a critical stage that required the presence of counsel. *Id.* at 988. The panel held that this Court erred, however, in its analysis of whether counsel was appointed within a reasonable time after attachment of the right, and remanded for consideration of that issue under the correct legal standard:

> The remaining question is whether Lipetzky appointed counsel within a "reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Rothgery*, 554 U.S. at 212. In other words, how soon after the Sixth Amendment right attaches must counsel be appointed, and at what point does delay become constitutionally significant? Instead of addressing whether the delay in appointing counsel was unreasonable, the district court considered only whether the delay "impacted [plaintiff's] representation at subsequent

> critical stages of his proceedings." By framing the question in that way, the district court erroneously required the plaintiffs to allege actual prejudice. *See United States v. Wade*, 388 U.S. 218, 225, 236-37, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (finding a Sixth Amendment violation based on the "grave potential for prejudice"); *Hamilton v. Alabama*, 368 U.S. 52, 54, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961) (finding a Sixth Amendment violation where the absence of counsel "may affect the whole trial"). We therefore remand for the district court to consider whether appointing counsel five to thirteen days and "sometimes longer" after the right attaches complies with the "reasonable time" requirement articulated in *Rothgery*.

Id. at 988-89 (alteration in original). The panel also directed this Court to reconsider whether supplemental jurisdiction over Plaintiffs' state law claims is appropriate in light of the Court's reconsideration of the Sixth Amendment claim. *Id.* at 989. The Supreme Court denied Plaintiffs' petition for certiorari on October 3, 2016. *See* dkt. 102.

4. Third Amended Complaint and Facts Subject to Judicial Notice

Following remand to this Court, Plaintiffs filed their operative third amended complaint, alleging that Lipetzky implemented a written policy that "arbitrarily withheld legal representation to indigent, in-custody criminal

defendants for a period of 5 to 13 days after their initial Court appearance." 3d Am. Compl. ("TAC," dkt. 91) ¶ 1. Under that policy, Plaintiffs alleged that a defendant would not receive counsel at the defendant's first court appearance, but if a defendant requested counsel at that appearance and could not afford to pay, the court would set bail, refer the defendant to the public defender, and continue the case for a "further arraignment" several days later. *See id.* ¶¶ 1-2, 4, 21, 27, 36.

Plaintiffs alleged that Farrow was arrested on August 30, 2011, based on allegations that he had assaulted his domestic partner. *Id.* ¶¶ 25, 31. He first appeared in court on September 2, 2011, at which time the judge asked if he could afford counsel and would like the court to appoint counsel. *Id.* ¶¶ 26-27. Farrow replied that he could not afford counsel and would like appointed counsel, and the judge "set bail, 'referred the matter to the Public Defender,' and continued the matter to September 15, 2011 for 'further arraignment.'" *Id.* ¶ 27. The judge also asked the probation department to prepare a bail study, which according to Plaintiffs was prepared during the period between the two court appearances and included only information unfavorable to Farrow because, without counsel, there was no way for him to provide mitigating information such as his ties to the community or employment status. *Id.* ¶ 28. The judge did not advise Farrow of his right to enter a plea at the first appearance, and Farrow remained in jail for the next thirteen days. *Id.* ¶ 27.

Plaintiffs alleged that Farrow was appointed counsel and entered a plea at his second appearance on September

15, 2011, which was sixteen days after his arrest and thirteen days after his first appearance. *Id.* ¶ 29. According to Plaintiffs, the delay in Farrow obtaining counsel "might have" contributed to his investigator's failure to locate witnesses whose testimony could have implicated the credibility of the complaining witness (Farrow's domestic partner) and thus "would have had an enormous impact on plea negotiations and may have resulted in acquittal had the matter gone to trial." *Id.* ¶ 31. Farrow pled guilty to one count against him on December 1, 2011. Def.'s Req. for Judicial Notice ("RJN," dkt. 94) Ex. A.

Plaintiffs alleged that Wade, then seventeen years old, was arrested at his high school on November 8, 2011 for his alleged involvement in a convenience store robbery. TAC ¶¶ 32, 43. Wade first appeared without counsel on November 14, 2011. *Id.* ¶ 33.[5] A county prosecutor also appeared in court that day, which Plaintiffs alleged made the appearance "an adversarial encounter." *Id.* ¶ 35. The judge set bail and asked Wade whether he could afford counsel and whether he would like counsel appointed. *Id.* ¶ 36. Wade responded that he could not afford counsel and would like appointed counsel, and the judge "'referred the matter to the Public Defender,' and continued the matter to November 21 for 'further arraignment.'" *Id.* Plaintiffs alleged that the judge did not advise Wade of "his right to enter a plea, his right to bail, his right to prompt arraignment or his right to a speedy preliminary hearing and trial." *Id.* As in the case of Farrow, the judge also referred the matter to the probation department for

5. Plaintiffs alleged that Wade was held illegally for four days before his first appearance, but did not bring a claim based on that pre-appearance detention. *See* TAC ¶ 34.

a bail study, which, according to Plaintiffs, did not include information favorable to Wade because he did not have counsel. *Id.* ¶ 37. Wade remained in jail for seven days. *Id.* ¶ 36.

According to Plaintiffs' allegations, the police and district attorney continued their investigation of Wade's case during the period between his first and second court appearances. *Id.* ¶ 39. On November 18, 2011, the district attorney filed an amended complaint adding new charges and significantly increasing Wade's exposure. *Id.* ¶ 40. Plaintiffs alleged that the district attorney was able to do so without leave of the court because Wade had not yet entered a plea. *Id.*

Wade was appointed counsel at his second court appearance on November 21, 2011. *Id.* ¶ 41. Later, his investigator interviewed his high school principal, who had been present when the police interrogated Wade. *Id.* ¶ 42. Plaintiffs alleged that the principal could not remember when Wade was given *Miranda* warnings or whether he had been wearing a sweatshirt that connected him to the robbery, and that she "likely" would have remembered what Wade was wearing if she had been interviewed sooner. *Id.* ¶¶ 42, 43. Plaintiffs also suggested (but did not specifically allege) that the principal's memory of the *Miranda* warnings would have been clearer during an earlier interview. *See id.* Wade pled guilty to three counts on December 6, 2012. RJN Ex. B.

The Third Amended Complaint included three claims: (1) a claim under 42 U.S.C. § 1983 for violation of Plaintiffs'

Sixth Amendment right to counsel, TAC ¶¶ 56–58; (2) a claim under the Bane Act, sections 52 and 52.1 of the California Civil Code, for violation of Plaintiffs' civil rights, TAC ¶¶ 59–60; and (3) and a claim under sections 1085 and 1086 of the California Code of Civil Procedure for a writ of mandate to enforce section 27706 of the California Government Code, which requires public defenders to represent criminal defendants "at all stages of the proceedings," TAC ¶¶ 61–63. Plaintiffs characterized their claims as "a facial challenge to the constitutionality of Defendant's written policy of arbitrarily withholding counsel for an unreasonable period of time" on behalf of all persons who "were subjected to the deprivation of counsel at their first court appearance and were forced to continue their cases for 5 days or more for appointment of counsel, pursuant to the Public Defender's written Policy," from December 21, 2010 through the resolution of this action. *Id.* ¶¶ 45–48.

5. April 2017 Order and Substitution of Defendant

Lipetzky again moved to dismiss, and the Court granted that motion in part. Addressing an argument that Lipetzky raised for the first time after remand from the Ninth Circuit, the Court held that *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), did not bar Plaintiffs' Sixth Amendment claim in its entirety because a Sixth Amendment violation for failure to appoint counsel within a reasonable time after attachment (as discussed in *Rothgery*) "would not *necessarily* imply the invalidity of Plaintiffs' convictions in state court." Order Regarding Mot. to Dismiss 3d Am. Compl. ("Apr. 2017 Order," dkt.

107) at 25.[6] The Court rejected Lipetzky's argument that Plaintiffs' claim for unreasonably delayed appointment of counsel must be evaluated under the ineffective assistance standards set forth in either *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), or *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), both of which would require per se reversal of Plaintiffs' convictions and would therefore be barred by *Heck*, because the Court determined that those cases' focus on prejudice was inconsistent with the Ninth Circuit's instructions that Plaintiffs need not show prejudice here. Apr. 2017 Order at 16-17, 24-25 ("The Court is not persuaded by Lipetzky's argument that the Ninth Circuit has asked this Court to analyze Plaintiffs' claims in 'the *Strickland/Cronic* framework.'" (quoting Lipetzky's reply brief)). The Court held that *Heck* did, however, bar Plaintiffs' Sixth Amendment claim to the extent that it was based on a theory that they were denied counsel at a "critical stage" of a criminal prosecution, because such a deprivation—at least for the particular stage at issue—would be grounds for per se reversal of Plaintiffs' convictions. *Id.* at 22-23. The Court also held that even with respect to the unreasonable delay claim, *Heck* dictates that Plaintiffs' "'compensable injury . . . does *not* encompass the "injury" of being convicted [or] imprisoned.'" *Id.* at 27-28 (quoting *Heck*, 512 U.S. at 487 n.7) (alterations in original).

Having held that Plaintiffs' claim for delayed appointment of counsel survived *Heck*, the Court turned

6. *Farrow v. Lipetzky*, No. 12-cv-06495-JCS, 2017 U.S. Dist. LEXIS 65331, 2017 WL 1540637 (N.D. Cal. Apr. 28, 2017).

to what standards should apply to evaluate that claim, and whether Plaintiffs' complaint plausibly stated such a claim. *Id.* at 25-27. With the exception of one Middle District of Louisiana case that required a showing of prejudice inconsistent with the Ninth Circuit's holding on appeal here, the Court found no authority articulating such a standard. *Id.* at 26. The Court therefore held "for the purpose of the [motion to dismiss] that the reasonableness of a delay in appointing counsel after attachment depends on the totality of the circumstances, including the time needed to prepare for an upcoming critical stage—but not limited to that factor." *Id.* at 27. The Court held Plaintiffs' allegations sufficient to state such a claim, which "does not lend itself to resolution on the pleadings." *Id.*

Because at least one aspect of Plaintiffs' federal Sixth Amendment claim survived the motion to dismiss, the Court had supplemental jurisdiction over the state law claims, and examined those as well. *Id.* at 28-32. The Court dismissed Plaintiffs' Bane Act claim with prejudice for failure to establish that Plaintiffs had a right to enter pleas at their first court appearances, and for failure to allege coercion. *Id.* at 28-30. The Court allowed Plaintiffs' claim under Government Code section 27706 to go forward, noting that the public defender's obligation to represent indigent defendants at "all stages of the proceedings" is broader than the "critical stages" at which counsel is required under the Sixth Amendment, and that the obligation is triggered not only by appointment by the court, but also by a defendant's request for representation. *Id.* at 30-31. The Court did "not decide at [that] time whether section 27706 requires a public defender standing

by at a defendant's first court appearance to provide representation immediately if requested, or whether the statute implicitly allows the public defender a reasonable period of time to begin representation after request by an indigent defendant or appointment by the court." *Id.* at 31-32.

After the Court issued its decision on the motion to dismiss the third amended complaint, the parties stipulated to substitute the County for Lipetzky as the defendant in this action. *See* Stip. (dkt. 115); Order on Stip. (dkt. 116).

B. Evidentiary Record

1. 1984 Letter

In a letter dated August 27, 1984, David Coleman, then the supervising attorney of the Richmond branch of the County's Public Defender's Office, wrote to a judge of the Bay Municipal Court in Richmond, California "to clarify and memorialize our understanding of how the client referral process will operate between the arraignment department of your court and our office." Martin Decl. (dkt. 125-1) Ex. 1 at 008.[7] The letter stated that when an

7. Several of Plaintiffs' exhibits include witness depositions and related documents as a single exhibit, with the documents, or portions thereof, inserted throughout the transcript. This order cites to non-transcript documents using Plaintiffs' three-digit Bates numbers. Citations to deposition testimony are identified as such and use the Bates numbers as well as the page and line numbers from the deposition transcripts, with a comma separating Bates citations

in-custody defendant requested referral to the Public Defender's Office, a courtroom clerk would provide a referral form and copy of the complaint to the Public Defender's Office no later than 5:00 PM the same day. *Id.* at 010. An attorney would at some point thereafter interview the defendant at the County's detention facility in Martinez, California, and would be prepared to appear with the defendant and enter a plea "on the afternoon of the third court day following the date of the referral." *Id.* The letter acknowledged that the probation department might require more than three days for a bail study, and that the arraignment might therefore take place more than three days after the defendant requested referral, but the letter stated that an attorney from the Public Defender's Office "will appear on any date such a coordinated appearance for a plea and bail study be scheduled, as long as it is no sooner than three court days away." *Id.* The letter went on to state that the same schedule would apply in multiple defendant cases where one or more attorneys would be appointed from the Bar Association Conflicts Panel, and that in those cases the Public Defender's Office would provide "provisional" notice of a conflict to the panel by noon of the court day following referral, although a final determination of financial eligibility would usually not be completed at the time of provisional notice. *Id.* at 010-11.

Robin Lipetzky, the current public defender, testified that she had no independent knowledge of the 1984 letter and that it appeared to refer only to proceedings in the

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from transcript pagination. In some exhibits, excerpts of documents and deposition transcripts are not presented in order. Plaintiffs are discouraged from using this format of consolidated, out-of-order exhibits in future filings.

Richmond courthouse. Martin Decl. Ex. 1 (Lipetzky Dep.) at 007, 20:16-25.

2. More Recent Practices of the Public Defender's Office and Other Testimony of Robin Lipetzky

Lipetzky testified regarding the Public Defender's Office's practices regarding representation at indigent misdemeanor and felony defendants' arraignments, including the older policy of bifurcated arraignments that Plaintiffs in this case experienced, a pilot program for providing representation at some first appearances in one courthouse, and a newer policy of representing nearly all indigent defendants at their first court appearances. Lipetzky has worked for the County's Public Defender's Office since 1990, initially as a deputy public defender, and in her current position as public defender for the County she is a department head in charge of the Public Defender's Office and sets policy for the office. Martin Reply Decl. (dkt. 142-1) Ex. 14 (Lipetzky Dep.) at 329, 7:12-8:16; *id.* at 338, 23:13-15.

In 2010, defendants charged with misdemeanors in the County were arraigned without counsel, and if they desired appointment of counsel, were referred by the court to the Public Defender's Office and required to come back for another court appearance at a later date. *Id.* at 012-13, 22:18-23:12. According to Lipetzky, many defendants waived their right to counsel and proceeded without counsel at the first appearance. *Id.* at 013, 23:3-12. Lipetzky had set a goal in 2010 of providing counsel for all misdemeanor defendants' first court appearances. *Id.* at 012, 22:10-17.

Although Lipetzky provided some testimony regarding the arraignment process for out-of-custody misdemeanor defendants, she testified that she was "not sure [she] ever knew what the misdemeanor process was" for in-custody defendants, and that she could instead "speak to [the process for] felony in-custody clients." Baker Decl. (dkt. 129) Ex. D (Lipetzky Dep.) at 44:5-11. After reading the charges at a felony defendant's first appearance, the court would ask if the defendant could hire an attorney. *Id.* at 44:12-14. If the defendant said "no," the court would refer the case to the Public Defender's Office and set the matter for a subsequent "counsel-and-plea" calendar date, and "sometime between that time and the time of the next court date," the Public Defender's Office would get the referral. *Id.* at 44:15-16. According to Lipetzky's declaration, the referrals were provided "by the following business day" along with "the complaint and discovery if available." Lipetzky Decl. (dkt. 131) ¶ 3. Some courthouses had "counsel-and-plea" calendars twice each week, while others had only one per week. *Id.*; Baker Decl. Ex. D (Lipetzky Dep.) at 45:3-9. Lipetzky did not know how the courts determined which calendar to set a defendant's second appearance for, and was not aware of any cases where a court set the appearance further out than one of the next two "counsel-and-plea" days, or longer than two weeks from the first appearance. Martin Decl. Ex. 1 (Lipetzky Dep.) at 084-86, 109:19-111:20. The Public Defender's Office had no involvement in setting the second appearance date. Lipetzky Decl. ¶ 3. A page of the Public Defender's Office's website listing answers to frequently asked questions included a section briefly describing this process. Martin Decl. Ex. 1 at 037.

Lipetzky states in her reply declaration that she is aware of other California counties that did not provide counsel at indigent defendants' first court appearances in 2011. Lipetzky Reply Decl. (dkt. 141-2) ¶ 4.

According to Lipetzky, after receiving a referral, her office conducted an initial investigation into whether the referred person was financially eligible and whether conflicts or excessive caseload precluded the main Public Defender's Office from taking the case, which began usually one or two days after receipt of the referral with "a paralegal visiting the person at the jail to gather information such as financial status, information relevant to a potential bail motion, and basic information about the charged offense." Lipetzky Decl. ¶ 4. The office would "take steps to address" any "immediate needs" disclosed during that initial interview, "such as mental health concerns, injuries that needed to be documented, misidentity, or the need to preserve evidence that could be lost or destroyed." *Id.* The Public Defender's Office would then check for conflicts of interest and determine if it had sufficient staffing to take the case, and would refer clients that it could not take on to the County's Alternate Defender's Office, which would check for its own conflicts. *Id.* ¶ 5. If the Alternate Defender's Office also could not represent the client, it would refer the matter to the conflict panel, which would appoint an attorney from the panel. *Id.*

Lipetzky testified that she did not "challenge" the County's policy of bifurcating arraignments in 2010. Martin Decl. Ex. 1 (Lipetzky Dep.) at 026, 73:10-14.

She did not recall whether she "raise[d] the issue with anybody" in 2011. *Id.* at 026, 73:15-22. She testified at her deposition that she did not "take any action prior to [receiving Farrow's government claim in this case] to stop this practice" of bifurcating arraignments, *id.* at 026-27, 73:23-74:10, but states in a reply declaration that during her 2017 deposition, her "memory was hazy on the exact timing of [her] actions in 2012," and that subsequent review of documents refreshed her memory that at the time she received Farrow's claim on June 26, 2012, she had in fact already implemented a pilot project at the Delta courthouse and developed and begun soliciting funding for a program to further expand representation at indigent defendants' first appearances, as discussed below. Lipetzky Reply Decl. ¶ 2 (citing Lipetzky Decl. Ex. G).

In "mid-2012," deputy public defenders began representing out-of-custody misdemeanor defendants at their first appearances through a pilot program at the Delta courthouse, located in Pittsburg, California. Lipetzky Decl. ¶ 11; Martin Decl. Ex. 1 (Lipetzky Dep.) at 018, 34:5-15. At some point—the date is not clear from the record—Lipetzky stated that her office would expand representation at first appearances to other courthouses if staffing levels increased. *Id.* at 028, 32:3-22. Plaintiffs' counsel asked Lipetzky if she agreed that she had a legal mandate to provide such representation, but her answer is not included in the excerpt in the record. *Id.* at 028, 32:23-25.

In a document dated June 7, 2012 discussing funds provided under the Public Safety Realignment Reform

Act of 2011, also known as Assembly Bill 109, Lipetzky proposed creation of the Arraignment Court Early Representation ("ACER") program to provide counsel at all in-custody indigent defendants' first court appearances, a proposal that Lipetzky had developed over the preceding months. Lipetzky Decl. ¶ 12 & Ex. G. Lipetzky states that her decision to develop and implement the ACER program was not related to this or any other litigation. *Id.* ¶ 18. A report dated July 13, 2012 further discussed the proposal. Martin Decl. Ex. 1 at 032. That report stated that indigent defendants did not have a real opportunity to request lower bail or release on their own recognizance until their second, counseled court appearance, and that providing representation at the first appearance would save the county money because fewer defendants would ultimately be held in pretrial custody. Martin Decl. Ex. 1 at 064. Based on statistics from the ACLU, the report stated that roughly eighty-five percent of the County's jail population was made up of defendants awaiting trial, which was higher than both the state and national averages. Martin Decl. Ex. 1 (Lipetzky Dep.) at 054, 62:7-25. A September 2012 report describing the proposal indicated that it would resolve the problem of such defendants having to "wait a period of time—between 7 and 14 days—in custody before their next court date when they will have an attorney to represent them." Martin Decl. Ex. 1 at 034. Lipetzky testified that those times were "not entirely accurate for every case, but yes." Martin Decl. Ex. 1 (Lipetzky Dep.) at 033, 55:10-25. Lipetzky testified that she believed the longest period a defendant spent in custody between the first and second appearances was "about 13 days," but she had not researched the issue. *Id.* at 083, 47:14-20.

Funding was secured for the program, and the Public Defender's Office was able to provide counsel at defendants' first appearances beginning January 9, 2013, except for out-of-custody misdemeanor defendants at the Richmond courthouse.[8] *Id.* at 055, 83:1-6; Lipetzky Decl. ¶¶ 13-14 & Exs. J—M. The Public Defender's Office has "staffed the initial appearance" or arranged for conflicts panel representation of all defendants at their first appearances at other courthouses, as well as all felony defendants and in-custody misdemeanor defendants in Richmond. Martin Decl. Ex. 1 (Lipetzky Dep.) at 078, 50:1-12; Lipetzky Decl. ¶¶ 15-16. "In the case of an obvious conflict, such as multiple defendants charged with the same offense, the case will be referred to the Alternate Defender's Office and the matter continued a short period of time (not more

8. As of the date of Lipetzky's deposition in this case, the Richmond courthouse did not permit attorneys from the public defender's office to represent out-of-custody misdemeanor defendants at their first court appearances. Martin Decl. Ex. 1 (Lipetzky Dep.) at 018, 34:17-38:9. In many cases, judges at that courthouse will present unrepresented misdemeanor defendants with three options: (1) the defendant can resolve a case for some negotiated disposition presented by the court at the first appearance; (2) the defendant can hire a private lawyer and return at a later date; or (3) the court can refer the defendant to the public defender's office. *Id.* at 023-25, 39:11-41:9. According to Lipetzky, when attorneys from the public defender's office attempted to inform defendants of their availability represent them before the calendar for first appearances began, the court instructed them not to. *Id.* at 025, 41:10-24. Lipetzky has not taken legal action in response to the Richmond court's policy prohibiting such representation. *Id.* at 021, 37:18-20. That policy is not at issue in this case. Neither Farrow nor Wade appeared in the Richmond courthouse or faced misdemeanor charges, and the Superior Court is not a defendant here.

than two days) for appearance by" an attorney from that office. Lipetzky Decl. ¶ 15. As a result of implementation of the ACER program, some defendants have been released from custody sooner than they would have been under the old system of bifurcated arraignments. Martin Decl. Ex. 1 (Lipetzky Dep.) at 038, 66:1-6. When such defendants receive sentences for time served, or have a case disposed of at the first appearance, the new policy has resulted in some defendants spending less total time in jail. *Id.* at 039, 69:1-8. Lipetzky has not kept accurate statistics of how many defendants are released at the first appearance under the new system, but testified that in aggregate, she believes the ACER program has reduced the number of pretrial custody days for indigent defendants. *Id.* at 045, 97:11-22; *id.* at 078, 50:18-21. She states in her declaration that she "commit[s] to continue the current practice of staffing the arraignment courts with an attorney and a legal assistant" even if the County were to discontinue funding for the ACER program, which she has "no reason to believe" would occur. Lipetzky Decl. ¶ 17.

Lipetzky testified that under the old system, defendants who had been misidentified or were ultimately acquitted sometimes spent longer in jail than they would have under the new system. Martin Decl. Ex. 1 (Lipetzky Dep.) at 041-43, 77:7-15, 81:23-82:12. In Lipetzky's approximately twenty years of experience as a deputy public defender, during the period when courts in the County used the bifurcated arraignment system, some of her clients were released from custody as a result of bail motions at the second court appearance, and she testified that they "presumably" would have

been released at the first appearance if they had been provided with representation at that appearance. *Id.* at 027, 74:11-25; *id.* at 040, 75:13-25; *but see* Lipetzky Reply Decl. ¶ 3 (clarifying that Lipetzky has "no personal knowledge of any instance where a criminal defendant served additional time in pretrial detention as a result of [her] office not staffing the initial appearance"). Lipetzky testified that a defendant who "has to stay in jail longer than necessary . . . risk[s] losing jobs, losing their housing, losing custody of their children, those sorts of things." Martin Decl. Ex. 1 (Lipetzky Dep.) at 039, 69:22-25. In a report promoting the ACER program, Lipetzky wrote that it would reduce recidivism by allowing defendants to maintain employment and community ties that would otherwise be jeopardized during pretrial detention. *Id.* at 061-62, 71:3-72:13.

A January 2016 performance review of the ACER program stated that "roughly between 20% and 40% of all detained defendants" were released at their first appearances, and that "roughly 10% of all cases" received expedited dispositions. Martin Decl. Ex. 1 at 047. Lipetzky testified that she had no reason to doubt those numbers but could not say whether they were true. Martin Decl. Ex. 1 (Lipetzky Dep.) at 046, 98:3-5. A February 2016 report on the program in fiscal year 2014/2015 stated that the program facilitated pretrial release and early case resolution, and cited statistics on the percentage of cases where those goals were achieved. Martin Decl. Ex. 1 at 050. Lipetzky testified that she could not confirm the accuracy of the statistics but she agreed that the program helped achieve those goals. Martin Decl. Ex. 1 (Lipetzky

Dep.) at 048-49, 100:7-101:20. One report indicated that ACER had saved the courts and sheriff's department money, but Lipetzky testified that she could not confirm whether that was true. *Id.* at 065, 86:9-25; Martin Decl. Ex. 1 at 066. She testified that ACER has required increased resources from the Public Defender's Office because the old system of regularly scheduled plea-and-counsel calendars was more efficient for the office than appearing at every first appearance, even though it was less efficient for defendants themselves. Martin Decl. Ex. 1 (Lipetzky Dep.) at 078-79, 50:22-51:13.

In a report dated July 1, 2012 assessing the performance of the Public Defender's Office in fiscal year 2011/2012, Lipetzky wrote that the office had a shortage of felony attorneys and was "unable to fulfill its mandate to provide competent representation to all of the clients referred to" it. Martin Reply Decl. Ex. 14 at 322. As a result, the office had "steadily increased" the number of cases it referred to private attorneys through the conflicts panel, reaching "roughly 75 per month, at significant ongoing cost to the County." *Id.*; *see also* Martin Reply Decl. Ex. 14 (Lipetzky Dep.) at 341-42, 26:14-27:20. Lipetzky testified that in those instances the office could not take on more clients while maintaining constitutional representation for its existing clients. Baker Decl. Ex. D (Lipetzky Dep.) at 27:14-20. From January of 2010 through January 13, 2013, Lipetzky did not receive any complaints from the conflicts panel about the timeliness of referrals to the panel. Lipetzky Decl. ¶ 7.

Appendix B

3. Plaintiffs' Experiences With Delayed Appointment of Counsel

a. *John Farrow*

Farrow was arrested on August 30, 2011 on charges including assaulting and threatening his domestic partner. Baker Decl. Ex. A (Farrow Dep.) at 12:18-13:1; Baker Decl. Ex. E. Farrow's first court appearance took place at the Walnut Creek courthouse of the Superior Court for the County of Contra Costa at 1:30 PM on Friday, September 2, 2011 before Judge Nancy Stark. Martin Supp'l Decl. (dkt. 134) Ex. 4 (Superior Court Clerk's Docket and Minutes) at 160. Judge Stark asked Farrow if he could afford counsel, to which he replied "[a]bsolutely not," and if he wanted a lawyer, which he said he did. Baker Decl. Ex. A (Farrow Dep.) at 18:25-19:8. Judge Stark referred the matter to the public defender and to the probation department for a bail study, and continued proceedings to September 15, 2011 at 9:00 AM. Martin Supp'l Decl Ex. 4. The clerk's minute order appears to indicate that bail was set at $106,000 and Farrow was remanded to county jail. *Id.*

Farrow met with Lorrie Silva, an employee of the Public Defender's Office, on September 6, 2011. Baker Decl. Ex. C (Requests for Admissions) ¶ 7. Silva completed an applicant interview and provided notes to the Public Defender's office, including that Farrow had no relevant medical or psychiatric history, that he had been in custody since August 31, and that he would like a copy of the police report. Lipetzky Decl. ¶ 6 & Ex. B. According

to Lipetzky, neither the referral packet provided to the Public Defender's Office nor Silva's interview with Farrow disclosed any urgent issues requiring attention before his next appearance date. *Id.* ¶ 6. Lipetzky determined that neither the Public Defender's Office nor the Alternate Defender's Office could take on Farrow's case due to their existing caseloads, and referred the case to the conflicts panel on September 14. *Id.* ¶ 8. Lipetzky states in her declaration that her "office never received a direct request from Mr. Farrow to represent him in this criminal proceeding and was never appointed by the Court to represent Mr. Farrow in this criminal proceeding." *Id.* Farrow's attorney Christopher Martin, who also represented Wade in his criminal case and represents both Plaintiffs in this action, learned that he would represent Farrow in his criminal case at 1:57 PM on September 14. Baker Decl. Ex. C ¶ 2; Baker Decl. Ex. F (Martin Dep.) at 9:25-10:6; Baker Decl. Ex. G. Martin did not do anything related to the case that day. Baker Decl. Ex. F (Martin Dep.) at 12:4-7; Baker Decl. Ex. H (billing records).

Farrow appeared again on September 15 with Martin representing him, pleaded not guilty to all counts, and appears to have been again remanded to the county jail with bail set at $106,000. Martin Supp'l Decl Ex. 4 at 162. That appearance was the first time Farrow met Martin, and they discussed the case while Farrow was in a holding area near the courtroom, including issues of bail and the fact that Farrow was upset that he had been in custody for weeks without representation. Baker Decl. Ex. A (Farrow Dep.) at 30:8-11; Baker Decl. Ex. F (Martin Dep.) at 13:23-15:14. Martin objected at that

hearing to the fact that Farrow had been in custody for thirteen days without a lawyer and asserted that Farrow had been prejudiced by the delay and lack of counsel at his first appearance, but the presiding judge stated on the record that she did not find Farrow's rights had been violated. Baker Decl. Ex. C ¶¶ 16-18; Baker Decl. Ex. I (transcript of state court proceedings). Martin did not formally request a bail reduction. Baker Decl. Ex. C ¶ 20. Martin did not "perform any legal services" on Farrow's behalf until the court appearance on September 15, and did not begin reviewing discovery until September 19. *Id.* ¶¶ 9-10. Martin testified that "the Court doesn't formally appoint in Contra Costa County" and, as is its typical practice, did not discuss appointment of counsel at the hearing, and that he had "accepted appointment through [the public defender's conflict program]" when he spoke to someone from that office. Baker Decl. Ex. F (Martin Dep.) at 14:4-19.

Martin did not request that an investigator seek to locate relevant witnesses until after a preliminary examination on September 27, 2011, and in fact did not communicate with investigator Kent Ringgenberg until November 7. Baker Decl. Ex. C ¶ 5. He testified at his deposition that his decision to engage the investigator to locate those witnesses was based on the complaining witness's testimony at the preliminary hearing. Baker Decl. Ex. F (Martin Dep.) at 19:1-20:11. Ringgenberg attempted to locate the witnesses on approximately November 14, but was not successful. *Id.* at 26:1-22. Farrow ultimately reached a plea agreement in which he waived his appellate rights and was sentenced to 270

days in county jail. Baker Decl. Ex. A (Farrow Dep.) at 40:9-25, 47:1-14; Baker Decl. Ex. L (plea agreement form).

b. *Jerome Wade*

Wade was taken into custody on November 8, 2011 and held at juvenile hall. Martin Reply Decl. Ex. 13 (Wade Dep.) at 309-10, 16:22-17:3. Wade's first court appearance took place at the Walnut Creek courthouse before Judge Stark on Monday, November 14, 2011. Martin Supp'l Decl. Ex. 5 (Superior Court Clerk's Docket and Minutes) at 165. Judge Stark asked if Wade needed and could afford a lawyer, and Wade asked Judge Stark to appoint a lawyer for him. Martin Reply Decl. Ex. 13 (Wade Dep.) at 311-12, 18:20-19:2. Judge Stark referred the matter to the public defender and to the probation department for a bail study, and continued proceedings to November 21, 2011 at 8:30 AM. Martin Supp'l Decl. Ex. 5 at 165. The clerk's minute order appears to indicate that bail was set at $4,350,000 and Wade was remanded to county jail. *Id.*

The Public Defender's Office determined on November 17, 2011 that it had a conflict of interest because it was taking on representation of one of Wade's four codefendants, and therefore referred his case to the Alternate Defender's Office. Lipetzky Decl. ¶ 9 & Ex. D. The Alternate Defender's Office decided to represent another codefendant and determined on November 18 that it too had a conflict as to Wade. *Id.* ¶ 9 & Ex. E. As with Farrow, Lipetzky states that Wade never directly requested that the Public Defender's Office represent him and the court never appointed the Public Defender's Office to do so. *Id.* ¶ 9.

Appendix B

Martin had a telephone conversation with someone from the conflicts panel regarding taking on representation of Wade's case at 10:22 AM on November 18, 2011—the same day that the Alternate Defender's Office determined it could not represent him—and received an email from the panel at 10:56 AM confirming the referral and attaching the "Crimetime calculation" and the complaint. Baker Decl. Ex. F (Martin Dep.) at 31:23-33:5. Martin began working on the case that day, including conducting legal research, and met with Wade at juvenile hall the following day (Saturday, November 19) to discuss the case, including whether Wade had been instructed as to his rights before he made certain admissions during an interrogation. *Id.* at 37:16-39:4; Baker Decl. Ex. R (billing records).

Wade appeared again on November 21, 2011 with Martin representing him, pleaded not guilty to all counts, and appears to have been again remanded to the county jail with bail set at $4,350,000. Martin Supp'l Decl. Ex. 5 at 167. Martin requested authorization to engage Ringgenberg as an investigator for Wade's case, specifically for the issue of whether Wade had received *Miranda* warnings, on November 29. Baker Decl. Ex. F. (Martin Dep.) at 42:9-14. On November 30, Martin asked Ringgenberg to report back on that issue "much sooner" than the next court appearance on December 12. *Id.* at 44:7-20. At some point, no later than December 29 but possibly before that, Martin learned that at least part of Wade's interrogation had been recorded. *Id.* at 40:15-22, 49:14-51:6. Martin considered pursuing a motion related to the *Miranda* issue but he and Wade decided instead to withdraw the motion as a condition of accepting a

time-limited plea deal offered by the prosecutor. *Id.* at 58:1-11. Ringgenberg did not recall at his deposition whether Martin also asked him to investigate what Wade was wearing during the interrogation. Baker Decl. Ex. J (Ringgenberg Dep.) at 22:10-13.

Wade pleaded guilty to three counts against him on December 6, 2012, approximately one year after Martin began negotiating a deal with the prosecutor on his behalf. Baker Decl. Ex. O (Wade Dep.) at 24:21-25:24. Wade testified that he actually committed the crimes to which he pleaded guilty and that he was satisfied with Martin's representation of him. *Id.* at 29:12-23. He received credit towards his sentence for the time he spent in jail before sentencing. *Id.* at 71:24-72:10.

4. Expert Witness Reports and Testimony

a. *Robert Boruchowitz*

Plaintiffs submit an expert witness report from Professor Robert Boruchowitz. *See* Martin Decl. Ex. 2. Boruchowitz is an attorney with "43 years of experience in public defense." Boruchowitz Report[9] at 17. He served as director of The Defender Association in Seattle for twenty-eight years, supervising as many as ninety attorneys and negotiating "contracts with government funders at

9. Boruchowitz's report appears in the record as a portion of Exhibit B to Christopher Martin's declaration in support of plaintiffs' motion (Bates numbers 090 through 116), and as Exhibit A to Cameron Baker's declaration (dkt. 127) in support of the County's motion to exclude the report.

the city, county and state level" for which The Defender Association provided service as public defenders. *Id.* at 18 ¶ 3. Boruchowitz also served as a staff attorney for The Defender Association, representing defendants in a variety of criminal proceedings, from juvenile and misdemeanor cases to at least one case involving capital charges. *Id.* at 19 ¶¶ 6-7. Boruchowitz participated in the development of public defender standards and model contracts for the American Bar Association and Washington State Bar Association, among other entities. *Id.* at 19 ¶¶ 8, 11. He has consulted for public defender services and associations, or the courts that oversee those services, in a number of states including Washington, Idaho, Utah, Michigan, Wisconsin, Louisiana, Arizona, and Nevada, and has founded or worked with several organizations dedicated to indigent criminal defense. *See generally id.* at 19-21. He is a "Professor from Practice" and serves as director of the Defender Initiative at the Seattle University School of Law, *id.* at 20-21 ¶¶ 17-18, and has written and spoken extensively, as well as testified as an expert, on matters related to public defense, *id.* at 21-26 ¶¶ 23-27. Boruchowitz relied on his experience in the field, "relevant state and federal law as to what constitutes effective assistance of counsel," and various standards, guidelines, and published ethical opinions in reaching his opinion. *Id.* at 17 ("Law and Experience Relied On"). He also reviewed the transcripts of both Plaintiffs' depositions, although he did not review Martin's or Ringgenberg's depositions, Martin's timesheets, or the file on Wade's criminal case. Martin Opp'n Decl. (dkt. 135-1) Ex. 12 (Boruchowitz Dep.) 10:13-11:9, 16:18-22, 21:25-22:4, 57:5-6.

Appendix B

Boruchowitz describes the scope of his report as follows:

> I was requested to provide an opinion on whether and in what manner having a policy of leaving indigent criminal detainees unrepresented in jail for a period of one to two weeks or more poses a "grave potential for prejudice" based on the totality of the circumstances test, which should include, but not be limited to, prejudice at later "critical stages" of the proceedings. I was also requested to provide an opinion on whether the Contra Costa Defender's policy violated California Government Code section 27706.

Id. at 1 ¶ 1. Citing case law, Boruchowitz states his opinion that "it is not reasonable to delay appointing counsel for five to thirteen days or longer after the right counsel attaches as articulated in *Rothgery*," and that "the delay in appointing counsel of five to thirteen days or longer violates California Government Code section 27706." *Id.* at 1-2 ¶¶ 4-7.

According to Boruchowitz, "[n]ational and state standards require that counsel be provided at the earliest possible time after an accused person is arrested, charged, or appears in court, whichever is earliest." *Id.* at 2 ¶ 8. He cites a number of standards and guidelines discussing the importance of timely representation. *Id.* at 2-5 ¶¶ 9-14. Some of those standards call for provision of counsel at specific points in the criminal process—

such as the American Bar Association Standards for Providing Defense Services ("Counsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committed magistrate, or when formal charges are filed, whichever occurs earliest."), the Washington State Bar Association Performance Guidelines for Criminal Defense Representation ("If the client is in custody, contact should be within 24 hours of appointment and shall be within no more than 48 hours unless there is an unavoidable extenuating circumstance."), a 1976 report of a commission of the National Legal Aid and Defender Association (calling for representation as soon as "[t]he person is arrested or detained," or when the person reasonably believes criminal process will commence), and the National Advisory Commission on Criminal Justice Standards and Goals ("Public representation should be made available . . . beginning at the time the individual either is arrested or is requested to participate in an investigation that has focused upon him as a likely suspect.")—while others speak more generally about the importance of prompt representation. *See id.*

Boruchowitz lists the following potential consequences of delay in appointing counsel for in-custody defendants: (1) defendants could suffer injury, illness, or death in jail while awaiting a second court appearance; (2) the mental condition of mentally ill defendants could deteriorate, which appointment of counsel can help to mitigate due to not only the potential for obtaining release, but also the possibility of arranging for treatment in jail; (3) defendants could lose employment, housing, child custody, or medical

benefits; (4) a delayed investigation can result in loss of evidence, including witness recollections; (5) defendants might not be able to bring a petition for habeas corpus to challenge unlawful confinement; (6) for defendants who can easily be shown to be innocent, delay in appointing counsel can result in delay making that innocence known and having charges dismissed; (7) juvenile defendants can face "additional challenges" due to vulnerability to peer pressure; (8) delays in obtaining discovery can cause delays in all phases of the prosecution; (9) prosecutors might set limits on plea bargain offers, and delays in appointing counsel can further limit the amount of time counsel has to discuss an offer with the defendant; and (10) failure to have counsel promptly available while a defendant is in custody can lead to mistrust between the attorney and client once an attorney is appointed. *Id.* at 5-8 ¶¶ 15.1-15.12; *see also id.* at 12-15 ¶¶ 37-48 (elaborating on some of those categories of potential consequences). Boruchowitz notes a California Penal Code statute permitting any attorney to visit a prisoner upon the prisoner's request, and asserts that the County's Public Defender's Office should have sent an attorney to visit each defendant after the court referred the defendant to that office. *Id.* at 8 ¶ 15.13.

