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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 DEFENDANT COUNTY OF FRESNO'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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INTRODUCTION

Plaintiffs bring this case to remedy the systemic violation of the right to counsel of indigent defendants in Fresno County (the "County"). The Complaint alleges with specificity the numerous structural deficiencies in Fresno's broken public defense system, including excessive public-defender caseloads and the pressure on defenders to secure plea agreements in the face of an overwhelming workload. As a result of these deficiencies, public defenders have little to no time to consult with their clients individually before these clients face the weighty decision of whether or not to take a guilty plea; factual investigations into guilt or innocence are rarely conducted; cases are rarely brought to trial; and indigent defendants feel compelled to plead guilty to crimes that they did not commit.

In response to these allegations, the County resorts to a number of arguments that rest on serious errors of law and on obvious mischaracterizations of Plaintiffs' claims, as well as extrinsic evidence not properly considered on a demurrer. ***First***, throughout its demurrer, the County erroneously relies on the ineffective assistance of counsel standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), in arguing that Plaintiffs have not stated a claim for relief. But *Strickland* simply does not apply here because Plaintiffs do not seek to overturn individual criminal convictions. Rather, Plaintiffs allege that Fresno's indigent defense system suffers from structural deficiencies resulting in denial of the right to counsel and that they are entitled to systemic, prospective relief—a claim that courts across the country have held as distinguishable from a *Strickland* challenge. *See, e.g., Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir 1988).

Second, contrary to the County's assertion, this case is not about the County's discretionary authority over budgetary matters. Notwithstanding its discretion to decide budgetary issues, the County also has a mandatory duty to comply with the United States and California Constitutions, including the obligation to provide adequate legal representation to indigent defendants. The County cannot evade its constitutional obligations merely because complying with them could have fiscal implications. *See, e.g., Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 392 (1992).

Third, the County ignores the governing legal standard on a demurrer. The County calls into question the "truth" of Plaintiffs' allegations and goes so far as to introduce extrinsic evidence to create fact disputes that cannot be decided on demurrer. At this stage, the County is deemed to have admitted Plaintiffs' allegations. The County cannot evade this legal standard through its improper request for judicial notice. *See* Plaintiffs' Opposition to Requst for Judicial Notice (Opp. to RJN).

In sum, the Complaint sufficiently alleges that numerous systemic problems pervade the County's public defense system, resulting in devastating long-term consequences to indigent defendants and their families in Fresno and violation of their constitutional rights. Plaintiffs respectfully request that the Court deny the demurrer in its entirety.

FACTUAL ALLEGATIONS

Plaintiffs' Complaint and Verified Petition for Writ of Mandate ("Complaint") alleges that 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 in violation of federal and California constitutional guarantees of due process and the right to counsel, and the constitutional and statutory rights to a speedy trial and hearing.

First, attorneys in the Office carry impossible caseloads. In fiscal year 2013-2014, the Office's felony attorneys carried an average caseload of 612 cases per year, or 418 cases if cases for violations of supervised release conditions are excluded. Compl. ¶¶ 4, 50. Misdemeanor attorneys carried an average of 1,462 cases, or 1,375 excluding supervised-release cases. *Id.* ¶¶ 4, 52. Using the National Advisory Commission on Criminal Justice Standards and Goals ("NAC") caps as an illustrative benchmark, the average felony public defender carries a caseload that should be handled by three to four attorneys, and each misdemeanor public defender carries a caseload that should be handled by nearly four attorneys. *Id.* ¶ 51.[1]

[1] Fresno suggests the positions added since the 2013-2014 fiscal year resolved the Office's understaffing. Fresno County Mem. P. & A. in Supp. of Dem. at 3:19-27 ("County MPA"). Even if these extrinsic facts were properly subject to judicial notice, *but see* Opp. to RJN at 8-10, *and* assuming that the budgeted positions have been filled, *and* that the additional non-level I attorneys took on full felony caseloads as opposed to other matters, there still would be only 20 misdemeanor attorneys and 33 felony attorneys for an average of 42,000 cases per year. *See* Fresno County Request for Judicial Notice Exs. L& P ("County RJN"). This does not undermine

Second, Fresno utilizes case management practices that create conflicts of interest for attorneys. When a lawyer has too many cases to fulfill her duties to existing clients, she has an ethical obligation not to accept additional cases, or, if necessary, to withdraw from representing existing clients. *Id.* ¶ 57. But the Office's policy prohibits attorneys from withdrawing from representing existing clients and actively discourages them from declining new matters, even when doing so is necessary to meet obligations to existing clients and thus ethically required. *Id.* ¶ 58. Attorneys in the Office also face pressure to secure plea agreements and to process cases quickly without engaging in motion practice, conducting an adequate factual investigation, or exploring viable legal defenses. *Id.* ¶ 54.

Third, Fresno's indigent defense system provides inadequate resources for attorney training, investigative and other support staff, or access to facilities where clients can have private conversations with their attorneys. *Id.* ¶¶ 69, 75, 78-79, 82. The Fresno County Board of Supervisors ("the Board") has consistently starved the Office of the resources it needs. *Id.* ¶¶ 2, 3, 4, 36, 82, 83. Indeed, the District Attorney's Office has a budget almost double that of the Public Defender's Office. *Id.* ¶ 85.

Fourth, Fresno's indigent defense system suffers from a lack of adequate supervision and oversight at multiple levels. Supervisors within the Office, overburdened by their own responsibilities, have little opportunity to support, monitor, or evaluate junior attorneys, who are often assigned to handle serious cases far beyond their experience level. *Id.* ¶¶ 75, 95.

