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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

Carolyn Phillips, Peter Yepez, and Ruthina Estrada,

Plaintiffs,

vs.

State of California, Edmund G. Brown Jr., in his official capacity as Governor of California, and County of Fresno,

Defendants.

CASE NO. 15 CE CG 02201

PLAINTIFFS' OPPOSITION TO DEFENDANTS STATE OF CALIFORNIA AND GOVERNOR EDMUND G. BROWN JR.'S DEMURRER

Date: December 16, 2015
Time: 8:30 a.m.
Dept.: Unassigned
Judge: Unassigned
Trial Date: None Set

Action Filed: July 14, 2015

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Pages (s)

TABLE OF AUTHORITIES
(continued)

Pages (s)

TABLE OF AUTHORITIES
(continued)

Pages (s)

TABLE OF AUTHORITIES
(continued)

Pages (s)

TABLE OF AUTHORITIES
(continued)

Pages (s)

TABLE OF AUTHORITIES
(continued)

Pages (s)

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Pages (s)

INTRODUCTION

The State of California criminally prosecutes people in Fresno County, but deprives them of their fundamental constitutional and statutory right to counsel. Defendants State of California and Governor Edmund G. Brown Jr. have a constitutional duty to provide due process—and, in particular, assistance of counsel that meets minimum constitutional and statutory standards—to indigent defendants facing criminal prosecution by the State. But because the State has abdicated that duty to the counties, and because Fresno's public defense system suffers from serious systemic deficiencies, people who are simply too poor to afford their own lawyer are deprived of the right to counsel. Plaintiffs bring suit to remedy this systemic denial, requesting systemic, prospective relief only.

Two main legal errors infect the State Defendants' demurrer. ***First***, Defendants contend that they can wash their hands of all responsibility to provide indigent defendants with assistance of counsel because California has enacted laws delegating the task to its 58 counties. The U.S. and California Constitutions, however, impose the duty to provide counsel directly on the State. Furthermore, the Supremacy Clause and the California Constitution prevent the State from passing a law to abrogate its obligations under the federal or state constitutions.

Second, the State relies on the wrong legal standard in arguing that Plaintiffs have failed to state a claim. Contrary to the State's assertion, this suit does not seek to overturn or collaterally attack individual criminal convictions, and accordingly, the standards set forth in *Strickland v. Wash.* and related cases do not apply to Plaintiffs' case. Rather, this case challenges the structural deficiencies in Fresno's indigent defense system that constructively deny the right to counsel, and Plaintiffs bring a claim for systemic, prospective relief—a claim that courts around the country have held as distinguishable from a *Strickland* challenge. *See, e.g., Luckey v. Harris,* 860 F.2d 1012 (11th Cir 1988).

FACTUAL ALLEGATIONS

As alleged in detail in Plaintiffs' Complaint and Verified Petition for Writ of Mandate ("Complaint"), the State of California has abdicated its responsibility to provide meaningful and

effective assistance of counsel to indigent defendants. Compl. ¶¶ 1, 117.[1] The State provides no oversight to ensure county-operated systems satisfy minimum constitutional and statutory standards. *Id.* ¶¶ 7, 27, 29, 31. The State spends very little money to fund indigent defense, thereby compelling counties to take on most of this cost, and the State does nothing to ensure these county-operated public defenses systems have the necessary resources. *Id.* ¶¶ 28, 29, 41, 115. Because of the State's omissions, the Fresno County Public Defender's Office ("the Office") suffers from structural deficiencies that prevent it from providing indigent defendants with meaningful and effective assistance of counsel. *Id.* ¶¶ 2, 3, 6, 41, 53, 98.

These structural deficiencies include excessive caseloads, *id.* ¶¶ 3, 4, 5, 50, 52, 81, case management practices that create conflicts of interest for attorneys, *id.* ¶¶ 54, 58-60, 80, inadequate resources, *id.* ¶¶ 69, 75, 78-79, 82, and inadequate supervision and oversight. *Id.* ¶¶ 29, 31, 93, 95, 97. As a result, public defender clients receive legal representation that fails to satisfy minimum constitutional and statutory standards. *Id.* ¶¶ 41, 98. This is apparent at every stage of a criminal defendant's proceedings.

The Office routinely accepts new cases, even though no attorneys are available to work on them. *Id.* ¶ 60. As a result, indigent defendants, although nominally represented, face significant delays before an attorney is actually assigned to them. *Id.* ¶¶ 60, 63. One case, for example, was continued for 92 days, simply because no attorney had been assigned to work on it. *Id.* ¶ 112.

Even after a case is initially assigned to an attorney in the Office, it is then shuffled between different attorneys, with the result that little to no work is performed on cases between hearings. *Id.* ¶ 63. Attorneys rarely have time to meet with their clients outside of court. *Id.* ¶ 67. Indeed, in a recent eight-month period, approximately 79% of the Public Defender's felony clients in pre-trial detention did not receive a legal visit. *Id.* ¶ 68.

The bulk of indigent defendants' communications with their attorneys occur at the courthouse, and because there are no private rooms to conduct attorney-client conversations, those conversations can be overheard by others. *Id.* ¶ 69. Public defenders facing pressure to

[1] Plaintiffs' allegations are set forth more fully in their opposition to the County of Fresno's Demurrer (at pages 2 to 5), incorporated herein by reference, but briefly summarized here.

move through their heavy calendars have little time to discuss cases with clients on an individual basis, and often provide "group" advice to as many as 15 clients at a time. *Id.* ¶ 71.

Attorneys face enormous pressure to secure plea agreements without engaging in motion practice, conducting an adequate factual investigation, exploring viable defenses, or even meeting with their clients. *Id.* ¶¶ 54, 71, 80. They often do not have time even to review case files before appearing in court. *Id.* ¶ 54. They lack sufficient secretarial, paralegal, language interpretation, and investigative staff. *Id.* ¶¶ 79, 82. Attorneys must either conduct their own investigations, forego submitting an investigation request, or submit a request, only to receive a delayed and incomplete investigation. *Id.* ¶ 79. Pre-trial motions are rarely filed. *Id.*¶ 54. Public defenders often handle matters far beyond their experience level, with very junior attorneys assigned to serious felony cases with three strikes consequences. *Id.* ¶ 75. The Office takes only 0.19% of its cases to trial, far below the average nationwide or within the state. *Id.* ¶ 87.

This systemic failure to provide actual assistance of counsel has a devastating impact on the lives of indigent defendants in Fresno. They face wrongful convictions; unnecessary or prolonged pre-trial detention; guilty pleas to inappropriate charges; waiver of meritorious defenses; compelled waiver of their rights to a speedy trial and hearing; guilty pleas taken without adequate understanding of the full, collateral consequences of the pleas; harsher sentences than the facts of the case warrant and few alternatives to incarceration; and waiver of the right to appeal and other post-conviction rights. *Id.* ¶ 98; *see also* ¶¶ 6, 17. For example, Plaintiff Yepez, a former Fresno public defender client, pled no contest to a violent felony enhancement, exposing him to an additional two years of custody, even though the police report indicated the absence of a critical legal element of the enhancement. *Id.* ¶¶ 103, 105. It is within the context of this fundamental breakdown in the adversarial criminal justice system that the State prosecutes and deprives Fresno County indigent criminal defendants of their liberty. *Id.* ¶ 117.

