No. 20-549

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN FARROW and JEROME WADE,

Petitioners,

v.

CONTRA COSTA COUNTY,

Respondent,

On Petition for a Writ of Certiorari
To the Ninth Circuit Court of Appeals

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this pre-certification class action, Petitioners John Farrow and Jerome Wade seek to raise three questions arising from a brief delay in their appointment of counsel in California criminal proceedings. Because Petitioners' Questions Presented do not accurately reflect the record below, Respondent Contra Costa County identifies the relevant questions presented as:

1. Should the Court address Petitioners' Sixth Amendment "critical stage" argument where a) the Ninth Circuit held that Petitioners waived that argument, b) the district court correctly held that this argument was barred by *Heck v. Humphrey,* 512 U.S. 477 (1994), in light of this Court's holdings in *United States v. Cronic,* 466 U.S. 648 (1984), and other cases that denial of counsel during a "critical stage" requires reversal of a conviction, and c) Farrow's claim is barred by collateral estoppel?

2. Assuming *arguendo* Petitioners could assert a Sixth Amendment "critical stage" argument here, should the Court address that argument where resolution of that issue depends on case-specific facts and applicable state law, there are no opinions from this Court or any circuit courts supporting Petitioners' position, and the practice at issue ceased in 2013?

3. Should the Court grant certiorari in order to formulate a nationwide standard regarding

the timing of appointment of counsel after attachment, where the evidentiary record in this case is insufficient to set such a standard and there are no circuit court decisions promulgating such a standard, much less a dispute between the circuits as to the applicable standard?

4. Should the Court reverse the Ninth Circuit's dismissal of Petitioners' Due Process claim, where the dismissal is dependent on case-specific facts and applicable state law, does not conflict with either this Court's decisions or decisions from other circuits, and the practice at issue, which ceased in 2013, did not result in any violation of Petitioners' state speedy trial rights, which was the sole basis for the alleged violation of due process?

5. Should the Court reverse the Ninth Circuit's dismissal of Petitioners' Equal Protection claim, where the dismissal is dependent on case-specific facts and applicable state law, there is no Circuit split on this issue and the County's alleged policy, which ceased in 2013, did not discriminate between indigent and non-indigent criminal defendants?

6. Is there any reason for this Court to exercise its supervisory powers in this case to correct four alleged errors by the Ninth Circuit and the district court, where none of the claimed errors are significant or noteworthy?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Plaintiffs/Appellants below, are two private individuals, John Farrow and Jerome Wade.

Respondent, who was Defendant/Appellee below, is Contra Costa County.

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I. INTRODUCTION

This case is not a suitable vehicle for addressing the broad constitutional issues posited by Petitioners. Indeed, in many respects, it is hard to imagine a less suitable vehicle. Consequently, the Court should deny the Petition.

Before addressing the reasons for not granting certiorari as to the specific issues in this case, it is important to set out the narrowness of this litigation. Because the district court never certified a class, this litigation involves only two individual plaintiffs who suffered a short delay in appointment of counsel (respectively twelve days and four days) and a practice that ended in 2013. Consequently, while not technically moot because Petitioners can still seek monetary damages, it is effectively moot with respect to any injunctive and declaratory relief. Further, Petitioners have disclaimed any prejudice to their criminal proceedings as a result of not having counsel at their initial appearances, contending that the alleged violation of their Sixth Amendment right to counsel was harmless error and seeking only

nominal damages. Finally, Petitioners, both of whom were charged with felonies, do not claim to have suffered any unnecessary detention as the result of not having counsel at their first appearances. Thus, this litigation does not present the concern raised by Senator Grassley regarding unrepresented misdemeanor defendants having to choose between pleading guilty and being released or asserting their Sixth Amendment right to representation by counsel and staying in jail. These considerations alone demonstrate that this litigation does not warrant certiorari. *Boag v. MacDougall,* 454 U.S. 364, 366 (1982) (O'Connor, J., concurring) (the effectiveness of the Supreme Court depends on its "declining to expend limited judicial resources on cases . . . whose significance is limited to the parties.").

However, there is more. In addition to the foregoing, denial of certiorari is appropriate in light of the specific legal issues posed by Petitioners and this litigation. These additional reasons for not granting certiorari are most apparent when

considering Petitioners' central claim, that their initial appearances in state criminal court were "critical stages" for purposes of the Sixth Amendment. This central claim is not clean, but subject to three separate preliminary bars to adjudication.

First and foremost, as the Ninth Circuit held, Petitioners waived this argument below by not challenging the district court's rejection of that claim under *Heck*. Second, putting waiver aside, this particular claim is, in fact, barred by *Heck* in light of this Court's holding in *Cronic* and other cases that the absence of counsel at a critical stage is per se reversible error. Third, Farrow's entire Sixth Amendment claim is barred due to collateral estoppel as a result of the state court's holding that his rights at the initial appearance were not violated.

In addition to these three preliminary issues, there are two jurisprudential reasons why the Court should not grant certiorari as to this issue. The first is that resolution of this claim in this case involves the peculiarities of California criminal law and a

unique fact pattern arising from a practice that ended in 2013. The second is that there are no conflicting opinions between the Ninth Circuit and any of the other circuits, or even the cited state high court decisions, that warrant this Court's intervention.

Similar considerations warrant denying certiorari as to the second constitutional issue posited by Petitioners, whether this Court should establish a nationwide standard for determining when, for purposes of the Sixth Amendment, counsel must be appointed after attachment. Petitioners seek some "bright-line" standard establishing a violation of the Sixth Amendment if counsel is not provided within a specified time period after attachment. As the district court noted, the evidentiary record in this case is inadequate to set such a standard. Further, although this Court in 2008 left this issue unresolved in *Rothgery v. Gillespie Cty., Texas,* 554 U.S. 191 (2008), no circuit court has yet announced such a standard, which reflects the underlying reality that this issue only

rarely comes up and is not yet sufficiently crystalized for this Court's intervention. *FCC v. Fox TV Stations, Inc.,* 556 U.S. 502, 529 (2009) (declining to consider constitutional issues without a lower court opinion). In sum, this Court would be addressing this issue without an adequate evidentiary record and without prior consideration of this issue by any circuit court.

There are equally significant reasons to deny Petitioners' request that this Court establish a nationwide standard for appointment of counsel under the Due Process and Equal Protection clauses. The Due Process claim was dismissed due to Petitioners' failure to allege a violation of California's speedy trial statutes, the basis for this claim. Consequently, even if Petitioners could establish such a violation, which they cannot, this Court's decision would have limited impact and would not resolve any critical issues. The Equal Protection claim was dismissed because Petitioners showed no impact of the former policy on a criminal defendant's ability to defend against the criminal

charges and because that practice applied to all individuals eligible for representation by the Public Defender, i.e., did not discriminate between different categories. Notably, the cases cited by Petitioners on this claim involve a) judicial officers as defendants and b) the setting of bail by those defendants as to both indigent and wealthy defendants. This litigation involves neither.

Petitioners' last question presented is in the nature of a legal "smorgasbord" positing four disparate alleged "errors" made by the Ninth Circuit and the district court in this case. Petitioners establish no basis for this Court to exercise its supervisory authority with respect to these errors. Petitioners do not claim that these issues are the subject of a circuit split or are otherwise noteworthy. *See Boag,* 454 U.S. at 366 (1982) (O'Connor, J., concurring) (the effectiveness of the Supreme Court depends on its "declining to expend limited judicial resources on cases . . . whose significance is limited to the parties."). And Petitioners do not show that there was actual error as to those issues, all of which

concern mundane procedural questions, much less any error having such broad import as to warrant this Court's intervention.

Respondent Contra Costa County (the "County") addresses these and other issues in greater depth below.

II. STATEMENT OF THE CASE

Petitioners' summary of the factual and procedural background of this case omits key facts and mischaracterizes other facts. Consequently, the County submits the following summary drawn from the district court's opinion granting summary judgment to the County. *See* Pet., App. B at 6a-47a.

Both Farrow and Wade made initial appearances in state criminal court in 2011. *Id.* at 28a, 31a. At that time, due to funding issues, the Contra Costa County Public Defender's Office did not staff the initial appearance calendar. *Id.* at 20a. That practice changed effective January 9, 2013 with one minor exception not applicable here.[1] *Id.* at 24a.

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[1] At some point, some state judges at the Richmond, California courthouse were not permitting the Public Defender to represent out-of-custody misdemeanor defendants at their

The change was initiated by Public Defender Robin Lipetzky prior to the initiation of this litigation. *See id.* at 23a.

At the initial appearances occurring in 2011, the state court judge would advise the defendant of the charges, inquire whether s/he wished to have an attorney appointed and if s/he could afford an attorney. *Id.* at 20a. If the defendant requested the appointment of an attorney and stated that s/he could not afford an attorney, the state court judge would continue the proceedings, set bail pursuant to the bail schedule, refer the defendant to the Public Defender's Office, and set a "counsel and plea" hearing. *Id.* The timing of the second appearance would depend on the judge and courthouse, but would be no more than two weeks after the initial appearance. *Id.* For reasons unknown, Farrow's counsel and plea date was set 13 days after his

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initial appearance despite the Public Defender's attempts to do so. *Id.* at 24a, n. 8. Because neither Farrow nor Wade appeared in that courthouse, and the specific state court judges are not defendants in this litigation, this exception is not at issue. *Id.*

initial appearance while Wade's counsel and plea date was set seven days after his initial appearance. *Id.* at 28a, 31a.

Farrow's initial appearance occurred on Friday, September 2, 2011. Pet., App. B at 28a. The state court set his bail at $106,000 and scheduled his counsel and plea hearing for Thursday, September 15. *Id.* On Tuesday, September 6, 2011, the first business day after September 2, a Public Defender paralegal interviewed Farrow to assess his financial eligibility for representation by that office and to determine whether there were any urgent issues in his case. *Id.* Neither Farrow's referral packet nor his interview revealed any urgent issues. *Id.* at 29a. After this interview, Public Defender Robin Lipetzky determined that representation of Farrow would result in a conflict of interest for the main Public Defender Office and the Alternate Defender's Office ("ADO") due to excessive case loads and referred his case to the conflicts panel on September 14. *Id.* Mr. Martin, counsel of record for Petitioners in this case, was appointed to represent Farrow on September 14,

i.e. the day before the "counsel and plea" hearing. *Id.* Martin took no actions related to the case on that day. *Id.*

On September 15, Martin met with Farrow before the hearing. *Id.* They discussed bail issues and Farrow's lack of representation at the initial appearance. *Id.* At the hearing, Martin did not challenge the amount of Farrow's bail, but did object to Farrow's lack of legal representation at the initial appearance as prejudicial. *Id.* at 30a. The state court judge denied the objection and held that Farrow's rights had not been violated "in any way." *Id.*

Following further proceedings, where Martin represented Farrow, including a preliminary hearing, Farrow pled guilty and was sentenced to 270 days in jail. *Id.* at 30a-31a.

Wade's initial appearance occurred on Monday, November 14, 2011. *Id.* at 31a. At the hearing, the state court set bail at $4,350,000 and scheduled the counsel and plea hearing for November 21, i.e. a week later. *Id.* Due to conflicts

of interest arising from concurrent representation of Wade's co-defendants, the Public Defender's Office and the ADO declined to represent Wade on November 17 and 18 respectively. *Id.* Wade's case was referred to the conflicts panel on November 18. *Id.* That same day, the panel contacted Martin, who began working on the case that day. *Id.* at 32a. On Saturday, November 19, Martin interviewed Wade. *Id.*

Martin appeared at Wade's counsel and plea hearing. *Id.* At that hearing, Martin did not seek any change to the amount of Wade's bail. *Id.* Following further proceedings, where Martin represented Wade, Wade pled guilty in December 2012 and was credited with time served. *Id.* at 33a.