These systemic deficiencies collectively disable Fresno's indigent defense system from delivering adequate legal representation, and have devastating consequences to indigent persons facing criminal prosecution. This is apparent at every stage of a defendant's proceedings.

The Office routinely accepts new cases, even when 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. For example, one case was

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Plaintiffs' allegations about excessive caseloads. Indeed, it simply reinforces those allegations. Using the NAC caps as a benchmark, the average Fresno felony public defender would be carrying a caseload that should be handled by three to four attorneys (3.7), and each misdemeanor defender would be shouldering the caseload of more than two attorneys (2.2).

continued for 92 days, simply because no attorney was available. *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. For example, in the case of Plaintiff Peter Yepez, from arraignment until sentencing, he was represented by nine different public defenders who repeatedly told him they did not have time to work on his case. *Id.* ¶ 100.[2] Indeed, attorneys rarely have time to meet with their clients outside of court. *Id.* ¶ 67. 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, where there are no private rooms to conduct attorney-client conversations, meaning that those conversations can be overheard by others. *Id.* ¶ 69. Public defenders, facing pressure to 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 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.

The collective result of these systemic problems is that indigent defendants and their families suffer grave consequences, including wrongful convictions; unnecessary or prolonged

[2] Indeed, no attorney conducted an initial factual interview with Plaintiff Yepez until September 2014, nearly a year after he had been arrested and appointed counsel; by the time of the interview, he had difficulty remembering the facts surrounding the charges. *Id.* ¶ 101. Plaintiff Yepez eventually pled guilty to a charge including a violent-felony enhancement for burglary even though the police report contains no factual basis to support the enhancement. *Id.* ¶¶ 103-105.

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 knowledge and awareness of the full, collateral consequences of the pleas; harsher sentences than the facts of the case warrant; few alternatives to incarceration; and waiver of the right to appeal and other post-conviction rights. *Id.* ¶ 98; *see id.* ¶¶ 6, 17.

LEGAL STANDARD

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. *See Gervase v. Superior Court,* 31 Cal. App. 4th 1218, 1224 (1995); *Gutkin v. Univ. of S. Cal.,* 101 Cal. App. 4th 967, 976 (2002). "[T]he allegations of the complaint must be liberally construed." *See King v. Central Bank,* 18 Cal. 3d 840, 843 (1977); *see also* Cal. Civ. Proc. Code, § 452. In ruling on a demurrer, the trial 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). Indeed, a demurrer does not test the truth of the factual allegations in the pleadings or the pleader's ability to prove these allegations. *Cundiff v. GTE Cal, Inc.,* 101 Cal. App. 4th. 1395, 1404-05 (2002). "All presumptions, inferences, and doubtful questions must be construed most favorably to the plaintiff's case." *Hawley v. Orange Cty. Flood Control Dist.*, 211 Cal.App.2d 708, 713 (1963). 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).

No evidence extrinsic to the pleading can be considered on a demurrer, except matters that are properly the subject of judicial notice. *Bach v. McNelis,* 207 Cal. App. 3d 852, 864 (1989). Throughout its demurrer, the County improperly relies on extrinsic evidence to dispute Plaintiffs' allegations. *See Rodas v. Spiegel*,87 Cal. App. 4th 513, 517 (2001) (on a demurrer "all material facts pleaded in the complaint and those that arise by reasonable implication, but not conclusions of fact or law, are deemed admitted by the demurring party"). Plaintiffs address this in their Opposition to Defendant's Request for Judicial Notice, rather than in this memorandum.

ARGUMENT

I. PLAINTIFFS STATE A CLAIM THAT FRESNO'S BROKEN PUBLIC DEFENSE SYSTEM VIOLATES THE CONSTITUTIONAL GUARANTEE TO COUNSEL.

Counts 1-5 and 9 allege that the County has violated its duty to provide assistance of counsel that satisfies minimum constitutional and statutory standards. Where, as here, structural deficiencies collectively result in a systemic failure to provide minimally sufficient legal representation, prospective relief is warranted. Plaintiffs first address the governing legal framework for this claim and then explain why the Complaint states a claim for systemic relief.

A. Constructive Denial Of Counsel Exists When Structural Deficiencies In A Public Defense System Collectively Result In A Regular Failure To Provide Assistance Of Counsel That Satisfies Minimum Constitutional Standards.

The federal and state constitutions and state 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. Two aspects of the legal doctrine are relevant here. ***First***, the right to counsel requires more than the formality of an appointed attorney; the legal representation provided must satisfy certain minimum standards. ***Second***, this right can be vindicated in a suit for prospective systemic relief where structural deficiencies in an indigent defense system constructively deny the assistance of counsel.

1. Fresno Has a Duty to Provide Assistance of Counsel that Satisfies Minimum Constitutional and Statutory Standards.

The County has a duty to provide actual, not merely token, legal representation to indigent defendants.[3] 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); *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,*

[3] The County does not dispute that it bears this duty, and any such argument would be meritless. *See, e.g., Phillips v. Seely,* 43 Cal. App. 3d 104, 115 (1974).

466 U.S. 648, 654, 656 (1984); *Avery v. Alabama,* 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. Ala.,* 287 U.S. 45, 57 (1932); *see 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 that the attorney do everything necessary to be competent. *See Powell,* 287 U.S. at 57-58. 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.

In *Gideon,* the U.S. Supreme Court held that our nation's criminal justice system requires that indigent defendants be provided with legal representation. *Gideon v. Wainwright,* 372 U.S. 335, 342 (1963). To make good on *Gideon*'s promise, 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.* at 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 found, 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. Based on those facts, the Court held 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.* at 1131.