LEGAL STANDARD

A demurrer's sole purpose is to test the legal sufficiency of a pleading by challenging defects that appear on the face of the pleading. *Fiorito v. Superior Court,* 226 Cal. App. 3d 433,

437 (2002). The only issue the court may resolve on a demurrer is whether the complaint, standing alone, states a cause of action under any possible legal theory. *Gervase v. Superior Court,* 31 Cal. App. 4th 1218, 1224 (1995); *Gutkin v. Univ. of S. Cal.,* 101 Cal. App. 4th 967, 976 (2002).

In ruling on a demurrer, the court must accept as true all material facts pleaded in the complaint and those arising by reasonable implication. *Burt v. Cty of Orange,* 120 Cal. App. 4th 273, 277 (2004). Further, the court must "give the complaint a reasonable interpretation, reading it as a whole and its parts in context." *Blank v. Kirwan,* 39 Cal. 3d. 311, 318 (1985), and "disregard any error,...or defect, in the pleadings ... which, in the opinion of said court, does not affect the substantial rights of the parties." *Cooper v. State Farm Mut. Auto. Ins. Co.,* 177 Cal. App. 4th 876, 904 (2009); *see also* Cal. Civ. Proc. Code § 475.

ARGUMENT

This lawsuit seeks to vindicate the right to counsel for persons who are accused of a crime, but cannot afford an attorney. Where, as here, structural deficiencies collectively result in a systemic failure to provide minimally sufficient legal representation, prospective relief is warranted. Plaintiffs first address why the State owes a duty to provide legal representation to indigent defendants. Plaintiffs then set forth the legal framework that governs this case and explain why Plaintiffs' allegations state claims for systemic relief. Plaintiffs also address why these claims are properly brought in this writ of mandate and taxpayer action.

I. THE UNITED STATES AND CALIFORNIA CONSTITUTIONS PROHIBIT THE STATE FROM SEEKING TO DEPRIVE THE INDIGENT ACCUSED OF THEIR LIBERTY WITHOUT PROVIDING ASSISTANCE OF COUNSEL.

The parties agree on at least this: the U.S. and California Constitutions, as well as state law, all guarantee indigent defendants the right to counsel. The State contends, however, that it is absolved of all responsibility for the systemic violations of the rights of indigent defendants in Fresno County because the State has statutorily delegated the job of implementing its constitutional duty to the counties. But the federal and state constitutions require the *State* to provide assistance of counsel to indigent defendants before depriving them of their liberty. There is no doctrine that allows the State to evade its constitutional duties by enacting a statute

delegating those duties to other entities.

A. Due Process Obliges the State to Provide Assistance of Counsel to Indigent Defendants.

In *Gideon v. Wainwright*, the U.S. Supreme Court held that the Sixth Amendment right to counsel is a provision of the Bill of Rights so "'fundamental and essential to a fair trial'" that it "is made obligatory *upon the States* by the Fourteenth Amendment." 372 U.S. 335, 342-43 (1963) (emphasis added).[2] The Fourteenth Amendment's Due Process Clause in turn provides: "nor shall any *State* deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend XIV (emphasis added). Due process thus requires the entity that effects the deprivation to provide due process. Because, in a criminal prosecution, it is the State that seeks to deprive the accused of her life or liberty, it is the State who bears the responsibility to provide assistance of counsel to indigent defendants.

In Fresno County, and all other California counties, the State seeks to deprive the criminal defendant of his life or liberty, and the State imposes the sentence constituting the deprivation. The district attorney prosecutes the accused in the name of the People of the State of California. *Venegas v. Cty. of Los Angeles*, 32 Cal. 4th 820, 831 (2004) ("a district attorney represents the state rather than the county when preparing to prosecute crimes"). The judge presiding over the prosecution is a state officer, and the court is a state agency. *Olson v. Cory*, 27 Cal. 3d 532, 543 (1980) ("Judges are state officers."); *see* Cal. Const. art. VI, § 1; *Cty. of Sonoma v. Workers' Comp. Appeals Bd.*, 222 Cal. App. 3d 1133, 1142 (1990).[3] Because State actors work to deprive the indigent accused of his life or liberty, California has a constitutional obligation to provide due

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[2] Since *Gideon*, the U.S. Supreme Court has consistently affirmed that the State must provide counsel to indigent defendants charged with a crime. *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102, 113 (1996) ("A State must provide trial counsel for an indigent defendant charged with a felony"); *Bounds v. Smith*, 430 U.S. 817, 825 (1977) (citing *Gideon* for the proposition that "State expenditures are necessary to pay lawyers for indigent defendants at trial"); *In re Gault*, 387 U.S. 1, 3-4, 29 (1967) (noting that if the habeas petitioner were over 18 years old and "a felony were involved, the State would be required to provide counsel if his parents were unable to afford it").

[3] The State contends Plaintiffs have failed to state a claim under Penal Code § 987 because it does not impose any duty upon the State, State Mem. P. & A. in Supp. of Dem. at 12:9-11 ("State MPA"), but that argument depends on an extremely narrow definition of "the State." The statute provides, *inter alia*, that if a criminal defendant desires and is unable to employ counsel, "the court shall assign counsel to defend him or her." Cal. Pen. Code § 987(a), (b). The statute expressly imposes the duty to assign counsel on the court. Because courts are creatures of the State, § 987 imposes a duty on the State.

process, and in particular assistance of counsel, to the indigent accused.[4]

The State cannot disclaim its constitutional responsibilities merely because the State has delegated such responsibilities to its municipalities. *See Duncan v. Mich.*, 774 N.W.2d 89, 97-98, 104-05 (Mich. Ct. App. 2009) (holding the class of indigent defendants stated a claim for denial of the right to counsel against the State of Michigan and citing *Gideon* for the proposition that "it is the state that is ultimately mandated to ensure that indigent defendants are provided their constitutional right to counsel");[5] *New York Cty. Lawyers' Ass'n v. State of New York*, 745 N.Y.S.2d 376, 381 (N.Y. Sup. Ct. 2002) (issuing a preliminary injunction in a case challenging New York's compensation rate for appointed counsel and citing *Gideon* for the proposition that "New York State bears the ultimate responsibility to provide counsel to the indigent").[6]

B. The State Cannot Evade Its Constitutional Obligation By Passing Statutes.

Here, the State argues that it bears no responsibility for the systemic violations of the rights of indigent defendants in Fresno County because it has enacted laws that delegate to its 58 counties the job of implementing its constitutional duties. This argument mistakes the legal significance of state statutes in a constitutional challenge. The State effectively contends that the state statutory scheme functions as an affirmative defense to a constitutional challenge. But the Supremacy Clause and California Constitution bar any such argument. The State cannot abdicate by statute duties imposed upon it by the federal and state constitutions. When an entity to which the State delegates its constitutional duties fails to provide indigent defendants with actual assistance of counsel, the State remains responsible.

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[4] Although the State asserts that California courts "typically construe the federal and state rights to counsel in parallel," State MPA at 5:11-13, the California Constitution's right-to-counsel provision has historically been interpreted more broadly than its federal counterpart. *See, e.g., Ex parte Newbern*, 53 Cal. 2d 786, 790 (1960), *superseded by statute on other grounds*, 59 Cal. 2d 646; *Mills v. Mun. Court*, 10 Cal. 3d 288, 301 (1973). The state constitution thus provides an independent basis for the Court to find that the State has a duty to provide counsel.