Petitioners filed this putative class action on December 21, 2012. The district court never certified a class and the case proceeded solely on Petitioners' individual claims. Pet., App. B at 5a. The initial complaint asserted, *inter alia,* two Section 1983 claims against Lipetzky in her official capacity: a) a Sixth Amendment claim based on violation of

Petitioners' right to counsel; and b) a Due Process claim based on violation of their speedy trial rights under state law. *See* Pet., App. G at 211a-260a.

The district court dismissed these claims with leave to amend. In its order, the district court held, *inter alia,* that: a) the initial appearances were not "arraignments" under California law, specifically California Penal Code section 988, and were not "critical stages" under the Sixth Amendment; b) Petitioners alleged no actual prejudice to their criminal cases due to the absence of counsel at the initial appearances; and c) there was no violation of their state speedy trial rights. *Id.*

Petitioners filed an amended complaint that asserted, *inter alia,* the same two Section 1983 claims and a new Section 1983 Equal Protection claim based on alleged discrimination against indigent defendants. Lipetzky again moved to dismiss. The district court granted the motion and dismissed the Due Process and Equal Protection claims and Farrow's Sixth Amendment claim without leave to amend, while giving Wade further

leave to amend his Sixth Amendment claim. *See* Pet., App. F at 155a-210a. The district court again concluded that the initial appearances were not critical stages and that Petitioners had alleged no actual prejudice to their criminal cases. *Id.* at 193a-198a. It also considered and rejected the argument that the waiting period was a "critical stage." *Id.* at 195a. When Wade elected not to file a further amended complaint, the district court granted judgment in favor of Lipetzky.

On appeal, the Ninth Circuit affirmed the dismissal of the Due Process and Equal Protection claims as well as the district court's holding that the initial appearances were not "critical stages" under the Sixth Amendment. Pet., App. E at 149a-154a. However, it reversed the district court's dismissal of the Sixth Amendment claim on the grounds that it had erroneously required Petitioners to establish actual prejudice to their criminal cases, and remanded the issue of whether the appointment of counsel took place within a reasonable time after

attachment in conformance with *Rothgery*.[2] *Id.* at 151a.

Following remand, Lipetzky again moved to dismiss, asserting, *inter alia,* that Petitioners' Sixth Amendment claim was barred under *Heck v. Humphrey,* 512 U.S. 477 (1994). The district court agreed that *Heck* barred any Sixth Amendment claim based on the initial appearances being "critical stages."

> 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 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*.

Pet., App. C at 132a. However, the district court rejected Lipetzky's argument that *Heck* also barred

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[2] Lipetzy petitioned this Court to grant a writ of certiorari. The Court denied this petition. Pet., App. D at 148a.

the Sixth Amendment claim to the extent that it was based on the assertion that counsel was not appointed within a reasonable time after attachment at the initial appearance because such a claim would not necessarily invalidate Petitioners' convictions. *Id.* at 136a. Shortly after this, the parties stipulated to the substitution of the County as the defendant.

After discovery, the parties filed cross-motions for summary judgment. Petitioners proffered expert testimony from Professor Robert Boruchowitz; the County proffered expert testimony from Henry Coker, a former San Diego County Public Defender. The district court granted summary judgment to the County on the Sixth Amendment claim and dismissed the remaining state law claim for lack of subject matter jurisdiction. Pet., App. B at 94a. The district court rejected the contention that the County's prior practice was facially invalid under *Rothgery* because a) both *Rothgery* and the Ninth Circuit's prior decision in this case hold that counsel does not need to be appointed at the initial appearance, but only within a "reasonable time"

after attachment, which occurred at the initial appearance and b) Petitioners failed to provide a sufficient evidentiary record for the court to set a hard absolute rule regarding the timing of appointment of counsel. *Id.* at 74a-80a & n.16. The district court then held that both Petitioners received counsel within a reasonable time after the initial appearance. It noted that both received counsel (Martin) with sufficient time for Martin to prepare for the second "counsel and plea" appearance based on Professor Boruchowitz's testimony and that the new "better" practice proffered by Petitioners provided less time to prepare than Martin actually had. *Id.* at 86a-87a. It also noted specific facts applicable to the individual Petitioners that supported the reasonableness of the timing of appointment. For Farrow, it found that the paralegal interview was adequate to discover any issues in his case requiring attention of counsel. *Id.* at 90a-92a. For Wade, it found that a four day delay in appointment was reasonable in light of the

multiple conflicts of interest posed by representation of Wade and his co-defendants. *Id.* at 87a-89a.

Petitioners again appealed to the Ninth Circuit. In a short, unpublished Memorandum Opinion, the Ninth Circuit denied the appeal, holding that: 1) Petitioners waived their "critical stage" claim by failing to challenge the district court's holding that *Heck* barred their critical stage claim in their opening brief; 2) Petitioners did not establish the district court erred in holding that there was insufficient evidence to show a facial violation by the County of the Sixth Amendment; and 3) Petitioners did not challenge the district court's finding that there was no Sixth Amendment violation as to their own cases. Pet., App. A at 2a-3a.

III. LEGAL ARGUMENT

This Court should deny the petition. Simply put, this case does not provide a suitable vehicle for this Court to address the constitutional issues posed by Petitioners and there is no reason for this Court to exercise its supervisory powers.

A. The Court Should Not Adjudicate Whether Petitioners' Initial Appearance in State Court Was a Critical Stage Under the Sixth Amendment

The primary issue raised by the petition is whether Petitioners' initial appearances were critical stages under the Sixth Amendment. The Court should decline to review this issue for several reasons.

First and foremost, Petitioners waived this issue below. As Petitioners concede, the Ninth Circuit held that they waived their critical stage argument due to a failure to challenge the district court's dismissal of that argument under *Heck* in their opening brief. Pet. at 12; *see* Pet., App. A at 2a. Consequently, the Ninth Circuit did not consider that argument in its last decision. As this Court has previously held, that is the end of the story; this Court does not address arguments that the court below held were waived. *California v. Taylor,* 353 U.S. 553, 556 n.2 (1957) (not recognizing contention that the court below deemed waived); *see*

also Cutter v. Wilkinson, 544 U.S. 709, 718 n. 7 (2005) (declining to address contention that the court below did not address).

Petitioners contend that the Ninth Circuit erred in finding waiver. However, their opening brief to that court did not include any discussion of the district court's *Heck* ruling in their "Statement of Issues Presented," "Summary of Argument" or "Argument" sections. *See* Supplemental Appendix ("Supp.App.") A hereto at 1-5, 50-71. Petitioners did discuss that ruling in their background section and in their section requesting re-assignment on remand. *See id.* at 8, 74-75. This is insufficient. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994); *see also* Fed. Rule App. Procedure 28.

Having waived their critical stage argument below, Petitioners cannot now attempt to raise it here. *Taylor,* 353 U.S. at 556 n.2.

Second, as the district court held, *Heck* bars their critical stage argument. This Court's decisions in "*Hamilton, White,* and *Cronic* all indicate that failure to provide counsel at that appearance would

be 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*." Pet., App. C at 132a.

Notably, while the petition discusses the *Heck* bar as an issue to be resolved, it contains no authority supporting the contention that *Heck* does not bar their critical stage argument. *See* Pet. at 39. To be blunt, Petitioners present no real argument regarding *Heck* whatsoever. *Id.*

Third, in addition to these hurdles, Farrow's entire Sixth Amendment claim is barred by collateral estoppel. As noted above, the state court expressly denied his current attorney's objection to the denial of counsel at the initial appearance. *See* Pet., App. B at 30a, 54a.

Fourth, even if Petitioners could surmount these preliminary hurdles, which they cannot, this Court should decline to adjudicate this issue for jurisprudential reasons. Contrary to Petitioners'

rhetoric, this is not an issue of significant import. There is no circuit split on this issue; to the contrary, the few circuit decisions addressing this issue are consistent with the County's position. *See United States v. Portillo,* 969 F.3d 144, 161 (5th Cir. 2020); *United States v. Mendoza-Cecelia,* 963 F.2d 1467, 1473 (11th Cir. 1992); *see also* Pet., App. E at 152a-153a (Ninth Circuit opinion in this case). And Petitioners' citation of Senator Grassley's statement is misplaced because this case does not implicate the issue of unrepresented misdemeanant defendants being pressured to plead guilty or of unnecessary pretrial detention. *See* Pet., App. B at 42a, 44a.

Further, any adjudication of this issue based on this case would necessarily be narrow. As noted above, Petitioners were not "arraigned" under California law at their initial appearances because they were not asked how they pled. Pet., App. G at 234a (quoting Cal. Penal Code § 988). Instead, their arraignments were "bifurcated" and only completed during their second appearance when with counsel, they were asked how they pled. *Id.*; *see also* Pet.,

App. F at 186a. This presents a unique (and no longer extant) procedural context for this claim.

And because Petitioners were not asked to enter a plea at their initial appearances, in order to concoct a claim that their initial appearances were critical stage, Petitioners must perforce assert that California law required that they be given the opportunity to enter a plea during those initial appearances. Pet. at 19 n.2; *see also* Pet., App. C at 132a & n. 13, 141a-142a. This dependence on California state law further narrows the applicability of any ruling by this Court.

Finally, lest it be forgotten, Petitioners are wrong on the merits of their "critical stage" argument. California law does not mandate that they be permitted to enter a plea at their initial appearances as opposed to the second appearance. Indeed, as the district court noted, Petitioners have never cited any authority in support of their contention. *See* Pet., App. E at 141a-142a. Not surprisingly, they again fail to do so here. *See* Pet. at 35 (citing state case for proposition that the state

court must afford the defendant the right to plea at the arraignment). Even if California law were to the contrary, Petitioners still could not establish that their initial appearances were critical stages because nothing happened at those appearances - the absence of counsel did not deprive Petitioners of any rights or have any impact on their criminal cases. *Hamilton v. Alabama,* 368 U.S. 52, 54 (1961); *see also* Pet., App. E at 152a.

Notably, only one case out of the multitude cited by Petitioners[3] helps their cause on this issue, the district court opinion in *Booth v. Galveston Cty.,* 352 F. Supp. 3d. 718 (S.D. Tex. 2018). In that case, the district court held the plaintiff's initial

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[3] The remainder of the federal cases cited by Petitioners do not involve determination of whether the initial appearance was a critical stage under the Sixth Amendment. And the state court cases cited by Petitioners are distinguishable. *See* Pet., App. G at 237a-240a (distinguishing *Hurrell-Harring v. State of New York,* 15 N.Y.3d 8 (2010), *DeWolfe v. Richmond,* 434 Md. 444 (2013)); *Gonzalez v. Comm'r of Corrections,* 308 Conn. 463, 481-82 (2013) (absence of counsel at initial appearance resulted in loss of right under Connecticut law); *Kuren v. Luzerne Cnty.,* 146 A.3d 715, 743, 746-48 (2016) (basing Sixth Amendment violation of "widespread, systematic and construction denial of counsel" due to "deficiencies in funding and resources provided by the county").

appearance was a critical stage because the state court set bail at that appearance. 352 F. Supp. 3d at 726. The district court opined "that based on longstanding precedent, the Supreme Court would undoubtedly conclude that a pretrial detention hearing is a 'critical stage' for Sixth Amendment purposes." *Id.* at 739 (citing *Coleman v. Alabama,* 399 U.S. 1, 9-10 (1970)); *Smith v. Lockhart,* 923 F.2d 1314 , 1319 (8th Cir. 1991). But neither *Coleman* nor *Smith* supports the proposition that bail setting pursuant to a schedule, which is what happened in Petitioners' cases, as opposed to a bail reduction motion, is a critical stage.

In *Coleman,* this Court held that preliminary hearings in Alabama state court were critical stages for four separate reasons, the last of which was that counsel could also effectively argue "on such matters as the necessity for an early psychiatric examination or bail." 399 U.S. at 9-10. Thus, counsel's ability to make bail arguments was only a part of one of four reasons why this Court determined an Alabama preliminary hearing was a critical stage. Further to

the point, *Coleman* addressed the need for counsel in the context of a bail reduction motion, not the setting of bail pursuant to a bail schedule. *See id.*; *see also Smith v. Lockhart,* 923 F.2d at 1319 (citing *Coleman* for the proposition that "the Supreme Court has recognized the special role played by counsel at preliminary hearings in which bail reduction motions are considered").