Numerous other courts have also held that prospective relief is appropriate to remedy systemic violations of the right to counsel.[4, 5]

3. *Strickland* Does Not Apply to Suits for Systemic Relief.

In its demurrer, the County ignores the long line of case law holding that structural deficiencies give rise to a right to counsel claim, and instead erroneously relies on *Strickland* to make legal and factual arguments that the Complaint is demurrable. These arguments are wide of the mark, and should be rejected.

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[4] *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 the 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 prosecutors); *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*").

[5] Cases recognizing claims for systemic relief have generally done so on the basis of the federal right to counsel. The California Constitution's right to counsel provides an independent ground for recognizing this claim. That 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 (1963)), *Mills v. Mun. Ct.,* 10 Cal. 3d 288, 301 (1973).

First, the County contends that Plaintiffs have failed to state a claim under *Strickland* because they cannot overcome "the strong presumption" that the counsel Fresno provides is reasonable and have not shown that any particular indigent defendant suffered prejudice. County MPA at 14-15. But *Strickland* is the wrong legal standard because this case seeks systemic prospective relief, not to overturn any individual past conviction. *See Luckey*, 860 F.2d at 1017.

Under *Strickland*, an individual seeking to overturn a conviction must satisfy a two-part test: that counsel's performance was deficient and the defendant suffered prejudice as a result. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). The Supreme Court explained that, in a case that collaterally attacks a conviction, deferential review of counsel's performance is appropriate to promote, among other things, the finality of judgments. *Id.* at 690. Similarly, the "prejudice" prong is tailored to the unique relief sought—"setting aside the judgment of a criminal proceeding." *Id.* at 691. In other words, *Strickland*'s test for ineffective assistance of counsel claims was formulated to address the specific remedy of overturning a conviction.

In contrast, where, as here, Plaintiffs seek to vindicate the right to counsel through purely prospective relief, courts consistently hold 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").[6] In suits such as this one, "the state's weighty interest in the finality of a specific criminal judgment is not involved." *Simmons*, 791 N.W. 2d at 76-77. Accordingly, "instead [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 p. 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

[6] *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 Georgia Constitution "need not 'establish that ineffective assistance was inevitable for each of the class members'") (citation omitted).

holding that "[t]he appropriate test … is … whether counsel so appointed are 'reasonably likely to render...reasonably effective assistance'") (citation omitted).

The County's second mistake is asserting that the purportedly low number of *Strickland* appeals arising out of Fresno Superior Court "contradict" Plaintiffs' allegations of systemic constitutional failures. However, the factual basis for that conclusion—the County's review of Fifth District Court of Appeal opinions and the County's conclusion that the court found counsel ineffective in only a few criminal appeals, County MPA at 11:23-24; Req. for Jud. Notice ¶ 2; Decl. in Supp. of Fresno's Suppl. Req. for Jud. Notice ¶¶ 4-9, 11-15,—is procedurally improper and legally irrelevant. Defendant cannot introduce extrinsic facts to dispute the allegations of the Complaint on a demurrer through the "guise" of its improper request for judicial notice. *See Bach*, 207 Cal. App. 3d at 864; *Fremont Indem. Co v. Fremont Gen. Corp.,* 148 Cal. App. 4th 97, 113-14 (2007); *see* Opp. to RJN at 5-6, 14-15. In any event, the success rate of *Strickland* claims has no bearing as Plaintiffs do not seek to overturn any convictions. Moreover, measuring adequacy of counsel by looking at *Strickland* claims at the appellate level overlooks the fact that *Strickland* claims generally are not brought on appeal because they are not issues preserved at trial. Rather, they typically are brought through habeas corpus—*i.e.*, after the appellate stage and at a stage when non-capital defendants have no right to appointed counsel who might identify trial counsel's inadequacies. *See People v. Adkins,* 103 Cal. App. 4th 942, 950-51 & n.5 (2002).

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

As explained in detail in the Complaint, Fresno's indigent defense system suffers from systemic deficiencies: excessive caseloads, case management practices that create conflicts of interest for attorneys, inadequate resources, and inadequate supervision. These deficiencies "collectively result in the constructive denial of counsel" and cause Fresno's indigent defense system to provide representation that falls below minimum constitutional and statutory standards. Compl. ¶ 41; *accord, Wilbur*, 989 F. Supp. 2d at 1126 ("myriad factors … determin[e] whether a system of public defense provides…the assistance required by the Sixth Amendment").[7]

[7] Plaintiffs allege that these deficiencies "*collectively* result in the constructive denial of counsel." Compl. ¶ 41 (emphasis added). The County's argument that Plaintiffs have failed to state a claim

1. The Complaint Alleges in Detail that Fresno's Indigent Defense System Suffers from Structural Deficiencies.

Fresno's indigent defense system suffers from the following structural deficiencies:

Excessive caseloads. Fresno public defenders carry crushing caseloads of over 600 cases per year for felony attorneys and over 1,400 for misdemeanor attorneys. Compl. ¶¶ 4, 50, 52. These caseloads are three to four times the maximum caseload caps set by the National Advisory Commission on Criminal Justice Standards. *Id.* ¶ 51.[8] Irrespective of these guidelines, even a common-sense analysis demonstrates that these caseloads are too high. 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. In other systemic denial-of-counsel cases, courts have recognized 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").