[5] "The Supreme Court subsequently granted reconsideration and reversed [the Court of Appeals' 2009] decision for the reasons stated in Judge Whitbeck's dissenting opinion. *Duncan v. Mich.*, 784 N.W.2d 51 (Mich. 2010). However, [the Michigan] Supreme Court later reinstated its original order affirming [the Court of Appeals'] decision and remanding the matter to the trial court. *Duncan v. Mich.*, 488 Mich. 957 (2010)." *Duncan v. Mich.*, 832 N.W.2d 761, 765 (Mich. Ct. App. 2013).

[6] *Cf. Stanley v. Darlington Cty. Sch. Dist.*, 84 F.3d 707, 713 (4th Cir. 1996) (noting in a school desegregation case that "both a state and its local school districts [may be sued] for violations of the Fourteenth Amendment").

1. The State's Authority to Pass Statutes Is Legally Irrelevant.

First, the State emphasizes that it has the authority to delegate implementation of the right to counsel to the counties, and has done so here. State MPA at 7. This point, while true, is irrelevant. The State may delegate to the counties the task of providing counsel to indigent defendants, but it simply does not follow that the statutory delegation abrogates the State's underlying constitutional duties. *See Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1074 (9th Cir. 2010) ("[A] State cannot avoid its obligation under federal law by contracting with a third party to perform its function."). Under our system of federalism, and under California law, the counties are "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions," rather than "sovereign entities." *Reynolds v. Sims,* 377 U.S. 533, 575 (1964); *see Marin Cty. v. Superior Court of Marin Cty.,* 53 Cal. 2d 633 (1960) ("The county is merely a political subdivision of state government, exercising only the powers of the state, granted by the state, created for the purpose of advancing the policy of the state...."). Thus, as one court explained in an analogous context, "[b]ecause the Fourteenth Amendment imposes direct responsibility on a state to ensure [due process]..., a state's delegation to a political subdivision of the power necessary to remedy the constitutional violation does not absolve the state of its responsibility to ensure that the violation is remedied." *Stanley*, 84 F.3d at 713 (equal protection school desegregation case); *see also United States v. New York*, 255 F. Supp. 2d 73, 74-75, 79-80 (E.D.N.Y. 2003) ("state agencies may not avoid their federal responsibilities through delegation").

Moreover, under the Supremacy Clause, California's enactment of a statute cannot serve as an affirmative defense to constitutional violations. *See Ex parte Young*, 209 U.S. 123, 167 (1908) ("The state cannot" "impart to [a state] official immunity from responsibility to the supreme authority of the United States").[7] Similarly, a state statute cannot make lawful what is unlawful under the state constitution. *City of Modesto v. Modesto Irrigation Dist.*, 34 Cal. App.

[7] *Cf. City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 385 (2007) (stating in the medical marijuana context that "California's statutory framework has no impact on the legality of [conduct proscribed by] federal law"); *People v. Ortiz*, 32 Cal. App. 4th 286, 291 (1995) (statute authorizing arrest does not trump the constitution's limit on unreasonable search and seizures).

3d 504, 508 (1973) ("if there is a conflict between the California Constitution and a law adopted by the Legislature, the California Constitution prevails").[8]

Although the State has discretion over the manner in which it implements the right to counsel, it remains ultimately accountable for complying with the constitution's minimal requirements. In *Douglas v. California*, 372 U.S. 353 (1963), for example, the U.S. Supreme Court held unconstitutional a California rule of criminal procedure that granted the court discretion to appoint counsel to indigent defendants in mandatory appeals. The Court acknowledged that "a State can, consistently with the Fourteenth Amendment, provide for differences" in how to provide counsel to indigent persons "so long as the result does not amount to a denial of due process." *Id.* at 356. Similarly, the State's discretion to delegate to counties the provision of counsel to indigent defendants does not immunize it from a legal challenge where the result of that delegation denies due process.

The State relies on *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), *Platt v. City & County of San Francisco*, 158 Cal. 74, 82 (1910), and *Marine Forests Society v. California Coastal Commission*, 36 Cal. 4th 1, 30 (2005), but these cases underscore the State's ultimate duty to comply with the Constitution. *Cf.* State MPA at 7:4-12. These cases, like *Douglas*, all stand for the proposition that while a State generally possesses discretion over the implementation of constitutional duties or the apportionment of power to its subdivisions, the State must still comply with the federal and state constitutions.[9]

The State also cites *People v. Chavez*, 26 Cal. 3d 334 (1980), for the proposition that the

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[8] *See California Logistics, Inc. v. State*, 161 Cal. App. 4th 242, 250 (2008) ("The California Constitution 'is the supreme law of our state,' subject only to the supremacy clause of the United States Constitution.") (citation omitted).

[9] *Ake* held that "the State must, at a minimum, assure the defendant access to a competent psychiatrist" to assist in the preparation of the defense, in cases where the defendant's sanity is likely to be significant factor. *Id.* at 83. Explaining that the defendant had no "constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own," the court then left "to the State the decision on how to implement this right." *Id. Ake* is thus entirely consistent with *Douglas*. While a State has discretion over implementation of the right to counsel, the constitution still establishes "minimum" requirements with which it "must" comply. *Id.* Likewise, our Supreme Court in *Platt* held that municipalities have the power to acquire and operate public utilities, but this was only because "[t]here is no provision of our state constitution which either expressly or by implication forbids" this. 158 Cal. at 82. *Marine Forests* stated that the federal constitution does not dictate an allocation of power between a state's branches, but then analyzed a state statute for compliance with the state constitution. 36 Cal. 4th at 43-45.

right to counsel is "satisfied in California by the statutory provision for the assignment of counsel." *Id.* at 344; State MPA at 7:18-20. But *Chavez* did not hold that the statutory scheme creates a *per se* immunity against all right-to-counsel challenges. Instead, it analyzed whether the right to counsel was satisfied in the case before that court, just as this Court must do here.[10]

2. Plaintiffs Do Not Challenge the Statutory Delegation to the Counties.

Second, the State contends that Plaintiffs have failed to establish either a facial or as-applied challenge to the California statutes delegating the provision of indigent defense to the counties. State MPA at 7 n.4 & 8:1-15; *see id.* at 4:1-22 (citing laws pertaining to the provision of counsel for indigent defendants). The State's point is irrelevant.

Plaintiffs do not take issue with the State's delegation, either to the counties in general or to Fresno in particular. Thus, Plaintiffs do not raise either a facial or as-applied challenge to the statutes the State references. Instead, Plaintiffs contend that the State Defendants have failed to provide indigent defendants who are criminally prosecuted in Fresno with counsel that satisfies minimum constitutional standards. In constitutional challenges such as this, the State and local government agencies are properly named as co-defendants. *See, e.g., Butt v. State of Cal.*, 4 Cal. 4th 668, 673-74 (1992) (challenge under the California Constitution against the State and local school board for failure to ensure students in a local school district would receive a full school term); *Tinsley v. Palo Alto Unif. Sch. Dist.*, 91 Cal. App. 3d 871, 878 (1979) (Fourteenth Amendment's equal protection clause challenge to compel the State and local school districts to submit a desegregation plan).