In a section titled "Three Days in Jail Can Harm a Client," Boruchowitz states that he "agree[s] with an experienced public defender who wrote" that "'three days in jail can be life destroying'" due to potential effects on medication, employment, and child custody or care. *Id.* at 8 ¶ 16. Boruchowitz construes the 1984 letter discussed above as demonstrating obliviousness to client needs and

also as evincing an ability to provide counsel in three days, which is less than the delay that either Plaintiff faced in this case. *Id.* at 8 ¶¶ 17-18.

Boruchowitz reviews various statements by Lipetzky and the Public Defender's Office, beginning with her 2010 comments to a county newspaper that she believed providing attorneys at misdemeanor defendants' first court appearances would protect their constitutional rights, and extending through the development and assessment of the ACER program. *Id.* at 9-12 ¶¶ 23-35. He concludes that these statements show that Lipetzky "has known for years that her office should be providing counsel . . . at arraignment," and that the successful implementation of the ACER program shows that the County could and should have put such a policy in place sooner. *Id.* at 9-12 ¶¶ 22, 27, 33, 36.

With respect to California Government Code section 27706, Boruchowitz discusses the language of the statute and several decisions by California courts, as well as a decision by the highest court of Maryland interpreting what Boruchowitz characterizes as a similar statute. *Id.* at 15-17 ¶¶ 50-55. He concludes that the period between Plaintiffs' first and second court appearances was itself a "stage of the proceedings" within the meaning of section 27706, and that to effectively fulfill the requirements of the statute, a public defender "should begin representation as soon as possible, and not wait for five to thirteen days to meet the client at a second appearance." *Id.* at 16 ¶ 51. Boruchowitz testified that his "process for determining whether or not there was a violation of" section 27706

was "that [he] read the statute, and then [he] read cases discussing the statute." Martin Opp'n Decl. Ex. 12 (Boruchowitz Dep.) at 45:21-25.

Boruchowitz testified at his deposition that a public defender "might get some hints of" the specific needs and risks of a client "in highly publicized cases," but that a defender "need[s] to see the client as soon as possible to assess all those factors effectively." *Id.* at 67:25-68:15. He testified that, in his opinion, it would not have been reasonable for Plaintiffs' counsel (who in addition to representing them here, also was appointed to represent them in their criminal cases) "to delay interviewing those clients for five to thirteen days or longer." *Id.* at 69:16-20. Boruchowitz also testified that he considered the issue of whether the County failed to provide counsel in a reasonable period of time to be "a *Cronic* problem," referring to the Supreme Court's decision in *United States v. Cronic*. *Id.* at 14:21-15:23.

Asked by defense counsel how much time is required to prepare for an arraignment, Boruchowitz testified that if appointed in advance, a lawyer "should spend a good hour meeting with the client before you do anything," and if "appointed right there in the courtroom, you try to take as much time as the judge will give you." *Id.* at 28:7-16. Boruchowitz also acknowledged that there "are still states that do not have representation of counsel at the initial hearing," that he has "observed a number of states that do not provide counsel at the initial appearance," and that there have been "instances where counsel was not appointed for months sometimes after the initial

appearance." *Id.* at 20:19-21:7, 34:2-10. Boruchowitz did not know whether there was a "consistent practice" as to that issue in California. *Id.* at 41:2-20. As a matter of "personal belief," however, Boruchowitz believes "that counsel should be there from the very beginning," "even though we don't have federal case law yet on when the appearance of counsel is required" and "even though the U.S. Supreme Court has not yet held it." *Id.* at 35:8-16.

A U.S. Department of Justice report discussed during Boruchowitz's deposition identifies Arkansas, Delaware, Iowa, Montana, New Hampshire, New Jersey, South Carolina, Virginia as states that in fiscal year 2013 lacked guidelines calling for attorneys to be present at bail hearings and arraignments, although many other states had such guidelines. Baker Reply Decl. (dkt. 141) Ex. B at 25, App'x Tbl. 3. States were also split as to whether they had guidelines calling for appointment of interim counsel within one day, and as to whether they had guidelines for appointment of permanent counsel within three days. *Id.* The table summarizing various states' guidelines does not include all fifty states, and California is among the states omitted.[10] *See id.* Boruchowitz testified that he was not aware of standards specific to California requiring representation at initial appearances,

10. The report appears to be limited to states that had "state-administered" indigent defense services (as well as the District of Columbia) as opposed to states with services administered at a local level. *See* Baker Reply Decl. Ex. B at 1. The report, prepared by Suzanne M. Strong, Ph.D., of the Bureau of Justice Statistics, is titled "State-Administered Indigent Defense Systems, 2013." It was published in November of 2016 and revised May 3, 2017. *See id.*

although he believed such representation was required by section 27706 "because it's a stage," and he identified several provisions of California's guidelines for indigent defense that more generally call for prompt and zealous representation. Martin Opp'n Decl. Ex. 12 (Boruchowitz Dep.) at 59:15-61:15.

b. *Henry Coker*

The County retained Henry Coker as an expert witness. Coker is an attorney who worked for the San Diego County Public Defender's Office from 1989 until his retirement in 2017, including serving as the public defender (i.e., the head of the department) from 2009 through 2017. Martin Decl. Ex. 3 at 122 ¶ 1; *see also id.* at 134-36 (Coker's resume). Like Boruchowitz, he was asked in this case to consider whether the County's former practice of "not providing public defender attorney staffing at the initial appearance of an in-custody criminal defendant in state court, which might have resulted in a delay in the provision of appointed counsel to the defendant detainees for a period between two days to thirteen days complied with the 'reasonable time' requirements for the provision of counsel articulated in *Rothgery*," as well as whether Lipetzky violated section 27706. *Id.* at 122-23 ¶ 2. He concluded based on his experience and review of documents and applicable law that "the timing of the actual provision of appointed counsel in Contra Costa County complied with" both *Rothgery* and section 27706. *Id.* at 123 ¶¶ 3-4.

According to Coker, although "[l]ocal jurisdictions may choose to provide stronger protections, and organizations such as the American Bar Association and the National Legal Aid and Defender Association may recommend even higher standards . . . those higher standards are not relevant to" determining what the Sixth Amendment requires. *Id.* at 123 ¶ 6.

Coker states that "the evidence indicates" that under the old policy of bifurcated arraignments, "counsel was typically 'provided' or 'assigned' to the case before the actual date of the 'counsel-and-plea' hearing," and the date on which counsel was actually assigned to the case is more relevant than the date of that second court appearance. *Id.* at 124 ¶ 9.

He describes the timeline of Wade's case as follows: Wade's first appearance was on Monday, November 14, 2011, the judge set the second appearance for Monday, November 21 (one week after the first appearance), the conflicts panel called Plaintiffs' counsel Christopher Martin the morning of Friday, November 18 (four days after the first appearance), and Martin started work on the case that day and interviewed Wade the following day, Saturday, November 19. *Id.* at 124 ¶ 10; *see also id.* at 131 (summarizing the timeline in a table). According to Coker, that timeline was reasonable, and allowed Martin sufficient time to prepare for the November 21 arraignment hearing as well as subsequent stages of the case. *Id.* Coker states that the seriousness of the charges, as evidenced by judge setting bail at several million dollars,[11] rendered "the

11. Coker's report transposes the digits of Wade's bail, stating that it was set at $3,450,000, as opposed to the figure of $4,350,000

bail issue . . . moot," as would have been apparent to the judge and to any competent defense counsel. *Id.* Coker notes that Wade was one of four defendants in a "complex" serial robbery case, and that determining how to assign counsel to avoid conflicts of interest in such cases "can, in some cases, take several days in light of the need for thorough conflicts checks and informed decisions about which defendants should be represented by internal staff." *Id.* at 125 ¶ 14. He states that the "conflict of interest process took place" on November 17, 2011, one day before Martin was assigned to the case, and concludes that "the fact that attorney Martin's assignment to represent Wade in this complex and serious five-defendant case occurred only four days after Wade's initial court appearance seems quite reasonable under all these circumstances and entirely consistent with diligent efforts to arrange for counsel." *Id.* at 126 ¶ 16.

As for Farrow's case, Coker summarizes the timeline as follows: Farrow first appeared on Friday, September 2, 2011, the judge set his second appearance for Thursday, September 15 (thirteen days later), a staff member from the Public Defender's Office interviewed Farrow on Tuesday, September 6 (four calendar days after the first appearance, and the next business day due to the Labor Day holiday weekend), the conflicts panel called Martin to assign him to the case at 1:57 PM on Wednesday, September 14 (twelve days after the first appearance), and Martin first met with Farrow on Thursday, September

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that appears in court documents in the record. *Compare* Martin Decl. Ex. 3 at 124 ¶ 10 *with* Martin Supp'l Decl. Ex. 5.

15 (the day of the second appearance, thirteen days after the first appearance). *Id.* at 124 ¶ 11, 127 ¶ 20, 132 (summarizing the timeline in a table). Like in Wade's case, Coker states that the court and competent defense counsel would have known that "the bail review issue was moot," in this case because "Farrow was a twice-convicted felon with a 'no-bail' parole hold." *Id.* at 124 ¶ 11. According to Coker, the staff interview on September 6 "included questions about potential bail issues and the status of [Farrow's] case," and "would have identified, but did not, any matter in Farrow's criminal case requiring immediate attention." *Id.* at 127 ¶ 20. Coker states that although Martin did not meet with Farrow until the date of his second appearance on September 15, he could have interviewed him the afternoon or evening of September 14, the day he was assigned the case. *Id.* at 124 ¶ 11.

Coker also states that because the Public Defender's Office did not have sufficient resources to handle all of the cases referred to it at that particular time, "there needed to be a determination regarding the volume of new cases coming into the Public Defender's Office and the Alternate Defenders Office at that time before a decision could be made to route [Farrow's] case to the Conflicts Panel Office for assignment to outside counsel." *Id.* at 126-27 ¶ 17. Farrow's case was an appropriate candidate for reassignment to the conflicts panel if the Public Defender's Office did not have sufficient resources available because it was "the type of lower level felony case that was very likely to settle without trial." *Id.* at 126-27 ¶ 17. Coker speculates that the Labor Day weekend, and perhaps a large volume of cases associated with "the end of summer

vacation[,] . . . parties, and the excessive consumption of alcohol" related to the holiday, could have contributed to the Public Defender's Office's need to refer some cases to outside counsel and to the timeline of Farrow's case, but he states that he "cannot state for certain" the reason for the volume of cases. *Id.* at 127 ¶ 18.

Coker also looks to what happened after each Plaintiff received counsel and appeared in court a second time, and states that those fact patterns support the conclusion that Plaintiffs were not prejudiced by the delay in appointing counsel and that receiving counsel earlier would not have affected their cases. *Id.* at 127-28 ¶¶ 20-21. With respect to section 27706, Coker states that the statute does not address how much time may elapse between a request of counsel and provision of counsel, and that Lipetzky carried out her obligations to both Plaintiffs by assigning them conflict counsel. *Id.* at 128-29 ¶¶ 22-23. He also asserts that the issue is moot in light of the County's commitment to provide counsel at all indigent felony defendants' first appearances under the ACER program that was implemented in the years since Plaintiffs' arraignments. *Id.* at 129 ¶ 23. Finally, Coker responds to some of the points made in Boruchowitz's report, primarily by asserting that the standards and best practices that Boruchowitz invokes go beyond what is required under the Sixth Amendment. *Id* at 129-30.

At his deposition, Coker testified that he "was not asked to look at the whole system," but instead "to take a microscopic look at two cases and render [his] opinion on that." Martin Decl. Ex. 3 (Coker Dep.) at 140, 56:5-7. He

declined to offer an opinion on whether it is "reasonable to delay representation for a period of five to 13 days or sometimes longer" in other cases, stating that it would not be an informed opinion. *Id.* at 140-41, 56:19-57:3. He conceded that "as a matter of good practice [he] would hope that it wouldn't take you two weeks to see the client, even if you have that much time to appear in court," but testified that the reasonableness of the delay would depend on actual and potential harm caused by the delay. *Id.* at 142, 44:3-12. "[A]fter looking at the facts of the two cases and looking at [Martin's] appointment and what [he] did and when [he] did it, [Coker] determined that it was reasonable." *Id.* at 143, 45:6-8. Coker also conceded that a two-week delay in meeting with counsel could cause prejudice or be unreasonable in some cases, such as the facts of the *Rothgery* case where the plaintiff had been held unnecessarily, or where a defendant relied on videotape evidence that was overwritten in the intervening period. *Id.* at 143, 45:9-44; *id.* at 144, 60:11-15. Coker testified generally to the importance of conducting a prompt investigation and that "[i]t is a good practice to interview any client that you're going to represent at the first opportunity you have." *Id.* at 149-53, 27:19-31:10.

Coker testified that "conflicts checks are rather tedious things to do," and that he had experienced cases as a chief deputy public defender "where it took us a week to get it all figured out," although he did not recall a case where a conflicts check took two weeks, and even in those cases his office either appeared for or arranged for private attorneys to appear for each defendant at the first court appearance. *Id.* at 147-48, 71:10-72:2.

Coker was not aware "off the top of [his] head" of any other county in California that used the bifurcated arraignment procedure previously employed by Contra Costa County. *Id.* at 155, 43:5-8.

C. The Parties' Present Arguments

The parties' arguments in their briefs on the motions for summary judgment are summarized below. Arguments regarding the County's motion to exclude Boruchowitz's testimony (dkt. 126) are addressed in context in the Court's analysis of that issue.

1. Plaintiffs' Motion for Summary Judgment

Plaintiffs seek summary judgment granting equitable relief and nominal damages on their individual claims, or alternatively, summary adjudication of issues including whether they were deprived of their Sixth Amendment right to counsel and whether the County had a policy of deliberate indifference to Plaintiffs' rights. Pls.' Mot. for Summ. J. ("Pls.' MSJ," dkt. 125) at 1-2.

Plaintiffs contend that to prevail on a Sixth Amendment claim based on the County's policy of inaction, they must show: (1) that they were deprived of a constitutional right; (2) that the County had a policy; (3) that the policy "amounts to deliberate indifference to" the right; (4) that the policy was the "moving force behind" the violation of that right. *Id.* at 3 (quoting *Oviatt ex rel. Waugh v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992)). They argue that *Strickland*'s "individualized analysis requirement"

is not the appropriate framework through which to view a case "seeking prospective, systemic reform." *Id.* at 18 (citing *Church v. Missouri*, 268 F. Supp. 3d 992, 2017 WL 3383301 (W.D. Mo. 2017)). Plaintiffs cite decisions from various state courts eschewing individualized analysis in cases based on systemic failure to provide appointed counsel, as well as the Supreme Court's decision in *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967), which considered the general risks to a defendant facing a post-indictment lineup without counsel, rather than the particular circumstances of the defendant in that case. Pls' MSJ at 18-19. They argue that the Court should look to "the grave potential for prejudice inherent in the written Policy of agreeing to withhold representation till any date the court chooses so long as the date is at least three court days out," and that the circumstances here amount to a systemic violation of indigent criminal defendants' right to appointed counsel because the County's public defender "set no outside limit on the length of the delay, did not pay any attention to the length of the delay, delegated responsibility for the length of the delay in representation to the court, and kept no records from which the outside [i.e., maximum] length of the delay could be determined." *Id.* at 19.

Plaintiffs argue that the County cannot rely on lack of funding as a basis for delay, *id.* at 20 (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)), but that even if the Court were to consider funding as a factor in assessing reasonableness, the evidence shows that providing counsel at indigent defendants' first court appearance actually saved the County money

after it changed its policy to do so in most cases. *Id.* at 21. They also contend that the County cannot escape responsibility by arguing that the state courts prevented it from providing counsel at defendants' first appearance because the evidence shows that only one courthouse actually prohibits that practice in some circumstances (the Richmond courthouse, in misdemeanor cases), and because the 1984 letter indicates that the public defender was, at least at that time, prepared to represent defendants three days after their first appearances, as opposed to the longer delays that defendants (including Plaintiffs here) experienced in more recent years. *Id.* Perhaps to some extent contradicting their contention that the courts were not responsible for the delays, Plaintiffs also argue that "eligibility and conflicts checks were never a factor in determining the delay in providing counsel" because the Public Defender's Office "had nothing to do with setting the duration of time between the first and second arraignment proceedings." *Id.* at 22.

Plaintiffs invoke Boruchowitz's report as "document[ing] 55 reasons why [the County's] Policy was unreasonable under the totality of the circumstances," although they do not identify or discuss any of those reasons in their motion. *Id.* They argue that the County "has not contradicted a single study or standard referenced by Professor Boruchowitz, or refuted a single factor that he considered." *Id.* Plaintiffs also rely on a 2012 report by Lipetzky stating that the County had the highest rate of pretrial detainees (as a percentage of the total jail population) in the state, and on the fact that County's expert witness was not aware of other

California counties that similarly failed to provide counsel at a defendant's first court appearance. *Id.* at 22-23. According to Plaintiffs, the lack of justification for the earlier "Policy" of failing to provide counsel at first appearances, combined with the potential for prejudice that Boruchowitz identified, establishes that the failure to provide counsel was unreasonable. *Id.* at 23.

Plaintiffs also argue that for purposes of section 27706, the burden is on the County to provide justification for a delay in providing counsel. *Id.* They contend that the County has failed to provide any justification, and that the rationale of the decision of the Maryland Court of Appeals (that state's highest court) applying Maryland's then-existing public defender law in *DeWolfe v. Richmond*, 434 Md. 403, 76 A.3d 962 (2012),[12] applies equally to section 27706 in California. Pls' MSJ at 23-25.

In support of their request for an injunction, Plaintiffs argue that a constitutional violation with potential to recur satisfies the "irreparable injury" and "inadequacy of legal remedies" requirements, and that although Plaintiffs were ultimately provided with counsel and their criminal prosecutions have since ended, they have standing to

12. On reconsideration, the Maryland court reached the same conclusion that counsel was required at a defendant's first appearance, but based that conclusion on the Maryland Declaration of Rights (a component of the state's constitution) rather than on the public defender statute, which the state legislature had amended in the intervening period to specifically exclude any requirement for representation at the type of hearing at issue in the case. *DeWolfe v. Richmond*, 434 Md. 444, 454-55, 464, 76 A.3d 1019 (2013).

seek prospective relief under the "relation back" doctrine discussed by the Supreme Court in *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991), and under the Ninth Circuit's framework for class actions challenging policies or officially sanctioned patterns of unlawful behavior as discussed in *Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir. 2001), *abrogated on other grounds as stated in Davidson v. Kimberly Clark Corp.*, 873 F.3d 1103, 1113 (9th Cir. 2017). Pls' MSJ at 26-27. Plaintiffs contend that the subsequent implementation of the ACER program does not moot their claims because "it is reasonable to expect that the practice of denying representation to indigent criminal defendants will recur without the injunction sought," and because the County has not taken action to remedy the Richmond courthouse's practice of prohibiting public defender representation at first appearances of out-of-custody misdemeanor defendants. *Id.* at 28-29. Plaintiffs also argue that they are entitled to nominal damages and declaratory judgment. *Id* at 29-34.

2. The County's Opposition to Plaintiffs' Motion for Summary Judgment

The County argues that Plaintiffs' motion should be denied because it fails to address the circumstances of Plaintiffs' individual experiences during their criminal prosecutions. Def.'s Opp'n (dkt. 137) at 1, 12-13. It contends that it "did not have a policy of 'withholding representation' for a period of days," but rather did not provide counsel at first appearances because the Public Defender's Office did not have a sufficient number of attorneys to

staff those appearances. *Id.* at 13. Although the County does not dispute that "attachment occurred at the initial appearance," it argues that it is "undisputed that [Plaintiffs] had counsel present at every critical stage," and that the delay in providing counsel was reasonable because Plaintiffs have not presented evidence that it "caused either of them any actual prejudice or posed any grave potential for prejudice." *Id.* at 14.

Despite this Court's previous determination that delayed appointment of counsel under *Rothgery* is its own Sixth Amendment violation distinct from the *Strickland* or *Cronic* tests for ineffective assistance of counsel, *see* Apr. 2017 Order at 25, the County continues to argue that *Rothgery* "should be read in conjunction with" those cases. Def.'s Opp'n at 15. Even if the Court disagrees with that approach, however, the County contends that "a critical or necessary factor in establishing any violation of the right to counsel is the impact, or potential impact, on Plaintiffs' criminal proceedings." *Id.* at 15-16. The County notes that the *Rothgery* decision discussed appointment of counsel within a reasonable time to allow for representation at "critical stages" before trial, and that Justice Alito's concurrence in that case construed the Sixth Amendment right to counsel as protecting only the effectiveness of assistance at trial, not "'other objectives that may be important to the accused.'" *Id.* at 15, 18 (citing *Rothgery*, 554 U.S. at 212, and quoting *id.* at 216 (Alito, J., concurring)).

Turning to the facts of this case, the County argues that Plaintiffs have not presented evidence to support

the forms of actual prejudice alleged in their complaint, specifically that the delay in appointing counsel affected Farrow's ability to locate witnesses relevant to his case and Wade's ability to gather statements from a witness while her memory of his interrogation was fresh regarding *Miranda* warnings and whether he was wearing a sweatshirt that tied him to the crimes. *Id.* at 19-21. It contends that the possible forms of prejudice identified by Boruchowitz "do not apply to Plaintiffs themselves," with the exception of Boruchowitz's opinion that Wade faced potential prejudice in obtaining witness statements while the witness's testimony was fresh, which the County argues was not based on review of the actual facts of Wade's case. *Id.* at 22-23. The County contends that Boruchowitz's reliance on professional standards and guidelines is unavailing because he conceded that there is not a national consensus on this issue and that some states do not provide counsel at initial appearances. *Id.* at 23-24.

The County also argues that any statements from Lipetzky suggesting that the previous practice of withholding counsel at first appearances was harmful or unreasonable do not bind the County because a public defender's interests are often adverse to a county's interests in cases like this one, and that the 1984 letter discussing the Public Defender's Office ability at that time to provide counsel for Richmond cases within three days of the first appearance does not establish that longer delays are unreasonable under *Rothgery* because it does not take into account the effect of such a delay on the proceedings. *Id.* at 22-23. The County points to the "undisputed facts" that the state court (not the public defender) set the length

of time between appearances, that the Public Defender's Office "took steps to ascertain whether there were any urgent issues needing to be addressed," and that deputy public defenders or appointed conflicts counsel could and sometimes did begin working on a case before the second court appearance. *Id.* at 23; *see also id.* at 26 (arguing that the court's role in setting the second appearance negates any causal link between the County and the alleged violations). The County also argues that, contrary to suggestions made in Plaintiffs' arguments and their counsel's questions during depositions, Plaintiffs cannot analogize a delay in providing counsel to a decision by an attorney already assigned to a case to delay the initial interview of a client, because the latter circumstances are evaluated under the *Strickland* standard and Plaintiffs have not satisfied *Strickland* by showing prejudice here. *Id.* at 24 (citing *Dick v. Scroggy*, 882 F.2d 192 (6th Cir. 1989)). The County contends that Plaintiffs cannot show deliberate indifference to their rights because no decisions now or at the time of the violation clearly demonstrated that the delays at issue were unconstitutional and because Lipetzky never received complaints about delays in referrals to the conflicts panel, among other reasons. *Id.* at 24-26.

The County argues that Farrow is estopped from bringing a claim here because his lawyer objected to the delay in appointing counsel at arraignment, the state court judge did not find Farrow's rights to be violated and overruled the objection, and Farrow waived his appellate rights as part of his plea agreement. *Id.* at 26-28.

As for section 27706, the County argues that Plaintiffs cannot support a claim because they did not make a "direct request for representation" to the Public Defender's Office and the state court did not formally appoint the office to represent them. *Id.* at 28. The County contends that the Maryland case on which Plaintiffs rely is distinguishable because the Maryland statute did not condition the public defender's obligations on a request for or appointment of counsel. *Id.* at 29. The County also argues that the Public Defender's Office acted responsibly in light of the ethical conflicts preventing it from directly representing either Farrow (due to staffing constraints) or Wade (due to a conflict of interest). *Id.* at 29. The County also argues that Plaintiffs' claims for declaratory and injunctive relief are moot, and that no exception to the normal doctrines of mootness and standing applies here. *Id.* at 30-33. Finally, the County contends that certain evidence on which Plaintiffs rely is inadmissible, including Boruchowitz's opinions for the reasons stated in the County's separate motion to exclude, certain parts of Coker's testimony that the County contends were outside the scope of his expert witness designation, statements by Lipetzky that the County argues are hearsay and improper opinion testimony by a fact witness, and the 1984 letter regarding representation at the Richmond courthouse, which the County argues is irrelevant or unduly prejudicial under Rule 403 of the Federal Rules of Evidence. *Id.* at 33-35.

3. Plaintiffs' Reply in Support of Summary Judgment

Plaintiffs again argue in their reply that their claims in this "case seeking systemic reform" should "be evaluated

in terms of how the Policy [of not providing representation at first appearances] poses a grave potential for prejudice to all detainees," not based on the facts of Plaintiffs' own cases with the benefit of hindsight. Pls.' Reply (dkt. 142) at 7-9. They argue that the evidence shows that the County had a policy of withholding representation for "a period that was typically between 5 and 13 days, but was sometimes longer," and that Farrow and Wade "suffered a constitutional tort" as a result of being subjected to the policy if the policy was unconstitutional. *Id.* at 9-10. Plaintiffs therefore argue that Boruchowitz's conclusions regarding the policy as a whole are sufficient for success on their Sixth Amendment claim. *Id.* at 10. Plaintiffs argue that the County was on notice of the violation based on a criminal case where the issue was raised in 2011 and Lipetzky's own statements. *Id.* at 10-11. Plaintiffs contend that the County, not the state court, was responsible for the delay in appointing counsel because "the Public Defender authored the Policy in 1984" and has ratified that policy through words and conduct in the years since then. *Id.* at 11. Plaintiffs also dispute the County's arguments that the requests for declaratory and injunctive relief are moot. *Id.* at 11-14.

As for the County's evidentiary objections, Plaintiffs argue that Coker's testimony regarding examples of prejudicial conduct falls within the scope of appropriate cross examination and that his lack of awareness of other counties with bifurcated arraignments is an issue of fact, not expert opinion. *Id.* at 14-15. They contend that Lipetzky's statements in various reports and publications are not hearsay, or meet the tests for hearsay exceptions,

because they are admissions of a party's agent, fall within the public records exception, or are relevant to show her state of mind, and also that they do not constitute improper expert opinion. *Id.* at 15-18. Plaintiffs argue that the 1984 letter is relevant to the origin and nature of the County's policy regarding indigent representation. *Id.* at 18-19. Plaintiffs address Boruchowitz's testimony separately in their opposition to the motion to exclude. *See id.* at 14.

Plaintiffs conclude by arguing that this Court should adopt a standard that, except in emergency circumstances, counsel should be appointed within forty-eight hours of arrest and provided at the first court appearance, mirroring the requirement for determinations of probable cause established by the Supreme Court's decision in *McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661, 114 L. Ed. 2d 49. Reply at 19-20.

4. The County's Motion for Summary Judgment

The County argues in its motion for summary judgment that the "'reasonableness' determination focuses on the consequences, if any, of the delay on the criminal defendant's ability to defend the charges against her/him." Def.'s Mot. for Summ. J. ("Def.'s MSJ," dkt. 128) at 18. It contends that the Sixth Amendment only protects the right to a fair trial, and that the Court should reconsider its previous order holding that an unreasonable delay in providing counsel is distinct from the *Strickland* and *Cronic* framework for evaluating ineffective assistance of counsel. *Id.* at 18-20. According to the County, *Cronic*'s presumption of prejudice standard is consistent with

the Ninth Circuit's instruction to this Court to consider risk of prejudice, as opposed to only actual prejudice, on remand. *Id.* at 18-19. The County argues that since, in its view, grave potential for prejudice falls within the *Cronic* framework, such a claim would be barred by *Heck*, and "Plaintiffs are limited to [showing] an actual prejudice to their individual cases, which they cannot establish." *Id.* at 21.[13] But even if the Court considers potential for prejudice, the County contends that there is no evidence on which to find such potential. *Id.*

As discussed above in summarizing the County's opposition brief, the County argues that the facts here do not show actual prejudice to either Farrow or Wade as a result of delay in providing counsel. *Id.* at 22-25. The County primarily analyzes Plaintiffs' cases with the benefit of hindsight, arguing that Martin's lack of urgency in engaging an investigator to pursue potentially relevant testimony demonstrates that appointing counsel sooner would not have changed the outcome, and that at least in Wade's case the testimony did not turn out to be material because there was an audio recording of Wade's interrogation. *Id.* The County also argues that Plaintiffs cannot show deliberate indifference by the County, that the delay in appointing counsel was caused by the state

13. The County does not address the fact that actual prejudice would presumably satisfy *Strickland*'s test for reversal of Plaintiffs' convictions, and thus would also presumably be barred by *Heck*. Because the Court declines to reconsider its previous determination that unreasonable delay in appointing counsel need not be considered in the framework of *Strickland* and *Cronic*, however, there is no reason to wade back into the *Heck* analysis of the previous order.

court, and that Farrow is collaterally estopped from asserting a Sixth Amendment violation. *Id.* at 25-28. The County contends that the Public Defender's Office's policy of interviewing defendants promptly after referral to identify urgent issues shows that prejudice was not foreseeable from the delay in appointing counsel, and asserts without citation to evidence that "generally speaking, a week or even two weeks is not likely to result in destruction of critical evidence." *Id.* at 27.

The County asks the Court to dismiss the section 27706 claim for lack of subject matter jurisdiction if summary judgment is granted for the County on the Sixth Amendment claim, and argues that even if the Court retains jurisdiction over the state law claim, the County is entitled to summary judgment because the Public Defender's Office did not receive a direct request for representation from Plaintiffs and was not appointed to represent them by the state court, and because the Public Defender's Office could not represent them due to ethical conflicts and properly referred their cases to the conflicts panel. *Id.* at 28-31. The County contends that Plaintiffs' claims for declaratory and injunctive relief are moot. *Id.* at 31-35.

5. Plaintiffs' Opposition to the County's Motion for Summary Judgment

Plaintiffs argue that the County's "argument that actual prejudice is required is a nonstarter, as the County bizarrely insists upon a legal standard that both this Court and the Ninth Circuit Court of Appeals have explicitly

rejected." Pls.' Opp'n to Def.'s Mot. for Summ. J. ("Pls.' Opp'n to MSJ," dkt. 135) at 6. Plaintiffs also argue that it is not appropriate to focus on the facts of their case for assessing potential prejudice, and instead contend that the Court should look "whether a Policy of arbitrarily delaying representation to all indigent jailed criminal defendants for 5 to 13 days, and sometimes longer — *without any reference to the facts of their underlying criminal cases* — poses a grave potential for prejudice." *Id.* Plaintiffs argue that the facts of their cases do, however, support a conclusion that delay caused potential for prejudice—in Wade's case, because the prosecution was able to add charges without having to seek leave of the court, and in Farrow's case, because the need for conflicts counsel was caused by the County's failure to provide sufficient funding to the Public Defender's Office and "myriad potentials for prejudice" could arise from a nearly two week delay that "cannot properly be evaluated in hindsight." *Id.* at 7-8.

Plaintiffs argue that the evidence supports a finding of deliberate indifference, and that the County had a written policy of delaying representation, as memorialized in the 1984 letter, a 2010 statement by Lipetzky to a local newspaper describing the Public Defender's Office's practices, memoranda from 2012 describing the then-current state of affairs in the context of proposals to establish the ACER program, and statements on the Public Defender's Office website. *Id.* at 9-10. Plaintiffs also argue that a lack of sufficient resources to provide counsel at defendants' first appearances is not a valid reason for delay, but instead is itself a failure to meet the County's obligations under *Gideon.* Id. at 10. Plaintiffs argue that

"California criminal procedure is exacting" and assert, without citation to evidence so stating, that Contra Costa was the only county in California that systematically denied representation to in-custody defendants at their first court appearances. *Id.* at 12.[14] Plaintiffs also argue that the County was on notice of "the problem" as a result of arguments raised "in a motion and petition for writ of mandamus in a case to which it was a party," although Plaintiffs do not contend that the court in that case determined that the County's practices were improper. *Id.* at 13. Plaintiffs contend that Lipetzky's testimony that some defendants remained in jail longer because they did not receive representation and that some defendants are now being released earlier under the ACER program demonstrates that defendants who did not receive earlier representation suffered prejudice within the meaning of *Strickland.* Id. at 14.

With respect to Lipetzky's testimony that paralegals interviewed defendants after their first court appearances to address "immediate concerns," Plaintiffs argue that "there is absolute no proof of a single case where the Public Defender did anything other than eligibility conflicts checks during the . . . period between appearances," and assert without citation to authority that "the failure to provide proof where a party would logically provide it creates the inference that such proof does not exist." *Id.* at 13.

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14. Plaintiffs cite Coker's testimony that he did not, "off the top of [his] head," know of other jurisdictions in California that had such a policy. *See* Pls.' Opp'n to MSJ at 12; Martin Decl. Ex. 3 (Coker Dep.) at 155, 43:5-7. That testimony does not show that no other jurisdiction had such a policy.

Plaintiffs contend that Farrow is not estopped from bringing a Sixth Amendment claim because the Sixth Amendment claim was not actually litigated or necessary to the judgment in his criminal case, and the issues are not the same. *Id.* at 14-17. Plaintiffs argue that the *Strickland* and *Cronic* paradigms applicable in criminal cases, including Farrow's case where Martin raised the issue of delayed appointment, do not apply to this civil case. *Id.* at 17.

Plaintiffs concede that section 27706 does not require a public defender to represent a defendant until that defendant requests that the public defender do so or at court appoints the public defender to do so, but argue that where a defendant has told a judge that the defendant would like appointed counsel and the judge referred that request to the public defender, the defendant has effectively requested representation from the public defender within the meaning of the statute. *Id.* at 18-19. Plaintiffs also argue that the County has not offered a sufficient reason why the Public Defender's Office did not have attorneys available to represent defendants at their first appearances. *Id.* at 19.

Plaintiffs contend that their claims for prospective relief are not moot, in part because the County still delays representation by bifurcating arraignment proceedings for defendants where the Public Defender's Office has clear conflicts of interest, in which cases arraignments are continued by up to two days to resolve the conflict. *Id.* at 19-21. Plaintiffs also argue that the new policy shows that delays of more than two days to resolve conflicts issues in their own cases were unreasonable. *Id.* at 21.

Plaintiffs conclude their opposition brief, as in their reply in support of their own motion, with an analogy to the *McLaughlin* case and an argument that the same presumptive deadline of forty-eight hours after a warrantless arrest to conduct a probable cause determination should apply to appointment of counsel. *Id.* at 23-24.

6. The County's Reply in Support of Summary Judgment

The County argues in its reply that the steps taken and facts discovered in Plaintiffs' criminal cases after counsel was appointed demonstrate that the delay in providing counsel after their first court appearances did not actually cause prejudice or a grave potential for prejudice. Def.'s Reply in Support of Mot. for Summ. J. ("Def.'s Reply re MSJ," dkt. 141) at 8-10. The County contends that the Court should not consider "hypothetical injuries not present in [Plaintiffs'] own cases," and that regardless, adverse effects to a defendant's pretrial liberty interest are not cognizable as prejudice in a Sixth Amendment claim. *Id.* at 10-11. The County argues that Plaintiffs also have not established that the potential injuries that they cite "are so inherent and frequent in cases where there is no counsel at the initial hearing as to warrant the presumption of prejudice," in contrast to the dangers that the Supreme Court considered when it recognized a right to counsel at post-indictment lineups in *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). Def.'s Reply re MSJ at 11-12. The County further argues that counsel cannot be required under the Sixth

Amendment at a defendant's first appearance because *Rothgery* explicitly permits a reasonable period of time to appoint counsel after attachment of the right, and that there is no national consensus on whether counsel must be provided at defendants' first appearances, citing the Department of Justice report surveying state standards. *Id.* at 12-13.

The County briefly contends that Plaintiffs have not shown a policy of deliberate indifference, *id.* at 13-14, that the state court rather than the County was responsible for the length of delay, *id.* at 14, and that Farrow is collaterally estopped from bringing a Sixth Amendment claim, *id.* at 14-15. If the Court does not dismiss the section 27706 claim for lack of jurisdiction, the County argues that it is entitled to summary judgment because a referral from the state court to the Public Defender's Office is not equivalent to a direct request from a defendant or appointment by the court, and because the Public Defender's Office acted reasonably in light of its ethical conflicts after the referrals. *Id.* at 15-16. The County also continues to argue that Plaintiffs' claims for declaratory and injunctive relief are moot, and that no exception applies. *Id.* at 16-19.

III. ANALYSIS

A. Motion to Exclude Expert Testimony and Other Evidentiary Objections

Rule 702 of the Federal Rules of Evidence permits a party to offer testimony by a "witness who is qualified as an expert by knowledge, skill, experience, training,

or education." Fed. R. Evid. 702. This Rule embodies a "relaxation of the usual requirement of firsthand knowledge," *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and requires that certain criteria be met before expert testimony is admissible. The Rule sets forth four elements, allowing such testimony only if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. These criteria can be distilled to two overarching considerations: "reliability and relevance." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011). The inquiry does not, however, "require a court to admit or exclude evidence based on its persuasiveness." *Id.*

The reliability prong requires the court to "act as a 'gatekeeper' to exclude junk science," and grants the court "broad latitude not only in determining whether an expert's testimony is reliable, but also in deciding how to

determine the testimony's reliability." *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 145, 147-49, 152, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)). Evidence should be excluded as unreliable if it "suffer[s] from serious methodological flaws." *Obrey v. Johnson*, 400 F.3d 691, 696 (9th Cir. 2005).

The relevance prong looks to whether the evidence "fits" the issues to be decided: "scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes," and "[e]xpert testimony which does not relate to any issue in the case is not relevant." *Daubert*, 509 U.S. at 591. "Where an 'expert report' amounts to written advocacy . . . akin to a supplemental brief, a motion to strike is appropriate because this evidence is not useful . . . ." *Williams v. Lockheed Martin Corp.*, No. 09CV1669 WQH (POR), 2011 U.S. Dist. LEXIS 58716, 2011 WL 2200631, at *15 (S.D. Cal. June 2, 2011) (citation omitted; first ellipsis in original). Moreover, "an expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law[; . . .] instructing the jury as to the applicable law is the distinct and exclusive province of the court." *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) (citations and internal quotation marks omitted). An expert nevertheless may, in appropriate circumstances, rely on his understanding of the law and refer to the law in expressing an opinion regarding professional norms. *Id.* at 1016-17.

The County moves to exclude the opinions of Plaintiffs' expert Robert Boruchowitz, arguing that his

testimony only "fits" the case if it corresponds to harms that actually befell Farrow and Wade, and faulting Boruchowitz for failing to review evidence regarding the particular prosecutions at issue in this case. Because hindsight is generally inappropriate in assessing *potential* for prejudice, the Court agrees with Plaintiffs that Boruchowitz had no need to review evidence pertaining to proceedings after Plaintiffs' second court appearances, such as the timing of work by investigator Ringgenberg and evidence later available or unavailable. On the other hand, to the extent that the Court's analysis focuses on the particular circumstances of Wade and Farrow's prosecutions, Boruchowitz's failure to discuss those circumstances in any detail renders his opinions unsuited for that analysis.

To the extent that the Court looks more generally to whether the County's former policy violated the Sixth Amendment rights of criminal defendants as a class, Boruchowitz's expertise and experience qualifies him to identify risks associated with delayed appointment of counsel, and his statements identifying such risks are admissible expert opinion. The County's motion is DENIED as to those portions of Boruchowitz's report. But while those ill effects support a conclusion that delay is bad, it is less clear whether they can support a conclusion that a particular period of delay is or is not reasonable. Boruchowitz's ultimate conclusion—that "it is not reasonable to wait to appoint counsel for five to thirteen days after the first court appearance"—is not based on any discernable framework for determining reasonableness. *See* Boruchowitz Report ¶ 49. Along the

same lines, Boruchowitz's "opinion that it is critical to have counsel begin work on the case of an accused person as soon as possible," *id.*, only raises the question of when appointment is "possible." Taken literally, and devoting unlimited resources, it would likely be *possible* to appoint counsel for every defendant the moment that the right to counsel attached, but as discussed below, a rule requiring appointment at that time would be inconsistent with the "reasonable time after attachment" standard applicable here. If Boruchowitz's opinion is read more liberally as requiring appointment "as soon as [reasonably] possible," *see id.*, it only begs the original question of what delay is reasonable. The County's motion to exclude these opinions on the ultimate question at issue is GRANTED.

Boruchowitz's opinions regarding section 27706 consist solely of legal analysis "akin to a supplemental brief" and thus do not constitute admissible opinion evidence. *See Williams*, 2011 U.S. Dist. LEXIS 58716, 2011 WL 2200631, at *15; *see also Hangarter*, 373 F.3d at 1016. The County's motion is GRANTED to exclude those opinions as evidence. Because, as discussed below, the Court declines to exercise jurisdiction over Plaintiffs' claim under that statute, the Court need not decide whether it would be more appropriate to consider Boruchowitz's analysis of section 27706 as supplemental argument or to disregard it entirely.