Smith is likewise inapposite. In that case, the Eighth Circuit addressed the need for counsel at an "omnibus" hearing, which considered several motions filed by the pro se defendant and at which "defenses and motions" can be waived if not asserted then. 923 F.2d at 1319.

Perhaps more significantly, *Booth* is inconsistent with, and contrary to, the Fifth Circuit's decisions holding that setting bail does not render a hearing "critical" for purposes of the Sixth Amendment. *See, e.g., Mendoza-Cecilia,* 963 F.2d at 1473 (initial hearing where court set bail was "largely administrative" and not critical); *Portillo,* 969 F.3d at 161 (initial appearance where court

announced government intention to hold defendant without bail was not critical stage). In light of these Fifth Circuit rulings,[4] it is unlikely that the Fifth Circuit would adopt *Booth's* critical stage analysis.

As a final gasp, Petitioners request that this Court fashion a new critical stage analysis. Rather than utilize the traditional standard of assessing a Sixth Amendment violation based on the impact on the criminal defense, i.e. prejudice to that defense, Petitioners seek to have this Court extend the critical stage analysis to whether the delay in counsel could result in unnecessary pretrial detention. *See* Pet. at 26. This Court has consistently declined to extend the Sixth Amendment's protections to harms unrelated to the defense. It declined to do so in *Rothgery*. Notably, in that case, Justice Alito made this point expressly in his concurring opinion. *Rothgery,* 554 U.S at 218 (Alito, J., concurring). And in this case, Petitioners have no basis to claim that they suffered any

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[4] The Ninth Circuit's initial decision in this case is consistent with the Fifth Circuit's decisions. Pet., App. E at 152a (setting of bail is not critical stage).

unnecessary pretrial detention. *See* Pet., App. B at 42a, 44a.

For all of the foregoing reasons, the Court should decline to consider Petitioners' critical stage argument.

B. The Court Should Not and Cannot Fashion a Broad Ruling Respecting the Timing of Appointment of Counsel Required by the Sixth Amendment

The Court should also decline to adjudicate the issue of when under the Sixth Amendment counsel must be appointed after attachment. Although this Court expressly left this issue unresolved in *Rothgery,* nothing has occurred in the interim to warrant the Court addressing that issue now. There are no circuit decisions establishing any standards as to this issue, much less any split between the circuits. The Court should decline to address this constitutional issue in the absence of lower court opinions. *Fox TV Stations,* 556 U.S. at 760. And even if the Court was inclined to address that issue, this case is not a suitable vehicle to do so.

Petitioners fault the Ninth Circuit for not setting forth a bright line mandatory standard regarding the timing of appointment of counsel, i.e., within a specified time period after attachment. Pet. at 28-30. However, they do not, and cannot, offer any such standard from another circuit. *See id.* The simple truth is that no circuit has adopted such a standard. The absence of circuit decisions on this issue reflects its relative unimportance and the absence of any need for this Court to further develop *Rothgery's* reasonable time requirement at this time.

In addition, the evidentiary record in this case is not appropriate for establishing a nationwide standard. As the district court noted, Petitioners failed to provide necessary information regarding the timing of appointment in other states or even other counties in California and necessary information regarding when the length of a delay in appointment in counsel begins to meaningfully impact representation. *See* Pet., App. B at 77a-78a. Without an adequate evidentiary record, this Court

cannot fashion the nationwide standard Petitioners seek.

Nor have Petitioners established that the Ninth Circuit's decision in this case was error. Given the record below, that court correctly issued a narrow decision affirming the district court's grant of summary judgment. Petitioners do not offer this Court any basis to disturb that ruling. Notably, Petitioners do not, and cannot, dispute the district court's factual findings establishing that they received counsel within a reasonable time after attachment. As the district court found, both received counsel sometime between the first and second appearances. Pet., App. B at 80a. Indeed, Wade's counsel met with him prior to the second appearance and Farrow's counsel could have done so. *Id.* at 28a-29a, 32a, 87a-90a. Further, as the district court expressly found, the appointment of counsel occurred with adequate time for counsel to prepare for the next critical stage. *Id.* at 86a-87a (relying in part on testimony from Petitioners' expert, Boruchowitz). Given these factual findings,

Petitioners have no basis to contest the reasonableness of the timing of their appointment of counsel.

C. Petitioners Present No Basis For this Court to Review Dismissal of Their Due Process and Equal Protection Claims

This Court should not grant certiorari to consider the Ninth Circuit's affirmance of the dismissal of Petitioners' Due Process and Equal Protection claims. Contrary to Petitioners' arguments, the Ninth Circuit's holdings on these claims are narrow rulings based on state law and the facts of this case that do not conflict with decisions from other Circuits.

Petitioners predicated their Due Process claim upon a violation of their state speedy trial rights. *See* Pet., App. G at 245a. However, because Petitioners did not adequately allege any violation of those rights, the district court dismissed this claim and the Ninth Circuit affirmed.

> 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 that 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 ten days later. Without an underlying violation of California's speedy trial scheme, plaintiffs have not adequately plead a due process claim.

Pet., App. E at 151a.

There is no basis for this Court to grant certiorari as to this narrow ruling. Petitioners do not, and cannot, contend that there is any circuit split as to this particular issue of California state law. Petitioners cite *ODonnell v. Harris Cty.,* 892 F.3d 147 (5th Cir. 2018), and *Walker v. City of Calhoun,* 901 F.3d 1245 (11th Cir. 2018). However, both of those decisions addressed a Due Process claim in the context of bail determinations, not state speedy trial rights, and both involved county judges as defendants. *ODonnell*, 892 F.3d at 155-156, 157; *Walker,* 901 F.3d at 1255-56, 1265-66.

Petitioners suffer similar problems with respect to the Ninth Circuit's affirmance of the dismissal of their Equal Protection claim. As to that claim, the Ninth Circuit held that the then-extant practice did not deprive indigent defendants of "an adequate opportunity to present their claims fairly within the adversary system." Pet., App. E at 151a. This is consistent with its holding as to the Due Process and Sixth Amendment claims that Petitioners suffered no adverse consequences from the absence of counsel at their initial appearances. *Id.* at 151a-152a. In addition, as the district court pointed out, this practice applied to all individuals eligible for Public Defender representation and, thus, did not discriminate against indigent defendants in favor of wealthy ones. Pet., App. F at 208a-209a.

Petitioners assert that the Ninth Circuit's decision somehow conflicts with *ODonnell*. Pet. at 36. *ODonnell* is distinguishable. In that case, the court found an equal protection violation because the bail hearing officers and county judges, who are not defendants here, discriminated between "otherwise

similarly-situated misdemeanor arrestees [] based solely on the relative wealth." 892 F.3d at 161. As noted above, the County's former practice applied to all eligible defendants and, thus, there was no discrimination based on wealth.

D. There is No Reason for this Court to Exercise Its Supervisory Powers

To invoke this Court's "supervisory powers," Petitioners assert that there were "departures from the normal course of judicial proceedings" in four respects. Pet. at 37. The four alleged errors were 1) the district court's use of a "totality of the circumstances" test, 2) the district court conducting a "bench trial by affidavit," 3) the Ninth Circuit not conducting a *de novo* review, and 4) the Ninth Circuit's holding that Petitioners waived their critical stage argument. None of these alleged errors warrant this Court's intervention.

As an initial point, all four alleged errors concern procedural issues impacting only this case. Petitioners do not suggest that these errors are commonplace or likely to occur again. Thus, these

"errors," even if truly errors, do not warrant certiorari. *Boag,* 454 U.S. at 366 (1982) (O'Connor, J., concurring) (the Court should decline to expend judicial resources on cases "whose significance is limited to the parties.").

Equally significantly, the lower court decisions on these issues were correct. Petitioners fault the standard employed by the district court, but do not demonstrate that the standard was inappropriate or inconsistent with the Ninth Circuit's remand. *See* Pet. at 37. As to the "bench trial by affidavit," Petitioners themselves concede that "[t]here are no meaningful factual disputes in this case." Pet. at 15. Petitioners' claim that the Ninth Circuit did not conduct a *de novo* review is based solely on the *ipse dixit* of counsel as there is nothing to support this claim in the Ninth Circuit's opinion.[5] And for the

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[5] Petitioners also suggest that the Ninth Circuit erred in holding that Petitioners "did not challenge the District Court's holding that they were not personally injured by the delay," citing their contention that they were injured through deprivation of a constitutional right. Pet. at 11. Petitioners misrepresent the Ninth Circuit's holding. As plainly stated in its decision, the Ninth Circuit held that Petitioners failed to challenge the district court's ruling that they did not suffer any

reasons stated above, Petitioners did in fact waive their critical stage argument.

IV. CONCLUSION

Petitioners have provided no reason for this Court to grant certiorari in this case. To the contrary, the foregoing establishes numerous reasons for this Court to deny certiorari. As to Petitioners' main Sixth Amendment "critical stage" argument, they waived that argument below, it is barred by *Heck,* and there is no circuit court split on this issue. As to the remainder of Petitioners' claims, the Ninth Circuit's rulings on those issues are narrow rulings based on the unique facts of this case and California

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Sixth Amendment violation based on their own experiences in state criminal court. Pet., App. A at 3a. That is manifestly correct.

law and not the subject of circuit court splits. The petition should, therefore, be denied.

DATED: January 6, 2021

Respectfully submitted,

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APPENDIX A - APPELLANTS OPENING BRIEF

No. 19-15152

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

John Farrow, et al.,
Plaintiffs-Appellants

v.

Contra Costa County
Defendant-Appellant

Appeal from the United States District Court
for the Northern District of California
No. 3:12-cv-06495
Honorable Joseph C. Spero

APPELLANTS' OPENING BRIEF

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I. STATEMENT OF JURISDICTION

After remand from this Court, Plaintiffs filed a Third Amended Complaint in the district court on November 16, 2016 alleging claims under the Sixth Amendment to the United States Constitution, 42 U.S.C. § 1983, and additional state claims. Accordingly, the district court had jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331 and 1343, and it had supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367(a). On January 2, 2019 the district court granted Defendant's Motion for Summary Judgment in its entirety, entering final judgment in favor of Defendant Contra Costa County. (Dkts. 145-146; 1-60.) Plaintiffs filed a timely notice of appeal from the judgment on January 25, 2019. (Dkt. 147; 663-68.) Accordingly, this Court has appellate jurisdiction under 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES PRESENTED

1) Is a presumptively innocent criminal detainee's first appearance in a California Court a "critical stage" of the proceedings requiring the provision of appointed counsel

given that the state court judge must ask the detainee whether he wishes to enter a plea at that hearing, bail is set according to a schedule, and statutory speedy trial rights are directly impacted?

2) The Contra Costa County Public Defender declared in an official County document on September 6, 2012 that,

> ***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. Only at that time, after spending one to two weeks in custody, will they have an opportunity to ask a judge to reduce their bail or release on their own recognizance.***

(Dkt. 125-2; 298:12-23; 299; 346.)

In light of this statement explicitly describing the Policy of delaying representation for a period of one to two weeks, and other overwhelming evidence establishing the existence of the Policy, did the district court err by concluding that,

> 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." 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. (Internal citation omitted.)

(Dkt. 145; 50:4-9.)

3) Did Plaintiffs prove – through the expert opinion of Professor Boruchowitz, the 55 compelling reasons supporting his opinion, the inculpatory testimony of the County Public Defender, the damning statements of Defendant's own expert, and the negative inference that should be drawn from the County's failure to justify its Policy – that the County violated Plaintiffs' Sixth Amendment right to counsel by delaying provision of counsel for an "unreasonable period of time" by withholding representation for five to thirteen days, and sometimes longer?

4) Did the magistrate judge erroneously exclude Professor Boruchowitz's expert opinion that the County withheld provision of counsel for an unreasonable period of time in

violation of the "reasonable time" requirement of *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 212 (2008)?