Indeed, *Wolfe v. City of Fremont,* 144 Cal. App. 4th 533 (2006), on which the State relies, supports Plaintiffs' position. There, the court stated: "The surest justification for joining a particular governmental official, body, or agency is that the putative defendant's conduct violated a statutory duty, whether owed to the plaintiff personally or more generally to the public...." *Id.* at 551. *Wolfe* addressed the violation of statutory duties, but its reasoning applies equally to suits

[10] Any suggestion in *Chavez* that the right to counsel could be satisfied merely by the statutory provision for counsel also contradicts the U.S. Supreme Court's statement that the right to counsel "'cannot be satisfied by mere formal appointment'" of a lawyer. *Evitts v. Lucey*, 469 U.S. 387, 395 (1985) (citation omitted).

enforcing constitutional duties. Under *Wolfe*, the State Defendants are properly named because Plaintiffs allege that they have violated their constitutional duty to ensure indigent defendants in Fresno County receive actual assistance of counsel.[11]

II. PLAINTIFFS HAVE STATED A CLAIM THAT THE STATE SYSTEMICALLY DEPRIVES FRESNO COUNTY INDIGENT DEFENDANTS OF THE RIGHT TO COUNSEL (COUNTS ONE THROUGH FIVE AND NINE).

The United States Constitution, California Constitution, and California statutes all guarantee a criminal defendant the right to assistance of counsel. U.S. Const. Amend. VI; Cal. Const. art. I, § 15; Cal. Pen. Code § 987.[12] This right can be vindicated through individual suits seeking to challenge the validity of particular criminal convictions, or suits seeking prospective systemic relief where structural deficiencies in an indigent defense system constructively deny the assistance of counsel. The State Defendants' demurrer rests on the erroneous premise that Plaintiffs seek to challenge individual convictions. *See* State MPA at 8:21-22 (Plaintiffs' allegations fail "to state a cognizable claim for violation of any *individual*'s right to counsel") (emphasis added). As a result, the legal framework they invoke simply does not apply to this case, which challenges the systemic failure to provide indigent defendants prosecuted in Fresno County with assistance of counsel that satisfies minimum constitutional and statutory standards. Under the framework that applies to systemic challenges, Plaintiffs have stated a claim.

A. Structural Deficiencies in an Indigent Defense System That Cause Constitutional Violations Can Be Remedied Through Prospective Relief.

1. The State Defendants Have a Duty to Provide Assistance of Counsel That Satisfies Minimum Constitutional and Statutory Standards.

The State has a duty to provide actual, not merely token, legal representation to indigent defendants. The right to counsel "'cannot be satisfied by mere formal appointment'" of a lawyer.

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[11] The State also cites *State v. Superior Court*, 12 Cal. 3d 237 (1974), for the proposition that the State's demurrer should be sustained where the petition identifies no basis for relief against the State, as distinct from other defendants. State MPA at 8:9-11. The basis for relief against the State in this case is that it bears a constitutional and statutory duty to provide counsel, independent of Fresno's duty. The State has violated that duty because Fresno indigent defendants are constructively denied counsel since Fresno's indigent defense system provides representation that falls below minimum constitutional and statutory standards.

[12] The State constitutional right to counsel provides an independent ground for recognizing this claim. The California Constitution's right-to-counsel provision has historically been interpreted more broadly than its federal counterpart. *See, e.g., Ex parte Newbern,* 53 Cal. 2d 786, 790 (1960); *Mills v. Mun. Court,* 10 Cal. 3d 288, 301 (1973).

Evitt v. Lucey, 469 U.S. 387, 395 (1985) (citation omitted); *People v. Avilez,* 86 Cal. App. 2d 289, 294 (1948) ("The protection so guaranteed is not provided by a mere 'token' or 'pro forma' appearance of an attorney."). Rather, the appointed attorney must actually represent the client—through presence, attention, and advocacy—at all critical stages of the defendant's criminal prosecution. *Lafler v. Cooper,* 132 S. Ct. 1376, 1385 (2012); *United States v. Cronic,* 466 U.S. 648, 654, 656 (1984); *Avery v. Ala.,* 308 U.S. 444, 446 (1940). "[P]erhaps the most critical period of the proceedings" is "from the time of [] arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important." *Powell v. Alabama,* 287 U.S. 45, 57 (1932); *see also Me. v. Moulton,* 474 U.S. 159, 170 (1985). Critical stages include certain arraignments, *Bell v. Cone,* 535 U.S. 685, 696 (2002); pretrial lineup, *Coleman v. Ala.,* 399 U.S. 1, 7 (1970); preliminary hearings, *id.* at 7-10; plea negotiations, *Mo. v. Frye,* 132 S. Ct. 1399, 1408 (2012); *Padilla v. Ky.,* 559 U.S. 356, 373 (2010); plea entry, *White v. Md.,* 373 U.S. 59, 60 (1963); and sentencing, *Lafler v. Cooper* , 132 S. Ct. 1376, 1385-86 (2012).

At a minimum, actual representation requires the attorney to do everything necessary to be competent. *Powell v. Ala.,* 287 U.S. 45, 57-58 (2012). If an accused is denied an attorney at any critical stage, there can be no other conclusion than that representation was not provided. *United States v. Cronic,* 466 U.S. 648, 659 (1984).

2. Systemic Violations of the Right to Counsel Can Be Remedied Through Prospective Relief.

The fundamental right to counsel can be vindicated in at least two ways – suits, such as this, that seek prospective relief to remedy systemic violations, and suits that seek to overturn criminal convictions to remedy individual violations of the right to counsel.

a. Systemic Relief Is Available to Remedy Structural Deficiencies.

In *Gideon*, the Supreme Court held that fundamental fairness requires that indigent criminal defendants be provided with assistance of counsel. *Gideon v. Wainwright,* 372 U.S. 335, 342 (1963). To make good on *Gideon*'s promise, federal and state courts across the country have recognized that systemic prospective relief is appropriate where an indigent defense system suffers from structural deficiencies – such as, inadequate resources, unreasonable caseloads,

inadequate supervision, or pressure on attorneys to handle their cases in a particular fashion – that cause the legal representation to fall below minimum constitutional standards.

In *Luckey v. Harris,* 860 F.2d 1012 (11th Cir. 1988), plaintiffs alleged "systemic deficiencies," such as "inadequate resources, delays in the appointment of counsel, pressure on attorneys to hurry their clients' case to trial or to enter a guilty plea, and inadequate supervision in the indigent defense system." *Id.* at 1013. These deficiencies, plaintiffs alleged, denied them the "right to the representation of counsel at critical stages in the criminal process [and] hamper[ed] the ability of counsel to defend them." *Id.* 1013, 1018. The Court of Appeals for the Eleventh Circuit held that plaintiffs stated a systemic claim for prospective relief based on the denial of the right to counsel. *Id.* at 1018.

Similarly, in *Wilbur v. City of Mount Vernon,* 989 F. Supp. 2d 1122 (W.D. Wash. 2013), the federal district court held, after a trial on the merits, that because of unreasonable caseloads and "case management practices" that limited the "opportunity for a representational relationship to develop and follow[] up," public defenders had inadequate opportunities to confer with clients in a confidential setting, rarely conducted investigations in their cases, and failed to do legal analysis regarding the elements of the crimes charged or possible defenses or discuss such issues with their clients. *Id.* at 1124, 1128, 1131. The court thus found that the public defense system at issue had "systemic flaws that deprive indigent criminal defendants of their Sixth Amendment right to the assistance of counsel." *Id.* 1131.[13]

[13] Numerous other courts have also held that prospective relief is appropriate to remedy systemic violations of the right to counsel. *See Nicholson v. Williams,* 203 F. Supp. 2d 153, 224-25, 233, 241, 255-56 (E.D.N.Y. 2002) (holding structural deficiencies such as a shortage of attorneys, excessive caseloads, appointed counsel remaining in court six and a half hours a day for five days per week, inadequate training and supervision, and the regular late appointment of counsel led to a systemic violation of plaintiffs' right to due process); *Simmons v. State Public Defender,* 791 N.W.2d 69, 87, 88 (Iowa 2010) (holding the compensation structure for appointed appellate counsel violated indigents' right to counsel); *Duncan v. State* , 774 N.W.2d 89, 99, 137 (Mich. Ct. App. 2009) (holding plaintiffs stated a claim for denial of the right to counsel where they alleged structural deficiencies, including underfunding of the public defense system and the lack of client eligibility standards, attorney hiring, training and retention programs, written performance and workload standards, monitoring and supervision, conflict of interest guidelines, and independence from the judiciary and prosecutorial offices); *Hurrell-Harring v. State,* 930 N.E.2d 217, 224-25 (N.Y. 2010) (holding "the complaint states a claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*").

b. *Strickland* and Related Doctrines Do Not Apply to Suits for Systemic Relief.