The Court also excludes and disregards the portions of Boruchowitz's report addressing case law interpreting the Sixth Amendment. *See, e.g.*, Boruchowitz Report ¶¶ 46-48 (block-quoting case law from the United States

Supreme Court and an 1883 decision of a New York state court). If Plaintiffs wanted Boruchowitz to present legal arguments, they could have retained him as counsel rather than as an expert, or requested that he file an amicus brief on behalf of himself or one of the indigent defense organizations with which he works. Such arguments fall outside of Boruchowitz's role as an expert witness.

This order assumes for the sake of argument that all of the other evidence to which the County objects is admissible. The Court agrees with the County, however, that statements by Lipetzky do not constitute binding judicial admissions on behalf of the County, nor are her or any other witness's personal opinions as to what the Sixth Amendment requires in this context relevant to the Court's interpretation of the law.

B. Legal Standard for Summary Judgment Under Rule 56

Summary judgment on a claim or defense is appropriate "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). In order to prevail, a party moving for summary judgment must show the absence of a genuine issue of material fact with respect to an essential element of the non-moving party's claim, or to a defense on which the non-moving party will bear the burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Once the movant has made this showing, the burden then shifts to the party opposing summary judgment to designate "'specific facts showing there is a genuine issue for trial.'" *Id.* (citation omitted); *see also* Fed. R. Civ. P. 56(c)(1) ("A party asserting that a fact . . . is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . . ."). "[T]he inquiry involved in a ruling on a motion for summary judgment . . . implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The non-moving party has the burden of identifying, with reasonable particularity, the evidence that precludes summary judgment. *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). Thus, it is not the task of the court to scour the record in search of a genuine issue of triable fact. *Id.; see Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001); Fed. R. Civ. P. 56(c)(3).

A party need not present evidence to support or oppose a motion for summary judgment in a *form* that would be admissible at trial, but the *contents* of the parties' evidence must be amenable to presentation in an admissible form. *See Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir. 2003). Neither conclusory, speculative testimony in affidavits nor arguments in moving papers are sufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979). On summary judgment, the court draws all reasonable factual inferences in favor of the non-movant, *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007),

but where a rational trier of fact could not find for the non-moving party based on the record as a whole, there is no "genuine issue for trial" and summary judgment is appropriate. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

C. Plaintiffs' Claim Under § 1983 and the Sixth Amendment

Both parties seek summary judgment on Plaintiffs' claim under 42 U.S.C. § 1983 that the County failed to honor their right to counsel under the Sixth Amendment of the United States Constitution. The parties agree that the Ninth Circuit's *Oviatt* decision describes the appropriate framework for a claim for failure to act to preserve a constitutional right. That case held that a plaintiff bringing such a claim under § 1983 "must establish: (1) that he possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy 'amounts to deliberate indifference' to the plaintiff's constitutional right; and (4) that the policy is the 'moving force behind the constitutional violation.'" *Oviatt*, 954 F.2d at 1474 (quoting *City of Canton v. Harris*, 489 U.S. 378, 389-91, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)). The analysis here both begins and ends with the first element: whether Plaintiffs were deprived of a constitutional right.

1. The Sixth Amendment and *Rothgery*

The Sixth Amendment provides in relevant part that in "all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Appendix B

U.S. Const. amend. VI. The Supreme Court addressed "attachment" of the right to counsel in *Rothgery* as follows:

> The Sixth Amendment right of the "accused" to assistance of counsel in "all criminal prosecutions" is limited by its terms: "it does not attach until a prosecution is commenced." *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991); see also *Moran v. Burbine*, 475 U.S. 412, 430, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). We have, for purposes of the right to counsel, pegged commencement to "'the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,'" *United States v. Gouveia*, 467 U.S. 180, 188, 104 S. Ct. 2292, 81 L. Ed. 2d 146 (1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972) (plurality opinion)). The rule is not "mere formalism," but a recognition of the point at which "the government has committed itself to prosecute," "the adverse positions of government and defendant have solidified," and the accused "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby, supra*, at 689.

Rothgery, 554 U.S. at 198. The Court went on to hold in that case that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge

against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel," reversing a decision by the Fifth Circuit that the right had not attached because no prosecutor was aware of or involved with the plaintiff's first court appearance. *Id.* at 213.

Formally, the Supreme Court resolved only the question of whether the right had attached, and declined to "decide whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights" or "what standards should apply in deciding this." *Id.* The Court hinted at the answer to that question, however, by stating that "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Id.* at 212.

2. Legal Standard for Unreasonable Delay

As noted above, the Ninth Circuit instructed this Court to consider the question of whether the County provided counsel within a reasonable time after attachment as stated in *Rothgery*, which does not require Plaintiffs to show "actual prejudice." *Farrow*, 637 F. App'x at 988-89. Plaintiffs' surviving Sixth Amendment claim is limited to that issue. *See* Apr. 2017 Order at 21-27. With the exception of one district court that used a standard of actual prejudice inconsistent with the Ninth Circuit's instructions here, this Court is not aware of any decision articulating a standard by which to evaluate

reasonableness of delay. *See id.* at 26 (discussing *Grogen v. Gautreaux*, No. 12-0039-BAJ-DLD, 2012 U.S. Dist. LEXIS 120411, at *9-11 (M.D. La. July 11, 2012), *report and recommendation adopted*, 2012 U.S. Dist LEXIS 120404 (M.D. La. Aug. 24, 2012)).

The language that the Supreme Court and Ninth Circuit used to describe the requirement for timely appointment rules out possibilities of how to apply the standard that fall at both extremes of the potential significance of attachment. First, and contrary to Plaintiffs' arguments and their expert's personal view of the right to counsel, *Rothgery* cannot be understood as requiring counsel to be appointed *at* an indigent defendant's first court appearance, because the decision specifically provides for "a reasonable time *after* attachment," and also holds that the right attaches at such an appearance. 554 U.S. at 212-13 (emphasis added). Thus, except where a defendant's first appearance is itself a critical stage requiring representation, or arises after such a critical stage, at least some time between the first appearance and the appointment of counsel is constitutionally permissible. Second, and contrary to the County's arguments here, the majority opinion's framing of the issue as "a reasonable time *after attachment*," rather than "before a critical stage," precludes a framework that looks *only* to the timing of appointment with respect to upcoming criminal stages. *See id.* (emphasis added); *cf. id.* at 218 (Alito, J., concurring) ("Texas counties need only appoint counsel as far in advance of trial, and as far in advance of any pretrial 'critical stage,' as necessary to guarantee effective assistance at trial."). Although

the majority opinion's phrasing explicitly recognizes the importance of adequate representation at critical stages, it also requires some evaluation of whether the period of time between attachment and appointment is reasonable. Both of these conclusions are bolstered by the Ninth Circuit's instruction for this Court to consider "*how soon after the Sixth Amendment right attaches must counsel be appointed*, . . . at what point does delay become constitutionally significant," and "whether the delay in appointing counsel was unreasonable." *Farrow*, 637 F. App'x at 988 (emphasis added).[15]

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15. Affording due respect to, on one hand, Justice Alito, and on the other, Professor Boruchowitz, the majority opinion's "reasonable time after attachment" language could be understood as dicta in light of the Court's statement that its "narrow" holding was limited to the issue of whether the right had attached and that the Court therefore had "no occasion to consider what standards should apply in deciding" whether a delay in appointment of counsel actually violated the Sixth Amendment. *Rothgery*, 554 U.S. at 213. Outside of the context of this case, one could perhaps reasonably argue that the language on which this order focuses is not binding, and either that the time between attachment and appointment of counsel is not in itself significant (and the appropriate metric is instead solely the time between appointment and a critical stage) or that appointment is required at the time of attachment. Taking into account the Ninth Circuit's instructions remanding this case, however, this Court has no occasion to reconsider whether the phrase at issue in *Rothgery* would in itself constitute binding precedent. *See Farrow*, 637 F. App'x at 988 (stating that the "remaining question is whether Lipetzky appointed counsel within a 'reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself,'" and instructing this Court to consider Plaintiffs' claim in that context).

In its previous order, this Court indicated that it would look to "the totality of the circumstances" to determine whether delay in providing counsel was constitutionally unreasonable, taking into account "the time needed to prepare for an upcoming critical stage," but not limiting the analysis to that factor. Apr. 2017 Order at 27. The Court is not persuaded that any alteration of that framework is warranted.

3. Plaintiffs Have Not Presented Evidence Sufficient to Establish a Violation Based on a Facially Unconstitutional Policy or Deliberate Indifference

Plaintiffs argue that the Court need not and should not consider the particular circumstances of their individual experiences to find a violation of their rights under the Sixth Amendment based on the County's policy of failing to provide counsel at criminal defendants' first court appearances. The record presented here does not support such a finding.

As a starting point, the Court declines to accept Plaintiffs' invitation to set a per se rule as to how much time after attachment is presumptively reasonable. *See* Pls.' Reply at 19-20 (asking the Court to hold that "arrangements for provision of counsel should [presumptively] occur within 48 hours of arrest, and that counsel should [presumptively] be provided at the first court appearance"). Plaintiffs cite no authority for the proposal that "arrangements for provision of counsel" must begin before the right to counsel attaches. As previously discussed and as determined by the court of

appeals, the right to counsel only attached at Wade and Farrow's first appearances. Moreover, as discussed above, the Court construes *Rothgery* as foreclosing a rule that counsel must be provided at the first appearance under the circumstances presented here. Finally, the record in this case is not amenable to crafting the kind of rule Plaintiffs seek. It is true that courts have, in some circumstances, fashioned rules to protect constitutional rights that incorporate clear time periods. *See, e.g., McLaughlin*, 500 U.S. at 56-57 (establishing a presumptive time limit of forty-eight hours for probable cause determinations after warrantless arrests). If Plaintiffs wish for this Court to derive from the "reasonable time" standard endorsed by the Supreme Court and Ninth Circuit a hard rule that, under the Sixth Amendment, counsel must always be appointed within a fixed amount of time after attachment—or that some fixed period is presumptively reasonable or unreasonable absent a showing to the contrary—they have not presented the sort of evidence that would allow the Court to do so. Derived from the federal Constitution, such a rule would presumably apply nationwide, in jurisdictions with a wide range of resources, caseloads, and current practices.

Boruchowitz's report, to the extent that it complies with *Daubert*, identifies a number of ways that delay in appointing counsel can potentially harm an indigent defendant. That there is some risk of such harm is not controversial—the Supreme Court recognized as much in *Rothgery*: "a defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be

ready with a defense when the trial date arrives." 554 U.S. at 210. For the most part, Boruchowitz does not tie the risks that he identifies to a particular period of delay, and Coker focuses his opinions on the particular circumstances of Plaintiffs' cases rather than considerations affecting a typical case. The evidentiary record before the Court therefore provides no basis to determine how much time a generic, competent public defender's office (or other system for appointing counsel) would need to provide a defendant with an attorney—or in other words *how much delay is reasonable*, and thus tolerable, under the Constitution in a typical case.

The record that Plaintiffs have presented also does not show that the Public Defender's Office employed an inherently unconstitutional policy in delaying appointment of counsel.

With the possible exception of the 1984 letter regarding arrangements at a particular courthouse where neither Farrow nor Wade appeared—a letter of which Lipetzky was not aware before this litigation, and for which there is no evidence that those arrangements continued in force even at that courthouse through the time of Plaintiffs' prosecutions—Plaintiffs cite no evidence of a policy to withhold representation for any particular period of multiple days. While there is some evidence regarding typical periods *between court appearances*, the only evidence cited regarding the timing of *representation* indicates that the Public Defender's Office received referrals from the court "sometime between" the two court dates, Baker Decl. Ex. D (Lipetzky Dep.) at 44:21-23,

or as stated in Lipetzky's declaration, the next business day after the first appearance, Lipetzky Decl. ¶ 3, and defendants waited "up to"—i.e., at most—"two weeks in custody . . . to be represented by an attorney," Martin Decl. Ex. 1 (Lipetzky Dep.) at 030, 64:2-12. The record also indicates that the Public Defender's Office initiated contact with criminal defendants before the second court appearance. Martin Decl. Ex. 1 at 037 (excerpt from the Public Defender's Office website stating that "a paralegal, law clerk or attorney" would interview defendants in custody "before the next court date"); *see also* Baker Decl. Ex. C (Requests for Admissions) ¶ 7 (indicating that a staff member met with Farrow the next business day after his first court appearance, which was nine days before his second appearance); Lipetzky Decl. ¶ 6 (same).

Plaintiffs cite no evidence that, as a matter of course, the County "appoint[ed] counsel five to thirteen days and 'sometimes longer' after the right attaches." *Cf. Farrow*, 637 F. App'x at 988-89 (instructing this Court to consider at the pleading stage whether Plaintiffs' allegation that the County utilized such a test stated a claim for unreasonable delay under *Rothgery*). Aside from their own individual experiences, Plaintiffs have not presented evidence that such a policy exists, and cannot prevail on the basis that a hypothetical policy would violate the Sixth Amendment.[16]

16. Even if Plaintiffs had established the existence of such a policy, the record is not conducive to determining its reasonableness, for much the same reasons that, as discussed above, this record would not allow the Court to develop a per se rule of how much time is permissible. The lack of evidence regarding broad topics like, for example, logistical challenges to appointing counsel, processes for

The only policy actually supported by the record is that counsel was provided "sometime between" the first court appearance and the second court appearance. *See* Baker Decl. Ex. D (Lipetzky Dep.) at 44:21-23. Such a policy—i.e., appointing counsel between attachment of the right and the first critical stage—does not inherently violate *Rothgery*'s requirement that counsel be appointed "within a reasonable time after attachment to allow for adequate representation at any critical stage." *See* 554 U.S. at 212.

Plaintiffs also contend that the County used a policy that allowed for arbitrary periods of delay in appointment of counsel, and that this policy of indifference—rather than, as addressed above, a policy of a particular length of delay—itself violated Plaintiffs' Sixth Amendment right to counsel, regardless of the delay (or lack thereof) that Plaintiffs themselves experienced. *See* Pls' MSJ at 18-20. In making that argument, Plaintiffs implicitly disregard the first element of the *Oviatt* test—that Plaintiffs were deprived of a right—by assuming that demonstrating a policy of indifference to the right to timely provision of counsel would in itself suffice to show that they were deprived of a constitutional right.

Plaintiffs rely on cases considering the right to due process, citing *Oviatt*'s examination of whether a jail had sufficient internal procedure to track whether

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resolving conflicts and caseload constraints, and accepted practices and timelines in other jurisdictions would still leave the finder of fact without sufficient facts to justify a conclusion that the policy, on its face, was constitutionally unreasonable.

inmates' liberty interests established by Oregon law were sufficiently protected, and the Supreme Court's decision in *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978), which held that even students whose suspensions were justified and who suffered no other actual injury were deprived of their procedural due process rights as a result of constitutionally defective procedures and thus entitled to nominal damages. *See Carey*, 435 U.S. at 266; *Oviatt*, 954 F.2d at 1473-76; Pls.' Mot. at 19-20 (citing *Carey*); Pls.' Opp'n to MSJ at 11-12 (discussing *Oviatt*). In those cases, however, the defendants' indifference, lack of safeguards, or defective procedures were themselves components of the deprivation of a right because the right at issue was a *right to process*. Here, the Plaintiffs' surviving constitutional claim is for the right to counsel, and specifically the right to appointment of counsel within a reasonable time after attachment. *See Farrow*, 637 F. App'x at 987 (affirming dismissal of Plaintiffs' due process claims); Apr. 2017 Order at 27-28 (allowing Plaintiffs' *Rothgery* Sixth Amendment claim to proceed). Plaintiffs have not presented authority for the proposition that a criminal defendant who is in fact provided counsel within a reasonable period of time after attachment nevertheless suffers a deprivation under the Sixth Amendment if the process by which counsel is provided lacks safeguards to ensure timeliness.[17]

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17. Even if this case included a due process claim, which in its present form it does not, it is not at all clear that the Due Process Clause would govern the process by which counsel is appointed. The Fourteenth Amendment provides that a state may not "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV. While indigent criminal defendants certainly

Accordingly, on the record before the Court, Plaintiffs cannot prevail based on a per se rule of when counsel should be appointed, a theory of systemic deficiency based on a generally applicable policy of delay, or a theory that deliberate inaction or indifference itself violates the Sixth Amendment without need to consider the specific circumstances of Plaintiffs' own appointment of counsel.

4. Plaintiffs' Individual Experiences

Without establishing a per se rule of how long a delay is permissible or showing that the County subjected Plaintiffs to an inherently impermissible policy, Plaintiffs could of course still prevail by showing that the particular delays that they each experienced were constitutionally unreasonable under the totality of the circumstances, *see* Apr. 2017 Order at 27, and that the County is liable under *Monell* and *Oviatt* for its deliberate failure to prevent such unreasonable delays. To meet *Oviatt*'s first element of deprivation of a constitutional right, Plaintiffs must show that the County in fact did not provide them with counsel within a reasonable time after attachment.

That is not to say, however, that the County can rely on circumstances after counsel was appointed to show, post

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have a right under the Sixth Amendment to timely appointment of counsel, Plaintiffs have not argued that indigent defendants have a liberty or property interest in timely appointment such that an inadequate procedure in determining the time of appointment would effect a constitutional deprivation in itself under the Due Process Clause, even if counsel was timely appointed within the meaning of the Sixth Amendment.

hoc, that the time of appointment was reasonable because it did not actually affect Plaintiffs' ability to defend themselves in the criminal proceedings against them. Although *Rothgery*'s "reasonable time after attachment" requirement has not yet been subject to significant analysis in the courts, the concept of reasonableness more generally is a familiar one, and does not generally include the benefit of hindsight. *See, e.g., Premo v. Moore*, 562 U.S. 115, 132, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011) (considering the reasonableness of counsel's conduct in the context of a *Strickland* ineffective assistance claim, and holding that "hindsight cannot suffice for relief when counsel's choices were reasonable and legitimate based on predictions of how the trial would proceed"); *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (holding in the context of the Fourth Amendment that the "'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight"); *Zebley v. Heartland Indus. of Dawson, Inc.*, 625 F.3d 449, 457-58 (8th Cir. 2010) (holding that a district court correctly stated the standard for negligence under North Dakota law when it instructed jurors that they should not consider hindsight in determining how a reasonable person exercising ordinary care would have behaved). Moreover, to engage in post hoc analysis of how the delay affected Farrow and Wade would run afoul of the Ninth Circuit's admonition that Plaintiffs need not show actual prejudice. In the context of *Rothgery*, the appropriate test is therefore whether counsel was provided within a period of time after attachment that was reasonable under the circumstances of a defendant's case, as such

circumstances were apparent at the time of attachment and during the intervening period before counsel was provided. The Court declines to consider developments in Plaintiffs' cases that occurred, or circumstances that only became clear, after Martin was assigned and agreed to represent them.

There is some dispute as to whether it is appropriate to take into account considerations that are not directly related to the fairness of the criminal trial, such as the potential effects of confinement on a criminal defendant's employment or child custody, among other risks identified in Boruchowitz's report. The County cites *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006), for the proposition that the right to counsel is limited to the purpose of ensuring a fair trial, and that the only relevant potential for prejudice would be the potential for an unfair trial. *See* Reply Re Mot. to Exclude at 3. The passage on which the County relies, however, describes "the right to the *effective* assistance of counsel," which the Supreme Court originally derived from the Due Process Clause and later recognized as also arising from "the Sixth Amendment's purpose of ensuring a fair trial." *Gonzalez-Lopez*, 548 U.S. at 146-47 (emphasis added). The Court contrasted that right with the "right to select counsel of one's choice," which "has been regarded as the root meaning of the constitutional guarantee," and which requires no showing of prejudice to establish a violation of a defendant's right under the Sixth Amendment. *Id.* at 147-148. As discussed in this Court's previous order, this Court construes the right to timely appointment of *any* counsel as distinct from

the right to *effective* counsel. *See* Apr. 2017 Order at 25 ("Moreover, it is not clear that the same standards apply to a case involving delayed appointment of counsel, like this case, as would apply to cases involving ineffective assistance of counsel, as in *Strickland* and *Cronic*."); *see also Hurell-Harring v. State*, 15 N.Y.3d 8, 22, 930 N.E.2d 217, 904 N.Y.S.2d 296 (2010) (holding that allegations that "counsel was simply not provided at critical stages of the proceedings . . . state[d] a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*"). Because it does not affect the conclusion that the County is entitled to summary judgment, the Court assumes for the sake of argument that considerations aside from the fairness of trial are relevant to whether counsel was appointed within a reasonable period of time after attachment

Having addressed the framework to apply and the sort of considerations that are relevant, the Court turns to whether the delays that Plaintiffs experienced were reasonable.

a. *Time Allowed to Prepare for a Critical Stage*

As a starting point, with respect to the only factor specifically identified by the Supreme Court in *Rothgery*, the time allowed after appointment for counsel to prepare for upcoming critical stages in Plaintiffs' cases does not suggest that the delay was unreasonable. The Ninth Circuit affirmed this Court's determination, based on allegations that do not differ significantly from the evidence in the record as to this issue, that Plaintiffs' first appearances

were not critical stages, but that their second appearances for "further arraignment" were critical stages. *Farrow*, 637 F. App'x at 988. The question as to this factor, then, is whether the timing of appointment reasonably allowed for adequate representation at the second appearances. *See id.* (quoting *Rothgery*, 554 U.S. at 212). Asked how much time a lawyer needs to prepare for arraignment, Boruchowitz testified that a lawyer appointed in advance "should spend a good hour meeting with the client before you do anything," and if "appointed right there in the courtroom, you try to take as much time as the judge will give you." Martin Opp'n Decl. Ex. 12 (Boruchowitz Dep.) at 28:7-16.

Martin was assigned to Farrow's case one day before Farrow's second appearance for arraignment and to Wade's case three days before Wade's second appearance for arraignment. Baker Decl. Ex. F (Martin Dep.) at 9:25-10:6, 31:23-33:5; Martin Supp'l Decl Ex. 4 at 162 & Ex. 5 at 167. That timing allowed for the sort of preparation that Boruchowitz testified is appropriate, and there is no other evidence in the record suggesting that more time would be necessary for an attorney to provide adequate representation at an arraignment. Moreover, it is difficult to see how appointment one or more days before a defendant's arraignment could be construed as providing inadequate time to prepare when appointing counsel *at* a first appearance that includes arraignment—the process that Plaintiffs seek to require, which the County has in large part adopted in the years since this case was filed, and which is widely used in other jurisdictions—provides less time for counsel to prepare than was available in

either Plaintiff's case. There is also no evidence that Martin believed he had insufficient time to prepare for Plaintiffs' second appearances. The factor of sufficient time to prepare for a critical stage therefore weighs against finding the delay unreasonable for either Plaintiff.

The next question is whether evidence in the record pertaining to other relevant factors would nevertheless require the conclusion that the delay in appointment for either Plaintiff was unreasonable (as Plaintiffs assert) or reasonable (as the County asserts) based on the totality of the circumstances. The Court examines each Plaintiff's circumstances separately, beginning with Wade.

b. *Other Factors Relevant in Wade's Case*

Wade, one of five codefendants, first appeared in court on Monday, November 14, 2011, and his right to counsel therefore attached. Martin Supp'l Decl. Ex. 5 at 165; Lipetzky Decl. ¶ 9. The Public Defender's Office determined that it had a conflict three days later on November 17. Lipetzky Decl. ¶ 9 & Ex. D. The Alternate Defender's Office determined that it also had a conflict the following day, November 18, and the case was referred to the conflicts panel and assigned to Martin that same day. *Id.* ¶ 9 & Ex. E; Baker Decl. Ex. F (Martin Dep.) at 31:23-33:5. Martin began working on the case that day—four days after Wade's right to counsel attached. *See id.* at 37:16-39:4; Baker Decl. Ex. R.

Coker, an experienced public defender who before his retirement was in charge of the San Diego County

Public Defender's Office, states in his report that "the fact that attorney Martin's assignment to represent Wade in this complex and serious five-defendant case occurred only four days after Wade's initial court appearance seems quite reasonable under all these circumstances and entirely consistent with diligent efforts to arrange for counsel." Martin Decl. Ex. 3 at 126 ¶ 16. Although Boruchowitz—who is also an experienced public defender—identifies a number of generic risks inherent in delayed provision of counsel that would tend to weigh against the reasonableness of any delay, his report and testimony do not address how much time is reasonable to resolve conflicts of interest in a case with several codefendants, and thus do not refute Coker's opinion on that issue. *See* Martin Decl. Ex. 2 at 094-97, 101-04 ¶¶ 15.1-15.13, 37-48. Nor is the Court persuaded that the fact that the County's more recent practice under the ACER program (which devotes more resources to provide counsel at first appearances) calls for resolving conflicts within "not more than two days," Lipetzky Decl. ¶ 15, creates a material factual dispute. The possibility of faster appointment does not contradict Coker's conclusion that the four-day conflicts process in Wade's case was reasonable. Followed to its logical conclusion, a rule that reasonableness requires that all *possible* efforts and resources must be devoted to minimizing delay in provision of counsel would essentially require appointment at all defendants' first appearances—an outcome that, as discussed above, is not consistent with the law of the case or with *Rothgery*'s allowance of a reasonable delay.

Even assuming for the sake of argument that the delay in appointing counsel allowed charges to be added against Wade that would not otherwise have been permitted without leave of the court, and that the delay affected his school principal's recollection of his interrogation to his detriment, there is no evidence aside from Coker's opinion as to how much time is reasonable for a public defender's office to resolve conflicts of interest in a case like Wade's. Because Coker's opinion on that issue is undisputed, and taking into account the fact that there is no evidence that the delay left counsel with insufficient time to prepare for a critical stage, no rational finder of fact could conclude on this record that the four-day delay in Wade's case was unreasonable. The County's motion for summary judgment is therefore GRANTED as to Wade's Sixth Amendment claim, and Plaintiffs' motion is DENIED as to that claim.

c. *Other Factors Relevant in Farrow's Case*

Farrow's case presents a closer call, because there is essentially no evidence in the record explaining a reason for the longer delay of twelve days between attachment of his right to counsel and Martin's assignment to represent him. The Public Defender's Office determined that appointment from the conflicts panel was necessary in light of its excessive caseload, but neither Coker nor Boruchowitz addresses the amount of time reasonable to arrange for such appointment. Coker's speculation that the Labor Day holiday weekend might have led to more criminal cases than usual does not appear to be based on any evidence, and regardless, does not explain why

appointment of conflict counsel in such circumstances should take twelve days. *See* Martin Decl. Ex. 3 at 127 ¶ 18.

The totality of the circumstances, however, is not limited to merely the length of the delay. In Farrow's case, the Public Defender's Office dispatched a paralegal to meet with Farrow and inquire about his case on the next business day after his first court appearance, which, due to the long weekend, was four calendar days later. Lipetzky Decl. ¶ 6. The paralegal completed a report of the interview on a form that included sections for medical or psychiatric history, bail information or "general comments," and case notes "re case progress, problems, settlement," among other topics. Lipetzky Decl. Ex. B. According to Lipetzky, "[n]either the referral packet itself nor the interview with Mr. Farrow disclosed any urgent issues pertaining to Mr. Farrow or the charges that had to be addressed in advance of" the next appearance. Lipetzky Decl. ¶ 6. Coker's report states his opinion that "[t]his interview process would have identified, but did not, any matter in Farrow's criminal case requiring immediate attention." Martin Decl. Ex. 3 at 127 ¶ 20. Lipetzky states in her declaration that in cases where the paralegal interview identified such issues, the Public Defender's Office "would take steps to address these immediate needs." Lipetzky Decl. ¶ 4.[18]

18. Plaintiffs assert that there is no evidence that the Public Defender's Office actually took such steps. Pls.' Opp'n to MSJ at 13. Plaintiffs do not, however, identify any evidence contradicting Lipetzky's statement, and in the absence of contrary evidence there is no reason to conclude that Lipetzky's declaration under penalty of perjury about the procedure that her office followed is not accurate.

Boruchowitz's report generally identifies potential harms that could result from delayed appointment of counsel because of issues that counsel would recognize and might redress if appointed sooner. *See* Martin Decl. Ex. 2 at 094-97, 101-04 ¶¶ 15.1-15.13, 37-48. Boruchowitz's report does not, however, address whether a paralegal could identify those issues, and thus does not rebut Coker's conclusion that the paralegal who interviewed Farrow would have identified any such issues if they had applied to Farrow. As for whether the paralegal interview was itself unreasonably delayed, if the Court accepts the premise (based on the Supreme Court's formulation of the rule in *Rothgery*) that some delay is permissible, Boruchowitz's report does not provide a standard to evaluate how much delay is reasonable, and Plaintiffs do not identify other evidence in the record to support a conclusion that meeting with a defendant on the next business day after attachment of the right to counsel is unreasonable, particularly where the next court appearance is not imminent, and where the Public Defender's Office generally did not receive referrals from the Superior Court until that next business day, *see* Lipetzky Decl. ¶ 3.

The evidence that the paralegal interview would have revealed any issues requiring attention before the second appearance, and that it in fact revealed no such issues, is uncontroverted. The evidence also shows, as discussed above, that Martin was appointed with enough time to prepare for the first critical stage of Farrow's case. Taking into account all of the facts and circumstances of Farrow's case, no reasonable finder of fact could conclude on this record that the twelve-day delay in appointing

counsel in that case was constitutionally unreasonable. The County's motion for summary judgment is therefore GRANTED as to Farrow's Sixth Amendment claim, and Plaintiffs' motion for summary judgment is DENIED as to this claim.

* * *

Because the Court concludes that a rational finder of fact could not find on this record that provision of counsel to Farrow and Wade was unreasonably delayed for the purpose of the Sixth Amendment, the Court does not reach the parties' remaining arguments regarding the Sixth Amendment claim, including whether Farrow is collaterally estopped from bringing such a claim and whether the practices at issue violated the Sixth Amendment rights of potential class members other than the current Plaintiffs. Without evidence to support the conclusion that Plaintiffs' own Sixth Amendment rights were violated, Plaintiffs cannot represent a class of other individuals on their claims that the County's practices violated the rights of putative class members. In any event, the Court does not decide whether the rights of the non-party putative class members were violated, as no class has been certified. Although Plaintiffs' own Sixth Amendment claims are dismissed with prejudice, the claims of other members of the putative class are not before the Court, and this order does not bar any person other than Wade and Farrow from bringing such a claim.

D. Plaintiffs' Claim Under California Government Code Section 27706

Plaintiffs' remaining claim under section 27706 of the California Government Code is a state law claim that falls within this Court's subject matter jurisdiction, if at all, under the doctrine of supplemental jurisdiction codified by 28 U.S.C. § 1367(a). Under subsection (c) of that statute, however, a district court "may decline to exercise supplemental jurisdiction over a claim under subsection (a) if," among other reasons, "the claim raises a novel or complex issue of State law" or "the district court has dismissed all claims over which it has original jurisdiction." *Id.* § 1367(c). "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the [supplemental] jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988).

This case raises what appear to be novel issues of how quickly section 27706 requires a public defender to provide representation upon request or appointment, whether and how ethical conflicts affect that inquiry, and whether a referral of a plaintiff's request for counsel by a court to a public defender's office triggers the public defender's obligations under section 27706 as either a direct request by the plaintiff for representation by the public defender or an appointment of the public defender by the court. Plaintiffs present no argument in their briefs why this case

warrants a deviation from the usual approach of declining to exercise state law claims after all federal claims have been dismissed. The Court therefore GRANTS the County's request and dismisses Plaintiffs' section 27706 for lack of subject matter jurisdiction, without prejudice to Plaintiffs bringing that claim in a court of competent jurisdiction.

IV. CONCLUSION

For the reasons discussed above, the Court concludes that a reasonable finder of fact could not find that the delay in providing counsel after Plaintiffs' first appearances in their criminal cases was constitutionally unreasonable. To be clear, in reaching this determination, the Court considers only what conclusions can be drawn from the record available, and does not purport to hold that a four- or twelve-day delay is presumptively reasonable, or that an interview by a paralegal before counsel is appointed can necessarily substitute under the Sixth Amendment for providing an attorney. Based on the evidence presented in this case, however, Plaintiff's motion for summary judgment is DENIED, the County's motion for summary judgment is GRANTED as to Plaintiffs' claim under 42 U.S.C. § 1983 and the Sixth Amendment, and Plaintiffs' claim under California Government Code section 27706 is DISMISSED for lack of subject matter jurisdiction, without prejudice to Plaintiffs bringing that claim in a court of competent jurisdiction. The Clerk is instructed to enter judgment accordingly and to close the file.

Because the claims of the putative class are not before the Court, this order does not bar absent putative class members from bringing any claim in a separate action.

IT IS SO ORDERED.

Dated: January 2, 2019

/s/ Joseph C. Spero
JOSEPH C. SPERO
Chief Magistrate Judge

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, DATED APRIL 28, 2017

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 12-cv-06495-JCS

JOHN FARROW, *et al.*,

Plaintiffs,

v.

ROBIN LIPETZKY,

Defendant.

April 28, 2017, Decided;
April 28, 2017, Filed

ORDER REGARDING MOTION TO DISMISS THIRD AMENDED COMPLAINT

Re: Dkt. No. 93

JOSEPH C. SPERO, Chief United States Magistrate Judge.

I. INTRODUCTION

In this putative class action under 42 U.S.C. § 1983, Plaintiffs John Farrow and Jerome Wade allege that

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Defendant Robin Lipetzky, in her official capacity as the Contra Costa County Public Defender, violated Plaintiffs' Sixth Amendment right to counsel by implementing a policy of delaying appointment of counsel until several days after a criminal defendant's first appearance in court. Plaintiffs also bring related claims under California law. The Court twice previously dismissed Plaintiffs' claims. After the second dismissal, Plaintiffs appealed to the Ninth Circuit, which reversed this Court's holding as to certain aspects of Plaintiffs' claim under the Sixth Amendment, and remanded for this Court to consider whether Plaintiffs have adequately alleged that Lipetzky failed to provide counsel within a reasonable time after attachment of the right.

Lipetzky moves to dismiss once again. Among other arguments, she raises for the first time the question of whether Plaintiffs' claims are barred by the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994). The Court held a hearing on January 20, 2017. For the reasons discussed below, Lipetzky's motion is GRANTED in part and DENIED in part.[1]

1. The parties have consented to the jurisdiction of the undersigned magistrate judge for all purposes pursuant to 28 U.S.C. § 636(c).

II. BACKGROUND

A. Plaintiffs' Allegations and Facts Subject to Judicial Notice

Plaintiffs allege that Lipetzky implemented a written policy that "arbitrarily withheld legal representation to indigent, in-custody criminal defendants for a period of 5 to 13 days after their initial Court appearance." 3d Am. Compl. ("TAC," dkt. 91) ¶ 1. Under that policy, a defendant would not receive counsel at his or her first court appearance, but if a defendant requested counsel at that appearance and could not afford to pay, the court would set bail, refer the defendant to the public defender, and continue the case for a "further arraignment" several days later. *See id.* ¶¶ 1-2, 4, 21, 27, 36.

Plaintiff Farrow was arrested on August 30, 2011, based on allegations that he had assaulted his domestic partner. *Id.* ¶¶ 25, 31. He first appeared in court on September 2, 2011, at which time the judge asked if he could afford counsel and would like the court to appoint counsel. *Id.* ¶¶ 26-27. Farrow replied that he could not afford counsel and would like appointed counsel, and the judge "set bail, 'referred the matter to the Public Defender,' and continued the matter to September 15, 2011 for 'further arraignment.'" *Id.* ¶ 27. The judge also asked the probation department to prepare a bail study, which was prepared during the period between the two court appearances and included only information unfavorable to Farrow because, without counsel, there was no way for him to provide mitigating information such as his ties to

the community or employment status. *Id.* ¶ 28. The judge did not advise Farrow of his right to enter a plea at the first appearance, and Farrow remained in jail for the next thirteen days. *Id.* ¶ 27.

Farrow was appointed counsel and entered a plea at his second appearance on September 15, 2011, which was sixteen days after his arrest and thirteen days after his first appearance. *Id.* ¶ 29. According to Plaintiffs, the delay in Farrow obtaining counsel "might have" contributed to his investigator's failure to locate witnesses whose testimony could have implicated the credibility of the complaining witness (Farrow's domestic partner) and thus "would have had an enormous impact on plea negotiations and may have resulted in acquittal had the matter gone to trial." *Id.* ¶ 31. Farrow pled guilty to one count against him on December 1, 2011. Def.'s Req. for Judicial Notice ("RJN," dkt. 94) Ex. A.

Plaintiff Wade, then seventeen years old, was arrested at his high school on November 8, 2011 for his alleged involvement in a convenience store robbery. TAC ¶¶ 32, 43. Wade first appeared without counsel on November 14, 2011. *Id.* ¶ 33.[2] A country prosecutor also appeared in court that day, which Plaintiffs contend made the appearance "an adversarial encounter." *Id.* ¶ 35. The judge set bail and asked Wade whether he could afford counsel and whether he would like counsel appointed. *Id.* ¶ 36. Wade responded that he could not afford counsel and would like appointed

2. Plaintiffs allege that Wade was held illegally for four days before his first appearance, but do not argue that that detention is relevant to Wade's claims against Lipetzky. *See* TAC ¶ 34.

counsel, and the judge "'referred the matter to the Public Defender,' and continued the matter to November 21 for 'further arraignment.'" *Id.* The judge did not advise Wade of "his right to enter a plea, his right to bail, his right to prompt arraignment or his right to a speedy preliminary hearing and trial." *Id.* As in the case of Farrow, the judge also referred the matter to the probation department for a bail study, which did not include information favorable to Wade because he did not have counsel. *Id.* ¶ 37. Wade remained in jail for seven days. *Id.* ¶ 36.

During the period between Wade's first and second court appearances, the police and district attorney continued their investigation of his case. *Id.* ¶ 39. On November 18, 2011, the district attorney filed an amended complaint adding new charges and significantly increasing Wade's exposure. *Id.* ¶ 40. The district attorney was able to do so without leave of the court because Wade had not yet entered a plea. *Id.*

Wade was appointed counsel at his second court appearance on November 21, 2011. *Id.* ¶ 41. Later, his investigator interviewed his high school principal, who had been present when the police interrogated Wade. *Id.* ¶ 42. The principal could not remember when Wade was given *Miranda* warnings or whether he had been wearing a sweatshirt that connected him to the robbery. *Id.* ¶¶ 42, 43. Plaintiffs allege that the principal "likely" would have remembered what Wade was wearing if she had been interviewed sooner, and suggest (but do not specifically allege) that her memory of the *Miranda* warnings would have been clearer as well. *See id.* Wade pled guilty to three counts on December 6, 2012. RJN Ex. B.

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Plaintiffs characterize their claims as "a facial challenge to the constitutionality of Defendant's written policy of arbitrarily withholding counsel for an unreasonable period of time," and seek to represent a class consisting of all persons who "were subjected to the deprivation of counsel at their first court appearance and were forced to continue their cases for 5 days or more for appointment of counsel, pursuant to the Public Defender's written Policy," from December 21, 2010 through the resolution of this action. TAC ¶¶ 45-48.

The Third Amended Complaint includes three claims: (1) a claim under 42 U.S.C. § 1983 for violation of Plaintiffs' Sixth Amendment right to counsel, TAC ¶¶ 56-58; (2) a claim under the Bane Act, sections 52 and 52.1 of the California Civil Code, for violation of Plaintiffs' civil rights, TAC ¶¶ 59-60; and (3) and a claim under sections 1085 and 1086 of the California Code of Civil Procedure for a writ of mandate to enforce section 27706 of the California Government Code, which requires public defenders to represent criminal defendants "at all stages of the proceedings," TAC ¶¶ 61-63.

Although the Third Amended Complaint includes allegations that Lipetzky's policy sometimes resulted in delays in appointing counsel longer than thirteen days, Plaintiffs have stipulated that the Court may disregard that allegation for the purpose of Lipetzky's motion to dismiss. *See* Case Mgmt. Statement (dkt. 87) at 4.

