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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

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BARTLETT, CALEB AIONA, TYRIK
DAWKINS, JOSHUA JAMES-RICHARDS,
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ANTHONY REMINGTON, CRISTA JEAN
DAVIS, NICHOLE LYNN WHALEN, and
JACOB ISAAC NATHANIEL COLE, on
their behalf, and on behalf of all others
similarly situated,**

Petitioners,

v.

**PATRICK GARRETT,
WASHINGTON COUNTY SHERIFF, in his
official capacity, WASHINGTON COUNTY
CIRCUIT COURT JUDGES, in their official
capacities, and THE STATE OF OREGON,
Respondents.**

Case No. 23-cv-01097-CL

**REPLY IN SUPPORT OF SECOND
AMENDED PETITION FOR WRIT OF
HABEAS CORPUS**

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Introduction

At the outset of its Response, the State of Oregon asserts, “[t]he claims in this case arise from what all parties agrees is a crisis in Oregon’s public defense system.” ECF 52 at 1. With respect, the petitioners do not agree: the claims arise from the State subsidizing its criminal justice system by systematically violating the petitioners’ federal constitutional rights. The petitioners do not, and the Court should not, accept the framing of this case as a search for a “panacea” “to immediately resolve these issues.” *Id.* Nor, as the Sheriff suggests, do the petitioners seek to “radically reshape the contours of the Oregon criminal justice system.” ECF 51 at 1. The petitioners invoke the federal court’s authority only to prohibit one option that the State has embraced for over a year: paying for its failure to comply with the Sixth Amendment with restrictions on the liberty of the class of presumptively innocent Oregonians charged with crimes who cannot afford to retain private counsel.

To be clear: the petitioners and class members do not ask the Court to regulate either the supply side of the “crisis” described by the respondents (adequate funding to be able to provide appointed lawyers) or the demand side (the number, manner, and disposition of prosecutions). Nor do they seek to litigate the consequences of the federal constitutional violations in individual cases, which is a task for appointed counsel to address on a case-by-case basis. What the petitioners seek is simply to prohibit the restriction of their liberty based on criminal charges for which they have no counsel.

As courts have repeatedly held, the rights of individual citizens cannot be violated because of bureaucratic failures or resource limitations. *See Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1121 (9th Cir. 2003) (finding an individual has a liberty interest in being free and in restorative treatment and, therefore, “[l]ack of funds, staff or facilities cannot justify the State’s

failure to provide such persons with the treatment necessary for rehabilitation.”) (cleaned up) (quoting *Ohlinger v. Watson*, 652 F.2d 775, 779 (9th Cir. 1980); *United States v. Donnelly*, 41 F.4th 1102, 1108-09 (9th Cir. 2022) (Watford, J., concurring) (“The BOP’s bureaucratic failure to allocate adequate agency resources to meet the demand for competency evaluations is not, of course a legitimate excuse for failing to comply with [statutory time limits].”); *Lavellee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 912 (Mass. 2004) (noting that, while the lack of counsel resulted from decisions and policies years in the making, the burden could not be borne by the indigent accused: “The continuation of what is now an unconstitutional state of affairs cannot be tolerated.”).

This comprehensive reply addresses the arguments raised by Sheriff Garrett and the Washington County Circuit Court Judges and the State of Oregon. ECF 51 and 52. For the following reasons, the writ should issue.

A. There Is No Serious Factual Dispute Regarding Widespread Denial of Counsel.

The central fact in the Second Amended Petition is that thousands of Oregonians, who are charged with crimes, are being deprived of their constitutionally guaranteed counsel. In a recent official publication from the Oregon Judicial Department Office of the State Court Administrator, the breadth and impact of the problem is confirmed:

Oregon’s ongoing failure to provide representation to those with a constitutional right to counsel threatens the viability of our justice system by not only neglecting the constitutional rights of individuals facing prosecution, but also the rights of crime victims and others in our communities. As of this date, approximately 3,000 people are currently charged with a crime without representation.

Executive Summary to Summary of Circuit Court Unrepresented Defendant Crisis Plans, September 1, 2023.¹

Indeed, the State concedes that “[e]ach of the named petitioners in the Second Amended Petition has spent varying amounts of time unrepresented while charges were pending, some while in physical custody in a Washington County detention facility and others while on conditional release.” ECF 52 at 7.² The State further confirms that, as of the date of their response, “about 13 unrepresented people were in custody in Washington County, and about 2,500 defendants statewide were awaiting counsel while on pretrial release in criminal or contempt cases.” *Id.* The State sets out the procedures regarding pretrial release and detention decisions with reference to multiple statutes. However, the same statutory scheme assumes that counsel will be appointed for defendants. Or. Rev. Stat. § 135.045 provides that, “[i]f the defendant in a criminal action appears without counsel at arraignment or thereafter, the court *shall* determine whether the defendant wishes to be represented by counsel,” and, “[i]f the defendant does wish to be represented by counsel, the court, in accordance with ORS 135.050, *shall* appoint counsel to represent the defendant” (emphasis added).