In response to these staggering numbers, the County contends that Plaintiffs' claims are "speculative" because caseloads may somehow change in the future. County MPA at 16:7-17:8, 22:14-16. But wishful thinking does not support a demurrer. Equally meritless is the County's complaint that Plaintiffs have not included allegations about caseloads in other jurisdictions. County MPA at 9:1, 8-9. Such information has no bearing on whether public defenders in Fresno face structural barriers to delivering constitutionally adequate representation.

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because violation of any one standard does not amount to a deprivation of the right to counsel does not address the totality of the problems. *Cf.* County MPA at 8:15-22, 9:6-7.

[8] Although the County repeatedly dismisses the significance of these professional guidelines as "academic" without citing any legal authority to support its argument, *see, e.g.,* County MPA at 8, the U.S. Supreme Court has expressly and repeatedly relied on such standards as evidence that counsel's performance is deficient. *See, e.g., Padilla v. Kentucky,* 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).

Case management practices that create conflicts of interest for attorneys. As alleged in detail in the Complaint, Fresno public defenders labor under several case management practices that pressure defenders to handle cases in a particular fashion—rather than the client's best interest—and which create an inherent conflict. *See Wilbur,* 989 F. Supp. 2d at 1128 (finding the indigent defense system adopted "case management procedures" that failed to "provid[e] an opportunity for a representational relationship to develop" or to "follow[] up as appropriate given the facts of each case"). Specifically, written departmental policy discourages attorneys from complying with their ethical obligations, Compl. ¶ 58., and effectively neutralizes any "safety valve" existing under Penal Code § 987.2. It is axiomatic that where a lawyer 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 existing clients so she can effectively represent the remainder. *In re Edward S.,* 173 Cal. App. 4th 387, 414 (2009). But 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 ("Unavailability *shall not be declared* in any …on-going attorney-client relationship") (emphasis added). Departmental policy also creates strong disincentives for attorneys to decline new cases.[9] Fresno public defenders thus have no meaningful way to address excessive caseloads, even when caseloads interfere with their ability to interview clients or conduct legal and factual research. *Id.* ¶¶ 58-59.[10]

[9] Departmental policy requires that attorneys, who are at-will employees, must first request redistribution of cases to peers and only if that is not feasible, to seek approval from at least two layers of management. *Id.* ¶¶ 59-60.

[10] The County seeks to "contradict[]" Plaintiffs' allegations regarding departmental policy by asserting that the Public Defender declared unavailability (and thus declined representation) in 59 cases under Penal Code § 987.2. County MPA at 5:17-21. The County contends § 987.2 serves as a "Sixth Amendment backstop." *Id.* at 14:22-24. Even if on demurrer the County could dispute allegations based on its improper request for judicial notice, *see* Opp. to RJN at 3-5, this argument misses the point. There is no contradiction between the written policy and these alleged 59 declarations of unavailability, since the proposed record for judicial notice does not indicate that any of these cases pertained to existing Public Defender clients. *See* County RJN, Ex. A. Moreover, even if the Office filed 59 declarations of unavailability, that would underscore the inadequacy of Penal Code § 987.2 as any kind of "Sixth Amendment backstop." Declining 59 cases in a single year would reduce the Office's overall caseload by 0.14%. *See* Compl. ¶ 78 (Public Defender's Office handles more than 42,000 cases per year).

In addition, public defenders face "pressure to process cases quickly" and "to secure plea agreements." Compl. ¶¶ 54, 80. In fiscal year 2013-2014, only 0.19% of cases—far below the statewide average—went to trial. *Id.* ¶ 87 (statewide, 2.29% of felonies and 1.02% of misdemeanor cases go to trial). The Public Defender's inability to credibly threaten to take cases to trial means that clients routinely are forced to accept pleas that do not reflect the merits of their cases. *Id.* That is exactly the type of "systemic deficienc[y]" the Court in *Luckey* held sufficient to state a claim. *Luckey*, 860 F.2d at 1018 (identifying as a "systemic deficienc[y]" the "pressure on attorneys to hurry their clients' case to trial or to enter a guilty plea.") *Id.* at 1013.

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, and 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). The inadequacy of resources provided to the Fresno Public Defender's Office must also be viewed in context. In fiscal years 2014-2015 and 2015-2016, the Office's budget amounted to just under *half* that of the District Attorney's budget. Compl ¶ 85; *see Wilbur*, 989 F. Supp. 2d at 1127 ("Court must also take into consideration the resources available to the other side").

Inadequate supervision. Fresno public defenders also receive "inadequate supervision." *Luckey*, 860 F.2d at 1013. Supervisors have little time to monitor, evaluate, or ensure the quality of representation, and formal attorney evaluations and feedback are rare. Compl. ¶ 95.

2. The Complaint Adequately Alleges that 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, indigent defendants in Fresno 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. Ala.,* 287 U.S. 45, 59 (1932) (counsel must have "opportunity to acquaint himself with the facts or law of the case") (citation omitted); *People v. Fontana*, 139 Cal. App. 3d 326, 333 (1982) ("A criminal defendant is entitled to a prepared counsel").

With only a few hours to devote to each case, Fresno public defenders simply cannot satisfy the minimum constitutional requirement to adequately prepare their clients' cases. They face enormous pressure to secure pleas without conducting legal or factual investigation. *Id.* ¶ 54. Actually interviewing the client is a luxury, not a staple. *Id.* ¶ 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 go to trial, counsel routinely lacks the time to prepare due to competing demands. *Id.* ¶¶ 87-88. The "unmanageable caseloads" in Fresno "directl[ly] result" in public defenders "not properly prepar[ing]." *Nicholson*, 203 F. Supp. 2d at 255.