This suit for systemic, prospective relief seeks to vindicate *Gideon*'s promise. The State Defendants contend that Plaintiffs have failed to state a claim under *Strickland* and related doctrines. But the legal framework on which they rely does not apply to this suit.

Strickland does not apply to this suit because Plaintiffs do not seek to upset any criminal judgments. Under *Strickland*, an individual seeking to overturn a conviction must make a two-part showing that counsel's performance was deficient and the defendant suffered prejudice as a result. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). As the Supreme Court stated, however, the "prejudice" prong is tailored to the unique relief sought – "setting aside the judgment of a criminal proceeding." *Id.* at 691. *Strickland* was thus formulated to address the specific remedy of overturning a criminal conviction.

In contrast, where, as here, Plaintiffs seek to vindicate the right to counsel through purely prospective relief, courts have consistently held that there is no basis to adopt *Strickland*'s deferential review. This is so because "deficiencies that do not meet the 'ineffectiveness' standard [of *Strickland*] may nonetheless violate a defendant's rights under the sixth amendment." *Luckey*, 860 F.2d at 1017 (holding that the *Strickland* "standard is inappropriate for a civil suit seeking prospective relief"); *see also Wilbur v. City of Mount Vernon,* 989 F.Supp.2d 1122, 1127 (W.D. Wash. 2013) (distinguishing between *Gideon* and *Strickland* claims); *Hurrell-Harring v. State,* 930 N.E.2d 217, 221-22, 224 (N.Y. 2010) (same); *Kenny A. ex rel. Winn v. Perdue,* 356 F. Supp. 2d 1353, 1360, 1362 (N.D. Ga. 2005) (holding that plaintiffs in a systemic challenge to "institutional deficiencies in the provision of counsel" under the Georgia constitution "need not 'establish that ineffective assistance was inevitable for each of the class members'") (citation omitted). In suits such as this one, "the state's weighty interest in the finality of a specific criminal judgment is not involved." *Simmons v. State Pub. Defender,* 791 N.W.2d 69, 76-77 (Iowa 2010). "[I]nstead [of showing prejudice], what is required is a showing that the structural feature being challenged threatens or is likely to impair realization of the right to effective

assistance of counsel." *Id.* at 77; *see also Nicholson v. Williams,* 203 F. Supp. 2d 153, 240 (E.D.N.Y. 2002) (in challenge to adequacy of "system for appointed counsel," distinguishing *Strickland* and holding that "[t]he appropriate test ... is ... whether counsel so appointed are 'reasonably likely to render ... reasonably effective assistance'") (citation and quotations omitted).[14]

The State Defendants also mistakenly contend that this suit is barred by *Heck v. Humphrey*, 512 U.S. 477 (1994), in which the Supreme Court held "that, in order *to recover damages* for allegedly unconstitutional conviction or imprisonment . . . a § 1983 plaintiff must prove that the conviction or sentence has been" invalidated on direct appeal, in a suit for habeas corpus, or by executive order. *Id.* at 486-87 (emphasis added). By its own terms, *Heck* does not bar this suit because Plaintiffs seek purely prospective relief; they do not seek damages or any other retrospective relief that would "necessarily imply the invalidity" of any convictions previously imposed. *Id.* at 487. Indeed, in *Wilkinson v. Dotson*, 544 U.S. 74, 76, 82 (2005), the Supreme Court held that *Heck* did not bar state prisoners from bringing a § 1983 claim challenging the constitutionality of state parole procedures where they sought declaratory and injunctive relief.

B. Plaintiffs' Allegations State a Claim for Systemic Constructive Denial of Counsel.

The Complaint more than adequately alleges that Fresno's indigent defendants are systemically deprived of the right to counsel. The Complaint details the ways in which structural deficiencies in Fresno's indigent defense system cause the legal representation afforded to indigent defendants to fall below minimum requirements established by the constitution and statutes.

[14] Because Plaintiffs are challenging the systemic denial of assistance of counsel and seeking prospective relief, the State's argument that Fresno County indigent defendants have not been constructively denied assistance of counsel under *United States v. Cronic*, 466 U.S. 648 (1984), similarly fails. *Cf.* State MPA at 11:3-14. In *Cronic*, decided the same day as *Strickland*, the Court articulated circumstances under which prejudice is presumed such that reversal of conviction is warranted. *Id.* at 650, 659-60. Because here Plaintiffs do not seek reversal of conviction or sentencing for any individual Fresno County public defender client, Plaintiffs need not allege facts to warrant reversal for such individuals under *Cronic*.

1. The Complaint Alleges That Fresno's Indigent Defense System Suffers from Structural Deficiencies.

As alleged in Plaintiff's Complaint, Fresno's indigent defense system suffers from the following structural deficiencies.

Excessive caseloads. In other systemic denial-of-counsel cases, courts have recognized the common-sense proposition that a public defender with too many cases simply does not have enough time to do what the constitution requires. *See*, e.g., *Wilbur*, 989 F. Supp. 2d at 1124 (systemic deprivation of assistance of counsel "was the natural, foreseeable, and expected result of the caseloads the attorneys handled"); *Hurrell-Harring v. State of New York,* 930 N.E.2d 217, 232 (N.Y. 2010) ("excessive caseloads … affect[] the amount of time counsel may spend with any given client"). Using the National Advisory Commission on Criminal Justice Standards and Goals ("NAC") caps as an illustrative benchmark, the average Fresno felony public defender carries a caseload that should be handled by three to four attorneys, and each Fresno misdemeanor public defender carries a caseload that should be handled by nearly four attorneys. Compl. ¶ 51.[15] Put differently, given the Fresno public defender caseloads in the 2013-2014 fiscal year, *see id.* ¶¶ 4, 50, 52, public defenders who work every single weekday of the year could spend an average of only 3.4 hours on each felony matter or 1.4 hours on each misdemeanor case. Taking into account holidays, vacations, sick leave, administrative tasks, and the reality that defenders must spend most of their work days in court, the actual amount of time is significantly lower.

Case management practices that create conflicts of interest for attorneys. Where an attorney has so many cases that she cannot fulfill her duties to existing clients, she has an ethical obligation not to accept additional cases or, if necessary, to withdraw from representing some

[15] The State Defendants argue that violations of professional guidelines do not state the right to counsel claims. State MPA at 11-12. But Plaintiffs' allegations do not rest solely on violations of professional norms. Also, the U.S. Supreme Court has expressly relied on such standards as evidence that representation falls below objective standards of reasonableness, rendering counsel's performance deficient. *See, e.g., Padilla v. Ky.*, 559 U.S. 356, 366-67 (2010); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522, 524 (2003). Those norms are undoubtedly relevant to whether Defendants are complying with their constitutional obligations.

existing clients so she can effectively represent the remainder. *In re Edward S.*, 173 Cal. App. 4th 387, 414 (2009). But the Fresno Public Defender's departmental policy flatly prohibits attorneys from withdrawing from an existing case, even in order to meet obligations to other existing clients. *Id.* ¶ 58 & Exh. C at 2. Also, public defenders face "pressure to process cases quickly" and "to secure plea agreements." Compl. ¶¶ 54, 80. That is exactly the type of "systemic deficienc[y]" the court in *Luckey* held sufficient to state a claim. 860 F.2d at 1018.