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B. Procedural History

1. May 2013 Order

Plaintiffs' original complaint included six claims: (1) violation of Plaintiffs' right to counsel under the Sixth Amendment; (2) violation of Plaintiffs' right to a speedy trial under substantive due process protections of the Fourteenth Amendment; (3) violation of Plaintiffs' right to a speedy trial under procedural due process protections of the Fourteenth Amendment; (4) violation of Plaintiffs' procedural due process rights under the Fourteenth Amendment with respect to the timing of Plaintiffs' bail hearings; (5) violation of California Civil Code sections 52 and 52.1; and (6) a claim for a writ of mandate to enforce California Government Code section 27706. *See* Order Granting Def.'s Mot. to Dismiss Compl. ("May 2013 Order," dkt. 47) at 5-6.[3]

The Court held that Plaintiffs' right to counsel attached at their first court appearances, but that neither that appearance nor the waiting period before the second appearance was a "critical stage" at which counsel was required. *Id.* at 14-20. The Court also held that the delay in appointing counsel between the time of attachment and the second appearance—which, unlike the first, was a critical stage—did not violate the Supreme Court's instruction that counsel must be provided within a reasonable time after attachment, because the delay was shorter than

3. *Farrow v. Lipetzky*, No. 12-cv-06495-JCS, 2013 U.S. Dist. LEXIS 65824, 2013 WL 1915700 (N.D. Cal. May 8, 2013) .

in other district court cases that found no violation, and because Plaintiffs did not adequately allege that they were prejudiced by the delay. *Id.* at 20-22 (citing *Rothgery v. Gillespie County*, 554 U.S. 191, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008)). The Court therefore dismissed Plaintiffs' Sixth Amendment claim with leave to amend. *Id.* The Court also dismissed Plaintiffs' other federal claims with leave to amend, for reasons that are not relevant to the present motion because Plaintiffs have not renewed those claims. *Id.* at 23-31. With no federal claims remaining, the Court declined to exercise supplemental jurisdiction over Plaintiffs' state law claims. *Id.* at 31-32.

2. August 2013 Order

After the Court dismissed the initial complaint, Plaintiffs amended their complaint twice, and Lipetzky moved to dismiss the second amended complaint. *See generally* Order Granting Def.'s Mot. to Dismiss 2d Am. Compl. ("Aug. 2013 Order," dkt. 69).[4] The Court granted that motion and dismissed all claims, although it allowed Wade leave to amend his Sixth Amendment claim. *Id.* at 1-2.

With respect to the Sixth Amendment claim, the Court reaffirmed its previous holdings that neither the first appearance nor the waiting period before the second appearance was a critical stage at which Plaintiffs were entitled to counsel, but the second appearance was. *Id.* at

4. *Farrow v. Lipetzky*, No. 12-cv-06495-JCS, 2013 U.S. Dist. LEXIS 111493, 2013 WL 4042276 (N.D. Cal. Aug. 7, 2013), *rev'd in part*, 637 F. App'x 986 (9th Cir. 2016).

22-26 (citing *Lopez-Valenzuela v. County of Maricopa*, 719 F.3d 1054 (9th Cir. 2013), *subsequently superseded sub nom. Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (9th Cir. 2014) (en banc)[5]). Turning to the question of whether the challenged policy failed to provide counsel within a reasonable time after attachment of the right, the Court held that although Plaintiffs added allegations regarding the effect of the delay, the allegations did not sufficiently identify any actual prejudice that Plaintiffs suffered as a result. *Id.* at 26-27. Because Plaintiffs came closer to plausibly alleging prejudice to Wade than to Farrow, the Court dismissed Wade's Sixth Amendment claim with leave to further amend but dismissed Farrow's claim with prejudice.

The Court dismissed Plaintiffs' remaining federal claims with prejudice, for reasons that are not relevant to the present motion, and again declined to exercise supplemental jurisdiction over Plaintiffs' state law claims. *Id.* at 28-35. Wade declined to further amend his Sixth Amendment claim, and Plaintiffs instead appealed to the Ninth Circuit.

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5. The initial Ninth Circuit panel to hear *Lopez-Valenzuela* affirmed the district court's grant of summary judgment for the defendants on claims under multiple constitutional theories. *See generally Lopez-Valenzuela v. County of Maricopa*, 719 F.3d 1054. This Court's August 2013 Order relied on that panel's Sixth Amendment holding. Later, an en banc panel reached a different outcome, reversing the holding as to substantive due process and finding the Arizona laws at issue facially invalid on that basis, but declined to address the plaintiffs' Sixth Amendment claims. *See Lopez-Valenzuela v. Arpaio*, 770 F.3d at 791-92.

3. Ninth Circuit Decision and Subsequent Proceedings

The Ninth Circuit affirmed this Court's dismissal of Plaintiffs' due process and equal protection claims. *Farrow v. Lipetzky*, 637 F. App'x 986, 987-88 (9th Cir. 2016) (dkt. 81), *cert. denied*, 137 S. Ct. 82, 196 L. Ed. 2d 36 (2016). As for Plaintiffs' Sixth Amendment claims, the panel affirmed this Court's conclusion that, on the facts alleged, Plaintiffs' first court appearance was not a critical stage that required the presence of counsel. *Id.* at 988. The panel held that this Court erred, however, in its analysis of whether counsel was appointed within a reasonable time after attachment of the right, and remanded for consideration of that issue under the correct legal standard:

> The remaining question is whether Lipetzky appointed counsel within a "reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Rothgery*, 554 U.S. at 212. In other words, how soon after the Sixth Amendment right attaches must counsel be appointed, and at what point does delay become constitutionally significant? Instead of addressing whether the delay in appointing counsel was unreasonable, the district court considered only whether the delay "impacted [plaintiff's] representation at subsequent critical stages of his proceedings." By framing the question in that way, the district court

> erroneously required the plaintiffs to allege actual prejudice. *See United States v. Wade*, 388 U.S. 218, 225, 236-37, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (finding a Sixth Amendment violation based on the "grave potential for prejudice"); *Hamilton v. Alabama*, 368 U.S. 52, 54, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961) (finding a Sixth Amendment violation where the absence of counsel "may affect the whole trial"). We therefore remand for the district court to consider whether appointing counsel five to thirteen days and "sometimes longer" after the right attaches complies with the "reasonable time" requirement articulated in *Rothgery*.

Id. at 988-89. The panel also directed this Court to reconsider whether supplemental jurisdiction over Plaintiffs' state law claims is appropriate in light of the Court's reconsideration of the Sixth Amendment claim. *Id.* at 989.

The Supreme Court denied Plaintiffs' petition for certiorari on October 3, 2016. *See* dkt. 102. Following remand to this Court, Plaintiffs filed their operative third amended complaint, and Lipetzky again moves to dismiss.

C. Parties' Arguments

1. Motion to Dismiss

According to Lipetzky, the Ninth Circuit's decision in this case requires this Court to consider both whether

the delay in appointing counsel created "grave potential for prejudice," and whether it resulted in actual prejudice. Mot. (dkt. 93) at 6. Lipetzky argues that Plaintiffs do not meet the standard to show the former, because the Supreme Court cases on which the Ninth Circuit relied for the "potential for prejudice" standard involved denial of counsel *at critical stages*, and the Ninth Circuit's decision did not reverse this Court's holdings that neither the first appearance nor the waiting period between appearances was a critical stage. *Id.* at 6-8 (discussing *Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149; *Hamilton*, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114). Lipetzky contends that those prior holdings are therefore the law of the case, and that Plaintiffs have not given the Court a sufficient reason to depart from those holdings. *Id.* at 8-9. To the extent Plaintiffs' present complaint could be construed as bringing an as-applied, rather than facial, challenge to the policy at issue, Lipetzky argues that actual prejudice is required for such a challenge, and Plaintiffs have not adequately alleged that they suffered actual prejudice as a result of the policy. *Id.* at 9-12.

Lipetzky also contends that Plaintiffs' Sixth Amendment claim is barred by the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994), because success on that claim would necessarily imply the invalidity of their convictions. Mot. at 12-13 (citing, *e.g.*, *Trimble v. City of Santa Rosa*, 49 F.3d 583 (9th Cir. 1995)). Lipetzky further challenges the Sixth Amendment claim on the basis that the state court, not Lipetzky, set the length of the delay. *Id.* at 13-14.

Lipetzky's motion concludes by briefly arguing that Plaintiffs' state law claims should be once again dismissed for lack of jurisdiction if she succeeds in dismissing the Sixth Amendment claim, and that if the Court reaches those claims, the Third Amended Complaint does not plausibly allege a violation of Plaintiffs' rights under state law. *Id.* at 14-15.

2. Opposition

Plaintiffs argue that their Sixth Amendment claim should not be dismissed for several reasons. First, they contend that new allegations in the Third Amended Complaint—specifically, that Plaintiffs had a right to enter a plea at the first appearance—distinguish the case in its present form from what this Court and the Ninth Circuit previously considered, and render the first appearance a critical stage requiring counsel. Opp'n (dkt. 98) at 5-6. Next, they argue that the Ninth Circuit's instruction to consider whether counsel was appointed within a reasonable time after attachment, a mandate that Plaintiffs believe contemplates a facial challenge to the policy, requires examination of factual issues inappropriate for resolution at the pleading stage. *Id.* at 6-11. Plaintiffs also contend that they have adequately alleged facts supporting an as-applied challenged, because they allege that the delay in receiving counsel affected both Wade's and Farrow's ability to gather evidence. *Id.* at 11-12. As for Lipetzky's law of the case argument, Plaintiffs respond that the Ninth Circuit did not address whether the waiting period between appearances was a critical stage, and that this Court has not yet considered

whether counsel was appointed within a reasonable time under the standard stated in the Ninth Circuit's decision. *Id.* at 13-15. Plaintiffs argue that the law of the case doctrine does not apply because the Ninth Circuit's decision constitutes intervening controlling authority, and because new allegations in the Third Amended Complaint require new analysis. *Id.* at 15.

Turning to the *Heck* doctrine, Plaintiffs argue that their claims should proceed because *Heck* "does not apply to civil matters involving criminal defendants whose convictions and sentences rest upon guilty pleas—as they do in this case." *Id.* (citing, *e.g.*, *Lockett v. Ericson*, 656 F.3d 892 (2011)). Plaintiffs also argue that their claims do not implicate *Heck* because "this Court has twice determined that there was no actual prejudice" to either Farrow or Wade, and the error was therefore harmless. *Id.* at 16. According to Plaintiffs, the cases that Lipetzky cites are not analogous because each involved a conviction at trial rather than a guilty plea. *Id.* at 16-17.

Responding to Lipetzky's argument that the court, rather than Lipetzky, determined the length of the delay, Plaintiffs contend that they have adequately alleged that the delay was caused by Lipetzky's policy, and that it is reasonable to infer that "the continuance between arraignment proceedings that Plaintiffs suffered could only occur upon agreement between the Public Defender and the Superior Court." *Id.* at 17-21.

Because Plaintiffs believe that the Sixth Amendment claim should go forward, they contend that the Court has

supplemental jurisdiction over their state law claims. *Id.* at 21. Addressing the merits of those claims, Plaintiffs argue that they should be allowed to proceed on a claim under section 52.1 of the California Civil Code for interference with their speedy trial rights under section 859b of the California Penal Code, because although the policy did not actually violate those rights, it prevented Plaintiffs from exercising their rights to enter a plea at the first appearance, which would have started the clock on their speedy trial rights under section 859b. *Id.* at 22. Plaintiffs also argue that Lipetzky's policy violated section 27706 of the California Government Code because that statute requires public defenders to represent indigent defendants "upon request . . . at all stages of the proceedings," Cal. Gov't Code § 27706, and Plaintiffs requested counsel at their first appearances—a "stage[] of the proceedings"—but did not receive counsel at that appearance. Opp'n at 23-24. Plaintiffs argue that had Lipetzky been present to represent Plaintiffs at their first appearances, she could have expedited the resolution of their cases. *Id.* at 24.

3. Reply

Lipetzky contends in her reply brief that claims based on the Sixth Amendment are evaluated either under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which requires that a person claiming ineffective assistance of counsel must show actual prejudice, or under *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), which held that prejudice can be presumed for certain structural denials of counsel. Reply (dkt. 101) at 1-3. According to Lipetzky,

Plaintiffs have not stated a *Strickland* claim because their Third Amended Complaint does not plausibly allege that either Farrow or Wade was actually prejudiced by the delay in appointing counsel. *Id.* at 8-10. She also argues that analysis of a *Cronic* claim depends only on whether counsel was denied during a critical stage, and that nothing in the Ninth Circuit's decision or Plaintiffs' Third Amended Complaint should alter the Court's conclusion that neither the first appearance nor the waiting period between appearances was a critical stage. *Id.* at 4-8. Lipetzky contends that the "only issue that the Ninth Circuit directed this Court to consider on the *Cronic* side of the ledger, which this Court did not previously consider, is whether the 'sometimes longer' allegation potentially results in a delay of constitutional import." *Id.* at 5. Because the parties have since stipulated that the Court may disregard that allegation, Lipetzky argues that the Court's prior holding should stand. *Id.*

Turning to the application of *Heck*, Lipetzky contends that *Heck* does, in fact, apply to cases where a conviction was based on a guilty plea rather than trial. *Id.* at 10 (citing *Radwan v. County of Orange*, 519 F. App'x 490, 490-91 (9th Cir. 2013)). Lipetzky also argues that Plaintiffs' "harmless error" argument is unavailing because a Sixth Amendment violation is not complete unless the criminal defendant is prejudiced—either under a *Cronic* claim for denial of counsel, where prejudice is presumed and reversal would be required per se, or under a *Strickland* claim for ineffective counsel, where the criminal defendant must demonstrate prejudice to prove a violation. *Id.* at 10 (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140,

147, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); *Smith v. McDonald*, 597 F. App'x 911, 913 (9th Cir. 2014)). Lipetzky asserts that the Ninth Circuit has never applied harmless error analysis to determine whether *Heck* bars a Sixth Amendment claim, and notes that several Ninth Circuit and district court decisions have dismissed such claims under *Heck* without considering whether the error was harmless. *Id.* at 11.

Lipetzky also continues to argue that the Sixth Amendment claim fails because the state court, not Lipetzky, set the date of the second appearance, and thus determined the length of the delay in appointing counsel. *Id.* at 12-13. As for the state law claims, Lipetzky argues that Plaintiffs have not alleged threats or coercion as required for a claim under the Bane Act, that they have conceded that their statutory speedy trial rights were not violated, and that Lipetzky complied with her duties under section 27706 of the Government Code because her office represented Plaintiffs at all "stages of the proceedings" after they requested counsel. *Id.* at 13-14.

III. ANALYSIS

A. Legal Standard

A complaint may be dismissed for failure to state a claim on which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. "The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint." *N. Star Int'l v. Ariz. Corp. Comm 'n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a

plaintiff's burden at the pleading stage is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

In ruling on a motion to dismiss under Rule 12(b)(6), the court analyzes the complaint and takes "all allegations of material fact as true and construe[s] them in the light most favorable to the non-moving party." *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint must "contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 555). "[C]ourts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Rather, the claim must be "'plausible on its face,'" meaning that the plaintiff must

plead sufficient factual allegations to "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 570).

B. *Heck v. Humphrey*

What has come to be known as the "*Heck* preclusion doctrine," "*Heck* bar," or "favorable-termination requirement" is based on the following paragraph in the Supreme Court's opinion in *Heck v. Humphrey*:

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless

> the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

Heck v. Humphrey, 512 U.S. 477, 486-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) (footnotes omitted). The Ninth Circuit has explained that under *Heck*, "'if a criminal conviction arising out of the same facts stands and is fundamentally inconsistent with the unlawful behavior for which section 1983 damages are sought, the 1983 action must be dismissed.'" *Beets v. County of Los Angeles*, 669 F.3d 1038, 1042 (9th Cir. 2012) (quoting *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005) (en banc)). Consequently, "the relevant question is whether success in a subsequent § 1983 suit would 'necessarily imply' or 'demonstrate' the invalidity of the earlier conviction or sentence." *Smith v. City of Hemet*, 394 F.3d 689, 695 (9th Cir. 2005) (quoting *Heck*, 512 U.S. at 487).

1. *Heck* and Guilty Pleas

Both parties here oversimplify the application of *Heck* to convictions obtained through plea agreements—Plaintiffs, by arguing that the doctrine "does not apply to civil matters involving criminal defendants whose convictions and sentences rest upon guilty pleas," Opp'n at 15 (citing *Lockett v. Ericson*, 656 F.3d 892, 896 (9th

Cir. 2011); *Ove v. Gwinn*, 264 F.3d 817, 823 (9th Cir. 2001)), and Lipetzky, by arguing only that "*Heck* does apply to individuals who plead guilty as opposed to being convicted by a jury," Reply at 10 (citing *Radwan v. County of Orange*, 519 F. App'x 490, 490-91 (9th Cir. 2013)). The parties' disagreement on this point reflects tension in the case law applying *Heck* in the context of guilty and no-contest pleas.[6]

Some Ninth Circuit decisions have applied *Heck* to no-contest pleas. In *Szajer v. City of Los Angeles*, the Ninth Circuit applied *Heck* to bar a § 1983 lawsuit alleging an unlawful search where the plaintiff had pled no contest to possession of an illegal assault weapon discovered during the disputed search, without explicitly discussing the issue of whether *Heck* applies to no-contest pleas. *Szajer*, 632 F.3d 607, 612 (9th Cir. 2011). More recently, the court in *Radwan* cited *Szajer* in support of its assertion that the Ninth Circuit "ha[s] repeatedly found Heck to bar § 1983 claims, even where the plaintiff's prior convictions were the result of guilty or no contest pleas." *Radwan*, 519 F. App'x at 490-91. Similarly, the court in *Chico Scrap Metal, Inc. v. Robinson* affirmed the district court's dismissal of § 1983 challenges to Department of Toxic Substances Control clean-up orders that were mandatory consequences of no-contest misdemeanor plea agreements. 560 Fed. Appx.

6. This Court has previously considered the application of *Heck* to convictions based on guilty and no-contest pleas in some detail in *Ellis v. Thomas*, 2015 U.S. Dist. LEXIS 138614, 2015 WL 5915368 (N.D. Cal. Oct. 9, 2015), a case which neither party discusses in their briefs here. Portions of the explanation of relevant law below are drawn from *Ellis* without further citation.

650, 651 (9th Cir. 2014). While the Ninth Circuit in that case did not address the issue of no-contest pleas, the district court had rejected the plaintiffs' argument that *Heck* did not apply because their "state court conviction[s were] based on their nolo contendere pleas, not the legal validity of the DTSC orders" that they challenged in their § 1983 action. *Chico Scrap Metal, Inc. v. Raphael*, 830 F. Supp. 2d 966, 971 (E.D. Cal. 2011). The district court held that case to be "exactly the kind of action barred by *Heck*," despite the defendants' nolo contendere pleas. *Id.* at 972.

In *Lockett v. Ericson*, however, the Ninth Circuit held that *Heck* did not bar a § 1983 claim for unlawful search because the plaintiff pled no contest to the charge on which the defendants based their *Heck* preclusion argument. *Lockett*, 656 F.3d at 897. There, the plaintiff's neighbor reported the plaintiff for drunk driving after the plaintiff left his car off the side of the road. *Id.* at 894. Investigating officers found the front door to the plaintiff's house ajar and entered the house. *Id.* They woke the plaintiff and administered field sobriety tests, which the plaintiff failed. *Id.* After the trial court denied the plaintiff's motion to suppress the results of the sobriety test and other observations the officers made in the plaintiff's home, the plaintiff pled no contest to a "wet reckless" driving violation under California Vehicle Code section 23103.5(a). *Id.* at 895.

The district court dismissed the plaintiff's § 1983 claim of unlawful search as barred by *Heck*. *Id.* at 896. The Ninth Circuit reversed, relying principally on *Ove v. Gwinn*, a case in which the Ninth Circuit held that

Heck did not bar § 1983 plaintiffs who pled no contest to driving under the influence from bringing a § 1983 lawsuit alleging that investigators used unqualified individuals to withdraw blood for blood tests. The court in *Lockett* reasoned that because the § 1983 plaintiff had pled no contest, his "conviction 'derive[d] from [his] plea[], not from [a] verdict[] obtained with supposedly illegal evidence.'" 656 F.3d at 896 (quoting *Ove*, 264 F.3d at 823) (all but first alteration in original). Accordingly, success on the plaintiff's § 1983 claim would not imply the invalidity of the conviction because the "conviction d[id] not in any way depend on the legality of the search of his home." *Id.* at 897 (internal quotation omitted). *Ove*, on which *Lockett* relied, in turn relied on an example presented in *Heck* itself of a claim that would not be barred under the doctrine:

> For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the § 1983 plaintiffs still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, *see Murray v. United States*, 487 U.S. 533, 539, 101 L. Ed. 2d 472, 108 S. Ct. 2529 (1988), and especially harmless error, *see Arizona v. Fulminante*, 499 U.S. 279, 307-308, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991), such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiffs conviction was unlawful. In order to recover compensatory damages, however, the § 1983 plaintiff must

> prove not only that the search was unlawful, but that it caused him actual, compensable injury, *see Memphis Community School Dist. v. Stachura, 477* U.S. 299, 308, 91 L. Ed. 2d 249, 106 S. Ct. 2537 (1986), which, we hold today, does *not* encompass the "injury" of being convicted and imprisoned (until his conviction has been overturned).

Heck, 512 U.S. at 487 n.7; *see also Ove*, 264 F.3d at 822 (quoting *Heck*).

The Ninth Circuit has since cited *Lockett* with approval. *See Jackson v. Barnes*, 749 F.3d 755, 760 (9th Cir. 2014) (noting that in *Lockett*, "a plaintiff who pled *nolo contendre* [sic] to reckless driving was not *Heck*-barred from bringing a § 1983 claim based on an alleged unlawful search because the outcome of the claim had no bearing on the validity of the plaintiff's plea"), *cert. denied*, 135 S. Ct. 980, 190 L. Ed. 2d 835 (2015). *Jackson* presents arguably a clearer case of harmless error than cases involving guilty pleas. There, plaintiff Frederick Jackson had initially been convicted of murder at a trial that included statements obtained in violation of the Fifth Amendment. *Id.* at 758-59. The Ninth Circuit reversed that conviction on habeas review in 2004, and Jackson was subsequently convicted again at a second trial that did not include the statements at issue. *Id.* at 759. Reviewing Jackson's § 1983 claim in 2014, the Ninth Circuit held that success on his civil claim for violation of the Fifth Amendment would have no bearing on his conviction at the second trial, and thus did not implicate *Heck*. *Id.* at 760-61.

Taken together, the precedent discussed above indicates that *Heck*'s inapplicability to certain cases involving guilty pleas is essentially an application of the harmless error exception first recognized in *Heck* itself, or more generally, the rule that success on a claim must *necessarily* imply the invalidity of the conviction in order to be barred by *Heck*. Where an alleged constitutional violation relates only to evidence that might or might not be admissible despite the error, might or might not be necessary to convict the defendant at trial, and regardless is not necessary for the defendant to enter a guilty plea, then a successful claim that the evidence was obtained in violation of the constitution would not necessarily imply the invalidity of the conviction. Accordingly, in considering whether *Heck* bars claims of other constitutional violations by defendants who have pled guilty to crimes, a court must look to what effect such a violation would necessarily have on the validity of the conviction.

In order to determine how *Heck, Lovett*, and the other authority discussed above apply to the present case, it is therefore necessary to understand the nature of the Sixth Amendment's guarantee of counsel—specifically, the circumstances in which violations of that right "would necessarily imply the invalidity of [a criminal defendant's] conviction or sentence." *See Heck*, 512 U.S. at 487.

2. Suitability of Harmless Error Analysis to Other Sixth Amendment Claims

As Lipetzky notes in her reply brief, courts recognize two types of *ineffective* assistance of counsel claims

under the Sixth Amendment: claims under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which require a showing of prejudice, and claims under *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), which involve circumstances "'circumstances so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified'" and prejudice may be presumed. *See Wright v. Van Patten*, 552 U.S. 120, 124-25, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008) (per curiam) (discussing both standards and quoting *Cronic*, 466 U.S. at 658); *see also Mickens v. Taylor*, 535 U.S. 162, 166, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002) (discussing both standards). Whether Plaintiffs' claim here for failure to appoint counsel at the required time is in fact an ineffective assistance claim, or is subject to the same rules as such claims, is discussed separately below.

Looking first to *Strickland*, the Supreme Court there held that a person claiming ineffective assistance of counsel must normally demonstrate likely prejudice as a result of his or her lawyer's error, i.e., "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In the years since *Strickland was* decided, courts have recognized that that its requirement of probable prejudice is not merely a question of standing or entitlement to relief, but instead a component of the constitutional violation itself: if counsel's errors were not so significant as to cast doubt on the outcome, counsel was not "ineffective" within

the meaning of the Sixth Amendment guarantee. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 147, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) ("Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced."); *Mickens*, 535 U.S. at 166 ("[D]efects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation.").

In *Cronic*, decided the same day as *Strickland*, the Supreme Court declined to require a specific showing of probable prejudice in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658. As the first example of one such circumstance, the Court stated that the "presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *Id.* at 659; *see also id.* at 662 (considering whether the criminal defendant was denied counsel at "a critical stage of the prosecution"). Other examples include counsel's wholesale "fail[ure] to subject the prosecution's case to meaningful adversarial testing," *id.* at 659 (citing *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)), and a court appointing an out-of-state lawyer—who was unwilling to represent the defendants due to his lack of time to prepare or knowledge of local procedure—on the day of trial to represent multiple defendants accused of capital crimes, *id.* at 659-60 (citing *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed.

158 (1932)). The distinction that the *Cronic* Court drew between such circumstances and claims that would require a showing of probable prejudice under *Strickland* was not that no prejudice was required for a *Cronic* claim, but rather that likely prejudice could be presumed from the nature of the error or absence of counsel.

Of course, not every violation of the Sixth Amendment's assistance of counsel clause involves the right to effective assistance of counsel. In the separate context of a defendant's Sixth Amendment right to paid counsel of his or her choosing, the Supreme Court has held that harmless error analysis is not permissible. *Gonzalez-Lopez*, 548 U.S. at 152. The Court reasoned that the right to paid counsel of the defendant's choosing is a freestanding constitutional guarantee, independent of the defendant's right to a fair trial, and to subject a denial of that right to harmless error analysis would negate the right to *choose* counsel so long as a defendant received *competent* counsel. *Id.* at 147-48. Because the defendant's right is to counsel of his or her choice, not merely competent counsel, determining the effect of the denial of that right would require comparing all of the decisions that the preferred lawyer would have made throughout the trial to the decisions that the actual lawyer did make, not merely identifying errors by the actual lawyer. *Id.* at 150. Observing that "[i]t is impossible to know what different choices the rejected counsel would have made," the Court held that denial of counsel of choice is a structural error not subject to review for harmless error. *Id.*

Each of those types of claims—ineffective assistance demonstrated to be prejudicial under *Strickland*,

structurally ineffective assistance under *Cronic*, and denial of counsel of choice under *Gonzalez-Lopez*—would likely be barred by *Heck* if brought by a plaintiff who had been convicted in the prosecution at issue, regardless of whether that conviction resulted from a guilty plea. In the case of a *Strickland* claim, that result follows from the rule that "a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced." *See Gonzalez-Lopez*, 548 U.S. at 147 (discussing *Strickland* claims). Accordingly, where a criminal defendant pled guilty, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"; without such a showing, there is no violation of the Sixth Amendment. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). A person asserting a *Strickland* claim therefore cannot show that he or she was denied effective assistance of counsel without also necessarily implying the invalidity of his or her conviction, even if it resulted from a guilty plea.[7] Essentially the same analysis applies to a *Cronic*

7. Analysis of a *Strickland* claim might in some ways resemble harmless error review, because the court must examine whether there is a reasonable probability that the attorney's error prejudiced the criminal defendant. The distinction here, however, is that if the attorney's error was harmless, there was no constitutional violation. In other words, an actual violation of the Sixth Amendment under *Strickland* can never be harmless, because if it was, it would not be a violation. *See Gonzalez-Lopez*, 548 U.S. at 147. The analysis is therefore distinguishable from, for example, a violation of the Fourth Amendment in the collection of evidence, which may be harmless to the defendant's case—and thus no basis for reversal—but nevertheless remains a constitutional violation.

claim, except that likely prejudice need not be explicitly shown because it can be inferred from the nature of the violation—even still, success on a *Cronic* claim necessarily implies the invalidity of the conviction because the presumption arising from such a violation "*requires* [a court] to conclude that a trial is unfair." *Cronic*, 466 U.S. at 659 (emphasis added). And with respect to claims for violation of the right to choice of counsel, the Supreme Court has held that a denial of that right is a structural error requiring reversal, with no occasion for harmless error review. *See Gonzalez-Lopez*, 548 U.S. at 150, 152. In each of those contexts, because a violation cannot be harmless, success on the claim would necessarily imply the invalidity of a conviction, and thus implicate the *Heck* doctrine, regardless of whether the conviction resulted from a guilty plea.

In other circumstances, however, the Supreme Court has held that a Sixth Amendment violation can constitute harmless error. One context where the Court has explicitly applied that doctrine is "where the evil caused by a Sixth Amendment violation is limited to the erroneous admission of particular evidence at trial." *Satterwhite v. Texas*, 486 U.S. 249, 257, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988) (citing, *e.g., Moore v. Illinois*, 434 U.S. 220, 98 S. Ct. 458, 54 L. Ed. 2d 424 (1977); *Milton v. Wainwright*, 407 U.S. 371, 92 S. Ct. 2174, 33 L. Ed. 2d 1 (1972)); *see also United States v. Wade*, 388 U.S. 218, 236-37, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (finding the absence of counsel at a post-indictment lineup involving witnesses who later made courtroom identifications to be harmless error, despite holding that the lineup "was a critical stage of the

prosecution at which [the defendant] was 'as much entitled to such aid (of counsel) . . . as at the trial itself'" (citation omitted)). It would follow that where a Sixth Amendment violation only affected the procurement of evidence—for example, as in *Satterwhite*, where a defendant was not able to consult with counsel before undergoing a psychiatric evaluation—a defendant who pled guilty could in some cases bring a subsequent civil claim under § 1983 without implicating *Heck*, because showing such a violation would not necessarily imply the invalidity of his or her conviction. *Cf. Lockett*, 656 F.3d at 897 (holding that *Heck* does not bar a claim that a police search violated of the Fourth Amendment where a defendant pled guilty, and the evidence obtained from the search thus was not the basis for his conviction).

Also, in one decision issued fourteen years before *Cronic*'s explanation of the per se rule for denial of counsel at critical stages, the Supreme Court held that a preliminary hearing, as used in the Alabama courts, was a "critical stage" at which counsel was required, but that denial of counsel at that hearing was subject to harmless error review. *Coleman v. Alabama*, 399 U.S. 1, 9-10, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970).

Plaintiffs here rely in part on the Ninth Circuit's decision in *Ayala v. Wong*, which adopted the Fourth Circuit's determination that the Supreme Court has used the phrase "critical stage" to mean two different things in the context of when a criminal defendant has the right to counsel as compared to in the context of when a deprivation of that right constitutes structural error. *Ayala*, 756 F.3d

656, 673 (9th Cir. 2013) (discussing *United States v. Owen*, 407 F.3d 222, 227 (4th Cir. 2005), *cert. denied*, 546 U.S. 1098, 126 S. Ct. 1026, 163 L. Ed. 2d 867 (2006)).[8] In other words, a proceeding might be a "critical stage" at which a defendant has the right to counsel, but might not be a "critical stage" such that failure to provide counsel warrants per se reversal without the need to specifically show probably prejudice. *See id.* The Supreme Court subsequently reversed *Ayala* on other grounds, without addressing the question of whether a "critical stage" for the right to counsel is necessarily also a "critical stage" for the purpose of finding structural error. *See generally Davis v. Ayala*, 135 S. Ct. 2187, 192 L. Ed. 2d 323 (2015).[9]

Other decisions by the Ninth Circuit, however, have applied a per se rule to denial of counsel at a "critical stage" without indicating that a court must examine which type of "critical stage" applies to the case at hand. For

8. Two other circuits have also adopted the reasoning of *Owen* or cited it with approval. *See Sweeney v. United States*, 766 F.3d 857, 861 n.3 (8th Cir. 2014); *Ditch v. Grace*, 479 F.3d 249, 255-56 (3d Cir. 2007)

9. The Ninth Circuit also suggested that harmless error review is appropriate for denial of counsel at a critical stage in *United States v. Perez*, a case cited by Plaintiffs here, although its discussion of that issue is dicta in light of the holding that "there [was] no constitutional right for counsel to be present" at the initial appearance in question. *United States v. Perez*, 776 F.2d 797, 800 (9th Cir. 1985), *overruled on other grounds by United States v. Cabaccang*, 332 F.3d 622, 634-35 (9th Cir. 2003). *Perez* was decided just months after the Supreme Court issued its opinions in *Strickland* and *Cronic* and does not cite or acknowledge either of those decisions, instead relying on older authority such as *Coleman* in its discussion of harmless error. *See Perez*, 776 F.2d at 800.

example, the most recent published opinion on the subject suggests a clearer rule than that discussed in *Ayala*:

> Most trial errors are subject to harmless-error analysis. However, certain errors fall within the class of "structural defects in the constitution of the trial mechanism" that "defy analysis by 'harmless-error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). "[T]he Sixth Amendment right to counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *United States v. Hamilton*, 391 F.3d 1066, 1070 (9th Cir. 2004) (quoting *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 17 L. Ed. 2d 705 & n. 5 (1967)). "[T]he absence of counsel during a critical stage of a criminal proceeding is precisely the type of 'structural defect' to which no harmless-error analysis can be applied." 391 F.3d at 1070 (citation omitted).

United States v. Yamashiro, 788 F.3d 1231, 1235-36 (9th Cir. 2015) (holding that absence of counsel at a victim allocution during the sentencing phase was structural error requiring per se reversal); *see also, e.g.*, *United States v. Benford*, 574 F.3d 1228, 1231-32 (9th Cir. 2009) ("[A]lthough most ineffective assistance of counsel claims require courts to conduct a prejudice inquiry [under *Strickland*], a complete denial of counsel at a critical stage does not."); *Musladin v. Lamarque*, 555 F.3d 830, 837-38 (9th Cir. 2009) (holding that *Cronic*'s rule of automatic reversal where counsel is denied at a critical stage remains

binding despite *Satterwhite* and *Fulminante*); *Hamilton*, 391 F.3d at 1071 (holding that the absence of counsel at a suppression hearing was structural error requiring per se reversal). Moreover, despite a number of relatively recent Supreme Court opinions recounting *Cronic*'s rule that denial of counsel at a critical stage is structural error—*e.g.*, *Wright*, 552 U.S. at 124-25; *Mickens*, 535 U.S. at 166—this Court is aware of no decision by the Supreme Court drawing any distinction between different types of critical stages in the manner of the Fourth and Ninth Circuit's *Owen* and *Ayala* decisions.

3. Application of *Heck* to Plaintiffs' Sixth Amendment Claim

The question here is how a claim for failure to appoint counsel to an indigent defendant at the required stage of the proceedings under *Rothgery* fits into the framework discussed above. The Ninth Circuit held on appeal that the Supreme Court set forth the appropriate standard for examining delay in appointment of counsel in *Rothgery*: "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Rothgery*, 554 U.S. at 212; *see Farrow*, 637 F. App'x at 988 (quoting *Rothgery*). The Court is not aware of any authority specifically considering whether failure to appoint counsel within the timeframe required by *Rothgery* is subject to harmless error analysis, or how *Heck* applies to such claims.[10]

10. *Rothgery* was itself a § 1983 case, but the criminal charges against the plaintiff had been dismissed after he was

Plaintiffs here present two arguments as to why the delay in appointing counsel violated their rights under the Sixth Amendment: (1) that the first appearance was a critical stage at which Plaintiffs were denied counsel; and (2) that even if the first appearance was not a critical stage, the delay in appointing counsel after attachment of the right at the first appearance was unreasonable. *See* TAC ¶ 57; Opp'n at 16. Plaintiffs argue that harmless error review is appropriate as to both versions of their claim, and contend that they can therefore show a violation of the Sixth Amendment and obtain nominal damages even if the error did not affect the outcome of their prosecutions. *See* Opp'n at 16 & n.6. The Court addresses Plaintiffs' two theories of violation in turn.

a. <u>Denial of Counsel at a Critical Stage</u>

Fortunately, the case at hand does not require this Court to wade into the question of whether different definitions of the term "critical stage" exist for different purposes, or, for that matter, the precedential value of *Ayala* after its reversal on other grounds by the Supreme Court. Even if some "critical stages" are not actually critical for the purpose of finding structural error, the appearances at issue here are not among those exceptions.

The Ninth Circuit's decision in this case held that Plaintiffs' second court appearances were critical stages

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appointed counsel. *See Rothgery*, 554 U.S. at 196-97. The *Heck* doctrine therefore had no bearing on that case, because there was no underlying conviction or sentence at risk of being impliedly invalidated.

"because the plaintiffs entered pleas at that hearing," although it affirmed the Court's holding that the first appearance was not a critical stage. *Farrow*, 637 F. App'x at 988 (citing *White v. Maryland*, 373 U.S. 59, 60, 83 S. Ct. 1050, 10 L. Ed. 2d 193 (1963)). Plaintiffs now renew their argument that the first appearance was also a critical stage,[11] based on a new allegation that Plaintiffs had the right under California law to enter a plea at that hearing. *See* Opp'n at 5-6 (citing *Hamilton v. Alabama*, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961)). *Hamilton*, the case on which Plaintiffs rely, held that per se reversal was warranted, without need to inquire into actual prejudice. 368 U.S. at 54. *White*, one of the Supreme Court cases on which the Ninth Circuit relied here, similarly held that a hearing at which a defendant entered a plea was a critical stage, and therefore "we do not stop to determine whether

11. Plaintiffs argue in their opposition that the Court's previous conclusion that the waiting period between appearances was not itself a critical stage is not the "law of the case" because the Ninth Circuit did not address it, but Plaintiffs do not present any reason not previously argued why this Court should depart from its prior holding on that issue. *See* Opp'n at 12-15; Aug. 2013 Order at 25-26 (concluding that the waiting period was not itself a critical stage). Moreover, although Plaintiffs suggest that the Court *could* reconsider that issue, they state that "the question in this context is *not* whether the 5-to-13-day waiting period is a 'critical stage,'" but rather whether counsel was appointed within a reasonable time after attachment. Opp'n at 15 (emphasis added). The Court's analysis of whether Plaintiffs' can pursue a claim for lack of representation at a critical hearing is therefore limited to the first appearance, which Plaintiffs more clearly argue that the Court should reconsider in light of new allegations. *See id.* at 5-6 (subsection titled "The first Appearance in California Court is a 'Critical Stage' of the Proceedings as now pled" (capitalization as in original)).

prejudice resulted: . . . the judgment below must be and is reversed." *White*, 373 U.S. at 61 (citing *Hamilton*, 368 U.S. at 55).[12] Accordingly, assuming for the sake of argument that Plaintiffs are correct that their first appearances were critical stages based on their rights to enter pleas, then *Hamilton, White*, and *Cronic* all indicate that failure to provide counsel at that appearance would be a structural error requiring per se reversal. Success on this theory would necessarily imply the invalidity of Plaintiffs' convictions, and to the extent that Plaintiffs' § 1983 claim relies on that theory, it must therefore be dismissed under *Heck*[13]

b. <u>Failure to Appoint Counsel Within a Reasonable Time</u>

In addition to their contention that they were denied counsel at a critical stage, Plaintiffs also allege that their

12. In *People v. Cox*, a case cited in Plaintiffs' opposition, a California appellate court held that denial of counsel at an arraignment at which pleas were entered was subject to harmless error review by analogy to *Coleman*, which considered the separate issue of denial of counsel at a preliminary hearing where pleas were not entered or permitted to be entered. *People v. Cox*, 193 Cal. App. 3d 1434, 1440, 239 Cal. Rptr. 40 (1987); *see Coleman*, 399 U.S. at 26 (Stewart, J., dissenting). This Court is not bound by California state court decisions on issues of federal law, and respectfully disagrees with *Cox* as inconsistent with *White* and *Hamilton*, if not also with *Cronic*.

13. As a separate and sufficient basis for dismissal of this theory, the Court also holds that Plaintiffs have not shown any right under California law to enter pleas at their first court appearances, as discussed below in the context of Plaintiffs' Bane Act claim.

rights under the Sixth Amendment were violated by Lipetzky's failure to represent them within "a reasonable time []after" the first appearance. TAC ¶ 57; Opp'n at 6-12. The Ninth Circuit instructed this Court to reconsider that issue on remand in light of *Rothgery*'s rule that counsel must be appointed "within a 'reasonable time after attachment to allow for adequate representation at any critical stage.'" *See Farrow*, 637 F. App'x at 988-89 (quoting *Rothgery*, 554 U.S. at 212)). Discussing this Court's error in requiring a showing of actual prejudice, the Ninth Circuit noted Supreme Court precedent finding Sixth Amendment violations on the lesser showing of "'grave potential for prejudice'" or "absence of counsel that 'may affect the whole trial.'" *Id.* (quoting *Wade*, 388 U.S. at 236; *Hamilton*, 368 U.S. at 54).