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. "[A] conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing." *In re Edward S.*, 173 Cal. App. 4th 387, 414 (2009). These conflicts manifest in unfortunate but predictable ways. For example, public defenders have limited time to meet with their clients or discuss the specific facts of their cases. Compl. ¶¶ 66-71. Because there is an insufficient number of investigators, attorneys forgo requesting investigations in some cases, to avoid burdening the investigation of others. *Id.* ¶ 79. Public defenders have waived clients' right to a speedy trial, simply because no attorney was available to work on the matter. *Id.* ¶ 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). Because of excessive caseloads, public defenders effectively are assigned to courtrooms, not cases. As a result, indigent defendants often are assigned to different public defenders at each court appearance and little to no work is performed on cases between court hearings. *Comp.* ¶ 63. In other words, indigent defendants are deprived of continuous representation during "the most critical period of the proceedings," the time between "arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important." *Powell v. Ala.*, 287 U.S. 45, 57 (1932).

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).[11] "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 as a result of excessive caseloads and inadequate resources, Fresno public defenders lack the time or physical space to meet individually or confidentially with clients.

Heavy caseloads frequently preclude attorneys from meeting with clients other than at court hearings. Compl ¶ 69. Approximately 79% of the Public Defender's felony clients in pre-trial detention did not receive a legal visit in one sample period. *Id.* ¶ 68.[12] Even when attorneys and clients meet at the courthouse, the opportunity for individual consultation is minimal: on days

[11] *See also* Cal. Bus. & Prof. Code § 6068(e) & (m); Cal. Rules Prof. Conduct Rs. 3-100 & 3-500; *Avery v. State of Ala.*, 308 U.S. 444, 446 (1940) ("opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense" is necessary to ensure "appointment of counsel" is not "a sham").

[12] The County questions whether this allegation is "true" and encourages the Court, with no citation to authority, to "dismiss the allegation." County MPA at 10:23-25. Plaintiffs allegations, however, "are deemed admitted by the demurring party." *Rodas v Spiegel*, 87 Cal. App. 4th 513, 517 (2001).

they are assigned to court, misdemeanor attorneys see between 60 to 80 clients a day and felony attorneys 40 to 50. Compl. ¶¶ 64, 66. Misdemeanor attorneys often provide "group" advice in which they explain charges and plea deals to groups of up to 15 clients, who must then decide whether to accept plea deals based on that limited and not individualized consultation. *Id.* ¶ 71.

Confidentiality is compromised due to the absence of private client interview rooms. In fact, communications often occur in earshot of other defendants, the judge, and even the district attorney. *Id.* ¶¶ 69-70.

Interference with competent representation. The 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); *see, e.g., Padilla v. Ky.,* 559 U.S. 356, 364, 374 (2010) (counsel ineffective in failing to advise non-citizen client as to immigration consequences of guilty plea). To provide competent representation, attorneys must be assigned cases commensurate with their experience. To keep current in the field, attorneys need ongoing training.

Inadequate resources for training and support staff and case management practices that assign Fresno public defenders to cases beyond their experience level all interfere with counsel's ability to provide competent representation. Inadequate supervision compounds the problem.

The Public Defender's Office routinely assigns very junior attorneys high-stakes, complex life imprisonment and three strikes cases, among others. Public defenders receive little to no support from their supervisors, who are themselves overburdened, and thus have minimal time to monitor, evaluate, and ensure meaningful representation is delivered. *Id.* ¶ 95. According to an assessment by the County, 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.[13]

In 2013, the union representing public defenders wrote a letter raising strong concerns about structural deficiencies such as excessive caseloads and case management practices that

[13] The County attempts to create yet another fact dispute here regarding the resources available for training. County MPA 6:14-21. But, once again, it relies on its improper request for judicial notice and ignores the legal standard on demurrer. *See* Opp. to RJN at 8.

assign attorneys to cases beyond their experience level. Compl. ¶¶ 60, 75 & Exh. B. The letter, signed by over 80% of the public defenders, warned "all of the undersigned attorneys are hereby giving notice that we are at risk of being ineffective in representing our clients due to excessive caseloads, shortage of investigators, legal assistants and office assistants." *Id.* ¶ 53 & Exh. B at 2. Neither the Office's management nor the Board of Supervisors responded. *Id.* ¶ 97.

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); *People v. Jones*, 186 Cal. App. 4th 216, 238 (2010) ("[B]efore counsel undertakes to act," he must "make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation.") (citations and quotations omitted).

But because the Fresno Public Defender has inadequate resources for investigation, cases are not adequately investigated. *Luckey*, 860 F.2d at 1013, 1018 (identifying "inadequate resources" as "systemic deficienc[y]"). Although the Office handles more than 42,000 cases a year, its most recent budget provided for only 14 investigators. Compl. ¶ 78. Assuming an even distribution of cases, each investigator must handle 3,000 cases a year.[14] Attorneys often forgo even submitting an investigation request because of limited resources. *Id.* ¶ 79. In many instances, clients plead guilty without a factual interview with anyone from the Office. *Id.* ¶ 80.

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).

Excessive caseloads, lack of adequate resources, and case management practices that pressure 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"). Pre-trial motion practice is rare.[15]

[14] The County suggests that the increase in budgeted investigator positions from 9 to 14 is sufficient. County MPA at 4:3-7. However, assuming those positions are filled, if investigators work 40 hours a week, every single week of the year, with no days off whatsoever, they can spend an average of 0.7 hours investigating each matter.