Inadequate resources. Fresno public defenders lack basic resources such as adequate training, investigative staff, secretarial or paralegal assistance, interpreters who can communicate with non-English proficient clients or witnesses, or access to private interview rooms where attorneys can have confidential conversations with clients. Compl. ¶¶ 69, 75, 78-79, 82; *see Luckey*, 860 F.2d at 1013, 1018 (plaintiffs stated claim for prospective relief based on, *inter alia*, "systemic deficiencies including inadequate resources," such as investigators and experts).

Inadequate supervision. Supervisors have little time to monitor, evaluate, or ensure the quality of representation offered by junior attorneys. Compl. ¶ 95. This "inadequate supervision" is another structural deficiency. *Luckey*, 860 F.2d at 1013.

2. Structural Deficiencies Cause Fresno's Indigent Defense System to Provide Representation That Falls Below Minimum Constitutional and Statutory Standards.

As a result of these structural deficiencies, Fresno indigent defendants receive representation that falls below the following minimum constitutional and statutory standards.

Inadequate preparation. The U.S. and California Constitutions require that appointed counsel have the "opportunity … to confer, to consult with the accused and to prepare his defense." *Avery*, 308 U.S. at 446; *see also Powell v. Alabama,* 287 U.S. 45, 59 (1932) (counsel must have "opportunity to acquaint himself with the facts or law of the case"); *People v. Fontana,* 139 Cal. App. 3d 326, 333 (1982). For Fresno public defenders, actually interviewing the client is a luxury, not a staple. Compl. ¶ 80. Little work is performed on cases between court hearings. *Id.* ¶ 63. Attorneys often do not have time to even review their clients' files before appearing in court. *Id.* ¶ 54. In the few cases that actually go to trial, counsel routinely lacks the time to prepare due to competing demands. *Id.* ¶¶ 87-88.

Lack of conflict-free legal representation. The U.S. and California Constitutions require that indigent defendants be provided "representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *People v. Doolin*, 45 Cal. 4th 390, 417 (2009). But excessive caseloads create conflicts of interests for Fresno public defenders who do not have sufficient time to work on each of their clients' cases. *See* Compl. ¶¶ 36, 48, 54, 64, 67, 69, 71, 79, 80, 95. Because of inadequate investigator staffing, attorneys forgo requesting investigations in some cases to avoid burdening the investigation of others. Compl. ¶ 79. Public defenders have waived clients' right to a speedy trial, simply because no attorney was available to work on the matter. Compl. ¶ 112.

Lack of continuous representation. The constitution requires that indigent defendants be provided representation at "pretrial critical stages that are part of the whole course of a criminal proceeding." *Lafler v. Cooper,* 132 S. Ct. 1376, 1385 (2012); *People v. Isby*, 267 Cal. App. 2d 484, 493 (1968). But the Fresno Public Defender routinely accepts case appointments even when no attorneys are available to work on the case. Compl. ¶ 60. Because of inadequate attorney staffing, different public defenders represent clients at each court appearance, and little to no work is performed on cases between court hearings. *Id.* ¶ 63.

Inadequate opportunity for consultation. The U.S. and California Constitutions require that defense counsel have the ability to confer with the accused, *Geders v. United States*, 425 U.S. 80, 91 (1976), and to do so in a confidential setting. *People v. Alexander*, 49 Cal. 4th 846, 887-88 (2010). "Timely and confidential input from the client regarding such things as possible defenses, the need for investigation, mental and physical health issues, immigration status, client goals, and potential dispositions are essential to an informed representational relationship." *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1126 (W.D. Wash. 2013). But, in Fresno, heavy caseloads frequently preclude attorneys from meeting with their clients other than at court hearings. Compl. ¶ 69. The absence of private client interview rooms compromises confidentiality; communications often occur in earshot of other defendants, the judge, and even the prosecutor. *Id.* ¶¶ 69-70.

Interference with competent representation. The U.S. Constitution requires that defense

counsel provide competent advice. *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *Kim v. Orellana*, 145 Cal. App. 3d 1024, 1027 (1983) (same). To provide competent representation, attorneys must be assigned cases commensurate with their experience. But the Public Defender's Office routinely assigns very junior attorneys to high-stakes, complex life imprisonment and three strikes cases, among others. Compl. ¶ 75. According to an assessment of the Public Defender's Office, the Office "dismantled [its] research and training programs … result[ing] in individual attorneys initiating continuing education efforts and seeking out information on an informal basis." *Id.* ¶ 74.

Inadequate factual investigation. The U.S. and California Constitutions require that defense counsel make objectively reasonable decisions regarding factual investigation. *See Wiggins v. Smith*, 539 U.S. 510, 521 (2003). "[B]efore counsel undertakes to act," he must "make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation." *People v. Jones*, 186 Cal. App. 4th 216, 238 (2010). In many instances, public defender clients plead to charges without a factual interview with anyone from the Office. *Id.* ¶ 80. Attorneys often forgo even submitting a request for an investigation because of limited resources. *Id.* ¶ 79.

Lack of meaningful adversarial testing. The U.S. Constitution requires that defense counsel "'act[s] in the role of an advocate'" and "require[s] the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984). Structural deficiencies, including pressure on attorneys to secure pleas, lead the Office to take exceptionally few cases to trial – only 0.19%, far below the statewide average. Compl. ¶ 87; *Wilbur*, 989 F. Supp. 2d at 1127 (very low trial rate may be "sign of a deeper systemic problem").

* * *

Plaintiffs' allegations therefore state a claim against the State under counts one through five and nine for systemically depriving Fresno County indigent defendants of assistance of counsel. Plaintiffs' allegations state a claim against the State Defendants as well as the County because the State Defendants share with the County the duty to provide counsel to indigent

defendants. *See supra* Part I. The State Defendants complain that allegations pertaining to them are "sparse." State MPA at 6:4. But that is because the State's sins are ones of omission. The State provides no oversight to ensure that county-operated systems meet the constitutional and statutory standards for adequate representation. Compl. ¶ 27. Nor has it taken any action to hold counties accountable for failing to provide counsel that meets minimum standards. *Id.* ¶ 31. The result has been the constructive deprivation of counsel to indigent defendants in Fresno, who are criminally prosecuted at the hands and in the name of the State.

III. PLAINTIFFS HAVE STATED A CLAIM FOR VIOLATING INDIGENT DEFENDANTS' RIGHTS TO A SPEEDY TRIAL AND SPEEDY PRELIMINARY HEARING (COUNTS SIX THROUGH NINE).

Structural deficiencies in Fresno's indigent defense system have caused rampant delays in trials and preliminary hearings. The State Defendants do not dispute that these delays occur, or that they are caused by systemic problems (nor could they on this demurrer). Instead, they contend that these claims are barred because they constitute a collateral attack on particular convictions and because these claims have been waived by the individuals whose cases are mentioned in the Complaint. Like their responses to Plaintiffs' right to counsel claims, Defendants' arguments rest on the mistaken premise that this suit seeks to challenge particular convictions. It does not.