5) Did the district court err in considering Retired San Diego Public Defender Henry Coker's expert opinion that provision of counsel in the two named Plaintiffs' criminal matters was not unreasonably delayed when: **(a)** he based his opinion upon a "microscopic review" of self-serving, factually unsupported hypotheticals posed by County Counsel; **(b)** he failed 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*"; and **(c)** he erroneously assumed that a visit by a paralegal qualified as representation by counsel under the Sixth Amendment?

6) Did the district court err in granting the County's Summary Judgment motion based upon the County's last-minute declarations – which contradicted its previous official statements and testimony?

7) Should this Court grant declaratory relief, injunctive relief and nominal damages, given that Plaintiffs have proven that Defendant maintained a Policy of withholding representation by counsel for an unreasonable period of time in violation of Plaintiffs' Sixth Amendment right to counsel?

8) In the event that this Court remands the matter to the district court for further proceedings, should this Court order that the matter be reassigned to a different judge due to the magistrate judge's outspoken commitment to Defendant's position and his explicit refusal to follow this Court's precedents, which have required continuing intervention by this Court?

III. STATEMENT OF THE CASE

A. Facts

Tens of thousands of indigent presumptively innocent criminal detainees were denied counsel, the right to enter a plea, their right to apply for bail, and their statutory speedy trial rights for a period of between five and thirteen days, and

sometimes longer, after their first appearance in court due to Defendant's longstanding and written Policy of withholding counsel during that period. Plaintiffs, who were subjected to this Policy, filed suit on December 21, 2012, to obtain judicial relief from this travesty.

B. This Court's Earlier Opinion in This Case

This Court previously remanded the matter to the district court in *Farrow v. Lipetzky*, 637 Fed.Appx 986 (2016), stating,

> We … 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*.

C. Proceedings on Remand

1) Third Amended Complaint

Plaintiffs filed a Third Amended Complaint in which they alleged that they had a right to enter a plea at their first court appearance, correcting the error of omission concerning this issue pointed out by Justice Fletcher during oral argument on

the first appeal in this case.[1] *See, People v. Figueroa*, 11 Cal.App.5th 665, 677 (2017) ("The arraignment 'is the defendant's first court appearance. ***[T]he court at the arraignment must afford the defendant the opportunity to enter a plea***"). Further, the California Court of Appeal stated in *Phillips v. Seely*, 43 Cal.App.3d 104, 112-13 (1974) that, ***"In the area of criminal proceedings the right of an accused person, whether indigent or otherwise, to the immediate and effective assistance of counsel is settled law in California."*** If this Court agrees with this conclusion, no further analysis of Plaintiffs' Sixth Amendment claim is required, and summary judgment should be entered in Plaintiffs' favor.

2) Third Motion to Dismiss

Defendant filed a third motion to dismiss pursuant Rule 12(b)(6), insisting that actual prejudice is a necessary element

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[1] The Third Amended Complaint is identical to the Second Amended Complaint previously reviewed by this Court, with the exception of the addition referenced above and the elimination of the Due Process and Equal Protection claims that were rejected by this Court.

of any Sixth Amendment claim – in spite of this Court's earlier ruling in this case to the contrary. (Dkt. 101; 574:25-575.) The County also asserted for the first time that the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994) bars any claim based upon a Sixth Amendment violation.

The district court further concluded that *Heck* barred "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." (Dkt. 145; 9:1-4.)

The "particular stage at issue" was the criminal defendant's first appearance in court. ***Here, the district court disagreed with both federal and California Court of Appeal precedent.*** See, *United States v. Morrison*, 449 U.S. 361, 364-65 (1981); *Ayala v. Wong, 756 F.3d 656, 673 (9th Cir. 2014,* overruled on separate grounds in *Davis v. Ayala,* 135 S.Ct. 2187 (2015)); *(U.S. v. Perez*, 776 F.2d 797, 800 (9th Cir. 1985, overruled on separate grounds by *U.S. v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003) ("Even if failure to appoint counsel at this

early stage was a constitutional violation it "was harmless error."); *U.S. v. Owen*, 407 F.3d 222, 227 (4th Cir. 2005) ("Our conclusion that Owen's arraignment without counsel is subject to harmless-error analysis is abundantly supported by Supreme Court cases applying harmless-error analysis to the denial of the Sixth Amendment right to counsel at various "critical stages" of criminal process"); *United States v. Roy*, 855 F.3d 1133, 1144 (11th Cir. 2017) (discussion of harmless error under the Sixth Amendment); *People v. Cox*, 193 Cal.App.3d 1434, 1440 (1987) ("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 rationalized its determination that it would not follow Ninth Circuit precedent, thus:

> 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.

(Dkt. 107; 116: fn. 9.)

In reaching this conclusion the district court assumed that this Court was unaware of *Strickland v. Washington*, 466 U.S. 668 (1984) and *United States v. Cronic,* 466 U.S. 648 (1984), when it drafted *Perez*. However, even if that were true, the district court ignored this Court's much later opinion in *Ayala v. Wong,756 F.3d 656, 673 (9th Cir. 2014),* where this Court stated:

> As the Fourth Circuit has explained, the statements in *Mickens* and *Cronic* rely on the Supreme Court's earlier usage of the phrase "critical stage," in cases such as *Hamilton v. Alabama*, 368 U.S. 52, 82 (1981), and *White v. Maryland,* 373 U.S. 59, 83 (1963) to refer narrowly to those proceedings both at which the Sixth Amendment right to counsel attaches and

> at which denial of counsel necessarily undermines the reliability of the entire criminal proceeding.... [T]he Supreme Court has subsequently used the phrase "critical stage," in cases such as *United States v. Wade*, 388 U.S. 218 (1967)]and *Coleman v. Alabama,* 399 U.S. 1 (1970), in a broader sense, to refer to all proceedings at which the Sixth Amendment right to counsel attaches—including those at which the denial of such is admittedly subject to harmless-error analysis.

The district court justified its decision not to follow *Ayala, supra*, thus, "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." (Dkt. 107; 116:8-10.)

With respect to California Court of Appeal precedent, the district court stated that, "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*." (*Id.*, at 119 fn. 13.)

The district court also held that, ***"for the purpose of the motion to dismiss that reasonableness of the 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." (Dkt. 107; 123:1-4.) It failed, however, to elucidate any of the other factors it found pertinent to resolving the question of whether Defendant's Policy of withholding counsel for five to thirteen days, and sometimes longer, complied with *Rothgery's* "reasonable time" requirement.

In granting Defendant's Summary Judgment Motion, however, 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.

(Dkt. 145; 50:25-28, fn. 16.)

Plaintiffs were blindsided by this ruling because the district court had not specified that they were required to produce this specific type of evidence in order to prevail, especially when Defendant, not Plaintiffs, would ordinarily be expected to adduce this type of evidence to establish that the automatically imposed five to thirteen day, and sometimes longer, delay imposed by the Policy in every case, without regard to the circumstances of any particular case, was reasonable. Indeed, in denying Defendant's third 12(b)(6) motion, the district court stated:

> 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.**

(Dkt. 107; 123:18-25.)

Thus, the district court appropriately placed ***the burden of establishing the reasonableness of the delay on Defendant*** with respect to its Motion for Summary Judgment, while ***Plaintiffs were required to prove that the delay was unreasonably long*** to prevail on their Motion for Summary Judgment. ***Here, Plaintiffs carried their burden by proving that the delay was unreasonably long through Professor Boruchowitz's expert opinion, the 55 factors underlying his opinion, the County Public Defender's statements, and the statements by Defendant's own expert.*** From this evidence a reasonable trier of fact could conclude that Defendant delayed provision of counsel for an unreasonably long period of time.

Furthermore, Defendant did not rebut this evidence with "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 that would justify a conclusion that the policy, on its face, was constitutionally" ***reasonable***, as opposed to ***unreasonable***. Therefore, it was utterly

irrational for the district court to grant Defendant's Summary Judgment Motion based upon its failure to rebut Plaintiffs' evidence demonstrating that the Policy was ***unreasonable***. In short, the magistrate judge saddled Plaintiffs with Defendant's burden and then granted Defendant's motion because Plaintiffs did not carry Defendant's burden.

However, given that Defendant had the burden of rebutting Plaintiffs' evidence showing that Defendant's Policy was unreasonable, and provided absolutely no evidence establishing that the delay was reasonable, summary judgment should have been granted in Plaintiffs' favor. As this Court stated in *Nat'l Indus., Inc. v. Republic Nat. Life Ins. Co.,* 667 F.2d 1258, 1265 (9th Cir. 1982), "[S]ummary judgment should be granted when the evidence in support of the motion would, if uncontradicted, entitle the moving party to a directed verdict were the case to proceed to trial." Additionally, the Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) stated,

> The burden of production imposed by Rule 56 requires the moving party to make a prima facie showing that it is

> entitled to summary judgment. 10A Wright, Miller & Kane § 2727. The manner in which this showing can be made depends upon which party will bear the burden of persuasion on the challenged claim at trial. If the *moving* party will bear the burden of persuasion at trial, that party must support its motion with credible evidence—using any of the materials specified in Rule 56(c)—that would entitle it to a directed verdict if not controverted at trial. *Ibid.* ***Such an affirmative showing shifts the burden of production to the party opposing the motion*** and requires that party either to produce evidentiary materials that demonstrate the existence of a "genuine issue" for trial or to submit an affidavit requesting additional time for discovery. *Ibid.;* Fed.Rules Civ.Proc. 56(e), (f). (Emphasis added.)

Additionally, the district court should have determined that the County was incapable of justifying the delay because it would have produced evidence supporting its Policy if such evidence existed. As this Court stated in *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. N. L. R.* B., 459 F.2d 1329, 1336 (D.C. Cir. 1972),

> ***Simply stated, the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence***

> ***is unfavorable to him. As Professor Wigmore has said: The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party***. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also always open to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such inference in general is not doubted.

In this regard, the County had the opportunity to justify its Policy through the testimony of its expert, Retired Public Defender Henry Coker, but expressly ordered him to avoid consideration of whether the Policy was reasonable. (404:11-406:12.) Moreover, Public Defender Lipetzky could have justified her Policy by explaining why she did not provide representation, or the County could have obtained an amicus brief from the California Association of Public Defenders

(CPDA), which would be uniquely qualified to address "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." The fact that the County affirmatively avoided this evidence, which was uniquely in its control, establishes that the County feared that CPDA and the witnesses would have found that the delay in providing representation was unreasonably long.

Ultimately, the district court's "totality of the circumstances" test impermissibly allowed the district court to conduct a bench trial by affidavit, where it weighed the evidence according to its own subjective perception of relevance. However, as the Supreme Court stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 245 (1986),

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury

> functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

3) Expert Reports, Testimony and Evidentiary Rulings

a. Professor Boruchowitz

Plaintiffs retained Professor Robert Boruchowitz who is a preeminent expert on indigent defense practices and Sixth Amendment rights. ***Professor Boruchowitz delineated 55 factors leading to his conclusion that a delay of five to thirteen days in appointment of counsel, and sometimes longer, was unreasonable.*** (Dkt. 125-2; 355-371.)

The district court, however, granted Defendant's motion to exclude Professor Boruchowitz's ultimate opinion with respect to whether Defendant delayed provision of counsel for an unreasonable period of time and the portions of his report addressing case law interpreting the Sixth Amendment, stating:

> 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.

(Dkt. 145; 43:21-24.)