[15] The County disputes allegations regarding the numbers of motions to suppress filed. County

The lack of adequate resources is especially troubling given the District Attorney's budget is approximately *double* that of the Public Defender. Compl. ¶ 85; *Wilbur*, 989 F. Supp. 2d at 1127 (in evaluating systemic deficiencies, court must "take into consideration the resources available to the other side"). If Fresno public defenders cannot credibly threaten to subject the prosecution to meaningful adversarial testing, *i.e.*, to engage in motion practice and take cases to trial, indigent defendants lack any assurance that their plea deals reflect the merits of their cases. Compl. ¶ 87.

* * *

Plaintiffs' allegations state a claim against Fresno County under Counts one through five and nine for systemically depriving Fresno County indigent defendants of assistance of counsel. Fresno's indigent defense system suffers from structural deficiencies—excessive caseloads, case management practices that create conflicts of interest for attorneys, inadequate resources, and inadequate supervision—that collectively and foreseeably cause the system to deliver representation that falls below minimum constitutional and statutory standards.

Fresno argues that Plaintiffs' claims rest on six examples of Sixth Amendment violations, County MPA at 15-16, but that is incorrect. Plaintiffs' case is premised on the structural deficiencies discussed above, and the examples are merely illustrative. *Rizzo v. Goode*, 423 U.S. 362 (1976), is thus factually distinguishable because plaintiffs there predicated their claim for equitable relief on individual instances of misconduct that—unlike the structural deficiencies here—were not tied to anything systemic. *Id.* at 371. The County's reliance on *Rizzo* is also misplaced because *Rizzo* turned on federalism concerns posed by federal court oversight of a local police department. *Id.* at 380. This *state* court suit for equitable relief raises no such concern.[16]

MPA 5:8-16. Again, the County cannot prevail on this demurrer by manufacturing fact disputes through its improper request for judicial notice. *See* Opp. to RJN at 3-5; *Fremont Indem. Co.*, 148 Cal. App. 4th at 115. In any event, even if the County's numbers are correct, that would confirm that pre-trial motions are rare. Since the Office handles over 42,000 cases yearly, Compl. ¶¶ 27, 65 misdemeanor and 17 felony motions hardly suggest a robust adversarial process.

[16] The County's demurrer lists Plaintiffs' speedy trial claims (Counts six through eight) but its memorandum in support entirely fails to address these claims. Any argument by the County as to these claims is therefore waived. *Wurzl v. Holloway*, 46 Cal. App. 4th 1740, 1754 n.1 (1996). In any event, Plaintiffs have stated a claim for violation of speedy trial and hearing rights for the reasons stated in Plaintiffs' Opposition to the State Defendants' Demurrer. *See* at 19-21.

II. THIS COURT HAS AUTHORITY TO REMEDY THESE CONSTITUTIONAL AND STATUTORY VIOLATIONS.

The County contends that separation of powers principles prevent this Court from issuing a remedy that would affect the Board's budgetary process. *Cf.* County MPA at 17-18. But it is well established that the judiciary is vested with equitable authority to remedy constitutional wrongs, even when the remedy has fiscal implications.

Corenevsky v. Superior Court, 36 Cal. 3d 307, 326 (1984), is on point. There, an indigent defendant sought funding for ancillary services based on his constitutional right to counsel, and the Supreme Court expressly rejected the separation of powers argument the County makes here. The Court held that "compliance with the court order in this case—even if it requires disbursal of funds in excess of specific appropriations—does not violate, but sustains, the separations of powers doctrine. The right to such funds is …compelled by the Constitution…." *Id.* at 326.

Courts addressing systemic denial of counsel claims have also rejected the argument that separation of powers principles preclude judicial relief. *See, e.g., Simmons v. State Pub. Defender.* 791 N.W.2d 69, 85-86 (Iowa 2010); *Duncan v. State,* 774 N.W.2d 89, 98 (Mich.Ct. App. 2009); *Hurrell-Harring v. State,* 930 N.E.2d 217, 227 (N.Y. 2010).

The cases on which the County relies do not support its position, but, even if they did, they would have to yield to *Corenevsky. Hicks v. Board of Supervisors*, 69 Cal. App. 3d 228 (1977), held that "the judiciary has no control" over "adoption of a county budget" but it limited its holding to circumstances in which "constitutional limits are not exceeded." *Id.* at 235. *County of Butte v. Superior Court*, 176 Cal. App. 3d 693 (1985), involved a dispute between the executive and legislative branches—a sheriff challenged the board of supervisors' budget cuts to his department. By contrast, in this case, the Court would not be interloping into a dispute between the elected branches; instead, it would be exercising its duty to adjudicate constitutional rights. *See Corenevsky*, 36 Cal. 3d at 326. *Citizens for Jobs & the Economy v. County of Orange*, 94 Cal. App. 4th 1311 (2002), is not on point. That case questioned whether an initiative intrudes

on the domain of the board of supervisors; it did not question whether the court has authority to issue equitable remedies for constitutional violations.[17]

III. PLAINTIFFS MAY BRING A TAXPAYER SUIT TO CHALLENGE THE COUNTY'S UNCONSTITUTIONAL CONDUCT.

California Code of Civil Procedure § 526a gives taxpayers standing to sue state and local government officials to prevent them from violating the law. The County's misguided effort to characterize this suit as interfering with the County's discretion ignores the fact that it has a mandatory duty to comply with the U.S. and California Constitutions and state laws.