Criminal defendants' rights to a speedy trial and preliminary hearing are enshrined in the California Constitution and statutes. The constitution provides criminal defendants with the right to a speedy trial. Cal. Const. art. I, § 15, cl. 1. This provision is construed in part by Penal Code § 1382, which establishes statutory time frames for bringing criminal defendants to trial. *People v. Martinez*, 22 Cal. 4th 750, 765 (2000). Because the state constitutional speedy trial right is self-executing, it may serve as a basis for a claim even in circumstances not covered by § 1382. *Id.* at 766. Penal Code § 859b also establishes statutory time frames for holding a preliminary examination for felony defendants.

In *People v. Johnson*, 26 Cal. 3d 557, 571-72 (1980), the California Supreme Court held that the indigent "defendant deserves not only capable counsel, but counsel who, barring exceptional circumstances, can defend him without infringing upon his rights to a speedy trial and

hearing." It therefore rejected the argument that a delay attributed to excessive public defender caseloads constitutes good cause for delaying trials beyond the statutory time frame, noting that a defendant's right to a speedy trial may "be denied by failure to provide enough public defenders or appointed counsel, so that an indigent must choose between the right to a speedy trial and the right to representation by competent counsel." *Id.* at 571. But, in Fresno, structural deficiencies in the indigent defense system routinely force criminal defendants to face unreasonable delays in their cases, in violation of their constitutional and statutory speedy-trial rights. *See* Compl. ¶¶ 6, 17, 98, 110, 112.

The State's reliance on *Heck* and related cases to excuse these wholesale delays is misplaced. The cases cited by Defendants sought retrospective relief that would overturn or otherwise impugn the validity of convictions previously imposed. *See Heck* (suit for damages pursuant to 42 U.S.C. § 1983); *People v. Villaneuva*, 196 Cal. App. 4th 411 (2011) (direct appeal of conviction); *Gibbs v. Contra Costa Cty.*, No. C 11-00403 MEJ, 2011 WL 1899406 (N.D. Cal. May 19, 2011) (suit for damages pursuant to 42 U.S.C. § 1983). But here, Plaintiffs seek prospective relief based on the systemic violation of Fresno indigent defendants' rights to a speedy trial and hearing. Compl. at 42:8-12, 42:16-19. That relief would not overturn the result in any individual criminal case. *See Wilkinson v. Dotson*, 544 U.S. 74, 76, 82 (2005) (holding *Heck* did not bar state prisoners from bringing a § 1983 claim challenging the constitutionality of state parole procedures where the prisoners sought declaratory and injunctive relief).

Similarly, the prejudice requirement of *People v. Lowe*, 40 Cal. 4th 937, 942 (2007), only applies where an individual seeks dismissal of an individual criminal case.[16] *Cf. Luckey*, 860 F.2d at 1017 (*Strickland* "standard [requiring demonstration of prejudice] is inappropriate for a civil suit seeking prospective relief.")

Defendants' argument—that the individuals identified in the Complaint "waived" their claims—is similarly unavailing. *Cf.* State MPA at 13:22-23. In adjudication of individual speedy

[16] Moreover, the rule in *Lowe* only applies where dismissal is sought based on a delay in the time period "'after the filing of a complaint and before arrest or formal accusation by indictment or information.'" *People v. Lowe*, 40 Cal. 4th 937, 939, 942 (2007). The rule does not apply here because Plaintiffs' claims are not based on delay in the aforementioned limited time period but delay throughout the course of an indigent defendant's criminal case.

trial or preliminary hearing claims, waiver serves only as a bar to dismissal of the criminal prosecution, but that is not a remedy sought in this case. *See* Cal. Penal Code §§ 1382(a)(2)(A) & (a)(3), 859b(a) & (b).

IV. PLAINTIFFS MAY BRING A TAXPAYER SUIT TO CHALLENGE THE STATE DEFENDANTS' FAILURE TO COMPLY WITH THE CONSTITUTION.

California Code of Civil Procedure § 526a gives taxpayers standing to sue state officials in state court for injunctive, declaratory, and mandamus relief to prevent them from violating the law. *See Van Atta v. Scott*, 27 Cal. 3d 424, 447 (1980). Defendants' contention that the allegations fail to establish taxpayer standing is meritless.

The primary purpose of section 526a "is to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement." *Blair v. Pitchess*, 5 Cal. 3d 258, 267-68 (1971) (internal citation and quotation marks omitted). California courts "have consistently construed section 526a liberally to achieve this remedial purpose." *Id.* at 268.

First, Defendants contend that Plaintiffs failed to allege a "specific expenditure by the State, much less an allegedly illegal State expenditure." State MPA at 16:27-28. But Plaintiffs allege that Defendants expend public funds to maintain Fresno County's unconstitutional public defense system. Compl. ¶ 115. This allegation necessarily includes the subsidiary allegation that the State, one of the named Defendants, expends public funds on Fresno's unconstitutional indigent defense system. Indeed, the State acknowledges that the funding of appointed counsel by the counties occurs "with the aid of certain state contributions prescribed by law." State MPA at 4:20-21 (citing, *inter alia*, Pen. Code §§ 987.6, 987.9; Gov. Code §§ 15200-15201) (emphasis added).[17] This more than suffices to allege the requisite expenditure *by the State*, given the legal

[17] Relatedly, Defendants mischaracterize the Complaint as stating that the State does not expend money on indigent defense. State MPA at 16-17. The relevant allegation of the Complaint, however, states that "the state leaves the counties to shoulder the financial costs of providing defense services." Compl. ¶ 29. Thus, Plaintiffs contend that the State's failure to provide sufficient money for indigent defense, not its failure to provide any money, has led to Fresno's failing public defense system. "It is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds." *Wirin v. Parker*, 48 Cal. 2d 890, 894 (1957); *Blair*, 5 Cal. 3d at 269 ("county officials may be enjoined from spending their time carrying out" an unconstitutional statute, even though unconstitutional conduct

standard on demurrer and the liberal construction of section 526a. *See Cundiff v. GTE California Inc.*, 101 Cal. App. 4th 1395, 1405 (2002) (court must "accept as true facts which may be inferred from those expressly alleged"); *Doe v. City of Los Angeles*, 42 Cal. 4th 531, 550 (2007) ("the complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts").

Plaintiffs satisfy the illegality pleading requirement because they make numerous and specific allegations that Fresno County's public defense system illegally deprives indigent defendants of assistance of counsel that satisfies minimum constitutional and statutory standards. *See, e.g.*, Compl. ¶¶ 6, 41, 50-54, 56, 58-61, 63, 64, 66-72, 74-77, 78-89, 92-112.

Finally, the State argues that Plaintiffs failed to state a valid taxpayer action because "the claims against the State are based on matters that involve the exercise of discretion." State MPA at 17:5-6; *see id.* at 16:20-23. The State's argument fails because it is well established that taxpayer challenges are a proper vehicle for challenging unconstitutional conduct. *See, e.g.*, *Blair*, 5 Cal. 3d at 268-69 (taxpayer suit proper in constitutional challenge to claim and delivery law); *Wirin*, 48 Cal. 2d at 894-95, (taxpayer suit proper in constitutional challenge to practice of police conducting surveillance using concealed microphones); *Cent. Valley Chap. of 7th Step Found. v. Younger*, 95 Cal. App. 3d 212, 232 (1979) (taxpayer suit proper in constitutional challenge to state Attorney General's policy regarding dissemination of arrest records). Notably, in *Van Atta v. Scott*, 27 Cal.3d 424 (1980), a challenge to the constitutionality of San Francisco's pre-trial release and detention practices, the California Supreme Court held that the taxpayer challenge was appropriate. *Id.* at 443, 449-50.[18] This was so even though the underlying practices involved "the exercise of …discretion" by "judges charged with setting bail and deciding motions for own recognizance release[.]" *Id.* at 451.[19]

"actually effect[s] a saving of tax funds").