However, Professor Boruchowitz did not make legal arguments. Rather he appropriately offered his professional opinion as a scholar and nationally recognized expert on indigent defense services, and as an indigent defense practitioner of forty-three years, with vast experience in every aspect of the delivery of indigent defense services. In this regard, having testified before the United States Senate Judiciary Committee, and having assessed the provision of indigent defense counsel nationally, and having had his testimony and reports accepted by courts in multiple landmark cases (Dkt. 125-2; 372-381), a reasonable inference arises that his expert opinion was based upon an understanding of "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." Indeed, his report references his vast experience with respect to indigent defense caseloads. (Dkt. 125-2; 356, 371, 374, 375, 376, 379, 380.)[2]

Unfortunately, however, as fully articulated in Plaintiffs' Opposition to Defendant's Daubert Motion (Dkt. 136; 669-690), the magistrate judge erroneously took Professor Boruchowitz's opinion concerning the "reasonableness" of the Policy as a question of law invading the province of the court, when the "reasonableness" of the Policy is a question of fact based upon assessment of all of the evidence presented. *See*, *West v. State Farm Fire & Casualty Co.*, 868 F.2d 348, 350-351 (9th Cir. 1988) (reasonableness generally a question of fact for the jury); *Berry v. Baca*, 379 F.3d 764, 773 (9th Cir. 2004) (reasonableness of policy a jury determination).

Moreover, Professor Boruchowitz did not opine on the issue of the Policy's constitutionality per se, but instead addressed

[2] To the extent that the County has caseload problems, they are self-inflicted. If caseload problems due to underfunding justified denial of representation, counties could ignore their obligation to provide adequate funding under *Gideon v. Wainright*, 372 U.S. 335 (1963).

the reasonableness of the delay imposed by the Policy when examined in the context of the facts. "As a general rule, testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Fed.R.Evid. 704(a)," *Nationwide Transport Finance v. Cass Information Systems, Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008).

Additionally, Professor Boruchowitz's references to the law and legal standards were not arguments on whether the Sixth Amendment was violated, but were statements to the effect that, among the multitude of factors showing that the Policy delayed provision of counsel for an unreasonable period of time, it is also manifestly unreasonable to have a Policy that flouts California case law and statutes mandating the immediate provision of counsel. (See, *Mejia v. Sacramento*, 177 Fed.Appx 661, 664 (2006) (reasonable officer would not flout law).

Also, the district court found that the standards portions of Professor Boruchowitz's report specifying that representation should begin "as soon as possible,"

> [O]nly 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.

(Dkt. 145; 43:2-10.)

Here, the district court obscured the importance of the standards portion of Professor Boruchowitz's report by quibbling with semantics, only to later complain that Plaintiffs cited no standards upon which it could make a ruling. However, to the extent that "provision of counsel as soon as possible" equates with "the original question of what delay is reasonable," as stated by the district court, logic dictates that Defendant's Policy of delaying representation for five to thirteen days, and sometimes longer, was unreasonable because the County admitted that it ***that it was possible to***

provide representation within three court days in a letter to the Presiding Judge of the superior court in 1984 (Dkt. 142-1: 504-507) and it has demonstrated that it is ***both cost effective and possible to provide representation at the first court appearance***. (Dkt. 131; 465:13-23.) ***Therefore, given that it is reasonably possible to provide counsel in less than five to thirteen days, and sometimes longer, the district court should have granted summary judgment in Plaintiffs' favor according to its own logic.***

The district court also stated,

> ***This order assumes for the sake of argument that all of the other evidence to which the County objects is admissible.***

(Dkt. 145; 43:25-26.)

The other admissible evidence was everything other than Professor Boruchowitz's "ultimate opinion with respect to whether Defendant delayed provision for an unreasonable period of time and the portions of his report addressing case law interpreting the Sixth Amendment."

Consequently, even if this Court accepts the district court's ruling excluding Professor Boruchowitz's ultimate opinion that the County delayed provision of counsel for an unreasonable period of time, this Court may independently examine, on de novo review, all of the evidence, including the evidence in Professor Boruchowitz's report that was admitted, which leads to the uncontroverted conclusion that the County delayed provision of counsel for an unreasonable period of time as a matter of Policy.

b. Retired Public Defender Henry Coker

The County hired retired San Diego Public Defender Henry Coker as an expert witness. ***The County ordered Coker not "... 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," or topics pertinent to this Court's mandate.*** (Dkt. 125-2; 424:2-10.) In other words, the County ordered its expert to avoid answering the question posed by this Court.

In this regard, Coker stated that,

> I was not – without having looked at the broad system – ***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.*** So I want to keep my views tightly to things that I have looked at. I don't know what's the overall Policy in Contra Costa on a Monday through Friday.

(Dkt.125-2; 404:6-406:3.)

Coker went on to "microscopically" evaluate whether the delay in appointing counsel in the named Plaintiffs' underlying criminal matters was reasonable based upon hypothetical impediments to providing representation, such as conflicts of interest and inadequate County funding (a self-inflicted problem), that were not even considered by the Public Defender when it denied representation until the second arraignment hearing in the named Plaintiffs' cases or in any of the tens of thousands of cases where representation was arbitrarily denied for a period of approximately one to two weeks over the course of decades. (Dkt. 125-2; 349:5-350:10.)

Consequently, Coker's opinion regarding the reasonableness of the delay should be disregarded under Federal Rules of Evidence, Rule 702(b), as Coker's testimony

and report concerning the reasonableness of the delay in providing representation are not based upon the actual reasons for the delay in providing representation, which were the convenience of the institutional actors, and the deliberate indifference of the County – as opposed to the pretense that the delay was due to sorting out conflicts of interest or due to analysis of caseloads.

In fact, during her deposition, the following colloquy took place:

> Lipetzky: It would be pure speculation for me to try to figure out why a court would decide which counsel-and-plea calendar to set a case on. ***We had nothing to do with that***.
>
> Martin: Okay. But the length of time was based upon which counsel-and-plea setting the court chose?
>
> Lipetzky: Yes.

This explicitly negates the contention that the Public Defender specified the length of the delay based upon the need to sort conflicts or analyze caseloads: the court set the date of the second appearance, and the County waited until the second appearance to provide counsel, precisely as described

in the 1984 letter between the Public Defender's Office and the Presiding Judge of the Superior Court. Therefore, Coker's opinion on the reasonableness of the delay, based upon the self-serving, factually unsupported hypotheticals posed to him by County Counsel, should be excluded from this Court's analysis. Indeed, this Court stated in *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988) that, "If the assumptions in the hypothetical are not supported by the record, the opinion of the … expert … has no evidentiary value."

Significantly, however, Coker also stated that: (1) his office arranges for the provision of counsel at the first appearance in every case, regardless of whether there are conflicts of interest; (2) that his office enters a plea at the first appearance in order to preserve the detainee's statutory speedy trial rights; (3) ***that he was unaware of any case requiring more than a week to sort out conflicts of interest, even when there were seventeen or eighteen codefendants*** (Dkt. 125-2; 413:15-414:7); (4) that his office tracks all court dates (*Id.* at 422:11-24.); (5) ***that it would be unreasonable for appointed counsel to wait five two weeks to take any action in a***

given case (*Id.* at 408:9-24); and (5) he stated that, ***"[F]rom my experience visiting other counties, surrounding counties, and I talk on a regular basis with other public defenders, we tend to do things pretty much the same way." In this regard, he stated that he knows of no other county in the state that employs a bifurcated arraignment process.*** (*Id.* at 420:1-421:7.)

Thus, Coker did opine on "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," just not in a manner that helps the County. Moreover, his testimony, rather than justifying the County's Policy, established that Contra Costa was alone in failing to appear at the first appearance, alone in arbitrarily withholding counsel for five to thirteen days, and sometimes longer, and alone in failing to preserve statutory speedy trial rights.

c. PUBLIC DEFENDER LIPETZKY

The magistrate judge stated, without analysis or reference to authority that,

> 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.

(Dkt. 145; 43:25-44:1.)

Context suggests that the magistrate judge held that the Public Defender's professional opinion that the County's Policy was "***unlawful***" and created a "***gap***" in providing "***legally mandated***" representation was inadmissible as a binding admission by the County on the illegality of the Policy. (Dkt. 142-1: 516:C; 536-537:4.). However, context further suggests that her many statements attesting to the existence of the Policy were admissible to prove the existence of the Policy and to show knowledge on the part of the County concerning the existence of the constitutional infringement.

In any event, it is clear that the Contra Costa County Public Defender agrees with Plaintiffs in this matter. Her statements regarding the Policy in terms of the devastation to the lives of detainees subjected to the Policy (Dkt. 125-2; 304:1-25; 295-

96), the financial irresponsibility of the Policy (*Id.* at 296:19; 299:II; 300:13-23; 303:7-304:20; 324:4-13; 325 [Expected Outcomes]; 329: [The Solution]; 330:11-25; 331:B; 333: [Expected Savings];), and the unlawfulness of the Policy (Dkt. 142-1: 516:C; 536-537:4), demonstrate that if she were called as an expert witness in this case and allowed to testify without being muzzled by County Counsel, as she was muzzled at her deposition, she would testify that the County delayed provision of representation for an unreasonable period of time.[3]

However, Lipetzky is fettered by her employer, the County, and by the superior court. She is still underfunded by the County, and routinely declares conflicts of interest on "overflow" cases (Dkt. 131; 465:24-28); and the superior court actually forbids deputy public defenders from making their services known to out of custody indigent defendants until after it has had an opportunity to coerce them into taking deals offered by the court. (Dkt. 125-2; 283:17-290:25.)

[3] Plaintiffs would be eager to cross-examine these witnesses in front of a jury.

With respect to this practice, the superior court penalizes indigent defendants who request public defender services by requiring them to return to court on another date to obtain representation by counsel, when deputy public defenders are available in the courtroom to provide legal representation then and there. (*Ibid.*)

Here, the Public Defender has stated that many criminal defendants simply plead guilty at the first appearance to avoid the inconvenience of having to return to court on another date. (*Id.* at 281: last para.) These detainees, therefore, had no advisement concerning their legal defenses or the profound consequences of a guilty plea – including potential deportation or loss of benefits. Further the Public Defender has not defended the public by asserting its right to defend these people. For example, in *In re Brindle*, 91 Cal.App.3d 660, 682 (1979), the California Court of Appeal stated that, "Upon the arrival of the public defender, the individual inmate or person being detained or in custody should be advised of his presence.")

IV. Summary Judgment Motions

A) Defendant's Motion

In spite of this Court's earlier ruling to the contrary, County Counsel insisted in its Summary Judgment Motion that a showing of actual prejudice is required to state a Sixth Amendment Claim for denial counsel. The County further insisted at oral argument that this Court would not have reversed the district court's earlier rulings if it had not "misread" [the district court's] prior orders." (65:18-23.)

Additionally, the County argued that it did not have a Policy of denying counsel to indigent detainees for a period of five to thirteen days and sometimes longer. (Dkt. 142: 466:14-16.) Here, Defendant implicitly conceded that the delay in appointment of counsel was between five and thirteen days, and sometimes longer; however, it implied that an interview by a paralegal sometime before the second arraignment appearance established that legal representation was provided long before the second arraignment hearing. (Dkt. 145: 12:21-13:1; 57:1-13; 58:3-5; 73:2-5.)

County Counsel raised most of these points in two post-discovery, last-minute declarations, signed by the Public Defender on November 21, 2017 (Dkt. 131; 460-466), and December 21, 2017 (Dkt. 141-2; 691-692), respectively – which contradicted her statements in official County documents and her deposition testimony. Specifically, in her December 21, 2017 declaration, she stated that, "I have no personal knowledge of any instance where a criminal defendant served additional time in pretrial detention as a result of my office not staffing the initial appearance of a defendant." (*Id.* 692:13-19.) This statement contradicts her deposition testimony to the effect that she personally represented people who had spent up to an additional two weeks in jail as a result of the Policy. (Dkt. 125-2; 307:23-12.) It also contradicts the factual basis for her statement in an official County document where she said, with respect to providing representation at the first appearance, where she states that, "By cutting down on the number of ***people in pretrial detention and reducing the overall time the average client spends in pretrial detention***, this program

will free up bed space for the most serious offenders." (Dkt. 125-2; 326:19-327:3.) In other words, "pretrial detention and overall time the average client spends in pretrial detention" would be reduced only if representation at the first appearance facilitated these outcomes.