In a 1970 case where a criminal defendant was adequately represented at his first trial but did not meet with counsel regarding a second trial until "a few minutes before" it began, the Supreme Court affirmed a denial of habeas corpus, noting that it was "not disposed to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel." *Chambers v. Maroney*, 399 U.S. 42, 53-54, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970). *Chambers* does not fully resolve the issue, because it is not clear whether the Court intended that delayed appointment of counsel in violation of the Sixth Amendment might not always be cause for reversal (which would suggest that *Heck* does not apply), or instead that not every delay in appointing counsel violates the Sixth Amendment (which would provide no guidance regarding the *Heck* issue). To the extent that it is relevant, though,

and particularly given the likelihood that appointing counsel mere minutes before trial would violate the reasonableness standard articulated more recently in *Rothgery*, the *Chambers* decision suggests that a *Rothgery* violation does not require per se reversal of a conviction.

Moreover, in reversing this Court's previous order, the Ninth Circuit cited and relied on the Supreme Court's decision in *Wade*. *See Farrow*, 637 F. App'x at 988 (citing *Wade*, 388 U.S. at 236-37). In that case, the Supreme Court held that "there can be little doubt that for Wade the postindictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid (of counsel) * * * as at the trial itself,'" and that denial of counsel at the lineup therefore violated Wade's rights under the Sixth Amendment. *Wade*, 388 U.S. at 236-37 (quoting *Powell*, 287 U.S. at 57). The Court nevertheless reversed the Fifth Circuit's determination that the violation warranted a new trial. *Id.* at 239-43. The Supreme Court analyzed that violation in an evidentiary context, addressing the extent to which the uncounseled lineup identification tainted in-court identification by the same witnesses. *Wade*, 388 U.S. at 239-42. The Court remanded for the district court to hold a hearing "to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error." *Id.* at 242. Although the evidentiary context of *Wade* is not precisely analogous to the case at hand, *Wade* nevertheless indicates that Sixth Amendment violations based on failure to provide appointed counsel at times when a defendant is entitled to counsel do not *necessarily* invalidate a conviction. And

while the Ninth Circuit here did not address that aspect of *Wade*'s holding, the Circuit's reliance on *Wade* tends to suggest that similar principles apply to this case.

The Court is not persuaded by Lipetzky's argument that the Ninth Circuit has asked this Court to analyze Plaintiffs' claims in "the *Strickland/Cronic* framework." *See, e.g.*, Reply at 3. The panel's memorandum decision cites neither of those cases. *See generally Farrow*, 637 F. App'x 986. Moreover, it is not clear that the same standards apply to a case involving delayed appointment of counsel, like this case, as would apply to cases involving ineffective assistance of counsel, as in *Strickland* and *Cronic*. Here, the Ninth Circuit held that this Court erred in requiring Plaintiffs "to allege actual prejudice." *Id.* at 988. Although both *Strickland* and *Cronic* set forth standards of proof that require something less than an explicit showing of prejudice, that lesser burden is based on concerns regarding the feasibility and efficiency of proving prejudice by a preponderance of the evidence, not on a principle that prejudice is not required. *See Strickland*, 466 U.S. at 693-96 ("The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."); *Cronic*, 466 U.S. at 658 ("There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."). In a more recent decision, the Supreme Court characterized *Strickland* as requiring "proof of both deficient performance *and prejudice* to the defense," and described *Cronic* as establishing circumstances in

which prejudice can be presumed. *Bell v. Cone*, 535 U.S. 685, 696-97, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (emphasis added). The Ninth Circuit's determination that prejudice is *not* required in this case, which is based on delayed appointment, is not consistent with the prejudice requirements that the Supreme Court set forth in *Strickland* and *Cronic*, which require a showing of prejudice at least by inference in cases based on ineffective assistance. Those cases therefore do not set the standard applicable here.

Taking into account *Wade, Chambers*, and the Ninth Circuit's instructions on appeal, the Court holds that success on a claim for failure to appoint counsel within a reasonable time after attachment would not *necessarily* imply the invalidity of Plaintiffs' convictions in state court. To the extent that Plaintiffs' § 1983 claim is based on that theory of violation of the Sixth Amendment, it is not barred by *Heck*.

C. Reasonableness of Delay

"The Supreme Court did not decide in *Rothgery* what constitutes a reasonable time to appoint counsel after attachment." *Clark v. State*, No. 03-09-00644-CR, 2011 Tex. App. LEXIS 5160, 2011 WL 2651902, at *5 (Tex. Ct. App. July 8, 2011). Indeed, the *Rothgery* Court explicitly disclaimed any intent to define that standard:

> Our holding is narrow. We do not decide whether the 6-month delay in appointment of counsel resulted in prejudice to Rothgery's

> Sixth Amendment rights, and *have no occasion to consider what standards should apply in deciding this*. We merely reaffirm what we have held before and what an overwhelming majority of American jurisdictions understand in practice: a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.

Rothgery, 554 U.S. at 213 (emphasis added); *see also id.* at 212 n.15 ("We do not here purport to set out the scope of an individual's postattachment right to the presence of counsel. It is enough for present purposes to highlight that the enquiry into that right is a different one from the attachment analysis.")

In *Rothgery* itself, the parties reached a settlement agreement after the Supreme Court issued its decision, and no court in that case had reason to examine the issue further. *See* Agreed Stipulation of Dismissal with Prejudice, *Rothgery v. Gillespie County*, No. A-CV-456-LY, ECF Doc. No. 87 (W.D. Tex. Apr. 30, 2009). As noted in this Court's previous orders, a district court in Louisiana has considered this issue and held that a forty-day delay in appointing counsel was not constitutionally unreasonable, but that court used a standard of actual prejudice that the Ninth Circuit has now rejected. *See Grogen v. Gautreaux*, No. 12-0039-BAJ-DLD, 2012 U.S.

Dist. LEXIS 120411, at *9-11 (M.D. La. July 11, 2012), *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 120404 (M.D. La. Aug. 24, 2012). Also noted in this Court's previous orders, a district court in Texas determined "that [an] approximate two-month delay in receiving court-appointed counsel fails to rise to the level of a constitutional violation," but provided no analysis as to how it reached that decision. *See Hawkins v. Montague County*, No. 7:10-CV-19-O, 2010 U.S. Dist. LEXIS 116361, 2010 WL 4514641, at *12 (N.D. Tex. Nov. 1, 2010). With the exception of *Grogen*, which is not consistent with the Ninth Circuit's decision here, this Court not aware of any decision articulating a standard by which to examine whether a delay in appointing counsel is reasonable within the meaning of *Rothgery*.

In the absence of such guidance, the Court holds for the purpose of the present motion that the reasonableness of a delay in appointing counsel after attachment depends on the totality of the circumstances, including the time needed to prepare for an upcoming critical stage—but not limited to that factor. To focus only on proximity to a critical stage would all but negate the significance of attachment, the importance of which the Supreme Court emphasized in *Rothgery*, where the Court acknowledged that "a defendant subject to accusation after initial appearance is headed for trial and needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Rothgery*, 554 U.S. at 210. Indeed, the facts of *Rothgery* illustrate the value of counsel even when a defendant does not face an impending adversarial proceeding: soon after

appointment, counsel was able to secure a bail reduction for Walter Rothgery that allowed him to get out of jail. *Id.* at 196-97. Counsel thereafter demonstrated that Rothgery had never been convicted of a felony—a key predicate of the felon-in-possession charge that he faced—and the district attorney dismissed the indictment. *Id.* It is not clear from the *Rothgery* opinion that any critical stage of the proceeding was imminent, but that in no way diminishes the value of appointed counsel to protect Walter Rothgery's process and liberty interests after the right had attached.

The broad standard of reasonableness that the Court finds applicable does not lend itself to resolution on the pleadings. Plaintiffs' complaint here alleges that Lipetzky "arbitrarily withheld legal representation . . . for a period of 5 to 13 days" after the right attached—seven days in the case of Wade, and thirteen days in the case of Farrow. TAC ¶¶ 1, 29, 41. Nothing on the face of the complaint shows that delay to be reasonable. For the purpose of the present motion to dismiss, the Court holds that Plaintiffs have plausibly alleged that the delay was unreasonable, and therefore violated their Sixth Amendment rights to appointed counsel as articulated in *Rothgery*. To the extent that Plaintiffs' § 1983 claim is based on a theory of unreasonable delay after attachment, the motion to dismiss is DENIED.[14] Of course, if Plaintiffs prevail

14. Lipetzky also argued that she cannot be held responsible for the state court's decisions regarding how long to continue Plaintiffs' arraignments, which, she contends, determined the delay in appointment. It is not clear why Lipetzky could not have provided counsel to Plaintiffs during the intervening period before

on this claim, their "compensable injury . . . does *not* encompass the 'injury' of being convicted [or] imprisoned." *Heck*, 512 U.S. at 487 n.7.

D. State Law Claims

Because Plaintiffs may proceed on their federal claim, the Court's previous holding that it lacked jurisdiction over the related state law claims no longer stands. Plaintiffs' two claims under California law are therefore discussed below.

1. Civil Code Section 52.1

Section 52.1 of the California Civil Code, also known as the Bane Act, creates a right of action against any person who "interferes by threat, intimidation, or coercion . . . with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or . . . of this state." Cal. Civ. Code § 52.1(a) (defining the conduct prohibited); see also id. § 52.1(b) (creating private right of action).

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the second hearing, after the court "referred the matter to the public defender." Although Plaintiffs' allege that the written policy of the public defender's office called for staff to meet with criminal defendants while in custody before further arraignment, *see* TAC ¶ 4, they also allege that neither of them received counsel before their further arraignments, *id.* ¶¶ 27, 29, 36, 41. *See also* Cal. Gov't Code § 27706 (providing that the public defender shall represent indigent defendants upon order of the court *or* "[u]pon request of the defendant."); *Joshua P. v. Superior Court*, 226 Cal. App. 4th 957, 963-64, 172 Cal. Rptr. 3d 509 (2014) (discussing the "upon request" prong of the statute and the fact that "appointment by the court [is] not required").

Plaintiffs contend that Lipetzky colluded with the judges of the Contra Costa Superior Court to interfere with Plaintiffs' speedy trial rights under California law, including the right to a preliminary examination "within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later." Cal. Penal Code § 859b. Plaintiffs do not dispute, however, that there was no actual violation of their rights under that law, because they have not alleged any improper delay after the entry of a plea at the further arraignment hearing. *See* May 2013 Order at 27-28 (dismissing Plaintiffs' claim for violation of statutory speedy trial rights); Mot. at 14; Opp'n at 22. Instead, Plaintiffs argue that by depriving Plaintiffs of their right to enter a plea at the first hearing, or conditioning that right on declining the Sixth Amendment right to appointed counsel, the process *interfered with* their right to set the speedy trial clock in motion. *See* TAC ¶ 59; Opp'n at 22. There are at least two problems with this theory.

First, although Plaintiffs state in their present complaint that "California criminal defendants have an absolute right to enter a not-guilty plea at their first appearance in a California Court," TAC ¶ 6, they cite no authority so holding, and the Court need not accept legal conclusions as true in evaluating the sufficiency of a pleading. *Twombly*, 550 U.S. at 555. Section 988 of the California Penal Code, cited in Plaintiffs' opposition brief, *see* Opp'n at 5, states in part that an arraignment "consists in . . . asking the defendant whether the defendant pleads guilty or not guilty," but does not on its face prohibit the continued arraignment or "further arraignment" process employed here, where the court continued the portion of

the arraignments at which Plaintiffs were asked for their pleas to their second court appearances. *See* Cal. Penal Code § 988.[15] Having not shown any right to enter a plea at the first appearance, Plaintiffs cannot proceed on the theory that denial of that opportunity impermissibly interfered with their right to set in motion the speedy trial rights premised on the entry of a plea.

Second, California court have held that "where coercion is inherent in the . . . violation [of rights] alleged," section 52.1 "requires a showing of coercion independent from the coercion inherent in the [violation] itself," because "the multiple references to violence or threats of violence in the statute serve to establish the unmistakable tenor of the conduct that section 52.1 is meant to address." *Shoyoye v. County of Los Angeles*, 203 Cal. App. 4th 947, 959, 137 Cal. Rptr. 3d 839 (2012). Here, Plaintiffs argue (but do not explicitly allege in their complaint) that "Sheriff [sic] deputies literally ordered these criminal detainees out of the courtroom and into the jail to await appointed counsel, which physically prevented them from entering a plea or asserting their statutory rights." Opp'n at 22. Even if Plaintiffs had alleged in their complaint that they received such orders from sheriff's deputies,

15. The practice guide also cited in Plaintiffs' brief—which in relevant part appears to describe typical procedures rather a defendant's procedural rights—is not a source of legal authority establishing rights under California law. *See* Opp'n at 5-6 (quoting Elena Condes, *Arraignment*, California Law and Procedure in Practice § 6.1 at 128 (CEB 2013) (stating that an arraignment includes the opportunity to enter a plea and "is the defendant's first court appearance)).

the connection between those orders and the delay in Plaintiffs' opportunity to enter a plea is tenuous at best. The Bane Act requires interference with rights "*by* threat, intimidation, or coercion." Cal. Civ. Code § 52.1 (emphasis added). Here, the delay was caused by the judge's order continuing the arraignment, not by the deputies ordering Plaintiffs into custody during the intervening period; the same delay would have occurred if no deputies had been present and Plaintiffs had been free to leave the courtroom on their own recognizance. Plaintiffs' detention is not a component of the deprivation of rights that they have asserted. Plaintiffs therefore have not alleged a deprivation by coercion within the meaning of section 52.1.

The Court finds that leave to amend would be futile and GRANTS Lipetzky's motion to dismiss this claim with prejudice. The Court does not reach the question of whether the state court's decision of when to allow Plaintiffs to enter a plea can be attributed to Lipetzky based on the facts alleged.

2. Government Code Section 27706

Plaintiffs' final claims seeks a writ of mandate pursuant to sections 1085 and 1086 of the California Code of Civil Procedure to compel Lipetzky to comply with section 27706 of the California Government Code, which Plaintiffs contend requires her "to represent all indigent, in custody defendants by appearing at the first appearance of all indigent, in-custody criminal defendants, or at a reasonable time thereafter." TAC ¶ 62. Section 27706 reads in relevant part as follows:

> Upon request of the defendant or upon order of the court, the public defender shall defend, without expense to the defendant . . . any person who is not financially able to employ counsel and who is charged with the commission of any contempt or offense triable in the superior courts at all stages of the proceedings, including the preliminary examination. The public defender shall, upon request, give counsel and advice to such person about any charge against the person upon which the public defender is conducting the defense . . . .

Cal. Gov't Code § 27706(a). The parties devote minimal argument to this claim. *See* Mot. at 14-15; Opp'n at 23-24; Reply at 14. Lipetzky argues only that Plaintiffs have not alleged a breach of her duties under section 27706, and does not separately address whether a writ of mandate is appropriate under these circumstances.

Lipetzky contends, without citation to authority, that she "could not 'represent' Plaintiffs until such time as the state court appointed her office to do so, which occurred at the second appearance." Reply at 14. California law does not support that position:

> The public defender is required by statute to determine whom to represent. Government Code section 27706, subdivision (a), provides that "[u]pon request of the defendant *or* upon order of the court, the public defender shall defend [indigent defendants.]" (Italics

> added.) . . . "In determining whether to provide the services of his office, the public defender 'exercises an original power vested in him by statute, not superior to but coequal with the power of the court' to determine whether a person is entitled to be represented by the public defender. [Citation.] The 'Upon request' condition of section 27706, subdivision (a), is an important alternative circumstance to formal court appointment to entitle a person to representation by the public defender and cannot be read out of the statute . . . ." (*In re Brindle* (1979) 91 Cal. App. 3d 660, 681 [154 Cal. Rptr. 563].) Not only is appointment by the court not required, the court "cannot challenge the public defender's decision that a person is entitled to be represented by him . . . ." (*Id.* at p. 681, 154 Cal. Rptr. 563.)

Joshua P. v. Superior Court, 226 Cal. App. 4th 957, 963-64, 172 Cal. Rptr. 3d 509 (2014) (alterations in original, except second brackets and second ellipsis). The failure of the state court to appoint counsel did not absolve Lipetzky of her duty under section 27706 to represent Plaintiffs after they requested counsel.

Lipetzky also argues that section 27706's description of the duty as applying to "all stages of the proceedings" acts as a limitation, and that because the state court continued the arraignments immediately after Plaintiffs requested counsel, no "stages" occurred before counsel was appointed at Plaintiffs' second court appearances. Reply at 14. The statute's phrasing of "all stages" is

broader than the "critical stages" at which counsel is required under the Sixth Amendment, and its requirement that the public defender "give counsel and advice to such person about any charge" suggests that it contemplates more than merely appearance at court proceedings on the defendant's behalf. *See* Cal. Gov't Code § 27706(a). For the purpose of the present motion, the Court holds that section 27706's requirement that the public defender represent indigent defendants upon request or appointment is not limited to court appearances. This holding is without prejudice to either party presenting at a later stage of this litigation a more thorough argument regarding the nature and interpretation of section 27706.

The Court need not decide at this time whether section 27706 requires a public defender standing by at a defendant's first court appearance to provide representation immediately if requested, or whether the statute implicitly allows the public defender a reasonable period of time to begin representation after request by an indigent defendant or appointment by the court. Assuming the latter for the sake of argument, the Court holds that Plaintiffs have plausibly alleged that the delay was unreasonable, as discussed above in the context of their Sixth Amendment claim. Lipetzky's motion to dismiss Plaintiffs' claim for a writ of mandate to enforce section 27706 is therefore DENIED.

IV. CONCLUSION

For the reasons discussed above, Lipetzky's motion is GRANTED as to Plaintiffs' claim under section 52.1

of the Civil Code, and as to Plaintiffs' § 1983 claim to the extent that it is based on a theory of failure to provide counsel at a critical stage. Those claims are DISMISSED without leave to amend. Lipetzky's motion is DENIED as to Plaintiffs' § 1983 claim to the extent that it is based on a theory of unreasonable delay in appointing counsel, and as to Plaintiffs' claim for a writ of mandate.

IT IS SO ORDERED.

APPENDIX D — OPINION OF THE SUPREME COURT OF THE UNITED STATES, DATED OCTOBER 3, 2016

SUPREME COURT OF THE UNITED STATES

No. 15–1426

ROBIN LIPETZKY,

Petitioner,

v.

JOHN FARROW, *et al.,*

October 3, 2016, Decided

Judges: Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

OPINION

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

APPENDIX E — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 8, 2016

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 13-16781

JOHN FARROW AND JEROME WADE, ON THEIR BEHALF, AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

ROBIN LIPETZKY, CONTRA COSTA COUNTY PUBLIC DEFENDER,

Defendant-Appellee.

December 7, 2015, Argued and Submitted,
San Francisco, California
January 8, 2016, Filed

Appeal from the United States District Court for the Northern District of California. D.C. No. 3:12-cv-06495-JCS. Joseph C. Spero, Magistrate Judge, Presiding.

Before: WARDLAW, W. FLETCHER, and MURGUIA, Circuit Judges.

Appendix E

MEMORANDUM*

John Farrow and Jerome Wade appeal the district court's grant of Robin Lipetzky's motion to dismiss their putative class-action complaint. Plaintiffs allege that defendant "arbitrarily withheld legal representation to indigent, in-custody, criminal defendants in felony [and misdemeanor] matters for a period of 5 to 13 days after their initial Court appearance, and sometimes longer, as a matter of policy," thereby violating their constitutional rights to counsel, due process, and equal protection. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm in part, reverse in part, and remand for further consideration.[1]

1. The district court did not err in dismissing plaintiffs' due process claims. "[S]tate statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the Fourteenth Amendment." *Carlo v. City of Chino*, 105 F.3d 493, 497 (9th Cir. 1997)

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

1. Lipetzky argues that because Wade declined to file a third amended complaint, his claims were dismissed for failure to comply with a court order under Federal Rule of Civil Procedure 41 rather than for failure to state a claim under Rule 12(b)(6). However, the district court never invoked Rule 41 in dismissing the complaint. Instead, the court relied on Rule 12(b)(6), "permitted" Wade "one more opportunity to amend" his Sixth Amendment claim, and closed the case when Wade's time to do so expired. We therefore treat the dismissal of both Farrow's and Wade's claims as pursuant to Rule 12(b)(6).

(citation omitted). Plaintiffs rely on California Penal Code § 859b, which provides that a defendant is entitled to a preliminary examination "within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later." However, the complaint alleges that Lipetzky delayed plaintiffs' arraignments and pleas, not that the preliminary examination occurred more than 10 days later. Without an underlying violation of California's speedy trial scheme, plaintiffs have not adequately pleaded a due process claim.

2. Nor did the district court err in dismissing plaintiffs' equal protection claim. That the assistance of counsel at the initial appearance "might be of benefit to an indigent defendant does not mean that the service is constitutionally required." *Ross v. Moffitt*, 417 U.S. 600, 616, 94 S. Ct. 2437, 41 L. Ed. 2d 341 (1974). Because indigent defendants in Contra Costa County retain "an adequate opportunity to present their claims fairly within the adversary system," Lipetzky's policy does not violate the Equal Protection Clause. *Id.* at 612; *see also Halbert v. Michigan*, 545 U.S. 605, 610-11, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005); *Johnson v. Oklahoma*, 484 U.S. 878, 879-80, 108 S. Ct. 35, 98 L. Ed. 2d 167 (1987).

3. The district court did err in dismissing plaintiffs' Sixth Amendment claim. The Sixth Amendment requires that counsel "be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Rothgery v. Gillespie County*, 554 U.S. 191, 212, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008). The complaint alleges that

Lipetzky deprived Wade of counsel for seven days after his initial appearance, deprived Farrow of counsel for thirteen days after his initial appearance, and sometimes withheld counsel from indigent defendants for periods exceeding thirteen days.

The right to counsel "attache[d] at the [defendant's] initial appearance," when "the magistrate inform[ed] the defendant of the charge[s]" against him and "determine[d] the conditions for pretrial release." *Rothgery*, 554 U.S. at 199 (citation omitted). However, the "question whether [an initial appearance] signals the initiation of adversary judicial proceedings . . . is distinct from the question whether the [initial appearance] itself is a critical stage requiring the presence of counsel." *Id.* at 212 (omission in original) (quoting *Michigan v. Jackson*, 475 U.S. 625, 630 n.3, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986)). On the facts alleged in the complaint, the initial appearance was not a critical stage. *See Gerstein v. Pugh*, 420 U.S. 103, 122-23, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); *United States v. Perez*, 776 F.2d 797, 800 (9th Cir. 1985), *overruled on other grounds by United States v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003). The hearing did not "test[] the merits of the accused's case"; "skilled counsel" was not necessary to "help[] the accused understand" the proceedings; and there was no risk that an uncounseled defendant would permanently forfeit "significant rights." *United States v. Benford*, 574 F.3d 1228, 1232 (9th Cir. 2009) (citation omitted). Nor did the preliminary bail determination made at the initial appearance render that hearing a critical stage. *See Rothgery*, 554 U.S. at 195, 212; *Gerstein*, 420 U.S. at 120-23.

The "further arraignment," by contrast, was plainly a critical stage because the plaintiffs entered pleas at that hearing. *See White v. Maryland*, 373 U.S. 59, 60, 83 S. Ct. 1050, 10 L. Ed. 2d 193 (1963). It is undisputed that the plaintiffs were therefore entitled to—and received—legal representation at their "further arraignments."

The remaining question is whether Lipetzky appointed counsel within a "reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Rothgery*, 554 U.S. at 212. In other words, how soon after the Sixth Amendment right attaches must counsel be appointed, and at what point does delay become constitutionally significant? Instead of addressing whether the delay in appointing counsel was unreasonable, the district court considered only whether the delay "impacted [plaintiff's] representation at subsequent critical stages of his proceedings." By framing the question in that way, the district court erroneously required the plaintiffs to allege actual prejudice. *See United States v. Wade*, 388 U.S. 218, 225, 236-37, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) (finding a Sixth Amendment violation based on the "grave potential for prejudice"); *Hamilton v. Alabama*, 368 U.S. 52, 54, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961) (finding a Sixth Amendment violation where the absence of counsel "may affect the whole trial"). We therefore remand for the district court to consider whether appointing counsel five to thirteen days and "sometimes longer" after the right attaches complies with the "reasonable time" requirement articulated in *Rothgery*.

4. After dismissing all of plaintiffs' federal law claims, the district court declined to exercise supplemental jurisdiction over their state law claims. Because we reverse the dismissal of plaintiffs' Sixth Amendment claim, we also reverse the dismissal of plaintiffs' state law claims.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED AUGUST 7, 2013

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 12-cv-06495-JCS

JOHN FARROW, *et al.*,

Plaintiffs,

v.

ROBIN LIPETZKY,

Defendant.

August 7, 2013, Decided
August 7, 2013, Filed

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

I. INTRODUCTION

Plaintiffs John Farrow ("Farrow") and Jerome Wade ("Wade") (collectively, "Plaintiffs") brought this putative class action against Defendant Robin Lipetzky, in her official capacity as the Contra Costa County Public Defender ("Defendant"). Plaintiffs allege causes of action (1) under 42 U.S.C. § 1983 for (a) violation of the Sixth

Amendment to the United States Constitution; and (b) violations of the Fourteenth Amendment to the United States Constitution; (2) under the Bane Act for violation of their statutory speedy trial rights; and (3) for violation of California Government Code § 27706. Plaintiffs claim that Defendant violated their rights by failing to provide counsel at Plaintiffs' initial appearance on criminal charges — resulting in a continuance of the proceedings for appointment of counsel. This case focuses on the constitutionality of that continuance: may the Public Defender not provide counsel for appointment at an initial appearance, where the result is a continuance of the remainder of the arraignment 7 to 13 days for appointment of counsel? This Order holds that, in the circumstances pleaded here, such a procedure is constitutional.

Presently before the Court is Defendant's Motion to Dismiss the Second Amended Complaint ("Motion"). A hearing was held on the Motion on July 26, 2013. At the Court's request, the parties submitted supplemental briefing on August 2, 2013. For the following reasons, the Motion is GRANTED. Wade will be given leave to amend his Sixth Amendment claim within the constraints set forth in this Order. Farrow's federal claims are dismissed with prejudice. Plaintiffs' state law claims are dismissed without prejudice.[1]

1. The parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c).

II. BACKGROUND

A. The May 8, 2013 Order Dismissing the Complaint Without Prejudice

1. The Sixth Amendment Claim

In the May 8, 2013 Order Dismissing the Complaint Without Prejudice ("Order"), the Court found that the motion at issue raised two related questions:

> First, does the failure to provide counsel at an initial appearance (at which the only events that occur are the provision of a copy of the charges to the defendant, the inquiry as to whether the defendant desires appointed counsel, and the continuance of the matter to allow for appointment of counsel) violate the Sixth Amendment guarantee of counsel in a criminal case? Second, where the matter is continued for 5 to 13 days, at which time counsel appears with the defendant, does the delay in appointment of counsel violate the Sixth Amendment?

Order, 1. The Court answered both questions in the negative. *Id.*

First, the Court concluded that the Sixth Amendment right to counsel attached at the initial appearance because, on the facts alleged, that was when prosecution began as to each Plaintiff. *Id.* at 13-14. Second, the Court stated: "Once the right to counsel attaches, the accused is entitled

to appointed counsel during any 'critical stage' of the post-attachment proceedings." *Id.* at 14 (citing *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 212, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008)). Third, the Court analyzed whether either (1) the initial appearance; or (2) the 5 to 13 day waiting period were, on the facts alleged, critical stages at which Plaintiffs were entitled to counsel. *Id.* at 14-22.

To begin its analysis, the Court noted that "[c]ourts decide whether a state criminal proceeding is critical by looking to the functions of the proceeding under state law." *Id.* at 15 (citing *Hamilton v. Alabama*, 368 U.S. 52, 54, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961)). The Court stated that the Ninth Circuit has developed a three-factor test for determining whether a stage is critical. *Id.* (citing *Menefield v. Borg*, 881 F.2d 696, 698-99 (9th Cir. 1989); *U.S. v. Benford*, 574 F.3d 1228, 1232 (9th Cir. 2009)). The Court described the test as follows: "Any one of these three factors may be sufficient to make a stage critical: (1) failure to pursue strategies or remedies results in a loss of significant rights; (2) skilled counsel would be useful in helping the accused understand the legal confrontation; and (3) the proceeding tests the merits of the accused's case." *Id.* The Court reasoned that: (1) because nothing happened at the initial appearance any failure to pursue strategies or remedies at that appearance did not result in a loss of significant rights; and (2) there was no legal confrontation or proceeding at which accused was unrepresented following the request for counsel. *Id.* at 16-17. The Court further concluded that the fact that, had counsel been appointed, counsel might have applied for a

release on bail, caused a plea to be entered, or triggered statutory speedy trial rights did not change the analysis. *Id.* at 17. The Court distinguished cases, cited by Plaintiffs, in which pretrial liberty interests were adjudicated in the absence of counsel. *Id.* at 19-20.

Next, the Court analyzed whether the five to thirteen day waiting period between the initial appearance, at which counsel was present, and the further arraignment, at which counsel was appointed, was a critical stage of the post-attachment proceedings. *Id.* at 16-17, 20-22. Although Plaintiffs did not allege that any event took place during the waiting period at which counsel would have been necessary, the court noted that *Rothgery* further requires the appointment of counsel a reasonable time prior to any critical stage after attachment to allow adequate representation at that critical stage. *Id.* at 16-17, 20. However, the Court stated that Plaintiffs had not alleged that they were prejudiced, or impeded, at any later critical stages by the absence of counsel during the five-to-thirteen day waiting period. *Id.* at 22.

Based on all of the above, the Court dismissed Plaintiffs' Sixth Amendment claim, on the facts alleged, with leave to amend. *Id.* at 22.

2. Fourteenth Amendment Claims Predicated on a Violation of State Statutory Speedy Trial Rights

The Court concluded that Plaintiffs had not alleged a violation of their state speedy trial rights because the

facts alleged were consistent with the requirements of California Penal Code §§ 859b, 1049.5, and 1382. *Id.* at 27. Further, the Court found that, on the facts alleged, the procedures of § 1050 were not triggered. *Id.* Accordingly, the Court dismissed Plaintiffs' Fourteenth Amendment claims predicated on a violation of their state statutory speedy trial rights with leave to amend. *Id.* at 28.

3. State Law Claims

After dismissing Plaintiffs' remaining federal cause of action, which has been replaced with a different federal cause of action in Plaintiffs' Second Amended Complaint ("SAC"), the Court declined to exercise its supplemental jurisdiction over Plaintiffs' remaining state law claims. *Id.* at 31-32.

B. The Second Amended Complaint

Pursuant to a now discontinued practice, Defendant withheld legal representation to all indigent, in-custody, criminal defendants for a period of 5 to 13 days after their initial Court appearance, and sometimes longer. SAC, ¶¶ 1-2.[2] At the first court appearance, dubbed "arraignment," no plea is taken, bail is set without consideration of the favorable information counsel would ordinarily provide to the court regarding the criminal defendant's circumstances, the case is referred to the

2. The SAC makes distinct allegations concerning the treatment of in custody felony defendants and in custody misdemeanor defendants. The SAC does not specify to which group Plaintiffs belong.

probation department for an evaluation concerning bail, and counsel is not appointed as required by California law. *Id.* at ¶ 3. The probation department's evaluation and report is based entirely upon information provided by government sources. *Id.* An indigent criminal defendant's request for court-appointed counsel triggers referral to the Public Defender and an automatic continuance for "further arraignment." *Id.* at ¶ 4. Criminal defendants are not apprised of their statutory speedy trial rights prior to the automatic continuance in violation of California law. *Id.* at ¶ 6. Good cause for continuance is never shown as required by California Penal Code § 1050. *Id.* This thwarts the intent of the California legislature's statutory speedy trial scheme, which requires that in-custody criminal defendants receive probable cause determinations through a preliminary hearing at the earliest time possible to protect their crucial liberty interest. *Id.* at ¶ 7.

Turning to Plaintiffs, Farrow was arrested on August 30, 2011. *Id.* at ¶ 28. He appeared alone in court for his arraignment on September 2, 2011. *Id.* at ¶ 29. The court asked him if he could afford counsel, and he replied that he could not. *Id.* at ¶ 30. The court then asked him if he wanted the court to appoint counsel, and he said that he did. *Id.* The court set bail, referred the matter to the Public Defender, and continued the matter to September 15, 2011 for "further arraignment" without advising Farrow of his right to a prompt arraignment, his right to bail, or his right to a speedy preliminary hearing and trial. *Id.* Farrow languished in jail, without meaningful examination of bail, the protection of statutory speedy trial rights, or legal representation, for thirteen days.

Id. Also at his September 2, 2011 arraignment, the court referred the matter for a bail study. *Id.* at ¶ 31. The bail study was conducted between Farrow's first and second court appearances and, because Farrow was not represented by counsel, there was no means for the probation department to include any favorable information in the highly influential report. *Id.* at ¶ 31.

At the further arraignment held 16 days after his arrest and 13 days after his first court appearance, counsel was appointed for Farrow and he was permitted to enter a plea. *Id.* at ¶ 32. He immediately asserted his right to a speedy preliminary hearing and his preliminary hearing was held on September 27, 2011. *Id.* at ¶ 33. As a result of the delay in the appointment of counsel, Farrow's counsel had 13 less days than the prosecutor to prepare for the preliminary hearing. *Id.* at ¶ 34.

Wade was arrested at his high school on November 8, 2011 when he was 17 years old. *Id.* at ¶ 35. He appeared in Court alone for his arraignment on November 14, 2011 after being held illegally in violation of California Penal Code § 825. *Id.* at ¶¶ 36-37. Wade was unaware of this violation of his rights. *Id.* at ¶ 37. The county prosecutor appeared at Wade's first appearance. *Id.* at ¶ 38. The proceedings at Wade's first appearance progressed in the same fashion as Farrow's, and the matter was continued to November 21, 2011 for further arraignment. *Id.* at ¶ 39. Also, as with Farrow, a bail study was ordered and Wade was unable to supply favorable information because he did not have counsel. *Id.* at ¶ 40. Wade languished in jail for the following 7 days without examination of bail,

the protection of statutory speedy trial rights, or legal representation. *Id.* at ¶ 39. During that time, the police investigation was ongoing and the district attorney was hard at work on his case. *Id.* at ¶ 42. On November 18, 2011, the district attorney filed an amended complaint, amending the complaint filed on November 10, 2011, adding an additional fifteen charges and enhancements, greatly increasing Wade's exposure. *Id.* at ¶¶ 41, 43. The prosecution was able to file the amended complaint as a matter of right because Wade had not yet entered a plea as a result of Defendant's policy. *Id.* at ¶ 43.

Counsel was appointed for Wade at his further arraignment on November 21, 2011, 13 days after his arrest and 7 days after his first appearance as a juvenile charged as an adult. *Id.* at ¶ 44. At that time, his counsel began reviewing approximately 600 pages of discovery. *Id.* at ¶ 45. In that process, counsel eventually became aware of a potential *Miranda* issue. *Id.* Because Wade had been interrogated in front of his high school principal, Wade's counsel obtained an investigative authorization and dispatched an investigator to interview the principal about the interrogation. *Id.* At the interview, held on November 28, 2011, the principal maintained that she could no longer remember when or how Wade was *Mirandized. Id.*[3]

On the basis of the foregoing allegations, Plaintiffs allege six causes of action, as follows:

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3. In addition to the allegations pertaining to Plaintiffs, the SAC contains allegations concerning the putative class they represent.

Appendix F

(1) Violation of the Sixth Amendment of the United States Constitution Pursuant to 42 U.S.C. § 1983: Plaintiffs allege that Defendant's failure to represent them at their first appearance, or a reasonable time thereafter, as a matter of policy, violated their Sixth Amendment right to the assistance of court-appointed counsel. *Id.* at ¶ 57. Plaintiffs allege that they were directly and proximately damaged and are entitled to recover nominal damages. *Id.*

(2) Violation of the Fourteenth Amendment of the United States Constitution — substantive due process with respect to statutory speedy trial rights: Plaintiffs allege that Defendant's policy violated the due process clause of the Fourteenth Amendment because it deprived them of their statutory speedy trial rights without a hearing to determine the cause or reasonableness of the denial. *Id.* at ¶ 60. They seek nominal damages. *Id.* Plaintiffs specify that their speedy trial plains rely on California Penal Code §§ 825, 859b, and 1050, specifically, but not exclusively, and on the legislative intent supporting California's statutory speedy trial scheme. *Id.* at ¶ 10.

(3) Violation of the Fourteenth Amendment of the United States Constitution — procedural due process with respect to statutory speedy trial rights: Plaintiffs repeat the allegations in their second cause of action. *Id.* at ¶ 63.

(4) Violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution: Plaintiffs allege that Defendant's policy denied them their right to a prompt arraignment, their right to assistance

of counsel, and their statutory speedy trial rights on the basis of their indigence because similarly situated criminal defendants who could afford private counsel were furnished prompt arraignments, were permitted to enter pleas at their first appearance, were allowed to influence the probation department with favourable information concerning bail in the days following arraignment, were immediately able to apply for bail, and were immediately able to assert their statutory speedy trial rights and begin trial preparation. *Id.* at ¶ 66. Plaintiffs seek nominal damages. *Id.*

(5) California Civil Rights Act, Civil Code §§ 52 and 52.1 — denial of statutory speedy trial rights: Plaintiffs allege that Defendant's policies forced them to sacrifice their speedy trial rights as a precondition to appointment of counsel, entitling them to a minimum of $4,000. *Id.* at ¶ 69.

(6) California Code of Civil Procedure §§ 1085 and 1086 — writ of mandate to enforce California Government Code § 27706: Plaintiffs allege that Defendant's policies violate California Government Code § 27706, which requires the public defender to represent criminal defendants at all stages of the proceedings, and seek a writ of mandate compelling Defendant to represent all indigent, in custody defendants at the first appearance or a reasonable time thereafter. *Id.* at ¶ 72.

C. The Motion

Defendant argues that Plaintiffs have failed to rectify the deficiencies in their Complaint. Motion, 4. First, Defendant argues that there has been no violation of the Sixth Amendment's right to assistance of counsel. Motion, 4-9. Defendant states that Article I, section 14 of the California Constitution, which governs arraignments in felony prosecutions, provides in relevant part: "The magistrate shall immediately give the defendant a copy of the complaint, inform the defendant of the defendant's right to counsel, allow the defendant a reasonable time to send for counsel, and on the defendant's request read the complaint to the defendant." *Id.* at 4-5. Defendant asserts that the SAC is predicated on an alleged failure to provide counsel at a non-critical stage. *Id.* at 5. In that instance, they argue that Plaintiffs must show prejudice to their substantive rights as a result of the absence of counsel. *Id.* (citing *McNeal v. Adams*, 623 F.3d 1283, 1288 (9th Cir. 2010)). Defendant contends that Plaintiffs cannot do so. *Id.* In that vein, Defendant argues that Plaintiffs cannot plausibly suggest that their lack of input into the bail studies caused them prejudice as they would have been able to raise any bail rights at a subsequent bail hearing. *Id.* at 5-6 (citing Cal. Penal Code § 1270.1(b)-(c); *State of New Jersey v. Anthony Fann*, 239 N.J.Super. 507, 517-18, 520-21, 571 A.2d 1023 (1990)). Moreover, Defendant argues that none of the allegations specific to Wade plausibly states a claim of prejudice. *Id.* at 7-9.

Second, Defendant argues that Plaintiffs cannot demonstrate that any of their state statutory speedy trial

rights because (1) the Court held in its previous Order that Plaintiffs' did not allege a violation of California Penal Code § 859b because Plaintiffs did not allege that a preliminary examination was not held within 10 court days of the date they were arraigned or pled, whichever occurs later; (2) the Court held in its previous Order that California Penal Code § 1050 lacks the mandatory language to create a liberty interest protected by the Fourteenth Amendment; and (3) California Penal Code § 825 does not mandate dismissal in the event of a violation. *Id.* at 9-10. As to § 825, Defendant also argues that she had no control over the time when Plaintiffs were initially brought before the magistrate. *Id.* at 10. Moreover, Defendant contends that § 825 does not mandate that arraignment be completed when the criminal defendant is first brought before the magistrate. *Id.*

Third, Defendant argues that Plaintiffs cannot establish a violation of the Fourteenth Amendment based on the Equal Protection Clause because Defendant does not represent individuals who can afford counsel with the exception of capital defendants and because a single policy that does not distinguish between classes of individuals cannot support an equal protection claim. *Id.* at 10-11.

Fourth, Defendant contends that Plaintiffs remaining state law claims should be dismissed without prejudice for lack of subject matter jurisdiction. *Id.* at 11. In the alternative, Defendant argues that the state law claims are without merit because (1) Plaintiffs have failed to allege any violation of their state speedy trial rights; and (2) Defendant complies fully with the directive of California

Government Code § 27706(a) to defend "[u]pon request of the defendant or upon order of the court." *Id.* at 11-12.