It is well established that taxpayer challenges are a proper vehicle for challenging unconstitutional conduct. *See, e.g., Blair v. Pitchess*, 5 Cal. 3d 258, 268-69 (1971) (taxpayer suit proper in constitutional challenge).[18] Notably, in *Van Atta v. Scott,* 27 Cal. 3d 424 (1980), the California Supreme Court held that a taxpayer had standing to "challenge[] the constitutionality of [San Francisco's] pre-trial release and detention practices." *Id.* at 452.[19] The Court reached this holding 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.

San Bernardino County v. Superior Court, 239 Cal. App. 4th 679 (2015), on which the County relies, is not to the contrary. There, the court held that a taxpayer could not challenge the County's failure to bring a lawsuit to void a settlement agreement it had previously entered into.

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[17] Fresno invokes fiscal concerns to excuse its systemic failure to provide adequate assistance of counsel to indigent defendants. County MPA 17:25-26. But a lack of funds does not justify what is otherwise a constitutional violation. *E.g., Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 392 (1992) ("Financial constraints may not be used to justify the creation or perpetuation of constitutional violations"); *Stone v. City and Cty. of San Francisco*, 968 F.2d 850, 858 (9th Cir. 1992) ("The city argues that it faces a financial crisis that prevents it from funding these programs, but federal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights."); *Robbins v. Superior Court*, 38 Cal. 3d 199, 217 (1985) ("[F]inancial considerations cannot justify an infringement of a basic constitutional right absent a showing that no less onerous cost-cutting methods are available.").

[18] *See also Wirin v. Parker*, 48 Cal. 2d 890, 894-95 (1957) (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).

[19] *Van Atta*'s statements regarding permissible pretrial release conditions were based on language in the former bail provision of the California Constitution and 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.

Id. at 687. The taxpayers lacked standing, the court held, because "the County's decision (or lack thereof) with respect to bringing suit … is an exercise of discretion." *Id.* Here, by contrast, the County has a mandatory duty to comply with the U.S. and California Constitutions and state laws to provide indigent defendants with minimally adequate legal representation. Its discretion as to how to execute that duty does not negate its mandatory duty to do so.[20]

Because Plaintiffs allege that Fresno County expends public funds to maintain Fresno County's unconstitutional public defense system, *see* Compl. ¶ 115, they have stated a claim under § 526a. Although the County suggests that a taxpayer suit is unavailable because "plaintiffs allege that not enough money is devoted to public defense," County MPA at 25:11, "[i]t is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds." *Wirin*, 48 Cal. 2d at 894; *Blair*, 5 Cal. 3d at 269 ("county officials may be enjoined from spending their time carrying out" an unconstitutional statute, even though unconstitutional conduct "actually effect[s] a saving of tax funds").

IV. PLAINTIFFS MAY BRING A PETITION FOR WRIT OF MANDATE.

The County's procedural arguments as to why writ relief is unavailable are meritless.

A. Fresno County Has a Mandatory Duty to Provide Assistance of Counsel to Fresno County Indigent Defendants.

Fresno's assertion that a writ does not lie to enforce discretionary duties, County MPA at 13-14, mischaracterizes the nature of the County's duty and Plaintiffs' claims. The County has a mandatory duty to provide assistance of counsel that complies with minimum constitutional and statutory standards. Even where there is some degree of discretion in how to perform a constitutional duty, a writ of mandate will still lie to compel performance of that duty.

By its terms, "[t]he 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. The provisions of the state constitution that Plaintiffs seek to vindicate contain no such express words,

[20] *Thompson v. Petaluma Police Dep't*, 231 Cal. App. 4th 101 (2014), also cited by the County, supports Plaintiffs' position. There, the court found the taxpayer suit proper in a due process challenge to a city's policies and practices regarding impoundment of vehicles. *Id.* at 105-06.

and thus are mandatory duties that are properly the subject of a writ. *See Jenkins v. Knight*, 46 Cal. 2d 220, 224 (1956).

The fact that implementing mandatory constitutional duties involves some discretion does not 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 acknowledged that county officials have discretion in this area, *id.* at 20, 25, but nonetheless held that such discretion did not preclude mandamus relief to remedy a constitutional violation. *Id.* at 19, 23. Because Fresno County has a mandatory duty to provide assistance of counsel that complies with minimum constitutional and statutory standards, mandamus is an appropriate remedy.[21]

B. Plaintiffs Have no Adequate Alternative Remedy to this Writ.

The County contends that the writ is barred because Plaintiffs have alternative remedies. However, the alternative remedies identified by the County would provide only individual relief and are thus not an adequate alternative to the systemic remedy sought here. Further, while Plaintiffs have pled in the alternative claims for declaratory and injunctive relief, it is well established that mandate is proper against public entities regardless of whether declaratory and injunctive relief are also available.

[21] Even if this Court were to sustain the demurrer to the writ petition, Plaintiffs' taxpayer suit enforcing the same substantive rights would be unaffected.

First, the County argues that a writ may not issue because Plaintiff Yepez did not "exhaust" his remedy of filing a motion to relieve defense counsel based on ineffectiveness or a conflict of interest under *People v. Marsden*. County MPA at 20:11-12, 20-21. But an alternative remedy is adequate only if "it is capable of directly affording and enforcing the relief sought" in the writ. *Dufton v. Daniels*, 190 Cal. 577, 582 (1923). And avenues for individual recourse are not an adequate alternative in suits seeking systemic relief for "wholesale deficiencies." *See Knoff v. City and County of San Francisco*, 1 Cal. App. 3d 184, 199 (1969) (rejecting argument that taxpayers should have pursued individual challenges to assessments of their own properties in writ action challenging misconduct in tax assessor's office).[22]

As in *Knoff*, the petition here provides individual examples "as symptomatic of the much broader problem the action is designed to relieve." The action's purpose is not to relieve the Fresno County Public Defender as counsel in any particular case but "to bring about examination and correction of wholesale deficiencies in" Fresno's indigent defense system. Because a *Marsden* motion would provide relief only to the individual who filed it, that alternative is not "capable of directly affording" the *systemic* remedy sought here.