Also, her statement that there was no written Policy in her November 21, 2017 declaration, where she stated that, "Contrary to Plaintiffs' allegations, my office never had a written policy of withholding representation to indigent, in-custody criminal defendants at their first appearance," directly contradicts her written description of the Policy in an official County document (Dkt. 295-2; 295:4-296-9), as well as her description of the Policy in the declaration itself. (461:8-18). Additionally, her justification for the delay in the November 21, 2017, declaration directly contradicts her testimony that the delay was due to the superior court setting the second arraignment date, as opposed to conflicts of interest or underfunding. (349:19-350:10.)

B) Plaintiffs' Motion

1) The First Appearance in a California Court is a Critical Stage of the Proceedings

Plaintiffs complaint, as amended, alleges that the first appearance in a California court is a "critical stage" of the proceedings. (Dkt. 91; 644:20-21.) Plaintiffs further proved that the first appearance in a California Court is a "critical stage" of the proceedings because the state court is required to afford criminal defendants an opportunity to enter a plea at their first appearance in court. *People v. Figueroa*, 11 Cal.App.5th 665, 677 (2017). Plaintiffs also demonstrated that the right to enter a plea is prerequisite to triggering the significant right to a preliminary hearing within ten court days (Pen. § 859b) and the significant right to a trial within 60 calendar days (Pen. § 1382).

2) Defendant's Policy Delayed Provision of Counsel for an Unreasonably long Period of Time

Plaintiffs demonstrated that the County delayed representation for an unreasonable period of time through the extensive list of potential harms to an unrepresented criminal

detainee articulated in Professor Boruchowitz's report. (Dkt. 125-2; 355-371.) Plaintiffs further demonstrated the unreasonableness of the delay through statements made by the Public Defender attesting to the fact that the Policy resulted in a very large percentage of criminal detainees unnecessarily spending an additional one to two weeks in jail (Dkt. 125-2; 298:12-23; 299; 346) at great County expense. (Dkt. 125-2; at 296:19; 299:II; 300:13-23; 303:7-304:20; 324:4-13; 325 [Expected Outcomes]; 329: [The Solution]; 330:11-25; 331:B; 333: [Expected Savings].) Plaintiffs further showed, through the statements of the Public Defender, that pretrial criminal defendants risk losing their jobs, housing, and children due to this prolonged unnecessary incarceration. (*Id.* at 304:1-25; 295-96.) And, of course, Plaintiffs showed that the delay violated California's statutory speedy trial scheme as well as California Government Code section 27706, which requires that the Public Defender provide representation at "all stages" of the proceedings, not just critical stages.

C) Magistrate Judge's Ruling on Summary Judgment

The magistrate judge ruled that,

> [O]n the record before the Court, Plaintiffs cannot prevail based on **(1)** a per se rule of when counsel should be appointed, **(2)** a theory of systemic deficiency based on a generally applicable policy of delay, or **(3)** 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.

(Dkt. 145; 51:18-22.)

The magistrate judge further held that appointment of counsel for the named Plaintiffs occurred within a reasonable period of time in spite of acknowledging that 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***." (*Id.* at 56:11-12.) Here, the magistrate judge accepted the self-serving, factually unsupported hypotheticals posed to Defendant's expert as fact, knowing that conflicts of interest and funding problems had nothing to do the Public Defender's failure to

provide detainees with legally mandated representation by counsel until the second arraignment date.

Similarly, the magistrate judge found that waiting twelve days to appoint counsel for John Farrow was reasonable in spite of the fact that it determined 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***." (*Id.* at 56:19-57-13). Here, the district court found that the fact that Mr. Farrow was interviewed by a paralegal during the twelve-day interim rendered the delay reasonable (*Ibid*), contradicting its own ruling, where it stated,

> 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.

(*Id.* at 59:22-27.)

Additionally, the district court stated that it had evaluated the possibility of (1) "a theory of systemic deficiency based on a generally applicable policy of delay," and (2) "a theory that deliberate inaction or indifference itself violates the Sixth Amendment." *Id.* at 29. The first question was appropriate, as it is the only question posed by this Court. Further, other courts have held that in cases alleging systemic deficiencies, case by case, piecemeal analysis is inappropriate. See, *Church v. Missouri*, 268 F.Supp.3d 992 (2017) (reversed and remanded on Eleventh Amendment grounds in *Church v. Missouri, 913 F.3d 736*); *Tucker v. State*, 162 Idaho 11 (2017); *Kuren v. Luzerne Cty.*, ––– Pa. ––––, 146 A.3d 715, 718 (2016); and *Hurrell–Harring v. State*, 15 N.Y.3d 8, 904 N.Y.S.2d 296 (2010); *Public Defender v. State,* 115 So.3d 261 (2013).

The consideration of the second question posed by the district court – "***a theory that deliberate inaction or indifference itself violates the Sixth Amendment***" – however, reflects a fundamental misunderstanding of Plaintiffs' theory of liability because Plaintiffs never alleged

that "deliberate indifference" would result in liability in the absence of an underlying constitutional violation.

With respect to the legitimate question, however, the magistrate judge did not actually consider "a theory of systemic deficiency based on a generally applicable policy of delay," or whether "appointing counsel five to thirteen days and 'sometimes longer' after the right attaches complies with the 'reasonable time' requirement articulated in *Rothgery*." ***Rather, it skirted the question posed by this Court by concluding, in spite of Defendant's statements to the contrary, that the Policy did not exist.*** (Dkt. 145; 50:4-9.)

The district court supported this transparently erroneous claim by implicitly ruling that perfunctory visits by paralegals qualify as representation by counsel under the Sixth Amendment, stating,

> 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.

> ***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.***

(Dkt. 145; 56:28-57-13.)

Here, there are two options: 1) Paralegals did not provide legal representation – in which case the paralegal visits should not have entered into the district court's analysis because no representation by counsel was provided; and 2) paralegals did provide representation by analyzing complex issues, "such as mental health concerns, injuries that needed to be documented, misidentity, or the need to preserve evidence that could be lost or destroyed," in addition to evaluations of psychiatric history, case progress, problems, and "***settlement***, among other topics" – in which case the paralegals did provide representation, leading to the conclusion that the paralegals and the Public Defender are guilty of the criminal offense of practicing law without a license pursuant to California Business and Professions Code section 6126.

This conclusion is bolstered by the fact that the paralegal advised Plaintiffs to sign a Penal Code section 977 waiver, waiving their right to personally appear in court, which they signed. (Dkt. 131-2; 459.) The paralegal also advised Plaintiffs to sign medical and psychiatric records release forms, which they did. (*Id.* at 458.)

Whether or not the paralegal was illegally practicing law on behalf of the County, it was totally inappropriate for the district court to equate a visit by a paralegal with representation by counsel under the Sixth Amendment, much less to implicitly condone the unlicensed practice of law; and it was unethical for the County to suggest to the district court that it should prevail on summary judgment due to facts that demonstrate that its paralegals were engaged in the unlicensed practice of law. Here, the paralegals discussed such things as settlement with Plaintiffs, and directed them to waive important rights, before any attorney-client relationship had been formed. Once this paralegal "factor" is removed from the district court's "totality of the circumstances" test, there is absolutely no basis upon which the district court could have

ruled in Defendant's favor with respect to either Plaintiff, but especially John Farrow.

Ultimately, the district court said that it was considering the "totality of the circumstances"; but ***it ignored most of the circumstances***, including the fact that: (1) a rational jury could find that the delay was unreasonable based upon the Public Defender's statement that all indigent defendants had to wait in jail for a week or two to be represented by counsel, and that only at that time would they be able to apply for bail or recognizance release (Dkt. 125-2; 298:12-23; 299; 346); (2) it ignored that a rational jury could find the delay unreasonable on the basis of any of the factors articulated by Professor Boruchowitz showing that the delay was unreasonable to everyone subjected to the Policy, much less all of the factors cited by Professor Boruchowitz showing that the delay was unreasonable (Dkt. 125-2; 355-371); (3) the district court ignored the negative inference that should be drawn from the County's failure to provide any evidence showing that the delay was reasonable, including its failure to introduce evidence concerning "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"; and (4) a rational jury could find that the delay was unreasonable based upon Coker's testimony, where he states that he is aware of how other public defender offices around the state operate and that none of them bifurcate arraignments like Contra Costa County. (Dkt. 125-2; 413:15-414:7; 408:9-24; 420:1-421:7.)

In granting Defendant's Summary Judgment Motion, the district court made the shocking statement that,

> 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***. (Emphasis added.)

(Dkt.145; 59:22-26.)

First, this statement acknowledges that the counsel was not appointed prior to the paralegal's discussion with Plaintiffs concerning mental health issues, preservation of evidence, and

waiver of medical confidentiality and the right to appear in court; and, second, it entertains the possibility that a visit by a paralegal working for counsel who does not represent the client might "substitute under the Sixth Amendment for providing an attorney." Obviously, this is an absurd proposition.

However, the district court clearly based its rulings on the summary judgment motions on the Public Defender's last-minute declarations reference to a paralegal substituting under the Sixth Amendment for an attorney. During oral argument on the summary judgment motions, for example, the following colloquy took place between counsel for Plaintiffs and the district court:

> Mr. Martin: The discussion by Mr. Coker is pure fantasy about what process was engaged in to determine the length of the delay, because the public defender stated during her deposition, and has repeatedly stated in its moving papers that the public defender had absolutely no input in determining the length of the delay. So it's not like, gee, we need to figure out this conflict.
>
> The court: determining the length of delay, I don't understand what you mean

> by that. Determining the length of the court delay, I understand that. But the length of the time before which counsel has identified and notified, they obviously have a role in that.
>
> Mr. Martin: They do, your honor. However, this Policy applied to the cases that they themselves represented defendants on. So if the public defender is coming into the case, there's no conflict. ***They still waited until the second court date to provide representation, and Ms. Lipetzky was very clear about that during her deposition***.
>
> The court: ***Absolutely false, actually***.
>
> Mr. Martin: I'm sorry?
>
> The court: ***That's wrong***. She said that – and there's lots of evidence in the record that even if there was a court appearance "x" days out, that part of ***the policy*** was that ***people*** would meet with their clients before the court date.

In other words, the district court's statement, "***Absolutely false, actually***," can be true, actually, only if the district court equated a visit by a paralegal (*i.e*, the ***"people"*** he mentions) with representation by counsel under the Sixth Amendment. ***Here, the district court is unquestionably***

equating paralegal visits with legal representation by counsel under the Sixth Amendment.

Additionally, the portion of the district court's opinion stating that, "The only policy actually supported by the record is that ***counsel was provided*** "sometime between" the first court appearance and the second court appearance," (Dkt. 145; 50:10-15) confirms that the district court equated a visit by an unlicensed "paralegal" with legal representation by counsel, as no other ***people*** visited public defender clients while they languished in jail without bail or the opportunity to apply for bail for five to thirteen days, and sometimes longer.

Indeed, the Public Defender has stated that poor people charged with crimes had to wait in jail for a period of between seven and fourteen days before they would be represented by counsel. (Dkt. 125-2; 295-296-9.)

The district court further stated,

> 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***. (Emphasis added.)

(Dkt. 145; 45:2-12.)

In addressing this standard, the district court stated that the analysis begins and ends with the first element. However, the district also ruled that there was no Policy (element two); and falsely concluded that Plaintiffs' implicitly agreed that there was no "constitutional violation," by asserting that Defendant was deliberately indifferent to Plaintiffs' Sixth Amendment right to counsel (element three). This analysis, however, ignores the fact that both denial of the "constitutional right" (element one) and "deliberate

indifference" (element three) are required elements of the *Oviatt* test. If Plaintiffs negated element one by proving element three the rule would be absurd. Furthermore, if Plaintiffs had neglected the "deliberate indifference" element of the claim, the district court would have pounced on that deficiency as a convenient means to dispose of the case.

V. SUMMARY OF ARGUMENT

The Public Defender wrote 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."*** (Dkt. 125-2; 295-296-9.) The moral and legal abomination stemming from that fact is what this case is about. Thousands of presumptively innocent poor people accused of criminal offenses, over the course of decades, did spend up to two weeks in custody just waiting to be represented by an attorney, inevitably resulting in devastating consequences to many of them.