D. The Opposition

First, Plaintiffs argue that Defendant's policy is unconstitutional because counsel is required at all critical stages, and arraignment is a critical stage in California. Plaintiffs' Response in Opposition to Defendant's Rule 12(b)(6) Motion to Dismiss the Second Amended Complaint ("Opposition"), 2. Plaintiffs contend that the Court erroneously overruled California law in its previous Order by concluding that the initial appearance, including the initial portions of the arraignment, is not a critical stage. *Id.* Plaintiffs begin by stating that critical stages are specific to the jurisdiction, not to the defendant. *Id.* at 5 (citing *Hamilton*, 368 U.S. at 54, 82 S.Ct. 157, 7 L.Ed.2d 114). Plaintiffs further state that considerations regarding a specific defendant come into play only when considerations of prejudice — in addition to the denial of counsel at a "critical stage" — may be required to reverse a conviction. *Id.* at 5. Plaintiffs contend that any analysis of prejudice is irrelevant to a civil action brought under § 1983. *Id.* Plaintiffs note that numerous California courts have held that arraignment is a critical stage of the criminal proceedings entitling the accused to an attorney, although the absence of counsel may not be such a grievous error that it compels reversal of a conviction without showing of prejudice. *Id.* at 7 (collecting cases, including *People v. Cox*, 193 Cal.App.3d 1434, 1440, 239 Cal.Rptr. 40 (1987)). In addition to their argument that California precedent compels the conclusion that the arraignment is

a critical stage in the proceedings, Plaintiffs assert that arraignment is a critical stage because detainees would benefit from guidance to avoid a forced continuance and because custody status is initially determined. *Id.* at 8-9. However, Plaintiffs decline to re-litigate whether arraignment is a critical stage of the proceedings in California. *Id.* at 9.

As to the waiting period, Plaintiffs state that *Rothgery* "point[s] the way" to the conclusion that counsel must be appointed "on the heels of the first appearance." *Id.* at 10-11 (citing *Rothgery*, 554 U.S. at 203-05, 128 S.Ct. 2578, 171 L.Ed.2d 366. Plaintiffs assert that each of the three district court opinions interpreting *Rothgery* are inapposite. *Id.* at 10.

Moreover, Plaintiffs argue that the Court erred in concluding that the portions of the arraignment that took place without the presence of counsel were not a critical stage of the proceedings in themselves. *Id.* at 11-14. Plaintiffs state that the Sixth Amendment requires counsel to be provided at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected. *Id.* at 11 (citing *McNeal*, 623 F.3d at 1286). Plaintiffs state that prejudice is irrelevant to the determination of whether the stage is critical. *Id.* Plaintiffs argue that the Court erroneously relied on *Benford*, because *Benford* is distinguishable based on its reliance on the reversible per se standard as opposed to narrower question of harmless error. *Id.* at 2-3 (citing *Benford*, 574 F.3d at 1233 ("[W]e do not hold that a status conference never can be a critical stage, but only that

this one was not. Additionally, because we address here only Defendant's claim that the absence of his counsel at the status conference constitutes per se ineffective assistance of counsel, he may bring all other claims in a habeas proceeding, the validity of which we do not consider here")). In any event, to the extent that a showing of prejudice is required, Plaintiffs contend that they have alleged prejudice. *Id.* at 14.

Second, Plaintiffs argue that Defendant violated the Fourteenth Amendment by deliberately failing to assert their state statutory speedy trial rights. *Id.* at 14-18. Plaintiffs contend that the Court overlooked the fact that the core value protected by California's speedy trial scheme is time, and that once lost it can never be recovered. *Id.* at 14. Moreover, Plaintiffs assert that the legislative intent behind the speedy trial statutes dictates that they be read as a whole in light of their goal of preventing prolonged incarceration prior to a preliminary hearing. *Id.* at 14-17 (citing *People v. Kowalski*, 196 Cal. App.3d 174, 178, 242 Cal.Rptr. 32 (1987); *In re Samano*, 31 Cal.App.4th 984, 989-90, 37 Cal.Rptr.2d 491 (1995); *Sykes v. Superior Court*, 9 Cal.3d 83, 88, 106 Cal.Rptr. 786, 507 P.2d 90 (1973); *People v. Martinez*, 22 Cal.4th 750, 768 n.1, 94 Cal.Rptr.2d 381, 996 P.2d 32 (2000); *People v. Valencia*, 82 Cal.App.4th 139, 144-45, 98 Cal.Rptr.2d 37 (2000)). Plaintiffs state that a criminal defendant's right to a speedy trial may be denied by the failure of the state to provide public defenders so that an indigent must choose between his right to a speedy trial and his right to representation by counsel. *Id.* at 16 (citing *People v. Johnson*, 26 Cal.3d 557, 571, 162 Cal.Rptr. 431, 606 P.2d

738 (1980)). Plaintiffs contend that Defendant subverted the statutory scheme by failing to appear at the initial appearance. *Id.* at 17-18.

Third, Plaintiffs contend that they have stated a claim under the equal protection clause. *Id.* at 18-19. Plaintiffs argue that the state cannot justify, in the face of strict scrutiny, a policy that denies speedy trial rights to indigent people. *Id.* at 18-19 (citing *Barsamyan v. Appellate Div. of Superior Court of Los Angeles Cnty.*, 44 Cal.4th 960, 981-82, 81 Cal.Rptr.3d 265, 189 P.3d 271 (2008); *Young v. Gnoss*, 7 Cal.3d 18, 28, 101 Cal.Rptr. 533, 496 P.2d 445 (1972); *People v. Olivas*, 17 Cal.3d 236, 251, 131 Cal.Rptr. 55, 551 P.2d 375 (1976); *Evitts v. Lucey*, 469 U.S. 387, 403-04, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985)).

E. The Reply

Defendant begins with Plaintiffs' Sixth Amendment claim. Reply Brief of Defendant in Support of Motion to Dismiss Second Amended Complaint ("Reply"), 3-7. Defendant notes that the Court did not hold in its prior Order that arraignment under California law is not a critical stage. *Id.* at 4 n.3. Indeed, Defendant concedes that the second appearance wherein arraignment was completed was a critical stage. *Id.* at 5 n.4. Regardless, Defendant states that the initial appearance was not a critical stage for the reasons set out in the Court's prior Order. *Id.* at 4. Defendant argues that Plaintiffs have not identified any contrary authority. *Id.* at 4-5 (collecting and distinguishing cases). Because counsel was present at all critical stages, Defendant asserts that Plaintiffs'

were required to plead factual allegations to support the inference that the absence of counsel until the second appearance resulted in prejudice to their criminal cases to plead a violation of the Sixth Amendment. *Id.* at 6-7 (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144, 147, 150, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); *Hovey v. Ayers*, 458 F.3d 892, 904 (9th Cir. 2006); *McNeal*, 623 F.3d at 1288-89).

Next, Defendant addresses the statutory speedy trial claim. *Id.* at 7-9. Defendant argues that Plaintiffs cannot rely on California Penal Code §§ 859b and 1050 for the reasons set out in the Court's prior Order. *Id.* at 7. Defendant contends that Plaintiffs cannot rely on § 825 because they have not adequately alleged a violation of that section and because it does not mandate dismissal in the event of a violation. *Id.* Defendant notes that Plaintiffs argument relies, to some extent, on the intent of the legislature. *Id.* at 7-8. Defendant asserts that the history of California Penal Code § 1382 demonstrates that the legislature intended to permit delays such as the one in this case. *Id.* at 8. Defendant states that § 1382(a)(2) provides speedy trial protections that, since 1965, have been triggered by the date the criminal defendant is arraigned. *Id.* Prior to 1965, the statute had used at least two different triggers. In 1977, a California Court of Appeal held that a multiple hearing arraignment was not concluded for the purposes of § 1382 until the criminal defendant was asked to plea. *Id.* (citing *Valdes v. Municipal Court*, 69 Cal.App.3d 434, 435-39, 138 Cal. Rptr. 50 (1977)). Thereafter, the legislature amended § 1382 but retained the arraignment trigger. *Id.* (citing

People v. Baca, 211 Cal.App.3d 675, 678, 259 Cal.Rptr. 566 (1989)).

Turning to the equal protection clause argument, Defendant contends that Plaintiffs rely on an underlying violation of their speedy trial rights. *Id.* at 9-10. Because Defendant argues that there was no such violation, Defendant asserts that the equal protection clause claim fails. *Id.* at 10.

Having addressed all federal claims, Defendant argues that the remaining state law claims should be dismissed without prejudice for lack of subject matter jurisdiction. *Id.* at 10-11.

F. Supplemental Briefing

At the July 26, 2013 hearing, the Court requested supplemental briefing to address the recent Ninth Circuit opinion in *Lopez-Valenzuela v. County of Maricopa*, 719 F.3d 1054, 2013 U.S. App. LEXIS 12269, 2013 WL 2995220 (9th Cir. June 18, 2013), which is discussed in more detail below. Defendant argues that the *Lopez-Valenzuela* decision, and its underlying logic, supports the ruling in the prior Order. Defendant's Supplemental Brief in Support of Motion ("Defendant's Supplemental"), 3.[4]

4. Defendant also uses the supplemental brief as a vehicle to press arguments concerning Wade's potential ability to allege prejudice if he is given leave to amend. Defendant's Supplemental, 3-5. The Court did not invite further argument on that issue, and Plaintiffs, properly understanding the Court's request, did not address the issue in their supplemental brief. The Court does

Plaintiffs argue that *Lopez-Valenzuela* is distinguishable. The foundation of Plaintiffs' argument is that the Arizona procedure in *Lopez-Valenzuela* was held in accordance with the statutory design, whereas the initial appearance in this case should have been a complete arraignment in accordance with California law. Plaintiffs' Supplemental Brief re: *Lopez-Valenzuela v. County of Maricopa* ("Plaintiffs' Supplemental"), 4-9. Plaintiffs distinguish the initial appearances at issue in *Lopez-Valenzuela* from arraignment in California. *Id.* at 4. Plaintiffs do not dispute that the Arizona legislature can provide for an initial appearance as described in *Lopez-Valenzuela*, or that counsel would not be required at such an appearance. *Id.* at 4-5. Instead, Plaintiffs argue that Defendant usurped the role of the legislature by bifurcating the California arraignment proceedings to impose an Arizona-style initial appearance. *Id.* at 4-5, 9.

III. ANALYSIS

A. Legal Standard

A complaint may be dismissed for failure to state a claim for which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). "The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint." *N. Star. Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). In ruling on a motion to dismiss under Rule

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not consider these additional arguments Defendant raises in her supplemental brief.

12(b)(6), the Court takes "all allegations of material fact as true and construe[s] them in the light most favorable to the non-moving party." *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1990).

Generally, the plaintiff's burden at the pleading stage is relatively light. Rule 8(a) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint need not contain "detailed factual allegations," but must allege facts sufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 663, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). The factual allegations must be definite enough to "raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Twombly*, 550 U.S. at 545, 127 S.Ct. 1955, 167 L.Ed.2d 929. "[T]he tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 663, 129 S.Ct. 1937, 173 L.Ed.2d 868.

B. 42 U.S.C. § 1983

42 U.S.C. § 1983 provides a cause of action against any person who, under color of state law, deprives another of any rights, privileges, or immunities secured by the Constitution or laws of the United States. § 1983 is not a source of substantive rights, but merely a method for vindicating federal rights established elsewhere.

Graham v. Connor, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). To state a claim for a violation of § 1983, a plaintiff must allege a deprivation of a constitutional right by a government official acting "under color of state law." *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003).

Plaintiffs sufficiently allege that Defendant, sued in her official capacity as the Public Defender for Contra Costa County, acted "under the color of state law." *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (allegations against public officials satisfy the state action requirement); *Miranda v. Clark County*, 319 F.3d 465, 469-71 (9th Cir. 2003) (Public Defender is a state actor for the purposes of § 1983 when acting solely as the administrative head of the agency, on behalf of the county, in determining how the overall resources of the Public Defender's office will be spent).

"[A] local government body may be liable if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights. [Citation]. However, the policy of inaction must be more than mere negligence, [citation]; it must be a conscious or deliberate choice among various alternatives. [Citation]." *Mortimer v. Baca*, 594 F.3d 714, 722 (9th Cir. 2010) (quoting *Berry v. Baca*, 379 F.3d 764, 767 (9th Cir. 2004)); *see also Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992). To impose liability based on a policy of deliberate inaction, the "plaintiff must establish: (1) that he possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate

indifference to the plaintiff's constitutional right; and (4) that the policy [was] the moving force behind the constitutional violation." *Oviatt*, 954 F.2d at 1474 (internal quotations omitted).

C. Sixth Amendment Right to Counsel

As discussed below, Plaintiffs have not alleged facts that show a violation of their Sixth Amendment right to counsel. Accordingly, Defendant's Motion to dismiss their first cause of action, asserting a § 1983 claim for a violation of that right, is granted. Farrow's Sixth Amendment claim is dismissed with prejudice. Wade's Sixth Amendment claim is dismissed with leave to amend within the constraints set forth below.

1. Background Law

a. Attachment

The Sixth Amendment right to counsel in criminal prosecutions attaches when prosecution begins. *Rothgery*, 554 U.S. at 198-99, 128 S.Ct. 2578, 171 L.Ed.2d 366 (citing *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)). Prosecution begins with the initiation of adversarial judicial criminal proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 198-99 (quoting *United States v. Gouveia*, 467 U.S. 180, 188, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984)). Federal law determines what suffices as a commitment to prosecute for purposes of the attachment of the right to counsel. *Id.* at 207 (citing

Moran, 475 U.S. at 429, n. 3 ("[T]he type of circumstances that would give rise to the right would certainly have a federal definition"). The right to counsel attaches at the initial appearance before a judicial officer, which is generally the hearing at which "the magistrate informs the defendant of the charge in the complaint, and of various rights in further proceedings," and "determine[s] the conditions for pretrial release." *Id.* (citing 1 W. LaFave, J. Israel, N. King, & O. Kerr, Crim. P. § 1.4(g), p 135 (3d ed. 2007)).

b. Critical Stage Determination

Once the right to counsel attaches, the accused is entitled to appointed counsel during any "critical stage" of the post-attachment proceedings. *Rothgery*, 554 U.S. at 212, 128 S.Ct. 2578, 171 L.Ed.2d 366. "[C]ourts are "require[d] ... to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.'" *Musladin v. Lamarque*, 555 F.3d 830, 836 (9th Cir. 2009) (quoting *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)); *see also Benford*, 574 F.3d at 1232.

A critical stage is a "stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Hovey*, 458 F.3d at 901 (quoting *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967)). While there is no definitive list of critical stages, decisions of the United States Supreme Court identify certain stages as critical. *See Iowa v. Tovar*, 541 U.S. 77, 81, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) (entry of a guilty plea);

Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (sentencing); *United States v. Wade*, 388 U.S. 218, 236-37, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (post-indictment lineup). Case law also illustrates stages that are not critical. *Gilbert v. California*, 388 U.S. 263, 267, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) (taking a handwriting sample); *United States v. Ash*, 413 U.S. 300, 321, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973) (post-indictment photo lineup); *Hovey*, 458 F.3d at 902 (mid-trial hearing on the competency of defendant's lawyer).

Courts decide whether a state criminal proceeding is critical by looking to the functions of the proceeding under state law. *See Hamilton*, 368 U.S. at 54, 82 S.Ct. 157, 7 L.Ed.2d 114 ("Whatever may be the function and importance of arraignment in other jurisdictions, we have said enough to show that in Alabama it is a critical stage in a criminal proceeding"); *see also United States ex rel. Cooper v. Reincke*, 333 F.2d 608, 612 (2d Cir. 1964) ("The Connecticut hearing in probable cause cannot, therefore, be characterized as critical as is arraignment in Alabama").

The Ninth Circuit has developed a three-factor test for determining whether a stage is critical. *Menefield*, 881 F.2d at 698-99; *Benford*, 574 F.3d at 1232; *McNeal v. Adams*, 623 F.3d at 1289. Any one of these three factors may be sufficient to make a stage critical: (1) failure to pursue strategies or remedies results in a loss of significant rights; (2) skilled counsel would be useful in helping the accused understand the legal confrontation; and (3) the proceeding tests the merits of the accused's

case. *Menefield*, 881 F.2d at 699; *Hovey*, 458 F.3d at 901-02. In reviewing the plaintiff's lack of counsel at a motion for a new trial, the *Menefield* court considered the substantive rights in question and whether the presence of counsel would have helped the defendant enforce those rights. *Id.*

First, Plaintiffs argue that there is a distinction between a "critical stage" where counsel is required by the Sixth Amendment and a critical stage where, pursuant to *Cronic*, prejudice is presumed where counsel is absent. Opposition, 12-14. Plaintiffs argue that the Ninth Circuit's three factor test only applies in the latter situations. *Id.* at 13 (citing *McNeal*, 623 F.3d at 1289-90 (Berzon, J., concurring in the judgment)). In *McNeal*, the majority opinion set out to clarify the difference between a stage at which the defendant has a right to counsel and a critical stage requiring per se reversal if counsel is absent. *See McNeal*, 623 F.3d at 1285. Without clearly delineating the analysis, the *McNeal* majority first held that the proceeding at issue was not a critical stage because it involved no "significant consequences" to the defendant's case. *Id.* at 1288. The *McNeal* majority proceeded to conclude that the proceeding at issue was not a *Cronic* critical stage applying the above-referenced three factor test. *Id.* at 1289. The concurring opinion relied on *Hovey* in criticizing the majority for applying a "significant consequences" test as opposed to determining whether the proceeding was "any stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Id.* at 1289-90. *Hovey* stated as follows:

We reject Hovey's claim that his Sixth Amendment right to counsel was violated because he was represented only by conflicted counsel, and thus effectively unrepresented, during the competency hearing. The right to counsel, and the "correlative right" to unconflicted counsel, [citation], attach at all critical stages of a criminal prosecution. *See, e.g., United States v. Wade*, 388 U.S. 218, 224-25, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). A critical stage is any "stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967); *see also Bell v. Cone*, 535 U.S. 685, 696, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (defining a critical stage as "a step of a criminal proceeding, such as arraignment, that [holds] significant consequences for the accused").

On the basis of Supreme Court precedent, principally *Mempa* and *United States v. Ash*, 413 U.S. 300, 309, 313, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973), we have distilled a three-factor test for determining what constitutes a critical stage. We consider whether: (1) "failure to pursue strategies or remedies results in a loss of significant rights," (2) "skilled counsel would be useful in helping the accused understand the legal confrontation," and (3) "the proceeding tests the merits of the accused's case." *Menefield v. Borg*, 881 F.2d 696,

> 698-99 (9th Cir. 1989). The presence of any of these factors may be sufficient to render a stage in the proceedings "critical." *Cf. Ash*, 413 U.S. at 313, 93 S.Ct. 2568 (noting that the relevant inquiry is "whether the accused require[s] aid in coping with legal problems *or* assistance in meeting his adversary") (emphasis added)).
>
> Based on the specific facts of this case, we conclude that the attorney competency hearing...

Hovey, 458 F.3d at 901-902. The clear import of *Hovey* is that a proceeding is only a critical stage wherein the right to counsel attaches if at least one of the three factors set forth in *Menefield* is present. *See also Menefield*, 881 F.2d at 698-99 (deriving the three factor test to determine whether the hearing at issue was a critical stage at which the Sixth Amendment provision of effective assistance of counsel applied); *Benford*, 574 F.3d at 1232.

More recent Ninth Circuit precedent continues to apply the three-factor test to determine whether state court criminal proceedings "are critical stages that trigger the Sixth Amendment Right to Counsel." *See Lopez-Valenzuela*, __ F.3d __, 2013 U.S. App. LEXIS 12269, 2013 WL 2995220, at *11. In accordance with the decisions running from *Menefield* to *Lopez-Valenzuela*, the Court concludes that the three-factor test set forth above is properly applied in determining whether a particular state court criminal proceeding is a "critical stage[] that trigger[s] the Sixth Amendment right to counsel." *Id.*

Second, Plaintiffs contend that the Court should not apply the Ninth Circuit's three-factor test to the state procedures in this case because California courts have already determined that arraignment is a critical stage in the proceedings.[5] The Court agrees that arraignment is a critical stage of the proceedings. Nothing in its prior Order is to the contrary. However, on the facts alleged, counsel was requested immediately after arraignment began and no further arraignment proceedings were undertaken until counsel was present, at which time the arraignment was completed. *See* Order, 15-16; Cal. Penal Code § 988; *Chartuck v. Municipal Court*, 50 Cal. App. 3d 931, 123 Cal. Rptr. 816 (1975) (holding that arraignment is complete when the court asks the defendant whether he pleads guilty or not guilty, rejecting decisions holding that arraignment is complete upon entry of plea).

The cases on which Plaintiffs rely do not shed any light on whether the initial appearance in the present case, which did not include the entirety of the arraignment, was a critical stage of the proceedings. *See Cox*, 193 Cal. App.3d at 1440, 239 Cal.Rptr. 40 (at the arraignment the criminal defendant waived the reading of the information

5. Plaintiffs implicitly contend that the question of whether a proceeding in California is a critical stage for the purposes of the Sixth Amendment is a question of state law. They are incorrect. Federal principles govern the inquiry concerning whether a state procedure is a critical stage. *See, e.g., Musladin*, 555 F.3d at 839-43; *Benford*, 574 F.3d at 1232 n.2 (noting that *Musladin* applied a more general formulation of the three-part test applied in the Ninth Circuit, but stating that *Musladin* did not amount to a departure from that test). Of course, the analysis is specific to the state procedure.

and the right to a speedy trial and entered a plea of not guilty to all counts); *In re Johnson*, 62 Cal.2d 325, 328-29, 42 Cal.Rptr. 228, 398 P.2d 420 (1965) (criminal defendant entered guilty plea at arraignment without counsel and was sentenced immediately after the other matters on the court's calendar for the day had been attended to); *Ingram v. Justice Court*, 69 Cal.2d 832, 835, 838, 73 Cal. Rptr. 410, 447 P.2d 650 (1968) (holding that the public defender's determination that a person is indigent is not subject to judicial review where trial court refused to allow the public defender to represent the petitioner seeking to set aside an eight-year-old conviction on the ground; stating in dicta that in the hypothetical situation where a defendant seeks out the public defender for assistance prior to his first court appearance the period preceding arraignment is a stage that is often of critical importance); *People v. Viray*, 134 Cal.App.4th 1186, 1190, 36 Cal. Rptr.3d 693 (2005) (interrogation by prosecutor on the morning of criminal defendant's arraignment violated the Sixth Amendment right to counsel but was insufficient to justify reversal); *Phillips v. Seely*, 117 Cal. Rptr. 863, 43 Cal. App. 3d 104 (1974) (no critical stage analysis); *People v. Ferry*, 237 Cal.App.2d 880, 887, 890, 47 Cal.Rptr. 324 (1965) (holding (1) that defendant was indigent and entitled to representation by the public defender; (2) that the public defender's duty to provide counsel ceases when defendant retains private counsel; and (3) failing to find that the defendant was unrepresented at any critical stage); *In re Smiley*, 66 Cal.2d 606, 615-16, 625, 58 Cal.Rptr. 579, 427 P.2d 179 (1967) (criminal defendant was indigent at the time of trial, was not advised he could have an attorney appointed by the court, and had not waived the right to

counsel such that his constitutional right to counsel was violated; stating that if the defendant is unrepresented at the time of arraignment the court must ask him if he desires the aid of counsel and if he desires and is unable to employ counsel, the court must assign counsel to defend him); *People v. Cummings*, 255 Cal.App.2d 341, 343, 346-47, 62 Cal.Rptr. 859 (1967) (criminal defendant was represented himself at arraignment, the preliminary hearing, and trial; reversing conviction because there was no effective waiver of the right to counsel); *People v. Pettingill*, 21 Cal.3d 231, 145 Cal.Rptr. 861, 578 P.2d 108 (1978) (criminal defendant was detained for prolonged custodial interrogation prior to arraignment); *In re Brindle*, 91 Cal.App.3d 660, 670 154 Cal.Rptr. 563 (1979) (trial court properly granted the public defender the right to access the criminal defendants who were inmates in the California Men's Colony); *People v. Carlon*, 161 Cal.App.3d 1193, 1196, 1196 n.2, 208 Cal.Rptr. 18 (1984) (holding that refusal to appoint counsel at arraignment was error, but harmless error, where, at arraignment, upon the request for counsel, the court informed the criminal defendant that the public defender did not have anyone to staff the court and therefore asked him to enter a not guilty plea and set the matter for pre-trial and jury trial); *People v. Howell*, 178 Cal.App.3d 268, 269-71, 223 Cal.Rptr. 818 (1986) (holding that an indigent accused who is provided counsel for the arraignment only must be advised of and waive his right to appointed counsel at all subsequent stages of the proceedings before the court may accept his guilty plea; criminal defendant entered guilty plea at arraignment); *Ng v. Superior Court*, 4 Cal.4th 29, 36-37, 13 Cal.Rptr.2d 856, 840 P.2d 961 (1992) (holding

that the California Constitution, and related statutory provisions, do not require multiple prompt arraignments where the criminal accused has been promptly arraigned in one county and is being held there as a result of those charges). Thus, Plaintiffs have offered no authority for the proposition that the initial appearance held in Contra Costa County was by itself a critical stage at which counsel was required to be present.

Plaintiffs further argue that the Court cannot divide the arraignment into its constituent portions and determine whether any constituent portion alone amounts to a non-critical stage. However, the facts giving rise to this case are such that the arraignment was bifurcated.[6] Plaintiffs were unrepresented at the initial portion but represented at the continued arraignment. To determine whether there has been a violation of the Sixth Amendment based on a deprivation of counsel at a critical stage, the Court must ascertain whether the only hearing at which Plaintiffs were unrepresented was a critical stage. In addition, the Court must ascertain whether the waiting period following the initial appearance was a critical stage.

6. Plaintiffs argue that the Court must look to the jurisdictional practice, as opposed to the facts of an individual case, to determine whether a given stage of the proceedings is critical. Yet Plaintiffs also allege that the practice throughout the jurisdiction of Contra Costa County in the relevant time period was to divide the arraignment in this manner.

c. Appointment of Counsel a Reasonable Time After Attachment Where Counsel Was Present at All Subsequent Critical Stages

In *Rothgery*, the Supreme Court stated that "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *Rothgery*, 554 U.S. at 212, 128 S.Ct. 2578, 171 L.Ed.2d 366. *Rothgery* did not discuss a framework for conducting the analysis into what a reasonable time would be. *Id.* at 212 n.15 ("We do not here purport to set out the scope of an individual's post-attachment right to the presence of counsel. It is enough for present purposes to highlight that the enquiry into that right is a different one from the attachment analysis").

After *Rothgery*, federal district courts have three times addressed the issue of whether a delay in the appointment of counsel is reasonable. In all three cases, the district court has declined to find the delay—forty days, two months, and an unspecified period—unreasonable without proof of actual prejudice:

> Finally, although the right to counsel under the Sixth Amendment attaches at the time of an arrestee's initial appearance, *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008), neither the Supreme Court nor the Fifth Circuit has determined that counsel must be appointed

> within a specific period of time thereafter. ... All that the plaintiff has alleged in this case is that he was not provided with appointed counsel for a period of forty (40) days after his arrest. He fails to allege, however, that he suffered any actual prejudice as a result of this delay or that, had an attorney been appointed at an earlier time, a meritorious defense might have been asserted resulting in his release or in the dismissal of the charges levied against him. ... Accordingly, in the absence of any assertion of prejudice resulting from the alleged delay, this Court concludes that the alleged 40-day delay in the appointment of counsel was not so unreasonable as to result in a Sixth Amendment violation.

Grogen v. Gautreaux, 2012 U.S. Dist. LEXIS 120411, *9-*10 (M.D. La. July 11, 2012); *see also Hawkins v. Montague County*, 2010 U.S. Dist. LEXIS 116361, *35 (N.D. Tex. Nov. 1, 2010) ("The Court finds that the approximate two-month delay in receiving court-appointed counsel fails to rise to the level of a constitutional violation based on the Sixth Amendment"); *Wingo v. Kaufman County*, 2010 U.S. Dist. LEXIS 55865, *2-*3 (N.D. Tex. June 4, 2010) ("The court can not determine from plaintiff's complaint ... whether the delay in appointment of counsel was reasonable or whether plaintiff suffered any prejudice from the delay"). These decisions are consistent with the Supreme Court's reference to ineffective assistance of counsel in *Rothgery. See Gonzalez-Lopez*, 548 U.S. at 147, 126 S.Ct. 2557, 165 L.Ed.2d 409 (distinguishing the right to

effective assistance of counsel from the case the Court was addressing because "a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced"); *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution").

2. Application to Facts

a. Attachment

Following *Rothgery*, the Court again concludes, on the basis of the facts alleged, that the right to counsel attached at the initial appearance. The parties earlier agreed on this point. *See* Order, 13. At the initial appearance, the court asked each Plaintiff whether he could afford counsel. SAC, ¶¶ 30, 39. Each responded that he could not and would like the court to appoint counsel. *Id.* After the right to counsel attached, the court referred Plaintiffs cases to Defendant and continued the arraignment to a later hearing date for "further arraignment." *Id.* Neither Plaintiff entered a plea. *Id.* Neither Plaintiff was represented until the further arraignment hearing, where each Plaintiff was represented by counsel and entered a plea. *Id.* at ¶¶ 32-33, 44.

b. Critical Stage

i. Initial Appearance

In their Complaint, Plaintiffs alleged that the initial appearance consisted of (1) the court's inquiry into whether Plaintiffs could afford counsel and whether Plaintiffs desired appointed counsel; (2) referral of the matter to the Public Defender; and (3) a continuance. Complaint, ¶¶ 31, 35. In their SAC, Plaintiffs add the new allegation that bail is set at the initial appearance. SAC, ¶¶ 30, 39. Plaintiffs do not provide any detail into the manner in which bail is set at the initial appearance. For example, they have not alleged whether facts are admitted or argument is made as to bail at the initial appearance or whether bail is simply set pursuant to a previously set bail schedule. The Court again concludes that, on the facts alleged, the Sixth Amendment permitted the events that actually transpired at the initial appearance to take place without the presence of counsel, and permits a continuance for the appointment of counsel.

Lopez-Valenzuela is instructive. In the relevant portion of that opinion, the Ninth Circuit addressed whether the Sixth Amendment right to counsel was triggered by initial appearances in Arizona. *Lopez-Valenzuela*, 2013 U.S. App. LEXIS 12269, 2013 WL 2995220, at *10-*11. At the initial appearance in Arizona no plea is entered. 2013 U.S. App. LEXIS 12269, [WL] at *10. At the initial appearance, the commissioner must: ascertain the criminal defendant's name and address; inform the defendant of the charges, the right to counsel,

and the right to remain silent; determine whether probable cause exists to believe that a crime was committed (if the arrest was made without a warrant); appoint counsel if the defendant is eligible; and determine release conditions, including an immigration status determination that can result in certain felony defendants being precluded from obtaining bail. 2013 U.S. App. LEXIS 12269, [WL] at *1-*2, *10. Although the bail determination was made at the initial appearance, any party can move for a reexamination of the release conditions. 2013 U.S. App. LEXIS 12269, [WL] at *2. Pursuant to Arizona law, a hearing on such a motion shall be held as soon as practicable but not later than seven days after filing. *Id.* In addition, if the court determines that the arrestee "entered or remained in the United States illegally," an evidentiary hearing, known as a *Simpson/Segura* hearing, is held within twenty-four hours to determine whether bail should be denied. 2013 U.S. App. LEXIS 12269, [WL] at *1. Arrestees are entitled to counsel at the *Simpson/Segura* hearing. *Id.*

In *Lopez-Valenzuela*, the Ninth Circuit concluded that the Sixth Amendment right to counsel was not triggered by the initial appearance in Arizona after applying the *Menefield* three-factor test. As to the first factor, the court reasoned that the "only strategies available to the defendant seeking to avoid pretrial detention were to deny the crime(s) alleged or that the defendant has entered or remained in the United States illegally. But, as no plea is entered at an [initial appearance] and the 'initial appearance provides no opportunity for a defendant to present evidence or make any argument regarding the law or evidence,' [citation], these are not

remedies available at the initial appearance. Rather, these are remedies available after the initial appearance at a *Simpson/Segura* hearing, by which point counsel will have been appointed." 2013 U.S. App. LEXIS 12269, [WL] at *11. With regard to the second factor, the court held that skilled counsel was unnecessary to help an accused understand the purely administrative matters covered during the initial appearance. *Id.* Reaching the third factor, the court concluded that the initial appearance did not test the merits of the defendant's case, noting that no plea is entered and any discussion of immigration status is undertaken for the sole purpose of determining whether a defendant is bondable. *Id.*

Plaintiffs' argument is that the initial appearance was a critical stage because, consistent with California law, it should have been a complete arraignment. *See* Opposition, 5-14 (arguing that arraignment in California is a critical stage and that the Court improperly excised the portions held at the initial appearance in undertaking its analysis and applied the wrong legal standard to the excised portions, not putting forward any argument that the proceedings held at the initial appearance made it a critical stage of the proceedings); *see also* Plaintiffs' Supplemental, 4-8. As discussed in more detail later in this Order, California law does not require that the entire arraignment be completed at the initial appearance. Plaintiffs' reliance on the entirety of the arraignment to establish a critical stage in effect concedes that nothing happened at the initial appearance to make it a

critical stage of the proceedings.[7] Moreover, Plaintiffs' supplemental brief appears to concede that the procedures at issue in this case would be proper if they had been enacted by the California legislature. *See* Plaintiffs' Supplemental, 5, 9 (distinguishing *Lopez-Valenzuela* from the present case because the procedure at issue in that case was enacted by the Arizona legislature, not the Public Defender). If that is true, then there can be no Sixth Amendment violation.

Even if California law requires the entire arraignment occur at the initial appearance, the SAC in this case does not allege that the complete arraignment occurred. As in *Lopez-Valenzuela*, the question before the Court here is whether the initial appearance held in Contra Costa County in each of Plaintiffs' criminal cases was a critical stage of the proceedings such that they were entitled to counsel under the Sixth Amendment. Plaintiffs have been given one opportunity to amend their Complaint to allege sufficiently that their initial appearances amounted to a critical stage within the meaning of *Menefield.* They have not done so. Like in *Lopez-Valenzuela:* (1) as discussed in more detail in this Court's prior Order, Plaintiffs have not alleged that the absence of counsel to pursue strategies at the initial appearance could result in the loss of significant rights because, as alleged, no rights can be lost at the initial appearance; (2) as alleged there was no legal confrontation in the initial appearance after the accused

7. At most, Plaintiffs argue that the Court applied the wrong standard in evaluating the initial appearance in its prior Order. Opposition, 11-14. However, Plaintiffs do not assert any basis for concluding that the initial appearance in itself was a critical stage.

requested counsel; and (3) nothing occurred at the initial appearance that tested the merits of the accused's case. *See Lopez-Valenzuela*, F.3d , 2013 U.S. App. LEXIS 12269, 2013 WL 299520, at *10-*11; Order, 16-18.

Indeed, the initial appearance in *Lopez-Valenzuela* was more substantial than the initial appearance in this case. In *Lopez-Valenzuela*, like here, the defendant was advised of the charges, offered counsel, and a bail determination was made. Unlike the procedure in California, however, the Arizona procedure required the Commissioner to make a probable cause determination. Nonetheless, the Ninth Circuit decided that the initial appearance in Arizona was not a critical stage. In Plaintiffs' initial appearances, where only advice of the charges and the right to counsel, and the setting of bail, occurred, that same conclusion is required.

This conclusion is buttressed by the practical implications of Plaintiffs' argument. If Plaintiffs are correct, the Sixth Amendment would put the state in an impossible position: Counsel must be present, whether available or not, and a continuance for appointment of counsel (as happened here) would not remedy the constitutional violation. One can readily envision the situation where the Public Defender has a conflict of interest, and conflict counsel is not available for a period of time. Plaintiffs' argument would call this a deprivation of a defendant's Sixth Amendment rights that could not be remedied. The Constitution imposes no such restriction.

For the above reasons, Plaintiffs' Sixth Amendment claim is dismissed with prejudice to the extent it relies on the theory that the initial appearance was a critical stage of the proceedings.

ii. Waiting Period

The Sixth Amendment may be violated during the waiting period either because (1) the waiting period contained, or was itself, a critical stage; or (2) the failure to appoint counsel at some point during the waiting period prevented Plaintiffs from being adequately represented at a subsequent critical stage. First, the Court concludes, on the facts alleged, that the waiting period did not contain, and was not, a critical stage.

In their Complaint, Plaintiffs did not allege any activity during the waiting period that could have made that time frame a critical stage. Now, Plaintiffs allege (1) that the Probation Department prepared a bail study during the waiting period; (2) that the bail study was an influential report; and (3) that the bail study contained no favorable information because the Probation Department could not ascertain that information in the absence of appointed counsel. SAC, ¶¶ 31, 40.

The Court applies the three *Menefield* factors to the new allegations regarding the waiting period. Plaintiffs still have not alleged that there was any legal confrontation during the waiting period or that anything occurred to test the merits of their case during the waiting period. Rather, the bail study allegations pertain to whether

failure to pursue strategies or remedies could result in the loss of significant rights. However, Plaintiffs do not allege that they could lose their ability to present favorable evidence at a bail determination. Accordingly, on the facts alleged, the Court cannot conclude that the preparation of the bail study in Contra Costa County is a critical stage in the proceedings.

Second, Plaintiffs have not alleged that the failure to appoint counsel during the waiting period prejudiced their representation at subsequent critical stages. Regarding Farrow, the SAC contains only the general statement that the prosecutor's office had more time to prepare for the preliminary hearing than defense counsel. *See* SAC, ¶ 34. Plaintiffs make no allegation that the disparity in preparation time impacted Farrow's defense in any way. Thus, there is nothing in the SAC from which to conclude that counsel was not appointed a reasonable time after attachment. *See Rothgery*, 554 U.S. at 212, 128 S.Ct. 2578, 171 L.Ed.2d 366 ("counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself").

The allegations pertaining to Wade come closer to alleging that counsel was not appointed at a reasonable time after attachment. Plaintiffs allege (1) that the delay in appointment of counsel impinged Wade's ability to interview a material witness on an important *Miranda* issue in his case because her memory faded; and (2) allowed the prosecution to amend its complaint as of right. SAC, ¶¶ 43, 45. Plaintiffs allege that this was prejudicial to

Wade because (1) certain facts that the witness may have remembered pertaining to a potential *Miranda* violation may have been helpful to his defense; and (2) the amended complaint increased his potential exposure. *Id.*

First, as to Wade's inability to interview a material witness, Plaintiffs still have not alleged, for example, how that inability affected, or could have affected, any subsequent proceedings in Wade's case. On these allegations, there is no basis to conclude that the delay in the appointment of counsel impacted Wade's representation at subsequent critical stages of his proceedings. Moreover, Plaintiffs only allege that it is "possible" that the witness would have remembered the relevant details of Wade's interrogation had appointment of counsel not been delayed. Plaintiffs do not plead that such a scenario is plausible, nor do they provide any factual allegations to support that possibility. For example, counsel interviewed the witness in question seven days after appointment at the continued arraignment. There are no allegations that counsel would have interviewed the witness earlier, or that the witness, who could not remember whether *Miranda* warnings were given when interviewed twenty days after the arrest, would have remembered them a week earlier. Though this scenario seems implausible to the Court, if Wade is in possession of any such facts he may plead them. He must also plead the impact of this evidence on the progress of his case, i.e. prejudice.

Second, the allegations pertaining to the prosecution's ability to amend its complaint as of right also fail because Plaintiffs have not alleged any impact this had on any later

proceedings. Moreover, Plaintiffs have not, and cannot, plausibly alleged that the prosecution would not have been able to amend the complaint to increase Wade's exposure even if he had entered a plea at the initial appearance.

Wade will be given one more opportunity to allege that counsel was not "appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself." *See Rothgery*, 554 U.S. at 212, 128 S.Ct. 2578, 171 L.Ed.2d 366. Leave to amend shall be limited to additional facts (1) concerning the witness' faded memory; and (2) any impact the witness' faded memory had on Wade's proceedings. As to Farrow, this claim is dismissed with prejudice.

D. Fourteenth Amendment Due Process as to State Speedy Trial Statutes

Plaintiffs' Fourteenth Amendment Due Process claims predicated on violations of California Penal Code §§ 825, 859b, and 1050 are dismissed with prejudice.

a. Background Law

"Unless there is a breach of constitutional rights, ... § 1983 does not provide redress in federal court for violations of state law." *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1060 (9th Cir. 2012) (quoting *Schlette v. Burdick*, 633 F.2d 920, 922 n.3 (9th Cir. 1980)). "[N]ot every violation of state law amounts to an infringement of constitutional rights." *Id.*

Appendix F

Plaintiffs seek to assert their statutory speedy trial rights, provided by the state of California, through the Fourteenth Amendment. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law..." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment contains both procedural and substantive due process protections. *United States v. Salerno*, 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

i. Procedural Due Process

Courts analyze procedural due process claims in two steps: "[T]he first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Carver v. Lehman*, 558 F.3d 869, 872 (9th Cir. 2008), *cert. denied*, 558 U.S. 973, 130 S. Ct. 466, 175 L. Ed. 2d 313 (2009) (quoting *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989)).