[18] *Van Atta*'s statements regarding permissible pretrial release conditions were based on language in the former bail provision of the California Constitution, which has been superseded by the current language of that constitutional provision. *In re York*, 9 Cal. 4th 1133, 1143 n.7 (1995). No intervening law supersedes its analysis of the taxpayer statute.

[19] *Humane Soc'y of United States v. State Bd. of Equalization*, 152 Cal. App. 4th 349, 353 (2007), on which Defendants rely, involved a strained effort to use the taxpayer action statute to challenge private conduct, based on the theory that the State Board of Equalization should not grant a particular sales tax exemption to farm equipment that was allegedly used on animals in a cruel fashion. *Id.* at 351-52. The court found section 526a not to apply because "even a cursory

V. PLAINTIFFS MAY SEEK WRIT RELIEF TO COMPEL THE STATE TO COMPLY WITH ITS MANDATORY CONSTITUTIONAL DUTY TO PROVIDE ASSISTANCE OF COUNSEL TO THE INDIGENT ACCUSED.

Defendants offer two arguments why writ relief is unavailable. Both are meritless.

First, Defendants contend that Plaintiffs do not seek to enforce any ministerial duty and therefore writ relief is inappropriate. But Plaintiffs raise claims under, *inter alia*, the state constitution. "The provisions of th[e State] Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Cal. Const., art. I, § 26. Our Supreme Court in *Jenkins v. Knight*, 46 Cal. 2d 220 (1956), therefore held that a writ was proper to compel the governor's compliance with the constitution because constitutional duties are mandatory, and thus "ministerial in character" for the purposes of a writ. *Id.* at 224.

Nor does the necessary exercise of some discretion in implementing mandatory constitutional duties alter this conclusion. In *Horn v. County of Ventura*, 24 Cal. 3d 605, 616, 618, 620 (1979), the plaintiff filed a petition for writ of mandate challenging the constitutionality of the county's procedures for notifying landowners of governmental conduct affecting their property interests. *Id.* at 610. The court held that the plaintiff stated a claim for writ relief (*id.* at 616, 620), even though the challenged conduct "involve[d] the exercise of judgment" and the court expressly "reject[ed] the concept that [the defendant's actions were] purely 'ministerial' acts[.]" *Id.* at 615. Similarly, in *Molar v. Gates,* 98 Cal. App. 3d 1, 25 (1979), the court held that because "defendants have a clear duty to respect" the constitutional equal protection right, mandamus is an appropriate remedy. There the plaintiff filed a petition for writ of mandate challenging the county defendants' practices and policies denying female inmates access to minimum security jail facilities. *Id.* at 6. The court's acknowledgement that county officials retained discretion in this area, *id.* at 20, 25, did not preclude it from granting mandamus relief to remedy a constitutional violation. *Id.* at 19, 23. Because the State Defendants have a mandatory duty to provide assistance of counsel that complies with minimum constitutional and statutory

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examination of appellants' complaint makes clear that it is not 'government conduct' that is at issue here but, rather, the conduct of *some* … poultry and egg producers[.]" *Id.* at 361. The court found this too "removed from *governmental action*, which is what section 526a is clearly directed at." *Id.* at 362 (emphasis added). Here, by contrast, governmental, not private, action is clearly at issue.

standards, mandamus is an appropriate remedy.

Defendants also argue that mandamus relief is not available against the State of California. State MPA at 15:4, 6-9. The case upon which Defendants rely notes that even though the writ cannot issue against the State, the petition naming the State would be construed as "seeking a writ against the appropriate *officers or agents* of the state." *Cty. of San Diego v. State*, 164 Cal. App. 4th 580, 593 n.12 (2008) (emphasis added). The court may do the same here.[20]

Plaintiffs have therefore stated a claim for writ relief under counts one through eight.[21]

VI. THE GOVERNOR HAS A DUTY TO ENSURE THAT THE LAWS PERTAINING TO INDIGENT DEFENDANTS' RIGHT TO COUNSEL ARE FAITHFULLY EXECUTED.

The State Defendants contend that the Governor has no legal duty in this matter. State MPA at 17-18. However, the Governor has a duty to "see that the law is faithfully executed." Cal. Const. art. V, § 1. By virtue of his office, the Governor must ensure that the law pertaining to indigent defendants' right to assistance of counsel is faithfully executed. Because of the Governor's role as the State's chief executive, the Governor is routinely named as a defendant in constitutional challenges. *See, e.g., Hotel Employees & Rest. Employees Int'l Union v. Davis*, 21 Cal. 4th 585, 615-16 (1999); *Raven v. Deukmejian*, 52 Cal. 3d 336, 340 (1990); *California Corr. Peace Officers' Ass'n v. Schwarzenegger*, 163 Cal. App. 4th 802, 808-09 (2008); *Bd. of Admin. v. Wilson*, 52 Cal. App. 4th 1109, 1117-18, 1164 (1997).[22]

The State cites *Nagle v. Superior Court*, 28 Cal. App. 4th 1465, 1468 (1994), for the proposition that allowing the governor to be a named defendant in every case would severely

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[20] If the court sustains the demurrer against the State to the writ petition, Plaintiffs Phillips and Estrada's requests as taxpayers for injunctive and declaratory relief would be unaffected.

[21] The State's claim that writ petition is not properly verified does not support a demurrer. State MPA at 15:24-28. The statutes cited by the State merely stand for the proposition that evidence in support of the application for a writ must be made based on personal knowledge. But this does not apply at the pleading stage: "A person verifying a pleading need not swear to the truth or his or her belief in the truth of the matters stated therein but may, instead, assert the truth or his or her belief in the truth of those matters 'under penalty of perjury.'" Cal. Civ. Proc. Code §446. This provision applies to a Petition for Mandamus. *See id.* § 1109.

[22] Other state court cases involving the systemic denial of counsel have found the governor to be an appropriate defendant. *See, e.g., Luckey v. Harris*, 860 F.2d 1012, 1013, 1016, 1018 (11th Cir. 1988); *Hurrell-Harring v. State of New York*, 930 N.E.2d 217, 225-26 (N.Y. 2010).

impede his everyday business. State MPA at 18:1-5. But *Nagle* does not state that government officials cannot be named in litigation. Rather, *Nagle* only was concerned with the time it takes "top governmental executives" to be deposed. 28 Cal. App. 4th at 1467. Plaintiffs do not seek to depose the Governor, and *Nagle*'s implicit assumption that "top governmental executives" are proper defendants confirms that the Governor may be named here. *See* Cal. Const., art. V, § 1 ("The supreme executive power of this State is vested in the Governor.").[23]

VII. CONCLUSION

For the foregoing reasons, the State's demurrer should be denied.

DATED: October 21, 2015

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[23] Finally, that the governor is a proper defendant in this lawsuit does not make him a proper defendant in every lawsuit as the State suggests, *see* State MPA at 18:9-10, since this is an unusual case in which the State has a constitutional duty and has failed to designate any state official or agency to ensure that right is provided.