This Court stated, "We … 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." Farrow v. Lipetzky*, 637 Fed.Appx 986 (2016). However, the district court did not attempt to comply with this mandate. Rather, it irrationally concluded that there was no Policy of delaying representation, in spite of the Public Defender's many statements to the contrary. (Dkt. 145; 50:10-15.) ***Indeed, the district court did not even mention the Public Defender's statements in its analysis.***

Ultimately, the district court gutted Plaintiffs' Sixth Amendment claim by declaring that there was no Policy of withholding representation for five to thirteen days, and sometimes longer. Aware, however, that this Court might disagree with the implicit determination that a visit by a paralegal constitutes representation by counsel – the district court went on to claim that even if there were such a Policy of withholding representation, Plaintiffs could not prevail in the absence of evidence concerning "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." (Dkt. 145; 50, fn. 16.) In this regard, the district court did not consider the "totality of the circumstances," but instead employed a previously unstated "accepted practices" test that placed Defendant's burden on Plaintiffs and excluded all other evidence.

Here, the district court also subscribed to the fallacy that the County's Policy of automatically delaying provision of counsel for five to thirteen days, and sometimes longer, was based upon logistical challenges, processes for resolving conflicts and caseload constraints, when the County itself has been emphatic that it "had nothing to do" with the length of the delay between arraignment hearings, (68:18-69-6) and further admitted that it did not provide representation until the second arraignment hearing in all cases, including those where there was no conflict of interest. (Dkt. 125-2; 295:2-296:9.)

Moreover, the district court was flatly wrong: A reasonable jury could find that the County delayed provision of counsel for an ***unreasonably*** long period of time based

upon the overwhelming evidence provided by Plaintiffs. However, it could not find that the delay was ***reasonable*** in the absence of evidence justifying the Policy, "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." Given that Defendant had the burden of justifying its Policy and did not justify it, the District Court, according to its own logic, mistakenly granted Defendant's Motion for Summary Judgment when it should have granted Plaintiffs' Motion for Summary Judgment.

VI. ARGUMENT

I. Standards of Review

A. Summary Judgment

In *George v. Edholm,* 752 F.3d 1206, 1214 (9th Cir. 2014), the Ninth Circuit Court of Appeals stated:

> We review de novo the district court's grant of summary judgment. We must determine, "viewing the evidence in the light most favorable to the nonmoving party, whether genuine issues of material fact exist." *Id.* We will affirm only if no

> "reasonable jury viewing the summary judgment record could find by a preponderance of the evidence that the plaintiff is entitled to a favorable verdict." If a rational trier of fact could resolve a genuine issue of material fact in the nonmoving party's favor," summary judgment is inappropriate." [C]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from facts are jury functions, not those of a judge." (Internal citations omitted.)

B. Denial of Constitutional Right Through Inaction

In *Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470 (1992) the Ninth Circuit Court of Appeals stated:

> A local governmental entity is liable under § 1983 when "action pursuant to official municipal policy of some nature cause[s] a constitutional tort." Moreover, a local governmental body may be liable if it has a policy of inaction and such inaction amounts to a failure to protect constitutional rights. [¶] To impose liability on a local governmental entity for failing to act to preserve constitutional rights, a section 1983 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 is the "moving force behind the

> constitutional violation." (Internal citations omitted.)

C. The District Court's Totality of the Circumstances Test

The District Court stated:

> 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.

(Dkt. 145; 47:16-19.)

D. Plaintiffs' First Appearance in a California Court was a "Critical Stage" of the Proceedings

Plaintiffs complaint, as amended, alleges that the they have an absolute right to enter a non-guilty plea at their first appearance. (Dkt. 91; 644:20-21.) Plaintiffs further proved that the first appearance in a California Court is a "critical stage" of the proceedings because the state court is required to afford criminal defendants an opportunity to enter a plea at their first appearance in court. *People v. Figueroa*, 11 Cal.App.5th 665, 677 (2017). Additionally, the

right to enter a plea is prerequisite to triggering the significant right to a preliminary hearing within ten court days (Pen. § 859b) and the significant right to a trial within 60 calendar days (Pen. § 1382).

In *Hovey v. Ayers*, 458 F.3d 892, 901-02 (9th Cir. 2006), this Court stated,

> 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 one of these factors may be sufficient to render a stage of the proceedings "critical." *Cf.* *902 *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.

Here, the right to enter a plea lies at the heart of this Court's "critical stage" test because nothing could be more significant to an innocent citizen than his right to declare his innocence through a plea of not guilty and demand a speedy

preliminary hearing and trial to assure his liberty before protracted custody causes him to lose his job, his children, his housing, and his good name. Indeed, denying the criminal defendant his right to enter a plea, by depriving him of the skilled counsel necessary to inform him of his statutory speedy trial rights, is a deliberate end run on California's statutory speedy trial scheme and California Supreme Court precedent, both of which are adamant that criminal detainees are entitled to a preliminary hearing and trial "at the earliest possible time." (Pen. Code, § 1050, et seq.)[4]

For example in *Sykes v. Superior Court*, 9 Cal.3d 83, 88 (1973), the California Supreme Court stated that,

> (O)ur Legislature has made provision for 'a speedy and public trial' as one of the fundamental rights preserved to a defendant in a criminal action. (s 686,

[4] If this Court is unsure about whether a California criminal defendant has a right to enter a plea at the first appearance, whether he is entitled to provision of counsel at the first appearance under California law, or whether California's statutory speedy trial scheme requires a preliminary hearing and trial as soon as possible, it can certify the matter to the California Supreme Court for guidance on these issues of state law. *Gradillas v. Lincoln General Ins. Co.*, 792 F.3d 1050 (9th Cir. 2015).

> subd. 1.) The policy behind the right to a speedy trial is expressed in section 1050 which states, '***The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time, and it shall be the duty of all court and judicial officers and of all prosecuting attorneys to expedite such proceedings to the greatest degree that is consistent with the ends of justice.'*** (Internal citations omitted.)

As such, Defendant's Policy of failing to appear at the first court appearance and for the period of five to thirteen days, and sometimes longer, was unreasonable as a matter of law because the first appearance in a California court is a "critical stage" of the proceedings. *See, Hovey v. Ayers*, 458 F.3d 892, 901-02 (9th Cir. 2006); *People v. Cox*, 193 Cal.App.3d 1434, 1440 (1987).

E. The County had a Policy of Delaying Provision of Counsel for a Period of Five to Thirteen days, and Sometimes Longer

The Public Defender's statements that indigent people waited one to two weeks for representation without is sufficient in itself for a reasonable jury to conclude that the

County maintained a Policy of denying representation for seven to fourteen days.

Moreover, Defendant's contradictory, last-minute declaration does not create a material issue of fact that would preclude summary judgment in Plaintiffs' favor. *Lopez v. General Motors Corp.*, 697 F.2d 1328, 1333 (9th Cir. 1983), "***We do not take kindly to counsel's having [the defendant] attempt ... to repudiate or contradict her sworn deposition testimony. The declaration created no genuine issue of fact***."

Therefore, this Court should rule in Plaintiffs' favor concerning the existence of the Policy based upon the only competent evidence in the record, which is: (1) the County's repeated descriptions of the Policy in official County documents and the Public Defender's deposition testimony; (2) Plaintiffs' experiences; and (3) the Public Defender's Letter to the presiding judge of the superior court describing the Policy.

However, if this court considers the County's self-serving, contradictory, last-minute declaration, there is at a minimum a material issue of fact precluding summary judgment in

Defendant's favor on this element because the trier of fact would be required to make a credibility determination concerning which of the Public Defender's conflicting statements it should believe; and credibility determinations are inappropriate on summary judgment. *George v. Edholm* 752 F.3d 1206, 1214 (9th Cir. 2014).

F. The Delay in Providing Representation by Counsel was Unreasonable

This Court, "[R]emand[ed] 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*." *Farrow v. Lipetzky*, 637 Fed.Appx 986 (2016). In response, the district court devised its own "totality of the circumstances" test, which did not elucidate any real standard.

Through Professor Boruchowitz's scholarly and informed report, however, Plaintiffs identified 55 reasons showing that the County delayed provision of counsel for an unreasonable period of time. (Dkt. 125-2; 355-371.) However, the district court erroneously excluded Professor Boruchowitz's opinion

and did not give any weight to the "totality of the circumstances" upon which he based his opinion.

Plaintiffs further provided the district court with the County's own admissions concerning: **(1)** the inability for indigent defendants to apply for bail or "OR" release without representation for one to two weeks (Dkt. 125-2; 298:12-23; 299; 346); **(2**) its admission that "5,500 defendants were represented at arraignment through the ACER program; of these between approximately 19 percent and 35 percent were released on recognizance" (Dkt. 125-2; 313:18-314:4); **(3)** that representation at the first appearance, "has resulted in financial savings to the court and the Sheriff's Department" (Id. at 65:11-25); **(4)** that representation at the first appearance reduced the pretrial detention population by 50 to 100 defendants each quarter since the program was launched in 2013" (385:11-19); **(5)** and that, ***"Contra Costa County has one of the highest pretrial detention rates in the state.*** In this county roughly 85 percent of the jail population on any given day is made up of persons who are awaiting trial. ***This is 14 percent higher than the statewide***

average and 24 % higher than the national average" (352:9-23); **(6)** the Public Defender's admission that, ***"Well, anytime somebody has to stay in jail longer than necessary, they risk losing jobs, losing their housing, losing custody of their children, those sorts of things."*** (304:22-25); and Plaintiffs further proved that, **(7)** California criminal defendants are entitled to a preliminary hearing and trial at the earliest possible time according to California case law and statutes (Cal. Pen. Code, § 1050; *People v. Martinez*, 22 Cal.4th 750 (2000) fn. 1 at 771; **(8)** that California criminal defendants are entitled to enter a plea at their first court appearance (*People v. Figueroa*, 11 Cal.App.5th 665, 677 (2017); **(9)**; that all detainees who received credit for time served sentences at their first appearance in court had spent up to an additional two weeks in custody as a result of the Public Defender's failure to provide representation during that period (Dkt. 125-2:304:1-8); **(11)** that Defendant's expert testified that all public defender offices do things pretty much the same way, that he is aware of the practices of public defender offices throughout the state, and he is unaware of

any other county engaging in a bifurcated arraignment process (Dkt. 125-2; 420:1-421:7; 420:1-421:7); **(12)** the County stated back in 1984 that it could provide representation in three court days (Dkt. 142-1; 506); **(13)** the Public Defender stated that, "With just three attorneys and two paralegals, the Public Defender's Office would be able to fully staff all of the arraignment courts in the county – at significant savings to the Sheriff's Office and the courts." (Dkt. 125-2; 296:12-20.)

Thus, Plaintiffs provided an overwhelming record upon which a reasonable jury could determine that the delay was unreasonable under the totality of the circumstances. However, Defendant did not offer any justification for the Policy of delaying representation; and the magistrate judge even acknowledged that there was no evidence concerning how long it would take to sort out conflicts in a case like Wade's other than Coker's factually unsupported opinion. (Dkt. 145; 56:11-12.) ***And the magistrate judge stated that, [T]here is essentially no evidence in the record explaining a reason for the longer delay of twelve days between attachment of***

the right to counsel and Martin's assignment to represent him. (Dkt. 145; 56:19-21.)

Nevertheless, the district court ruled that,

> 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.

(Dkt. 145; 50, fn. 16.)

Given that Plaintiffs proved the unreasonableness of the delay with specific examples of why the delay was unreasonable in Contra Costa County, as well as why it was unreasonable pursuant to California and national standards, and ***Defendant failed to adduce any evidence showing that it was reasonable***, Plaintiffs are entitled, upon de novo review, to a determination that the delay imposed by Defendant's Policy was ***unreasonable as a matter of law***. *See, Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986).