"A liberty interest may arise from either of two sources: the due process clause itself or state law." *Id.* (citing *Toussaint v. McCarthy*, 801 F.2d 1080, 1089 (9th Cir. 1986)). "[T]o create a liberty interest protected by due process, the state law must contain: (1) substantive predicates governing official decisionmaking, and (2) explicitly mandatory language specifying the outcome that must be reached if the substantive predicates are met." *Bonin v. Calderon*, 59 F.3d 815, 842 (9th Cir. 1995), *cert. denied*, 516 U.S. 1051, 116 S. Ct. 718, 133 L. Ed. 2d 671

(1996) (internal quotation marks and citations omitted); *Oviatt*, 954 F.2d at 1474. Where "[t]he only mandatory language in [the state statute at issue] concerns a procedural right ...[, t]hat language cannot create a liberty interest within the meaning of the Fourteenth Amendment because expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause of the Fourteenth Amendment." *Carver*, 558 F.3d at 875 (internal quotation marks, footnote, italics, and citations omitted); *see also Marsh v. County of San Diego*, 680 F.3d 1148, 1156 (9th Cir. 2012) ("to contain the requisite "substantive predicates,' "the state law at issue must provide more than merely procedure, it must protect some substantive end'") (quoting *Bonin*, 59 F.3d at 842).

ii. Substantive Due Process

Substantive due process limits what the government may do in its legislative and executive capacities. *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). Substantive due process "forbids the government from depriving a person of life, liberty, or property in such a way that "shocks the conscience' or "interferes with the rights implicit in the concept of ordered liberty.'" *Corales v. Bennett*, 567 F.3d 554, 568 (9th Cir. 2009) (quoting *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998))". Accordingly, "A substantive due process claim "must, as a threshold matter, show a government deprivation of life, liberty, or property.'" *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1026 (9th Cir. 2007) (quoting *Nunez*, 147 F.3d at 871).

Appendix F

iii. Statutory Speedy Trial Rights

California Penal Code §§ 859b, 1382, and 1050, governing the right to a speedy preliminary hearing, the right to a speedy trial, and the procedure for granting continuances, including a continuance of the preliminary hearing, are set forth in this Court's prior Order. *See* Order, 24-26. In the SAC, Plaintiffs also assert a denial of their right to a prompt arraignment pursuant to California Penal Code § 825. SAC, ¶ 10.

California Penal Code § 859 reads:

> When a defendant is charged with the commission of a felony by written complaint subscribed under oath and on file in a court in which a felony is triable, he or she shall, without unnecessary delay, be taken before a magistrate of the court in which the complaint is on file. The magistrate shall immediately deliver to the defendant a copy of the complaint, inform the defendant that he or she has the right to have the assistance of counsel, ask the defendant if he or she desires the assistance of counsel, and allow the defendant reasonable time to send for counsel. ... If the defendant desires and is unable to employ counsel, the court shall assign counsel to defend him or her. ... If it appears that the defendant may be a minor, the magistrate shall ascertain whether that is the case, and if the magistrate concludes that it is probable that the defendant is a minor, he or she shall immediately either notify the

> parent or guardian of the minor ... of the arrest, or appoint counsel to represent the minor.

Cal. Penal Code § 859. In *Ng*, the California Supreme Court noted that § 859 has been described as "in pari materia" with § 859b, and that § 859b applies only to persons in custody. *Ng*, 4 Cal.4th at 38, 13 Cal.Rptr.2d 856, 840 P.2d 961. The court drew on that note as additional support for its holding that a defendant in custody for charges in one county need not be immediately arraigned in other counties. *Id.*

California Penal Code § 849(a) states:

> When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, shall, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person shall be laid before such magistrate.

Cal. Penal Code § 849.

California Penal Code § 825(a) provides:

> (a)(1) Except as provided in paragraph (2), the defendant shall in all cases be taken before a magistrate without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays.

> (2) When the 48 hours prescribed by paragraph (1) expire at a time when the court in which the magistrate is sitting is not in session, that time shall be extended to include the duration of the next court session on the judicial day immediately following. If the 48hour period expires at a time when the court in which the magistrate is sitting is in session, the arraignment may take place at any time during that session. However, when the defendant's arrest occurs on a Wednesday after the conclusion of the day's court session, and if the Wednesday is not a court holiday, the defendant shall be taken before the magistrate not later than the following Friday, if the Friday is not a court holiday.

Cal. Penal Code § 825(a).

b. Application to Facts

In its prior Order, the Court dismissed Plaintiffs' constitutional claim predicated on the violation of their statutory speedy trial rights provided by California Penal Code §§ 859b, 1382, 1049.5, and 1050. In their SAC, Plaintiffs reassert liability under §§ 859b and 1050. SAC, ¶ 10. Plaintiffs also add a theory of liability pursuant to § 825. As in the previous Order, the Court concludes that Plaintiffs' arraignments were complete when they were asked to enter a plea at the further arraignment hearing. Order, 26. Thus, for the same reasons discussed in the previous Order, the Court again concludes that Plaintiffs

have not alleged a violation of either § 859b or § 1050. *See id.* at 27-28. The Court does not address those issues again here.

Defendant makes two arguments for dismissing Plaintiffs' second and third causes of action to the extent they are premised on § 825. First, that Defendant did not violate § 825 because the section does not require that arraignment be completed at the initial appearance. Motion, 10; Reply, 9. Second, that § 825 lacks mandatory language specifying the outcome that must be reached if the substantive predicates are met to create a cognizable liberty interest. Motion, 10; Reply, 9. Plaintiffs fail to defend their § 825 theory in their Opposition, making no mention of § 825. For that reason alone, the second and third causes of action predicated on a violation of § 825 are dismissed without leave to amend. Moreover, even if § 825 creates a cognizable liberty interest, the plain language of the statute mandates only that the criminal accused be "taken before the magistrate" within the prescribed time limits.[8] Nothing in the statute prohibits continuance of the arraignment by the court to allow for appointment of counsel.[9]

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8. The alleged "blatant violation of Penal Code section 825" visited on Wade through his detention prior to his initial court appearance is irrelevant to this section because Plaintiffs do not allege that Defendant had anything to do with that violation. *See* SAC, ¶ 37.

9. To the extent § 1050 may have been implicated by the continuance, that "section is directory only and does not mandate dismissal of an action by its terms." Cal. Penal Code § 1050(l).

Appendix F

E. Fourteenth Amendment Equal Protection

For the reasons set out below, Plaintiffs' equal protection claim is dismissed with prejudice.

1. Background Law

The Equal Protection Clause provides that no state shall "deny any person within its jurisdiction the equal protection of the law." U.S. Const. Amendment XIV, § 1. The Supreme Court has noted that the Equal Protection Clause "is basically a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985).

A plaintiff may allege an equal protection violation one of several ways. First, a plaintiff can demonstrate that the defendant intentionally discriminated on the basis of plaintiff's membership in a protected class. *See, e.g., Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001). Under this theory, a plaintiff must show that the defendant's actions were a result of the plaintiff's membership in a suspect class. *Thornton v. City of St. Helens*, 425 F.3d 1158, 1167 (9th Cir. 2005). Such actions are subjected to "strict scrutiny" and "will only be sustained if they are suitably tailored to serve a compelling state interest." *City of Cleburne*, 473 U.S. at 439, 105 S.Ct. 3249, 87 L.Ed.2d 313. Similar oversight is applied where state action "impinges on personal rights," otherwise framed as "fundamental rights," protected by the Constitution. *Id.*

If the action does not involve a suspect classification, a plaintiff may establish an equal protection claim by showing that similarly situated individuals were intentionally treated differently without a rational relationship to a legitimate state purpose. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000); *see San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1972); *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004) *overruled on other grounds Action Apt. Ass'n v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1025 (9th Cir. 2007); *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 679 (9th Cir. 2002). To state an equal protection claim under this theory, a plaintiff must allege that: (1) the plaintiff is a member of an identifiable class; (2) the plaintiff was intentionally treated differently from others similarly situated; and (3) there is no rational basis for the difference in treatment. *Village of Willowbrook*, 528 U.S. at 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060.

Several Supreme Court decisions have recognized violations of the Equal Protection Clause where the state provides mandatory criminal procedures, such as an appeal as of right, but in effect makes those procedures available only to those who can pay. *See Evitts v. Lucey*, 469 U.S. 387, 403-05, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985) (interpreting Supreme Court precedent as involving equal protection concerns "because the State treated a class of defendants-indigent ones-differently for the purposes of offering them a meaningful appeal") (citing *Griffin v. Illinois*, 351 U.S. 12, 17-18, 76 S.Ct. 585, 100 L.Ed. 891

(1956) (where the state in effect dismissed the petitioner's appeal, which was taken as of right, because he could not afford a transcript it made the right available only to the wealthy in violation of equal protection principles and also violated due process because the disposition of the appeal was arbitrary); *Douglas v. California*, 372 U.S. 353, 357-58, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963) (procedure whereby indigent defendant must demonstrate merit of case before obtaining counsel on appeal "does not comport with fair procedure" — "[t]here is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel[], while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself")). As Plaintiffs point out, the California Supreme Court has indicated in dicta that understaffing a public defender's office may result in denying indigent defendants the equal protection of the laws where the understaffing results in a violation of the defendants' state speedy trial rights. *See Barsamyan v. Appellate Div. of Superior Court*, 44 Cal.4th 960, 981-82, 81 Cal.Rptr.3d 265, 189 P.3d 271 (2008) (citing *People v. Johnson*, 26 Cal.3d 557, 571-72, 162 Cal.Rptr. 431, 606 P.2d 738 (1982) (stating, in dicta, that treating conflicts in the public defender's calendar as good cause for a delay extending the time for trial beyond that required by California Penal Code § 1382 may result in denying indigent defendants the equal protection of the laws)).

2. Application to Facts

Plaintiffs allege that they were denied a prompt arraignment, their right to assistance of counsel, and their statutory speedy trial rights on the basis of their indigence whereas similarly situated criminal defendants who could afford private counsel were furnished prompt arraignments, were permitted to enter pleas at their first appearance, were allowed to influence the probation department with favorable information concerning bail circumstances in the days following arraignment, were immediately able to apply for bail or release on their own recognizance, were permitted to immediately assert their statutory speedy trial rights, and were able to immediately begin preparation of their cases for future critical stages. SAC, ¶ 66.

Plaintiffs have not alleged that the Contra Costa County Public Defender, the only Defendant in this case, treated any group or individual differently from any other group or individual through the application of its policy prior to the filing of this case.[10] Indeed, the Contra Costa Public Defender's Office only represents indigent defendants and capital defendants.[11] Because, as alleged, Defendant had one blanket policy that applied equally

10. In their SAC, Plaintiffs allege that Defendant now appears at the initial appearance to represent in-custody felony defendants but continues to fail to do so with respect to in-custody misdemeanor defendants. SAC, ¶¶ 1-2. Plaintiffs do not specify to which group they belong.

11. Plaintiffs do not allege that the policy has ever made any distinction between capital defendants and non-capital defendants.

to each of its clients during the relevant time period, Plaintiffs have not adequately pled a violation of the Equal Protection Clause by Defendant.

F. Remaining State Law Claims

Under state law, Plaintiffs seek damages for an alleged violation of the California Bane Act and seek a writ of mandate to compel Defendant to comply with California Government Code § 27706. *See* Cal. Civ. Code §§ 51 *et seq.*, 52, 52.1; Cal. Gov. Code § 27706. The Court has jurisdiction over this action on the basis of the federal questions raised by the Complaint. *See* 28 U.S.C. § 1331. The Court's jurisdiction over the remaining state law claims relies on its supplemental jurisdiction. *See* 28 U.S.C. § 1367(a). Having dismissed all claims over which it has original jurisdiction, the court declines to exercise its supplemental jurisdiction over the state law claims. *See* 28 U.S.C. § 1367(c)(3). Plaintiffs' fifth and sixth causes of action are dismissed without prejudice for lack of subject matter jurisdiction.

IV. CONCLUSION

For the foregoing reasons, Defendants Motion to Dismiss the SAC is granted. Farrow's federal claims are dismissed with prejudice. The Court declines to exercise jurisdiction over Farrow's state law claims, which are dismissed without prejudice and may not be reasserted in this case. Wade will be given one more opportunity to amend his § 1983/Sixth Amendment claim, as permitted in the body of this Order, and to reassert the same state law claims found in the SAC. Any amended complaint shall be filed within twenty-one (21) days of this Order.

Appendix F

IT IS SO ORDERED.

Dated: August 7, 2013

/s/ Joseph C. Spero
JOSEPH C. SPERO
United States Magistrate Judge

APPENDIX G — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, DATED MAY 8, 2013

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 12-cv-06495-JCS

JOHN FARROW, *et al.*,

Plaintiffs,

v.

ROBIN LIPETZKY,

Defendant.

May 8, 2013, Decided;
May 8, 2013, Filed

JOSEPH C. SPERO, United States Magistrate Judge.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE COMPLAINT WITHOUT PREJUDICE

I. INTRODUCTION

Plaintiffs John Farrow ("Farrow") and Jerome Wade ("Wade") (collectively, "Plaintiffs") brought this putative class action against Defendant Robin Lipetzky,

in her official capacity as the Contra Costa County Public Defender ("Defendant"). Plaintiffs allege causes of action (1) under 42 U.S.C. § 1983 for (a) violation of the Sixth Amendment to the United States Constitution; and (b) violations of the Fourteenth Amendment to the United States Constitution; (2) under the Unruh Act for violation of their statutory speedy trial rights; and (3) for violation of California Government Code § 27706. Presently before the Court is Defendant's Motion to Dismiss the Complaint ("Motion"). The parties have consented to the jurisdiction of a magistrate judge pursuant to 28 U.S.C. § 636(c). This Motion raises two related questions. First, does the failure to provide counsel at an initial appearance (at which the only events that occur are the provision of a copy of the charges to the defendant, the inquiry as to whether the defendant desires appointed counsel, and the continuance of the matter to allow for appointment of counsel) violate the Sixth Amendment guarantee of counsel in a criminal case? Second, where the matter is continued for 5 to 13 days, at which time counsel appears with the defendant, does the delay in appointment of counsel violate the Sixth Amendment? Because the Court answers both questions in the negative, the Motion is GRANTED and the Complaint is dismissed with leave to amend.

II. REQUEST FOR JUDICIAL NOTICE

The standard for judicial notice is set forth in Rule 201 of the Federal Rules of Evidence, which allows a court to take judicial notice of an adjudicative fact not subject to "reasonable dispute," either because it is "generally known within the territorial jurisdiction of the trial court" or it is

"capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. As a general rule, the court "may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *U.S. v. Corinthian Colleges,* 655 F.3d 984, 998-99 (9th Cir. 2011) (quoting *Lee v. City of Los Angeles,* 250 F.3d 668, 688 (9th Cir. 2001)). However, the court may "consider materials that are submitted with and attached to the Complaint." *Id.* at 999. The court "may also consider unattached evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to plaintiff's claim; and (3) no party questions the authenticity of the document." *Id.* at 999 (citing *Marder v. Lopez,* 450 F.3d 445, 448 (9th Cir. 2006)). In addition, the court may take judicial notice of "matters of public record," but not facts that may be "subject to reasonable dispute." *Id.* (citing *Lee,* 250 F.3d at 689).

Defendant seeks judicial notice of two facts on the basis of five public records. Defendant's Request for Judicial Notice ("RJN"), 1-2; Corrected Declaration of D. Cameron Baker in Support of Defendant's Motion to Dismiss ("Baker Declaration"), Exs. A-E. The five public records are: (1) the "AB 109 Operations Plan for Contra Costa County as Approved and Adopted by the Executive Committee of the Contra Costa County Community Corrections Partnership Adopted November 9, 2012;" (2) a Position Adjustment Request from the official files of the Contra Costa County Board of Supervisors for funding for two full-time Deputy Public Defender Positions and one full-time Paralegal Position, signed with Board

approval on January 15, 2013; (3) an order dated January 15, 2013 approving the "2012/13 AB 109 Criminal Justice Realignment Implementation Plan" from the official records of the Contra Costa County Board of Supervisors; (4) an affidavit, from the Contra Costa County Office of the Public Defender in the matter entitled *People v. Farrow,* Contra Costa County Superior Court No. 01-15531-7, in which Christopher Martin is appointed to represent John Howard Farrow; and (5) a minute order dated November 21, 2011 from the Contra Costa Superior Court file entitled *People v. Wade,* Case No. 5-121217-4, stating that Jerome Edward Wade appeared with his attorney "Martin." Baker Declaration, ¶¶ 3-7, Exs. A-E. The two facts are: (1) Defendant now "has funding to have attorneys present at the initial court appearance for criminal defendants;" and (2) that "Christopher Martin, one of Plaintiffs' attorneys in this case, was counsel of record for both Plaintiffs in their underlying criminal proceedings." RJN, 1.

Plaintiffs oppose judicial notice. Plaintiffs' Opposition to Motion to Dismiss ("Opposition"), 7-9. In particular, Plaintiffs contest whether the apparent acquisition of funding for two additional public defender positions is sufficient to provide representation of indigent defendants in misdemeanor and felony cases at three courthouses in Contra Costa County. *Id.* at 8. The Court takes judicial notice of the five documents as public records. The Court cannot take judicial notice of the inference that Defendant now has adequate funding to have attorneys present at the initial court appearance for all criminal defendants. Although the noticed documents indicate that Defendant has obtained funding for two Deputy Public Defender

positions and one Paralegal position to "[p]rovide for early representation of arrestees at the first Court appearance," whether that funding is adequate is subject to reasonable dispute. As to whether Plaintiffs' counsel also represented them in their criminal proceedings, neither party has made any argument relying on that asserted fact and the Court does not rely on it in resolving this Motion.

III. BACKGROUND

A. Complaint

Plaintiffs allege that indigent, in-custody criminal defendants in Contra Costa County are customarily left in jail without counsel for 5 to 13 days after their first court appearance. Complaint, ¶ 1. Plaintiffs allege that, in the first court appearance, which is "dubbed 'arraignment,'" no plea is taken, bail is not examined, and counsel is not appointed. *Id.* at ¶ 2. Plaintiffs allege that this is a result of Defendant's policy:

> At the first court appearance (arraignment) when given a copy of the charges — or when questioned in police custody before arrest or charges are brought — a person may request representation by an attorney. At the arraignment or first appearance, persons out of custody will be referred to our office and given a date to return to court with an attorney. Persons in custody will be given a court date and will be visited at the jail by staff

> from the Department before the next court date.

Id. at ¶ 3-4, Ex. A. Plaintiffs allege that referral to a public defender at the first court appearance results in an automatic continuance, customarily between 5 and 13 days, for "further arraignment." *Id.* at ¶¶ 4, 6. Plaintiffs allege that this delays the activation of their state statutory speedy trial rights, because those rights run from the entry of plea. *Id.* at ¶ 7.

Plaintiffs allege that Farrow was arrested on August 30, 2012. *Id.* at ¶ 29. Thereafter, Farrow appeared alone in court for his arraignment on September 2, 2012. *Id.* at ¶ 30. The court asked Farrow if he could afford counsel, and Farrow replied that he could not. *Id.* at ¶ 31. The court asked Farrow if he wanted the court to appoint counsel, and Farrow said that he did. *Id.* The court then referred the matter to the Public Defender and continued the matter to September 15, 2012 for "further arraignment" without advising Farrow of his right to bail or his right to a speedy preliminary hearing and trial. *Id.* Farrow remained in jail without examination of bail, legal representation, or statutory speedy trial rights until the "further arraignment," at which counsel was appointed and Farrow entered his plea. *Id.* at ¶¶ 31-32.

Plaintiffs allege that Wade was arrested on November 8, 2012.[1] *Id.* at ¶ 33. Wade appeared at court alone for his

1. Consistent with the remainder of the Complaint, it appears that Plaintiffs intended to allege that Wade was arrested on November 8, 2011.

arraignment on November 14, 2011. *Id.* at ¶ 34. The court asked Wade if he could afford counsel, and he replied that he could not. *Id.* at ¶ 35. The court asked Wade if he wanted the court to appoint counsel, and Wade replied that he did. *Id.* The court referred the matter to the Public Defender and continued the matter to November 21, 2011 for "further arraignment" without advising Wade of his right to bail or his right to a speedy preliminary hearing and trial. *Id.* Wade remained in jail without examination of bail, the protection of the statutory speedy trial rights, or legal representation until the "further arraignment," at which counsel was appointed and Wade entered his plea. *Id.* at ¶¶ 35-36.

Plaintiffs allege that Farrow and Wade represent a class of indigent, in-custody criminal defendants in Contra Costa County that asked for appointment of the Public Defender, suffered an automatic continuance of between 5 and 13 days as a consequence of asserting their right to appointed counsel without any knowledge of their bail rights or statutory speedy trial rights, were deprived of counsel between 5 and 13 days, and were deprived of their statutory speedy trial rights and their right to a prompt bail hearing during the 5 to 13 day period. *Id.* at ¶ 41. Plaintiffs further allege that the putative class was deprived of said rights pursuant to the Public Defender's written policy, that the Public Defender maintains written records with regard to each Plaintiff, and that the Public Defender knew that the actions alleged in the Complaint violated state and federal law when she committed said actions. *Id.*

Appendix G

Plaintiffs allege six causes of action:

(1) *Violation of the Sixth Amendment of the U.S. Constitution*: Plaintiffs allege that Defendant's failure to represent Plaintiffs at their first appearance, or a reasonable time thereafter, violated their Sixth Amendment right to the assistance of court appointed counsel. *Id.* at ¶ 47. Plaintiffs allege that they are entitled to recover damages pursuant to 42 U.S.C. § 1983 because Defendant's actions, taken under the color of law, directly and proximately damaged them. *Id.*

(2) *Violation of the Fourteenth Amendment of the Constitution — Substantive Due Process with Respect to Statutory Speedy Trial Rights*: Plaintiffs allege that Defendant's conduct amounted to deliberate indifference and resulted in denial of Plaintiffs' statutory speedy trial rights without a hearing to determine the cause and reasonableness of the denial in violation of the Fourteenth Amendment. *Id.* at ¶ 50. Plaintiffs allege that they are entitled to recover damages pursuant to 42 U.S.C. § 1983 because Defendant's actions, taken under the color of law, directly and proximately damaged them. *Id.*

(3) *Violation of the Fourteenth Amendment of the Constitution — Procedural Due Process with Respect to Statutory Speedy Trial Rights*: Plaintiffs repeat the allegations in their second cause of action. *Id.* at ¶ 53.

(4) *Violation of the Fourteenth Amendment — Procedural Due Process with Respect to Application for Bail or Release on Own Recognizance*: Plaintiffs allege

that Defendant's deliberate indifference caused them to be denied their right to a prompt bail hearing. *Id.* at ¶ 56. Plaintiffs allege that they are entitled to recover damages pursuant to 42 U.S.C. § 1983 because Defendant's actions, taken under the color of law, directly and proximately damaged them. *Id.*

(5) *Violation of California Civil Code §§ 52 and 52.1*: Plaintiffs allege that Defendant's conduct forced them to sacrifice their statutory speedy trial rights as a precondition to the appointment of counsel, directly and proximately causing them damage. *Id.* at ¶ 59. Plaintiffs allege that they are entitled to statutory and other damages for these violations under the Unruh Act. *Id.*

(6) *Writ of Mandate to Enforce California Government Code § 27706*: Plaintiffs allege that Defendant's practices violate California Government Code § 27706, which states that the public defender shall represent criminal defendants at all stages of the proceedings. *Id.* at ¶ 62. Plaintiffs allege that they are directly damaged by those policies. *Id.* Therefore, they seek a writ of mandate compelling the Public Defender to comply with her statutory obligation to represent all indigent, in-custody defendants by appearing at their first appearance or at a reasonable time thereafter. *Id.*

B. The Motion to Dismiss

Defendant argues that Plaintiffs' federal claims are meritless as a matter of law even accepting Plaintiffs' factual allegations as true. Motion, 5. Defendant states

that the first step in analyzing a Sixth Amendment claim is assessing whether the right to counsel has attached. *Id.* (citing *Rothgery v. Gillespie County, Texas,* 554 U.S. 191, 211-12, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008)). Defendant contends that, once the right to counsel has attached, the court must determine if the absence of counsel at a subsequent event harmed the criminal defendant. *Id.* (citing *Rothgery,* 554 U.S. at 211-12, 128 S.Ct. 2578, 171 L.Ed.2d 366). Defendant notes that prejudice is presumed where counsel is absent at a subsequent "critical stage." *Id.* (citing *McNeal v. Adams,* 623 F.3d 1283, 1286 (9th Cir. 2010)). Defendant argues that there has been no Sixth Amendment violation because the right to counsel attached at the initial court appearance and there has been no subsequent event at which counsel is not present. *Id.* at 5-6. Defendant asserts that the Sixth Amendment inquiry is focused on whether a defendant was deprived of counsel at a critical stage, not the amount of time it takes to appoint counsel. *Id.* at 7. Defendant contends that the initial court appearance was not a critical stage. *Id.* at 6-7 (citing *United States v. Perez,* 776 F.2d 797, 800 (9th Cir. 1985); *United States v. Benford,* 574 F.3d 1228, 1232-33 (9th Cir. 2009)).

Second, Defendant attacks both of Plaintiffs' Fourteenth Amendment claims concerning their "statutory speedy trial rights." *Id.* at 7-9. Defendant states that the asserted speedy trial rights, provided in state court, derive from California Penal Code §§ 1049.5 and 1382. *Id.* at 7-8. Defendant contends that, for a Fourteenth Amendment claim to lie, the state statutes must mandate a particular substantive outcome. *Id.* at 8 (citing *Carver v.*

Lehman, 558 F.3d 869, 872-875 (9th Cir. 2009), *cert. denied, Carver v. Vail,* 558 U.S. 973, 130 S. Ct. 466, 175 L. Ed. 2d 313 (2009)). However, Defendant argues that the Court does not need to resolve whether these statutes mandate a particular substantive outcome because Plaintiffs cannot show a violation of the speedy trial statutes. *Id.* This is because, Defendant argues, the speedy trial rights do not attach until arraignment. *Id.* Defendant asserts that "arraignment" includes the reading of the charge and the court asking the defendant for a plea. *Id.* (citing Cal. Penal Code § 988). Defendant argues that arraignment did not occur until the second court appearance, at which point Plaintiffs were represented. *Id.* at 9. Therefore, Defendant concludes, the lack of representation at the first court appearance could not have resulted in a violation of the statutes. *Id.*

Third, Defendant argues that Plaintiff cannot assert a claim under the Fourteenth Amendment based on the alleged denial of a prompt bail hearing because there is no such right. *Id.* at 9-10 (citing *Fields v. Henry County, Tennessee,* 701 F.3d 180, 185 (6th Cir. 2012) for the propositions that there is no Eighth Amendment right to speedy bail and that the state right to be examined in a bail hearing does not establish a liberty interest worthy of protection under the Fourteenth Amendment).

Having addressed each of Plaintiffs' federal claims, Defendant argues that the Court has no subject matter jurisdiction over the remaining state law claims. *Id.* at 10. Should the Court exercise jurisdiction over this case, Defendant contends that the state law claims lack merit.

Id. First, Defendant asserts that Plaintiffs' claims under California Civil Code §§ 52 and 52.1 are based on the alleged denial of Plaintiffs' speedy trial rights, a theory that is flawed for the reasons stated above. *Id.* Second, Defendant contends that she complies with California Government Code § 27706 by providing counsel at the next hearing following the state court's order of referral. *Id.*

C. The Opposition

First, Plaintiffs argue that Defendant denied them their Sixth Amendment right to counsel. Opposition, 9-15. Plaintiffs argue that counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as trial itself. *Id.* at 10 (citing *Rothgery,* 554 U.S. at 212, 128 S.Ct. 2578, 171 L.Ed.2d 366). Plaintiffs assert that the critical stage analysis is jurisdiction specific. *Id.* at 14 (citing *Hamilton v. Alabama,* 368 U.S. 52, 54, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961)). Plaintiffs argue that, in California, arraignment and ensuing time period preceding trial are critical stages. *Id.* at 12 (citing *United States v. Hamilton,* 391 F.3d 1066, 1070 (9th Cir. 2004)). Plaintiff states that the Ninth Circuit applies a three-factor test for determining a critical stage, considering whether: (1) failure to pursue strategies or remedies results in the loss of significant rights; (2) skilled counsel would be useful in helping the accused understand the legal confrontation; and (3) the proceeding tests the merits of the accused's case. *Id.* at 12-13 (citing *Benford,* 574 F.3d 1228). Plaintiffs argue that Defendant's absence at the initial court appearance forced Plaintiffs to (1) forego their right to enter a plea at

arraignment; (2) forego examination regarding whether bail was excessive; (3) forego applying for lower bail or release on their own recognizance; (4) allow a continuance in violation of California Penal Code § 1050, which provides the right to a preliminary hearing at the earliest possible time; (5) forego their right to an immediate probable cause hearing when charged with a misdemeanor; (6) forego all investigation and preparation of their cases while they waited in jail; and (7) forego examination for diversion. *Id.* at 13. Plaintiffs argue that this satisfied the *Benford* criteria. *Id.*

Moreover, Plaintiffs assert that Defendant violated their Sixth Amendment rights when it required them to wait in jail for 5 to 13 days as a precondition to the appointment of counsel. *Id.* at 10. Plaintiffs contend that appointment of counsel was necessary in the days between hearings as the only possible means of asserting pretrial rights and investigation in preparation for trial. *Id.* Plaintiffs argue that the time they remained in custody awaiting their next court appearance was a critical stage of the trial for this reason. *Id.* at 10-11. Plaintiffs express concern that, if Defendant's arguments are accepted, there would be no violation of law if Defendant delayed coming to court for a prolonged period after the first appearance. *Id.* at 11.

Second, Plaintiffs argue that Defendant violated their Fourteenth Amendment due process right to a speedy trial. *Id.* at 15-18. Plaintiffs state that, pursuant to California Penal Code § 1050, criminal defendants have a right to a preliminary hearing and a trial at the

earliest possible time, and that the criminal cases may only be continued upon a showing of good cause. *Id.* at 15. Plaintiffs argue that Defendant's policy resulted in continuance without Plaintiffs' becoming aware of their rights or any showing of good cause. *Id.* Plaintiffs contend that the failure to provide enough public defenders in such a way that forces the indigent to choose between the right to a speedy trial and the right to representation of competent counsel denies their right to a speedy trial. *Id.* at 15-16 (citing *People v. Johnson,* 26 Cal.3d 557, 571, 162 Cal.Rptr. 431, 606 P.2d 738 (1980)). Plaintiffs assert that California Penal Code § 859b entitles them to a preliminary hearing at the earliest possible time, ten days after the initial court appearance unless the matter were continued, with good cause, to another date for entry of plea. *Id.* at 16. Plaintiffs argue that Defendant's policy results in continuance without good cause, thwarting the statutory scheme. *Id.* To the extent that entry of a plea is required to trigger the statutory scheme, Plaintiffs contend that Defendant has prevented them from being able to enter their plea and has thereby forced them, through inaction, to choose between their statutory speedy trial rights and their right to counsel. *Id.* at 16-18.

Plaintiffs assert that their statutory speedy trial rights are mandatory, and create a liberty interest that is protectable under the Fourteenth Amendment. *Id.* at 18. Plaintiffs note that Article I, Section 13 of the California Constitution declares that, "In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial." *Id.* Plaintiffs assert that criminal charges brought against them must be dismissed

if the preliminary hearing is set or continued, absent good cause or waiver by the parties, beyond the time period for holding the preliminary hearing specified by statue. *Id.* (citing *Ramos v. Superior Court,* 146 Cal.App.4th 719, 53 Cal.Rptr.3d 189 (2007)).

Third, Plaintiffs argue that Defendant prevented the magistrate from exercising independent judgment with respect to bail. *Id.* at 19-21. Plaintiffs assert that the Supreme Court has recognized the right to a bail hearing, and has stated that relief must be speedy. *Id.* at 19 (citing *Stack v. Boyle,* 342 U.S. 1, 4, 72 S.Ct. 1, 96 L.Ed. 3 (1951)). Plaintiffs contend that, under California law, a bail hearing must be held in open court within 48 hours. *Id.* at 19-20 (citing Cal. Penal Code §§ 825, 1270.1). Plaintiffs state that Defendant's policy prevented the magistrate from exercising independent judgment because it restricted the flow of information to the court regarding any favorable information concerning Plaintiffs' circumstances in violation of California Penal Code § 1270.1. *Id.* at 20-21 (citing *People v. Grace,* 166 Cal.App.2d 68, 79, 332 P.2d 811 (1958)). Plaintiffs contend that controlling Ninth Circuit precedent establishes that a violation may be found where officials interfere with the magistrate's judgment, which Plaintiffs argue happened in this case. *Id.* at 21 (citing *Galen v. County of Los Angeles,* 477 F.3d 652 (9th Cir. 2007)).

Fourth, Plaintiffs argue that Defendant is not in compliance with Government Code § 27706. *Id.* at 21-24. Plaintiffs assert that the Public Defender has an independent duty to seek immediate appointment to

represent in-custody indigent defendants. *Id.* at 22. Plaintiffs contend that Defendant's failure to appear in the case until the continued arraignment disadvantages criminal defendants and fails to comply with Defendant's statutory duty. *Id.* at 24.

D. The Reply

Defendant addresses several points in Reply. First, applying *Benford,* Defendant argues that the initial appearance was not a critical stage. Defendant's Reply in Support of Motion to Dismiss ("Reply"), 3-4. Defendant implies that the rights that Plaintiffs contend they lost at the initial appearance were not alleged in the Complaint and that Plaintiffs lack standing to raise some of those rights, as felony defendants. *Id.* at 3. In any event, Defendant argues that Plaintiffs were able to assert each of the purportedly denied rights either at their further arraignment or thereafter. *Id.* at 3-4 (citing Cal. Penal Code §§ 859b, 1000(b)).

Second, Defendant argues that whether Plaintiffs were forced to remain in jail until the second appearance is irrelevant to their Sixth Amendment claim. *Id.* at 4. Defendant contends that Plaintiffs' factual allegations do not plausibly lead to the conclusion that Plaintiffs remained in jail as a result of the absence of counsel at the preliminary hearing, given that they may not have been eligible for diversion or able to obtain or afford reduced bail. *Id.* Moreover, Defendant argues that the time period during which counsel must be appointed is governed primarily by the subsequent event, not the time it takes

to appoint counsel. *Id.* Defendant notes that courts have approved delays of over a month in appointment. *Id.* at 4-5 (citing *Grogen v. Gautreaux,* 2012 U.S. Dist. LEXIS 120411, at *10 (M.D. La. July 11, 2012); *Hawkins v. Montague County, Texas,* 2010 U.S. Dist. LEXIS 116361, at *35 (W.D. Tex. Nov. 1, 2010)). Further, Defendant asserts that it had no role in determining the length of the delay because the next court date was set by the state court judge. *Id.* at 5.

Third, Defendant addresses Plaintiffs' asserted speedy trial rights. *Id.* at 5-7. Defendant states that Plaintiffs added California Penal Code § 1050 in their Opposition, but that § 1050 is by its own terms discretionary and therefore does not convey the requisite liberty interest to support a § 1983 claim. *Id.* at 6. Defendant also rejects Plaintiffs' contention that Defendant forced them to give up their speedy trial rights, arguing that those rights could have been asserted at arraignment and subsequently. *Id.*

Fourth, Defendant addresses Plaintiffs' asserted bail rights. *Id.* at 7. Defendant argues that Plaintiffs could have sought lower bail at their subsequent arraignment or later in their criminal proceedings. *Id.* (citing Cal. Penal Code §§ 1269c, 1270.1).

IV. ANALYSIS

A. Legal Standard

A complaint may be dismissed for failure to state a claim for which relief can be granted under Rule 12(b)(6)

of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). "The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint." *N. Star. Int'l v. Ariz. Corp. Comm'n,* 720 F.2d 578, 581 (9th Cir. 1983). In ruling on a motion to dismiss under Rule 12(b)(6), the Court takes "all allegations of material fact as true and construe[s] them in the light most favorable to the non-moving party." *Parks Sch. of Bus. v. Symington,* 51 F.3d 1480, 1484 (9th Cir. 1990).

Generally, the plaintiff's burden at the pleading stage is relatively light. Rule 8(a) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint need not contain "detailed factual allegations," but must allege facts sufficient to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 663, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 547, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The factual allegations must be definite enough to "raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." *Twombly,* 550 U.S. at 545. "[T]he tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal,* 556 U.S. at 663.

B. 42 U.S.C. § 1983 Claims

42 U.S.C. §1983 provides a cause of action against any person who, under color of state law, deprives another

of any rights, privileges, or immunities secured by the Constitution or laws of the United States. § 1983 is not a source of substantive rights, but merely a method for vindicating federal rights established elsewhere. *Graham v. Connor,* 490 U.S. 386, 393-94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). To state a claim for a violation of § 1983, a plaintiff must allege deprivation of a constitutional right by a government official acting "under the color of state law." *Broam v. Bogan,* 320 F.3d 1023, 1028 (9th Cir. 2003).

Plaintiffs sufficiently allege that Defendant, sued in her official capacity as the Public Defender for Contra Costa County, acted "under the color of state law." *See Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (allegations against public officials satisfy the state action requirement); *Miranda v. Clark County,* 319 F.3d 465, 469-71 (9th Cir. 2003) (Public Defender is a state actor for the purposes of § 1983 when acting solely as the administrative head of the agency, on behalf of the county, in determining how the overall resources of the Public Defender's office will be spent). Nevertheless, as discussed below, the Court concludes that Plaintiff has not sufficiently alleged a cause of action pursuant to § 1983. Each of the § 1983 claims is dismissed with leave to amend.

1. Sixth Amendment Right to Counsel

The Sixth Amendment of the United States Constitution guarantees the accused, in all criminal prosecutions, the right "to have the assistance of counsel

for his defense." U.S. Const. amend. VI. The Federal Rules of Criminal Procedure require the court to advise the accused of the constitutional guarantee. *Fed. R. Crim. P.* 44 ("If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel"). As described below, the Court concludes that Plaintiffs have not alleged a violation of the Sixth Amendment right to counsel. This Court addresses only the narrow circumstances identified in the Complaint: at the Plaintiffs' first appearance, the only thing that happened (presumably after being provided with a copy of the charges) was a request for appointment of counsel. No other court proceedings occurred without counsel. Whether or not there was a delay between the initial appearance and the next appearance, the only specific allegation of prejudice is the brief delay in the assertion of speedy trial rights or the right to seek a reduction of bail, release on the defendant's own recognizance, or diversion. No rights were lost. As alleged, counsel was present at each critical stage following attachment of the right to counsel and Plaintiffs have not plausibly alleged that their representation at a subsequent critical stage was prejudiced by any delay in appointing counsel following attachment.

a. Attachment

i. Background Law

The Sixth Amendment right to counsel in criminal prosecutions attaches when prosecution begins. *Rothgery,*

554 U.S. at 198-99, 128 S.Ct. 2578, 171 L.Ed.2d 366 (citing *McNeil v. Wisconsin,* 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)). Prosecution begins with the initiation of adversarial judicial criminal proceedings, "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 198-99 (quoting *United States v. Gouveia,* 467 U.S. 180, 188, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984)). Federal law determines what suffices as a commitment to prosecute for purposes of the attachment of the right to counsel. *Id.* at 207 (citing *Moran,* 475 U.S. at 429, n. 3 ("[T]he type of circumstances that would give rise to the right would certainly have a federal definition"). The right to counsel attaches at the initial appearance before a judicial officer, which is generally the hearing at which "the magistrate informs the defendant of the charge in the complaint, and of various rights in further proceedings," and "determine[s] the conditions for pretrial release." *Id.* (citing 1 W. LaFave, J. Israel, N. King, & O. Kerr, Crim. P. § 1.4(g), p 135 (3d ed. 2007)).

ii. Application to Facts

Following *Rothgery,* the right to counsel in this case attached at each Plaintiff's initial appearance. The parties agree on this point. Motion, 5-6 ("the right to counsel attached at the initial court appearance"); Opposition, 10 ("the right to counsel attached at the initial court appearance"). At the initial court appearance, the Court asked each Plaintiff whether he could afford counsel. Complaint, ¶¶ 31, 35. Each responded that he could not and would like the court to appoint counsel. *Id.* After the

right to counsel attached, the court referred Plaintiffs' cases to the Defendant and continued the arraignment to a later hearing date referred to as "further arraignment." *Id.* Neither Plaintiff was asked to enter a plea. *Id.* At the further arraignment hearing, each Plaintiff was represented by counsel and entered a plea. *Id.* at ¶¶ 32, 36.

b. Critical Stage

i. Background Law

Once the right to counsel attaches, the accused is entitled to appointed counsel during any "critical stage" of the post-attachment proceedings. *Rothgery,* 554 U.S. at 212, 128 S.Ct. 2578, 171 L.Ed.2d 366. A critical stage is a "stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Hovey v. Ayers,* 458 F.3d 892, 901 (9th Cir. 2006) (quoting *Mempa v. Rhay,* 389 U.S. 128, 134, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967)). While there is no definitive list of critical stages, decisions of the United States Supreme Court identify certain stages as critical. *See Iowa v. Tovar,* 541 U.S. 77, 81, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) (entry of a guilty plea); *Gardner v. Florida,* 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (sentencing); *United States v. Wade,* 388 U.S. 218, 236-37, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (post-indictment lineup). Case law also illustrates stages that are not critical. *Gilbert v. California,* 388 U.S. 263, 267, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) (taking a handwriting sample); *United States v. Ash,* 413 U.S. 300, 321, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973) (post-indictment photo lineup); *Hovey,* 458 F.3d at 902 (mid-trial hearing on the competency of defendant's lawyer).