The County also suggests that Penal Code § 987.2—which authorizes a public defender to decline a case "because of conflict of interest or other reasons," by filing a declaration of unavailability—serves as a "Sixth Amendment backstop." County MPA at 14:22-24. This "remedy" is inadequate for at least three reasons. First, while it might provide *ad hoc* relief to some of the clients of an attorney who files a declaration of unavailability (by limiting that attorney's caseload somewhat), it provides no relief to the clients of attorneys who do not file declarations of unavailability and does nothing to address the structural deficiencies present in Fresno's indigent defense system. *See supra* at 12. Second, Penal Code section 987.2 does not provide adequate individual relief because indigent defendants have no control over whether their

[22] *See also Venice Town Council, Inc. v. City of Los Angeles*, 47 Cal. App. 4th 1547, 1567 (1996) (requirement to exhaust administrative remedies inapplicable where writ challenged city's "overarching policies" and "not … any of the City's past land use decisions"); *Sutco Constr. Co. v. Modesto High Sch. Dist.*, 208 Cal.App.3d 1220, 1227 (1989) (in challenge to imposition of school facilities fees on developers, individual suits for refunds not adequate because they would provide remedy only for fees already paid but not on-going and future assessments).

assigned or prospective public defender will file a declaration of unavailability. A remedy is not adequate if it lies beyond the party's control, and instead is in the hands of the individuals alleged to deprive them of the right they seek to have enforced. *See American Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937). Third, Plaintiffs allege that, notwithstanding § 987.2, the Public Defender's Office routinely accepts case appointments even when no attorneys are available to work on the case. Compl. ¶ 60. Thus, this "remedy" is not available as a practical matter, and any fact disputes about the number of declarations of unavailability filed by the Office are not suitable for resolution on demurrer. *See supra* at n.10.

Second, the County contends that the inclusion of a complaint for declaratory and injunctive relief along with the writ illustrates the availability of alternative remedies. County MPA at 20:7-8. But it is well established that in suits against public entities, mandate is proper, regardless of whether declaratory and injunctive relief are also available. *See Glendale City Emps.' Ass'n, Inc. v. City of Glendale*, 15 Cal. 3d 328, 343 n.20 (1975) (availability of declaratory relief does not prevent use of mandate); *Cal. Teachers Ass'n v. Nielsen*, 87 Cal. App. 3d 25, 28-29 (1978) (availability of injunctive relief is not a bar to a mandate).

C. Plaintiff Peter Yepez Does Not Have Unclean Hands.

The County argues that Mr. Yepez cannot obtain writ relief because he purportedly caused much of the delay of which he complains. County MPA at 18:26-27. Even assuming Mr. Yepez failed to appear, *but see* Opp. to RJN at 6-7, his conduct in this regard did not cause the structural deficiencies in Fresno's public defense system, and therefore cannot bar his claims for relief.

Under the doctrine of unclean hands, the alleged misconduct "must relate directly to the transaction concerning which the complaint is made, *i.e.*, it must pertain to the very subject matter involved and affect the equitable relations between the litigants." *Salas v. Sierra Chem. Co.*, 59 Cal. 4th 407, 432 (2014) (internal citations and quotations omitted). "'[W]hether there is a bar depends upon the analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries.'" *Stine v. Dell'Osso,* 230 Cal. App. 4th 834, 844 (2014). Moreover, "'[s]ince the doctrine of unclean hands is heavily fact dependent, it is a uniquely poor candidate to support a demurrer.'" *Id.* "[A]n affirmative defense cannot properly be sustained

where the action *might* be barred by the defense, but is not *necessarily* barred." *CrossTalk Prods., Inc. v. Jacobson*, 65 Cal. App. 4th 631, 635 (1998).

Here, the County cannot credibly claim that Mr. Yepez's conduct has contributed to staggering caseloads, pressured public defenders to secure plea agreements without interviewing their clients, starved the Office of staff to investigate cases, or resulted in the numerous other deficiencies detailed in the Complaint. Also, because Plaintiffs seek prospective relief rather than retrospective relief in Mr. Yepez's criminal case, Plaintiffs' claims will not affect the equitable relations pertaining to the criminal matter.[23] Thus, as a matter of law, the County's allegation of unclean hands by Mr. Yepez is not a bar to the claims asserted here.

D. Plaintiffs' Manner of Verifying the Petition for Writ of Mandate Is Not Relevant at this Stage of the Proceeding.

Fresno County provides no legal authority for its argument that Plaintiffs' manner of verification makes the writ petition demurrable. County MPA at 21:11-12. But it is clear that pleadings may be verified on information and belief: "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. Plaintiffs need only provide verifications based on personal knowledge when they rely on a pleading as evidence. *See Fall River Joint Unif. Sch. Dist. v. Superior Court,* 206 Cal. App. 3d 431, 436 (1988).

V. CONCLUSION

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

[23] In addition, the County has failed to identify "analogous case law" that demonstrates the doctrine bars this suit. *Stine,* 230 Cal. App. 4th at 844.

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