Furthermore, if a justification for the Policy existed, Defendant could have asked Coker, or any other Public Defender in the state, "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,"* which is the question posed by this Court. However, the County prevented Coker from considering this question. Therefore, this Court should conclude that Coker would have opined that the County delayed provision of counsel for an unreasonable period of time given the opportunity to address that question. As this Court stated in *Singh v. Gonzales*, 499 F.3d 1019, 1024 (9th Cir. 2007) (superseded in non-relevant part by statute) "***When a party has relevant evidence in his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him.***"

In short, Coker's report and deposition testimony establish that the Contra Costa County Public Defender's Policy of doing nothing – other than dispatching a paralegal of unknown qualifications, to ask unknown questions, and take unknown

actions – for five to thirteen days, and sometimes longer, resulted in an unreasonable delay in provision of counsel in comparison with the policies and practices of the San Diego Public Defender's Office, which tends to do everything pretty much the same way as public defenders in other California counties. (Dkt. 125-2; 420:1-421:7.)

Therefore, given that Defendant failed to provide any evidence establishing that the delay in providing counsel for five to thirteen days, and sometimes longer, was reasonable – and having provided damning testimony from its own expert to the effect that the delay was unreasonable – summary judgment should be granted in Plaintiffs' favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986).

Alternatively, Plaintiffs ask this court to find that Plaintiffs have raised issues of material fact concerning the reasonableness of the delay, precluding summary judgment in favor of Defendant.

G. Deliberate Indifference & Causation

The magistrate judge erroneously stated that,

> 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.

(Dkt. 145; 50:16-23.)

Here, the district court makes a totally illogical argument because "demonstrating a policy of indifference to the right to timely provision of counsel" does not "implicitly disregard the first element of the *Oviatt* test—that Plaintiffs were deprived of a right." If it did, no one could ever satisfy the *Oviatt* test because proof of element three would negate element one; and

if Plaintiffs did not prove element three, they would fail the test.

Additionally, Plaintiffs did not contend that **(1)** "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"; **(2)** did not contend that their Sixth Amendment right to counsel would be violated regardless of the delay (or lack thereof) that Plaintiffs themselves experienced; and **(3)** did not assume 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.

On the contrary, Plaintiffs proved: **(1)** that the County used a Policy that allowed for specific periods delay – i.e., "five to thirteen days, and sometimes longer" (Dkt. 125-2; 295-296-9); **(2)** that they were subjected to delay within this specific period (Dkt. 134; 542-550); that **(3)** the County had a Policy of deliberate indifference to denial of Plaintiffs' Sixth Amendment right to counsel (Dkt.142-1; 516:C; 536-537:4; Dkt. 131;

464:4-9); and that **(4)** this Policy was the moving force behind the violation.

In short, Plaintiffs carried their burden of proving all four of the elements of the *Oviatt* test. As the magistrate judge correctly stated,

> 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)).

(Dkt. 145; 45:3-12.)

Ultimately, however, by erroneously stating that Plaintiffs based their Sixth Amendment claim upon the "deliberate indifference" prong of the *Oviatt* test only – to the exclusion of the other three elements of the test that were also proved – the magistrate judge erroneously claimed that Plaintiffs asserted the misguided notion that they could predicate an action upon

deliberate indifference to a constitutional deprivation that did not exist.

Finally, the magistrate judge stated that,

> 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.

(Dkt. 145; 51:14-17.)

Here, again, Plaintiffs never proposed 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." On the contrary, Plaintiffs have always been emphatic that they suffered a deprivation under the Sixth Amendment because they were not provided counsel within a reasonable time after attachment. (Dkt. 91; 644:27-645:3; Dkt. 98; 549:20) Further, Plaintiffs have proposed that an indigent criminal detainee who is denied the right to counsel

within a reasonable period of time under *Rothgery* suffers a constitutional tort regardless of whether he suffered actual prejudice in his underlying criminal case. *See*, *Carey v. Piphus*, 435 U.S. 247 (1978).

In *Carey*, the Supreme Court held that constitutional rights are valuable in and of themselves, without further injury. Plaintiffs cited *Carey* for the same proposition: that is, their constitutional right to counsel under the Sixth Amendment was violated due to Defendant's Policy of withholding counsel for an unreasonable period of time, regardless of whether the timely provision of counsel would have averted actual prejudice in their underlying criminal matters. In other words, the only distinction between *Carey* and this case is that this case involves the right to counsel under the Sixth Amendment and *Carey* concerned the right to Due Process under the Fourteenth Amendment.

In any event, the district court's analysis of *Carey* detracts from the question of whether the County's Policy complied with the reasonable time provision in *Rothgery*. To remove this distraction, Plaintiffs wholeheartedly agree that, "a criminal

defendant who is in fact provided counsel within a reasonable period of time after attachment (***does not suffer***) a deprivation under the Sixth Amendment if the process by which counsel is provided lacks safeguards to ensure timeliness."

V. Reassignment

In *Manley v. Rowley*, 847 F.3d 705, 712-713 (9th Cir. 2017), this Court stated,

> We will reassign a case to a new judge on remand only under "unusual circumstances or when required to preserve the interests of justice." We need not find actual bias on the part of the district court prior to reassignment. Rather, we consider: **(1)** whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, **(2)** whether reassignment is advisable to preserve the appearance of justice, and **(3)** whether reassignment would entail waste and duplication out of proportion to any gain in preserving appearance of fairness." (Internal citations omitted.)

With respect to **(1)** the magistrate judge's previously expressed views, the district court stated at Plaintiffs' first appearance on April 12, 2013, that,

> ***Just looking at it from a practical perspective, if this Court were to hold that the initial appearance by defendant is not only when the right attaches but a critical stage at which they must be represented by counsel on pain of throwing out the Indictment, Complaint, or Information, it would mean we'd have to throw out half the cases in this courthouse***...

The magistrate judge at that point had been briefed on the relevant law and was later extensively briefed on every case concerning the issue, through two 12(b)(6) motions, showing that a violation of the Sixth Amendment right to counsel can occur in the absence of prejudice, and showing that such an error does not implicate *Strickland v. Washington*, 466 U.S. 668 (1984) or *United States v. Cronic*, 466 U.S. 648 (1984).

Nevertheless, and in spite of overwhelming authority to the contrary, the magistrate judge was adamant that actual prejudice was a prerequisite to a claim of denial of the right to counsel under the Sixth Amendment and dismissed Plaintiffs' claims accordingly. This "substantial difficulty ***in putting out of his mind*** previously expressed views or findings determined to be erroneous" led to the first appeal and first

reversal in this case. Moreover, the district court's continuing reference to *Strickland* and *Cronic*, as well as factors related to actual prejudice indicate that ***he still has not put out of his mind his previously expressed views and findings***. Therefore, this Court's first consideration **(1)** with respect to reassignment has been met.

On appeal, this court did not determine that the first appearance in a California court is not a "critical stage" of the proceedings per se but did decide that it was not a "critical stage" as then pled. *Farrow v. Lipetzky*, 637 Fed.Appx 986 (2016). Since then, however, Plaintiffs have amended their complaint to state that Plaintiffs have an absolute right to enter a plea at the first appearance, and they have conclusively established that right with citation to *People v. Figueroa*, 11 Cal.App.5th 665, 677 (2017), which states that, "***[T]he court at the arraignment must afford the defendant the opportunity to enter a plea.***"

Aware of the change to the pleadings, the district court erroneously concluded that California criminal defendants do not have the right to enter a plea at their first appearance in

court. The district court further stated that it would dismiss the case based upon its analysis of *Heck v. Humphrey*, 512 U.S. 477 (1994) if it were shown that the first appearance was a critical stage of the proceedings based upon the criminal defendant's right to enter a plea at that appearance. (Dkt. 145; 9:1-4.)

In this regard, the district court stated that it would not follow Ninth Circuit precedent stating that denial of counsel at the critical stage of arraignment is harmless error. Therefore, the magistrate judge has preannounced his intention to dismiss again based upon his erroneous interpretation of *Heck*, as opposed to the authority of this Court and other federal circuit courts, if this Court remands based upon a finding that the first appearance is a critical stage of the proceedings.

Additionally, as evidenced by the factual record before this Court and the final opinion of the magistrate judge, the magistrate judge discounted Professor Boruchowitz's report and ***did not even mention the Public Defender's admissions that no representation was provided for one***

to two weeks in its analysis, in favor of Defendant's last-minute declarations suggesting that an interview by a paralegal sufficed for legal representation by counsel. Plaintiffs assert that this suggests that this Court should order reassignment of the case to **(2)** preserve the appearance of propriety.

Also, the last-minute declarations should not have been considered at all given that they contradicted the County's earlier statements and given that the Public Defender could not, at that point, be cross-examined on the qualifications of the interviewer, the typical responses received, and whether the Public Defender ever acted on any information received by detainees during what would appropriately be described as "public defender eligibility interviews." ***And, significantly, the magistrate judge implicitly made credibility determinations to the effect that the Public Defender's many admissions concerning the failure to provide representation for one to two weeks were false based upon the Public Defender's statements in her eleventh-hour declarations that her office "took actions" (i.e.,***

provided representation) related to Plaintiffs' immediate concerns – without specifying what actions – during the one to two week period.

This was clearly inappropriate, as the magistrate judge simply conducted an unauthorized bench trial by affidavit, supplanting his personal views for that of an impartial jury. *See, Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249–52 (1986); *TransWorld Airlines v. American Coupon Exchange, Inc.,* 913 F.2d 676, 684–85 (9th Cir.1990) (holding that credibility determinations at summary judgment are … inappropriate).

As to element **(3)**, time considerations: If this case is remanded for trial, a bench trial would not be possible due to the magistrate's very clearly shown intention of ruling in Defendant's favor, regardless of the facts or the law. Therefore, a jury trial, which would be far more time consuming than a bench trial would be inevitable. Moreover, it would be before this magistrate judge who ignored all of Plaintiffs' evidence in this case and has exhibited a pattern of inexplicable legal rulings, as demonstrated by the record in this appeal as well

as the record of the first appeal, likely due to the belief he expressed at Plaintiffs' first appearance in his court back in 2013 – that Defendant's Policy of withholding representation by counsel for five to thirteen days, and sometimes longer, was perfectly acceptable.

In this regard, a jury trial before this magistrate judge, who has prejudged the case, would likely lead to erroneous evidentiary rulings and further appeals. Consequently, it would not be time efficient to remand this matter to the same magistrate judge.

VI. CONCLUSION

Due to the fact that Plaintiffs provided overwhelming evidence proving (1) a Policy of withholding counsel for a period of between 5 to thirteen days, and sometimes longer; (2) that the Policy denied counsel for an unreasonable period of time; (3) that the unreasonable delay was due to Defendant's deliberate indifference; and (4) that this indifference caused the denial of counsel under the Sixth Amendment and *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 212 (2008),

this Court should rule that Plaintiffs have proven that Defendant violated their right to appointment of counsel within a reasonable period under *Rothgery* and the Sixth Amendment.

Plaintiffs further urge this Court to rule that Plaintiffs have established that the County failed to abide by California Government Code section 27706 by failing to represent indigent criminal defendants at "all stages" of the proceedings as specified by the statute.

Plaintiffs further request declaratory relief, injunctive relief, and nominal damages.

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To the extent that this Court determines that there are remaining issues of material fact, or other matter requiring remand, Plaintiffs request that this Court remand for determination of those issues, while specifying which elements have been proven by a preponderance of the evidence, and order the Presiding Judge of the District Court to reassign the matter to a different judge.

Dated: June 5, 2019

Respectfully submitted,

CHRISTOPHER ALAN MARTIN

By: /S/ Christopher Alan Martin
CHRISTOPHER ALAN MARTIN

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

CERTIFICATE REGARDING BRIEFING FORM

I, Christopher Alan Martin, hereby certify that the foregoing brief is proportionately spaced, has a typeface of 14 points and contains precisely 13,874 words.

Dated: June 5, 2019

CERTIFICATE OF SERVICE
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I hereby certify that on June 5, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature: /S/ Christopher Alan Martin
CHRISTOPHER ALAN MARTIN