Courts decide whether a state criminal proceeding is critical by looking to the functions of the proceeding under state law. *See Hamilton v. Alabama,* 368 U.S. 52, 54, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) ("Whatever may be the function and importance of arraignment in other jurisdictions, we have said enough to show that in Alabama it is a critical stage in a criminal proceeding"); *see also United States ex rel. Cooper v. Reincke,* 333 F.2d 608, 612 (2d Cir. 1964) ("The Connecticut hearing in probable cause cannot, therefore, be characterized as critical as is arraignment in Alabama"). The Ninth Circuit has developed a three-factor test for determining whether a stage is critical. *Menefield v. Borg,* 881 F.2d 696, 698-99 (9th Cir. 1989); *Benford,* 574 F.3d at 1232; *McNeal,* 623 F.3d at 1289. Any one of these three factors may be sufficient to make a stage critical: (1) failure to pursue strategies or remedies results in a loss of significant rights; (2) skilled counsel would be useful in helping the accused understand the legal confrontation; and (3) the proceeding tests the merits of the accused's case. *Menefield,* 881 F.2d at 699; *Hovey,* 458 F.3d at 901-02. In reviewing the plaintiff's lack of counsel at a motion for a new trial, the *Menefield* court considered the substantive rights in question and whether the presence of counsel would have helped the defendant enforce those rights. *Id.*

ii. Application to Facts

Plaintiffs' right to counsel attached at the initial court appearance. Once each Plaintiff sought appointed counsel, the court stopped the proceeding and continued the arraignment to a further hearing, where the accused

would be represented by counsel. Each Plaintiff was then asked to enter plea at the further arraignment hearing. In California, arraignment consists of "reading the accusatory pleading to the defendant and delivering to the defendant a true copy thereof, and ... asking the defendant whether the defendant pleads guilty or not guilty to the accusatory pleading." Cal. Penal Code § 988. Plaintiffs' arraignment began at their initial appearance. It was completed at the further arraignment hearing because that is when they were apprised of the charges against them and asked to enter a plea. It is undisputed that Plaintiffs were represented by counsel at further arraignment, consistent with California law.[2]

Plaintiffs contend that Defendant violated Plaintiffs' constitutional right to counsel by failing to represent Plaintiffs at their first appearance, or a reasonable time thereafter. Complaint, ¶ 47. They argue that the initial appearance and the five-to-thirteen-day waiting period were critical stages of the proceedings. Opposition, 11. The core of Plaintiffs' complaint is that the five-to-thirteen-day delay before Defendant represented Plaintiffs at the arraignment hearing was "unreasonable" under the Sixth Amendment. Complaint, ¶ 42(1). The Court

2. California law guarantees the right to counsel at arraignment. *People v. Cummings,* 255 Cal.App.2d 341, 345, 62 Cal.Rptr. 859 (1967); *see also* Cal. Pen Code § 987(a) ("In a noncapital case, if the defendant appears for arraignment without counsel, he or she shall be informed by the court that it is his or her right to have counsel before being arraigned, and shall be asked if he or she desires the assistance of counsel. If he or she desires and is unable to employ counsel the court shall assign counsel to defend him or her").

recognizes that, at some point, the delay in appointment of counsel may be so long that it amounts to a deprivation of significant rights of the accused. The limited holding here is that, on the facts alleged in this case, no such deprivation has occurred.

The Court applies the Ninth Circuit's three-factor test to determine whether the initial appearance or the waiting period thereafter was a critical stage. Beginning with the first factor of the Ninth Circuit's test, the absence of counsel to pursue strategies or remedies at the initial appearance (where the only event was an inquiry about the need for counsel) or in the hiatus before the next hearing did not result in a loss of significant rights to Plaintiffs. Plaintiffs assert that they lost the rights to a prompt bail hearing and to a speedy trial. Complaint, ¶ 42. However, Plaintiffs could have asserted those rights at the further arraignment or later. Indeed, Plaintiffs maintained their rights—they entered a plea at the further arraignment, Complaint, ¶¶ 32, 36; they could have requested lower bail at or after arraignment, *In re Weiner,* 32 Cal.App.4th 441, 444, 38 Cal.Rptr.2d 172 (1995) (citing Cal. Penal Code §§ 1269b, 1269c, 1273, 1277, 1476, 1538.5(k)); their speedy trial rights, including the right to a speedy preliminary examination, were still triggered by arraignment or entry of plea, Cal. Penal Code § 859b; and they could have sought diversion at arraignment, Cal. Penal Code § 1000(b). Contrary to Plaintiffs' allegations, they lost none of these rights. Like the *Hovey* plaintiff and his mid-trial attorney competency hearing, Plaintiffs were "not at risk of permanent deprivation of any significant rights during the hearing." 458 F.3d at 902. The bare allegation that

they were delayed from five to thirteen days in asserting those rights – until counsel could be appointed to represent them – did not amount to a deprivation substantial enough to make the delay unreasonable, or a "critical stage."

The fact that, had counsel been appointed at or closer to the initial appearance, counsel might have applied for release on bail, caused a plea to be entered, or triggered statutory speedy trial rights, does not change this analysis. Nothing happened at the initial appearance other than a determination that Plaintiffs desired the appointment of counsel. The first appearance was not, therefore, a critical stage. The state court correctly continued the matters until counsel could be present. Similarly, no rights were lost or prejudiced during the brief waiting period. Indeed, immediately after the subsequent appointment of counsel, Plaintiffs could still enter a plea, invoke their statutory speedy trial rights, or seek release on bail. Standing alone, the brief temporary delay in assertion of these rights is not a sufficient deprivation to constitute a denial of their right to counsel.

The Ninth Circuit's decision in *Benford* is instructive on this point. There, counsel did not appear at a pre-trial conference. The defendant argued that, had counsel been present, he could have moved for a continuance of the trial. *Benford,* 574 F.3d at 1232. The Ninth Circuit, noting that "[n]othing significant occurred at the status conference," concluded that it was not a "critical stage" of the proceedings. *Id.* at 1232-33. The court rejected the defendant's argument that his counsel could have asked for a continuance of the trial at the conference, noting that

counsel could "have moved for a continuance before the conference or after it."

It is apparent from *Benford* that an appearance at which nothing happens (as is the case here, where nothing occurred after the court asked whether Plaintiffs desired the appointment of counsel) after which the defendant, represented by counsel, can still invoke his rights (here, their statutory speedy trial rights, their right to a hearing on bail, and any right to seek a diversion) is not a critical stage of the proceedings. The same can be said of a brief waiting period — here, five to thirteen days — after the initial appearance.

Second, skilled counsel would not have been useful in helping the accused understand the legal confrontation at the first appearance because there was no legal confrontation after the accused requested counsel. There was also no legal confrontation during the five to thirteen days Plaintiffs waited for further arraignment. Plaintiffs were subject to no adversarial proceeding during this time. Nothing happened at the initial appearance after the court inquired whether counsel should be appointed or during the five-to-thirteen day waiting period to test the merits of the Plaintiffs' case. *See Benford,* 574 F.3d at 1233 (no "legal confrontation" at the pretrial status conference, which was not a critical stage of the proceedings).

Plaintiffs cite *Hurrell-Harring v. State of New York,* 15 N.Y.3d 8, 904 N.Y.S.2d 296, 930 N.E.2d 217 (2010) as persuasive authority for the proposition that the arraignment and the time between arraignment and trial

are critical stages of the prosecution. In *Hurrell-Harring,* a number of the twenty plaintiffs were unrepresented at arraignment, jailed after bail had been set in amounts they could not afford, and remained unrepresented in subsequent proceedings where their pleas were taken. *Hurrell-Harring,* 15 N.Y.3d at 19, 904 N.Y.S.2d 296, 930 N.E.2d 217. Several other plaintiffs were nominally appointed counsel, but counsel was often unavailable, completely unresponsive to urgent inquiries from jail, waived important rights without consulting plaintiffs, missed court appearances, and appeared in court unprepared to proceed. *Id.* at 19-20.

The court held that the arraignment was a critical stage of the proceedings, even where no plea was entered, because "plaintiffs' pretrial liberty interests were on that occasion regularly adjudicated." *Id.* at 20 (citing N.Y. Crim. Proc. Law § 180.10(6) ("Upon arraignment, the court, unless it intends immediately thereafter to dismiss the felony complaint and terminate the action, must issue a securing order which, as provided in subdivision two of section 530.20, either releases the defendant on his own recognizance or fixes bail or commits him to the custody of the sheriff for his future appearance in such action") (concerning proceedings upon a felony complaint)). The court noted that, under New York law, a court is forbidden by statute "from going forward with the [arraignment] without counsel for the defendant, unless the defendant has knowingly agreed to proceed in counsel's absence." *Id.* at 20-21 (citing N.Y. Crim. Proc. Law § 180.10(3) ("The defendant has a right to the aid of counsel at the arraignment and at every subsequent stage of the action,

and, if he appears upon such arraignment without counsel, has the following rights: (a) To an adjournment for the purpose of obtaining counsel; and ... (c) To have counsel assigned by the court in any case where he is financially unable to obtain the same"), 180.10(5) ("If the defendant desires to proceed without the aid of counsel, the court must permit him to do so if it is satisfied that he made such decision with knowledge of the significance thereof, but if it is not so satisfied it may not proceed until the defendant is provided with counsel, either of his own choosing or by assignment")). The court concluded that "arraignments routinely, and in New York as a matter of statutory design, encompass matters affecting a defendant's liberty and ability to defend against the charges." *Id.* at 21. The court also broadly held that "the period between arraignment and trial" is also a critical stage under the Sixth Amendment. *Id.* at 21-22.

Hurrell-Harring is distinguishable from the present action. In *Hurrell-Harring,* the court's holding relied on the fact that a number of pretrial liberty interests were adjudicated at the arraignment, at which the right to counsel attached, without the presence of counsel. Here, no pretrial liberty interests were adjudicated in the initial appearance, or in the following days, in the absence of counsel. Rather, the arraignment was continued to allow for the appointment of counsel. Indeed, this procedure is not facially inconsistent with the New York statutory framework on which the holding in *Hurrell-Harring* was based. Moreover, the present case involves only a five-to-thirteen day waiting period for the appointment of counsel during which nothing happened to test the merits

of Plaintiffs' case, not a denial of counsel throughout the much longer time period between arraignment and trial.

DeWolfe v. Richmond, __ Md. __, A.3d, 2012 Md. LEXIS 1, 2012 WL 10853 (Jan. 4, 2012), cited by Plaintiffs, is also distinguishable. In *DeWolfe,* the court held that, pursuant to Maryland state law, the public defender was required to represent a criminal defendant at the bail hearing portion of their initial appearance. *DeWolfe,* __ Md. __, A.3d, 2012 Md. LEXIS 1, 2012 WL 10853 at *13. Thus, the court held that the bail hearing may not occur at the initial appearance, assuming the defendant qualified for public defender representation, unless counsel had been appointed or the defendant waived the right to counsel. 2012 Md. LEXIS 1, [WL] at *17. "If a public defender is not immediately available to assume representation, then the Commissioner must delay the bail hearing until such representation can be provided or is waived by the defendant." *Id.* In reaching its conclusion, the court repeatedly stated that the relevant Maryland state law it was interpreting affords broader protection than the Sixth Amendment. 2012 Md. LEXIS 1, [WL] at *7, *9-*11. First, *DeWolfe* differs from the present case in that involves only the interpretation of Maryland state law. Second, *DeWolfe* differs in that a bail hearing was held in the absence of counsel. Moreover, the facts of this case appear consistent with the statement in *DeWolfe* that the Commissioner must delay the portion of the initial appearance that constituted a critical stage, the bail hearing, until representation could be provided to a qualifying defendant. That is what was done in this case.

c. Length of Delay and Prejudice

Because the Court finds that the portion of the initial appearance after the accused requested counsel and the five-to-thirteen-day waiting period were not critical stages, the first critical stage after attachment of the right to counsel was the further arraignment. The Court now examines whether Plaintiffs' have sufficiently alleged that their Sixth Amendment rights were violated with respect to the timing of representation for the further arraignment and concludes that they have not.

i. Background Law

Though Rothgery requires the appointment of counsel within a reasonable time to allow for adequate representation at any critical stage after attachment, it does not address the issue of how much time is reasonable before counsel is appointed. *Rothgery,* 554 U.S. at 212 n.15, 128 S.Ct. 2578, 171 L.Ed.2d 366 ("We do not here purport to set out the scope of an individual's postattachment right to the presence of counsel. It is enough for present purposes to highlight that the enquiry into that right is a different one from the attachment analysis"). After *Rothgery,* federal district courts have three times addressed the issue of whether a delay in the appointment of counsel is reasonable. In all three cases, the district court has declined to find the delay — forty days, two months, and an unspecified period — unreasonable without proof of actual prejudice:

> Finally, although the right to counsel under the Sixth Amendment attaches at the time

> of an arrestee's initial appearance, *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008), neither the Supreme Court nor the Fifth Circuit has determined that counsel must be appointed within a specific period of time thereafter. ... All that the plaintiff has alleged in this case is that he was not provided with appointed counsel for a period of forty (40) days after his arrest. He fails to allege, however, that he suffered any actual prejudice as a result of this delay or that, had an attorney been appointed at an earlier time, a meritorious defense might have been asserted resulting in his release or in the dismissal of the charges levied against him. ... Accordingly, in the absence of any assertion of prejudice resulting from the alleged delay, this Court concludes that the alleged 40-day delay in the appointment of counsel was not so unreasonable as to result in a Sixth Amendment violation.

Grogen, 2012 U.S. Dist. LEXIS 120411 at *9-*10; *see also Hawkins,* 2010 U.S. Dist. LEXIS 116361 at *35 ("The Court finds that the approximate two-month delay in receiving court-appointed counsel fails to rise to the level of a constitutional violation based on the Sixth Amendment."); *Wingo v. Kaufman County,* 2010 U.S. Dist. LEXIS 55865, *2-*3 (N.D. Tex. June 4, 2010) ("The court can not determine from plaintiff's complaint ... whether the delay in appointment of counsel was reasonable or whether plaintiff suffered any prejudice from the delay.").

ii. Application to Facts

The district court decisions in *Grogen, Hawkins,* and *Wingo* make clear that, although there is no specific timeframe that federal courts have deemed reasonable for appointment of counsel post-attachment, a court faced with making a reasonableness decision needs to analyze prejudice to the accused that results from delay in appointment of counsel. *See Grogen,* 2012 U.S. Dist. LEXIS 120411 at *9-*10; *Hawkins,* 2010 U.S. Dist. LEXIS 116361 at *35; *Wingo,* 2010 U.S. Dist. LEXIS 55865 at *2-*3. Moreover, even if the specific timeframes in the previous district court cases were applied here, the five-to-thirteen-day delays of which Plaintiffs complain are significantly smaller delays than the forty-day and two-month delays the other district courts found permissible.

Plaintiffs do not suggest a bright-line rule regarding how quickly counsel should be appointed. However, in arguing that they lost rights during the delay, they argue that they were prejudiced. As discussed above in the *Menefield* factors, the Court is not persuaded that Plaintiffs were prejudiced by the delay. During the waiting period, Plaintiffs did not lose any of the rights they enumerate, nor did any adversarial action take place that affected the merits or resolution of their cases. When adversarial proceedings took place at the further arraignment, Plaintiffs were represented.

Plaintiffs also make a conclusory allegation that they were prejudiced because the delay hindered their investigation and preparation for trial. Opposition, 10,

13. Plaintiffs make no specific allegations on this matter nor do they explain how their trial preparation was hindered. Plaintiffs had no less time to prepare for trial than they would have had if counsel had been appointed a few days before or after the time counsel was actually appointed because, as discussed in greater detail below, the preliminary hearing and trial are scheduled from the date of arraignment. There is no indication that Plaintiffs' wait for appointment of counsel influenced the scheduling of post-arraignment procedures, including trial, in such a way that reduced the number of days available to them for trial preparation. Prejudice to a defendant's fair adjudication may stem, for example, from delays that "weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of evidence." *See People v. Martinez,* 22 Cal. 4th 750, 767, 94 Cal.Rptr.2d 381, 996 P.2d 32 (2000). However, Plaintiffs do not allege that they suffered any such impediments.

According to Plaintiffs, failing to treat the five-to-thirteen-day waiting period as a critical stage would mean that Defendant could delay appointment of counsel for an indefinite period of time after the initial hearing without violating the Sixth Amendment right to counsel. Opposition, 11. Plaintiffs rely on *Sullivan v. County of Los Angeles* to highlight the absurdity of such a position: postponing appointment of counsel for ninety-nine years would still not give a plaintiff a basis for redress. 12 Cal.3d 710, 718-19, 117 Cal.Rptr. 241, 527 P.2d 865 (1974). Plaintiffs are mistaken in this logic. As described above, the Court only addresses the delay at issue in this case,

five to thirteen days. At some point, a lengthy delay, or a delay accompanied by other events, may indeed constitute a deprivation of a defendant's Sixth Amendment rights. But not here. Taking the facts as Plaintiffs allege them to be true, the Court finds that Plaintiffs' Sixth Amendment claim lacks merit and it is DISMISSED with leave to amend.

2. Fourteenth Amendment Claims — Statutory Speedy Trial Rights

In their second and third causes of action, Plaintiffs assert that Defendant violated their substantive and procedural due process rights under the Fourteenth Amendment by depriving Plaintiffs of their state law speedy trial rights. Plaintiffs seek damages pursuant to 42 U.S.C. § 1983. For the reasons discussed below, Plaintiffs' second and third causes of action are DISMISSED with leave to amend.

a. Background Law

"Unless there is a breach of constitutional rights, ... § 1983 does not provide redress in federal court for violations of state law." *Samson v. City of Bainbridge Island,* 683 F.3d 1051, 1060 (9th Cir. 2012) (quoting *Schlette v. Burdick,* 633 F.2d 920, 922 n.3 (9th Cir. 1980)). "[N]ot every violation of state law amounts to an infringement of constitutional rights." *Id.*

Plaintiffs seek to assert their statutory speedy trial rights, provided by the state of California, through the

Fourteenth Amendment. The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property without due process of law..." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment contains both procedural and substantive due process protections. *United States v. Salerno,* 481 U.S. 739, 746, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

i. Procedural Due Process

Courts analyze procedural due process claims in two steps: "[T]he first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Carver,* 558 F.3d at 872 (quoting *Ky. Dep't of Corr. v. Thompson,* 490 U.S. 454, 460, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989)).

"A liberty interest may arise from either of two sources: the due process clause itself or state law." *Id.* (citing *Toussaint v. McCarthy,* 801 F.2d 1080, 1089 (9th Cir. 1986)). "[T]o create a liberty interest protected by due process, the state law must contain: (1) substantive predicates governing official decisionmaking, and (2) explicitly mandatory language specifying the outcome that must be reached if the substantive predicates are met." *Bonin v. Calderon,* 59 F.3d 815, 842 (9th Cir. 1995), *cert. denied,* 516 U.S. 1051, 116 S. Ct. 718, 133 L. Ed. 2d 671 (1996) (internal quotation marks and citations omitted). Where "[t]he only mandatory language in [the state statute at issue] concerns a procedural right ...

[, t]hat language cannot create a liberty interest within the meaning of the Fourteenth Amendment because expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause of the Fourteenth Amendment." *Carver,* 558 F.3d at 875 (internal quotation marks, footnote, italics, and citations omitted); *see also Marsh v. County of San Diego,* 680 F.3d 1148, 1156 (9th Cir. 2012) ("to contain the requisite 'substantive predicates,' 'the state law at issue must provide more than merely procedure, it must protect some substantive end'") (quoting *Bonin,* 59 F.3d at 842).

ii. Substantive Due Process

Substantive due process limits what the government may do in its legislative and executive capacities. *County of Sacramento v. Lewis,* 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). "[A] substantive due process claim 'must, as a threshold matter, show a government deprivation of life, liberty, or property.'" *Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.,* 509 F.3d 1020, 1026 (9th Cir. 2007) (quoting *Nunez v. City of Los Angeles,* 147 F.3d 867, 871 (9th Cir. 1998)).

Substantive due process protects against the arbitrary or oppressive exercise of governmental power. *See County of Sacramento v. Lewis,* 523 U.S. at 845-46, 118 S.Ct. 1708, 140 L.Ed.2d 1043. "[T]he Due Process Clause is violated by executive action only when it can be properly characterized as arbitrary, or conscience shocking, in a constitutional sense." *Id.* at 847 (quoting *Collins v. Harker Heights,* 503 U.S. 115, 128, 112 S.Ct. 1061, 117 L.Ed.2d 261

(1992)) (internal quotation marks omitted). The cognizable level of executive abuse of power is that which "shocks the conscience" or "violates the decencies of civilized conduct." *Id.* at 846.

iii. Statutory Speedy Trial Rights

California Penal Code §§ 1049.5 and 1382 create a right to speedy trial; the right to a speedy preliminary hearing arises from California Penal Code § 859b. California Penal Code § 1050 provides the procedure for granting continuances.[3] The clock for speedy trial determinations and for preliminary hearings begins to run at either arraignment or entry of plea, depending on the statute.

> In felony cases, the court shall set a date for trial which is *within 60 days of the defendant's arraignment* in the superior court unless, upon a showing of good cause as prescribed in Section 1050, the court lengthens the time. If the court, after a hearing as prescribed in Section 1050, finds that there is good cause to set the date for trial beyond the 60 days, it shall state on the record the facts proved that justify its finding.

Cal. Penal Code § 1049.5 (emphasis added).

> (a) The court, unless good cause to the contrary is shown, shall order the action to be dismissed in the following cases: ...

3. § 1050 "is directory only and does not mandate dismissal of an action by its terms." Cal. Penal Code § 1050(l).

> (2) In a felony case, when a defendant is not brought to trial *within 60 days of the defendant's arraignment*...
>
> (3) Regardless of when the complaint is filed, when a defendant in a misdemeanor or infraction case is not brought to trial *within 30 days after he or she is arraigned or enters his or her plea,* whichever occurs later, if the defendant is in custody at the time of arraignment or plea, whichever occurs later, or in all other cases, *within 45 days after the defendant's arraignment or entry of the plea,* whichever occurs later...

Cal. Penal Code § 1382 (emphasis added).

> Both the defendant and the people have the right to a preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found as provided for in Section 1050, the preliminary examination shall be held *within 10 court days of the date the defendant is arraigned or pleads,* whichever occurs later, or within 10 court days of the date criminal proceedings are reinstated...
>
> ...
>
> The magistrate shall dismiss the complaint if the preliminary examination is set or continued

> more than 60 days from the date of the arraignment, plea, or reinstatement of criminal proceedings ... unless the defendant personally waives his or her right to a preliminary examination within 60 days.

Cal. Penal Code § 859b (emphasis added).

In California, arraignment is defined by California Penal Code § 988, which provides that arraignment consists of "reading the accusatory pleading to the defendant and delivering to the defendant a true copy thereof, and ... asking the defendant whether the defendant pleads guilty or not guilty to the accusatory pleading." Determining whether or not a statutory speedy trial right has been violated involves determining the number of days between the time the accused was arraigned (apprised of charges and asked to enter a plea) and the time of trial. *People v. Benhoor,* 177 Cal.App.4th 1308, 1316, 99 Cal. Rptr.3d 827 (2009) ("section 1382 enforces the speedy trial right with specific deadlines measured by days after certain events, including arraignment, declaration of a mistrial or entry of an order granting a new trial"); see also *Craft v. Superior Court,* 140 Cal.App.4th 1533, 1546, 44 Cal.Rptr.3d 912 (2006) (section 1382(a) "enforces the speedy trial right with deadlines measured by days before or after arraignment or other prosecution events"). Where the accused faces an unexcused delay beyond the period set by California Penal Code § 1382 (sixty days after arraignment or entry of plea for felonies, thirty days after arraignment or entry of plea for misdemeanors), he or she is entitled to dismissal of the criminal charge.

Martinez, 22 Cal.4th at 766, 94 Cal.Rptr.2d 381, 996 P.2d 32 (quoting *People v. Godlewski,* 22 Cal.2d 677, 682, 140 P.2d 381 (1943)). Prior to the attachment of statutory speedy trial rights, protection for criminal defendants against unreasonable and prejudicial delays arises from the California constitution as well as the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution. *Benhoor,* 177 Cal.App.4th at 1316 n.8, 1317, 99 Cal.Rptr.3d 827 (citing *Serna v. Superior Court,* 40 Cal.3d 239, 251, 219 Cal.Rptr. 420, 707 P.2d 793 (1985); *Martinez,* 22 Cal.4th at 766-67).

b. Application to Facts

In their Complaint, Plaintiffs do not identify the source of the statutory speedy trial rights on which they predicate two of their Fourteenth Amendment due process claims. In their Opposition, they rely on California Penal Code §§ 859b and 1050. Defendant also addresses the speedy trial rights set forth in California Penal Code §§ 1382 and 1049.5. Whether or not the statutory scheme created a constitutionally protected liberty interest, Plaintiffs have not adequately pled a violation of their statutory speedy trial rights. Therefore, their Fourteenth Amendment claims relying on those statutory violations fail.

Each Plaintiff's arraignment was complete when they were asked to enter a plea at the further arraignment hearing, in accordance with the definition of arraignment under California state law. *See* Cal. Penal Code § 988. Plaintiffs assume that the initial hearing, rather than the further arraignment, was the arraignment. *See*

Opposition, 16 (time for preliminary hearing under California Penal Code § 859b would be ten days after initial court appearance). However, arraignment was not complete at the initial hearing because neither Plaintiff was asked to enter a plea. *Id.;* Complaint, ¶¶ 31-32; 35-36. Only when Plaintiffs had been apprised of the accusations against them, given a copy of the accusations, and asked to enter a plea were they arraigned. *See* Cal. Penal Code § 988.

Plaintiffs bolster their arguments about illegal speedy trial delays with legal authorities that are distinguishable from the present case. Plaintiffs rely on *People v. Johnson* for the premise that the government cannot use the scarcity of public resources as a justification for delaying appointment of counsel. 26 Cal.3d 557, 571-72, 162 Cal. Rptr. 431, 606 P.2d 738 (1980). However, the *Johnson* court was considering a post-arraignment delay, unlike the case at hand. *Id.* at 563, 571-72. *Johnson* is not instructive to the Court on the matters currently before it.

Plaintiffs also argue that they were subject to an illegal gratuitous delay, citing *Youngblood v. Gates,* 200 Cal.App.3d 1302, 1311-12, 246 Cal.Rptr. 775 (1988). However, the question in *Youngblood* was whether the government had violated the two-day timeframe for taking arrestees before a magistrate. *Id.* at 1309. In the present case, Plaintiffs have not alleged such a violation. The other legal authorities cited by Plaintiffs do no better than *Johnson* and *Youngblood* in shedding light on the issue raised by the present case.

Plaintiffs do not allege any delay *after* the completion of arraignment or the entry of their plea. Thus, they have not alleged: (1) that a preliminary examination was not held "within 10 court days of the date [Plaintiffs were] arraigned or [pled], whichever occurs later[;]" (2) that "the preliminary examination [was] set or continued more than 60 days from the date of the arraignment, plea, or reinstatement of criminal proceedings[;]" (3) that the court failed to "set a date for trial which is within 60 days of [Plaintiffs'] arraignment in the superior court[;]" or (4) that the procedures in § 1050 were triggered. *See* Cal. Penal Code §§ 859b, 1049.5, 1050, 1382. Accordingly, Plaintiffs have not alleged any deprivation of their statutory rights to a speedy trial and preliminary hearing due to delay that occurred prior to the completion of their arraignment. The Court concludes as a matter of law that Plaintiffs have failed to state a violation of statutory speedy trial rights under California state law. Therefore, Plaintiffs have suffered no violation of state statutory rights to a speedy trial on which to base a claim for a violation of the Fourteenth Amendment. Plaintiffs' second and third causes of action are premised solely on the alleged violation of their state statutory speedy trial rights. Accordingly, Defendant's Motion to Dismiss Plaintiffs' second and third causes of action is GRANTED. Plaintiffs will be given leave to amend.

3. Fourteenth Amendment Claim — Denial of Prompt Bail Hearing

As discussed below, Plaintiffs' fourth cause of action, a Fourteenth Amendment procedural due process claim

predicated on the alleged denial of a prompt bail hearing, is dismissed with leave to amend.

a. Background Law

i. Procedural Due Process

The procedural due process protections afforded by the Fourteenth Amendment are described above.

ii. Asserted Right to a Prompt Bail Hearing

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments be inflicted." U.S. Const. amend. VIII. The California Constitution also supplies a right to bail, with exceptions for capital crimes and felony offenses where certain conditions are met. Cal. Const. art. 1, § 12. To prevail on a claim that the bail set for Plaintiffs violated the excessive bail clause of the Eighth Amendment, Plaintiffs must demonstrate that their bail was enhanced for purposes unauthorized by California law or that the amount of bail was excessive in light of the valid purposes for which it was set. *Galen,* 477 F.3d at 661. California Penal Code § 1269b(c) provides in relevant part that: "It is the duty of the superior court judges in each county to prepare, adopt, and annually revise a uniform countywide schedule of bail for all bailable offenses..." Cal. Penal Code § 1269b(c). "If a defendant has appeared before a judge of the court on the charge contained in the complaint, indictment, or information, the bail shall

be in the amount fixed by the judge at the time of the appearance. If that appearance has not been made, the bail shall be in the amount fixed in the warrant for arrest or, if no warrant for arrest has been issued, the amount of bail shall be pursuant to the uniform countywide schedule of bail for the county in which the defendant is required to appear, previously fixed and approved..." Cal. Penal Code § 1269b(b).

"California vests judicial officers with the exclusive authority to enhance or reduce bail." *Galen,* 477 F.3d at 663 (citing Cal. Penal Code § 1269c). § 1269c provides:

> If a defendant is arrested without a warrant for a bailable felony offense or for the misdemeanor offense of violating a domestic violence restraining order, and a peace officer has reasonable cause to believe that the amount of bail set forth in the schedule of bail for that offense is insufficient to ensure the protection of a victim, or family member of a victim, of domestic violence, the peace officer shall prepare a declaration under penalty of perjury setting forth the facts and circumstances in support of his or her belief and file it with a magistrate, as defined in Section 808, or his or her commissioner, in the county in which the offense is alleged to have been committed or having personal jurisdiction over the defendant, requesting an order setting higher bail. Except where a defendant is charged with an offense listed in subdivision (a) of Section 1270.1, the

> defendant, either personally or through his or her attorney, friend, or family member, also may make application to the magistrate for release on bail lower than that provided in the schedule of bail or on his or her own recognizance. The magistrate or commissioner to whom the application is made is authorized to set bail in an amount that he or she deems sufficient to ensure the defendant's appearance or to ensure the protection of a victim, or family member of a victim, of domestic violence, and to set bail on the terms and conditions that he or she, in his or her discretion, deems appropriate, or he or she may authorize the defendant's release on his or her own recognizance. If, after the application is made, no order changing the amount of bail is issued within eight hours after booking, the defendant shall be entitled to be released on posting the amount of bail set forth in the applicable bail schedule.

Cal. Penal Code § 1269c. As to the offenses listed in § 1270.1, which are serious or violent felonies, that section provides in relevant part:

> (a) Except as provided in subdivision (e), before any person who is arrested for any of the following crimes may be released on bail in an amount that is either more or less than the amount contained in the schedule of bail for the offense, or may be released on his or her own recognizance, a hearing shall be held in open court before the magistrate or judge...

> (b) The prosecuting attorney and defense attorney shall be given a two-court-day written notice and an opportunity to be heard on the matter. If the detained person does not have counsel, the court shall appoint counsel for the purposes of this section only. The hearing required by this section shall be held within the time period prescribed in Section 825.

Cal. Penal Code § 1270.1(a)-(b).

California judicial officers' exclusive authority to enhance or reduce bail is constrained in that the judicial officer is required to take into consideration several factors. *See* Cal. Penal Code §§ 1270.1(c); 1275. Addressing law enforcement personnel, the Ninth Circuit held: "Pursuant to traditional tort law principles of causation, which we apply to § 1983 claims, ... a judicial officer's exercise of independent judgment in the course of his official duties is a superseding cause that breaks the chain of causation linking law enforcement personnel to the officer's decision..." *Galen,* 477 F.3d at 663 (internal citations omitted).

"When a person is detained in custody on a criminal charge prior to conviction for want of bail, that person is entitled to an automatic review of the order fixing the amount of bail by the judge or magistrate having jurisdiction of the offense. That review shall be held not later than five days from the time of the original order fixing the amount of bail on the original accusatory pleading. The defendant may waive this review." Cal. Penal

Code § 1270.2. Thereafter, "the issue of appropriate bail may be raised at various times throughout the criminal proceedings." *In re Weiner,* 32 Cal.App.4th at 444, 38 Cal. Rptr.2d 172 (citing Cal. Penal Code §§ 1269b, 1269c, 1273, 1277, 1476, 1538.5(k)).

b. Application to Facts

The basis for Plaintiffs' claim for denial of a prompt bail hearing is opaque. Plaintiffs have not alleged when bail was set or that bail was not set, the amount of bail that was set, any facts showing that the amount was excessive, the conclusion that the amount was excessive, or whether they took any action to reduce the bail. It appears that Plaintiffs' theory is as follows: (1) Defendant did not provide counsel at the first appearance; as a result (2) Defendant did not seek a reduction in bail at the first appearance; and, as a further result (3) Plaintiffs were unable to seek a reduction of bail until at least five to thirteen days later, when Defendant provided counsel at the second appearance. This theory does not state a claim on which relief can be granted.

First, assuming Plaintiffs have pled a violation of federal law, Plaintiffs have not pled facts that give rise to the plausible inference that Defendant's conduct caused them any harm. *See Galen,* 477 F.3d at 663 ("we apply [traditional tort principles of causation] to § 1983 claims"). That is, Plaintiffs have not pled that, if Defendant had (1) provided counsel at the first appearance; and (2) sought a reduction in bail, Defendant would have obtained a reduction in bail such that Plaintiffs would have been able to secure release.

Second, Plaintiffs have not pled a violation of the Eighth Amendment. That is, Plaintiffs have not pled their bail was enhanced for purposes unauthorized by California law or that the amount of bail was excessive in light of the valid purposes for which it was set. *See id.* at 661.

Third, Plaintiffs have not pled a violation of the due process clause of the Fourteenth Amendment predicated on any interest provided by state law. In their briefing, Plaintiffs point only to California Penal Code § 1270.1. They argue that § 1270.1 entitles them to a bail hearing, with counsel that is appointed within 48 hours. Opposition, 20. Whether or not this characterization is accurate, and whether or not Plaintiffs have pled facts sufficient to allege a violation of the statute, California Penal Code § 1270.1 does not create a liberty interest that is cognizable under the due process clause of the Fourteenth Amendment. Rather, the statute concerns a hearing before which the arrestee, arrested for an enumerated offense, "may be released on bail in an amount either more or less than the amount contained in the schedule of bail for the offense, or may be released on his or her own recognizance." *See* Cal. Penal Code § 1270.1. The statute at issue is procedural, it mandates no substantive outcome. *See Marsh,* 680 F.3d at 1156; *Carver,* 558 F.3d at 875.

Plaintiffs also argue that the right to a prompt bail hearing is protected directly by the due process clause of the Fourteenth Amendment. Plaintiffs argue that "the loss of liberty occasioned by excessive bail is a grievous loss entitling a defendant to 14th Amendment due process

protection." Opposition, 19 (emphasis omitted). As noted above, Plaintiffs have not alleged that any bail imposed was excessive. Nor have they cited authority holding that a delay of five to thirteen days in a bail hearing would violate the Fourteenth Amendment. Plaintiffs' fourth cause of action is DISMISSED with leave to amend.

C. Remaining State Law Claims

Under state law, Plaintiffs seek damages for an alleged violation of the California Unruh Civil Rights Act and seek a writ of mandate to compel Defendant to comply with California Government Code § 27706. *See* Cal. Civ. Code §§ 51 *et seq.*, 52, 52.1; Cal. Gov. Code § 27706. The Court has jurisdiction over this action on the basis of the federal questions raised by the Complaint. *See* 28 U.S.C. § 1331. The Court's jurisdiction over the remaining state law claims relies on its supplemental jurisdiction. *See* 28 U.S.C. § 1367(a). Having dismissed all claims over which it has original jurisdiction, the court declines to exercise its supplemental jurisdiction over the state law claims. *See* 28 U.S.C. § 1367(c)(3). Plaintiffs' fifth and sixth causes of action are DISMISSED with leave to amend for lack of subject matter jurisdiction.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Complaint is dismissed with leave to amend.

IT IS SO ORDERED.

APPENDIX H — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 5, 2020

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-15152

D.C. No. 3:12-cv-06495-JCS
Northern District of California, San Francisco

JOHN FARROW, ON HIS BEHALF, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; JEROME WADE, ON THEIR BEHALF, AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

CONTRA COSTA COUNTY,

Defendant-Appellee,

and

ROBIN LIPETZKY, CONTRA COSTA COUNTY PUBLIC DEFENDER,

Defendant.

Appendix H

ORDER

Before: GOULD, CHRISTEN, and BRESS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing *en banc*.

The full court has been advised of the petition for rehearing *en banc* and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing *en banc* are DENIED.

APPENDIX I — CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteen Amendment to the United States Constitution, Section 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other

proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

California Penal Code § 859b. Felony to which defendant has not pleaded guilty; setting time for examination; issuance of subpoenas; preliminary examination; dismissal of complaint:

At the time the defendant appears before the magistrate for arraignment, if the public offense is a felony to which the defendant has not pleaded guilty in accordance with Section 859a, the magistrate, immediately upon the appearance of counsel, or if none appears, after waiting a reasonable time therefor as provided in Section 859, shall set a time for the examination of the case and shall allow not less than two days, excluding Sundays and holidays, for the district attorney and the defendant to prepare for the examination. The magistrate shall also issue subpoenas, duly subscribed, for witnesses within the state, required either by the prosecution or the defense.

Both the defendant and the people have the right to a preliminary examination at the earliest possible time, and unless both waive that right or good cause for a continuance is found as provided for in Section 1050, the preliminary examination shall be held within 10 court

days of the date the defendant is arraigned or pleads, whichever occurs later, or within 10 court days of the date criminal proceedings are reinstated pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2.

Whenever the defendant is in custody, the magistrate shall dismiss the complaint if the preliminary examination is set or continued beyond 10 court days from the time of the arraignment, plea, or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2, and the defendant has remained in custody for 10 or more court days solely on that complaint, unless either of the following occur:

(a) The defendant personally waives his or her right to preliminary examination within the 10 court days.

(b) The prosecution establishes good cause for a continuance beyond the 10-court-day period.

For purposes of this subdivision, "good cause" includes, but is not limited to, those cases involving allegations that a violation of one or more of the sections specified in subdivision (a) of Section 11165.1 or in Section 11165.6 has occurred and the prosecuting attorney assigned to the case has another trial, preliminary hearing, or motion to suppress in progress in that court or another court. Any continuance under this paragraph shall be limited to a maximum of three additional court days.

If the preliminary examination is set or continued beyond the 10-court-day period, the defendant shall be released pursuant to Section 1318 unless:

The defendant requests the setting of continuance of the preliminary examination beyond the 10-court-day period.

The defendant is charged with a capital offense in a cause where the proof is evident and the presumption great.

A witness necessary for the preliminary examination is unavailable due to the actions of the defendant.

(4) The illness of counsel.

(5) The unexpected engagement of counsel in a jury trial.

(6) Unforeseen conflicts of interest which require appointment of new counsel.

The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment, plea, or reinstatement of criminal proceedings pursuant to Chapter 6 (commencing with Section 1367) of Title 10 of Part 2, unless the defendant personally waives his or her right to a preliminary examination within the 60 days.