Additionally, to the extent facts are in dispute, the habeas corpus rules permit access to discovery on a showing of good cause, expansion of the record, and an evidentiary hearing. *See* Rules 6, 7, 8 of the Rules Governing Section 2254 Cases.

¹ Available at https://www.courts.oregon.gov/Documents/OSCA%20report_Unrepresented%20Crisis%20Plan_PUBLISHED.pdf (last visited September 28, 2023)

² The State separately contends that Mr. Cole was never without counsel. ECF 52 at 2. While it is not evident from the current docket, Mr. Cole did go without counsel for several weeks and to the extent that fact is relevant to any issues in the case, counsel can produce evidence supporting it.

B. *Younger* Abstention Is Not Appropriate Where There Is No Fair And Sufficient Opportunity To Vindicate Federal Rights In State Court And Where Extraordinary Circumstances Call For Federal Intervention.

Federal courts have “a strict duty to exercise the jurisdiction that is conferred upon them by Congress.” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). “The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction,” provides “an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.” *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). The *Younger* exception does not apply where “the injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution.” *Gerstein v. Pugh*, 420 U.S. 103, 107 n.9 (1975) (citing *Younger v. Harris*, 401 U.S. 37 (1971)). As with *Gerstein*, the present case only challenges the legality of pretrial deprivation of appointed counsel to indigent defendants, not the underlying state prosecution.

The respondents contend that *Younger* calls for abstention here. *Younger* abstention is appropriate, absent “extraordinary circumstances,” when there is an ongoing state judicial proceeding; the proceeding implicates important state interests; there is an adequate opportunity to raise constitutional challenges; and the requested relief seeks to enjoin the state proceeding. *Page v. King*, 932 F.3d 898, 901 (9th Cir. 2019). “Abstention is only appropriate when all four requirements are met.” *Duke v. Gastelo*, 64 F.4th 1088, 1094 (9th Cir. 2023) (citing *AmerisourceBergen Corp. v. Roden*, 495 F.3d 1143, 1149 (9th Cir. 2007)). *Younger* abstention is inappropriate here because the third factor and fourth factors are not present.

There is not an adequate opportunity for petitioners and class members to raise the constitutional challenges in their state proceeding because they are deprived of counsel to do so.

Indeed, the very ““premise”” of *Younger* abstention is that ““ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights.”” *Duke*, 64 F.4th at 1095 (quoting *Kugler v. Helfant*, 421 U.S. 117, 124 (1975), and citing *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975), and *Gilbertson v. Albright*, 381 F.3d 965, 972 (9th Cir. 2004)). Of course, in an ordinary state prosecution, the accused has counsel. Because the petitioners are deprived of their right to counsel, they do not have a fair and sufficient opportunity to vindicate their federal constitutional rights. See *United States v. Cronin*, 466 U.S. 648, 654 (1984) (“Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”) (internal quotation and citation omitted).

In *Wilbur v. City of Mount Vernon*, a federal district court confronted a claim of systemic deprivation of the right to counsel and “easily” found that the plaintiffs had shown “inadequacy of available legal remedies”:

This burden is easily met here. A system that makes it impossible for appointed counsel to provide the sort of assistance required by the Sixth Amendment works irreparable harm: the lack of an actual representational relationship and/or adversarial testing injures both the indigent defendant and the criminal justice system as a whole. The exact impacts of the constitutional deprivation are widespread but difficult to measure on a case by case basis, making legal remedies ineffective.

989 F.Supp.2d 1122, 1135 (W.D. Wash. 2013). The constitutional violations that this action seeks to remedy foreclose a claim of adequate state remedies.

Additionally, even if petitioners could theoretically vindicate their constitutional rights later, either when counsel is appointed at trial or in state postconviction, that possibility does not satisfy the third *Younger* factor. “Properly framed, the third requirement for *Younger* abstention asks whether there remains an opportunity to litigate the federal claim in a state-court proceeding

at the time the federal court is considering whether to abstain.” *Duke*, 64 F.4th at 1096 (emphasis added). Accordingly, to the extent the right to counsel could be raised at trial, because petitioners and class members *presently* are without counsel, they are unable to vindicate their right, definitively making *Younger* inapplicable.

The fourth *Younger* factor is also not present because the suit does not seek to enjoin the proceedings. Instead, the suit seeks to secure one of the basic pillars of the adversarial system—counsel for the defendant. As evident in the procedural history of many of the named petitioners, the lack of counsel has stalled progress in the criminal proceedings. The relief requested will allow the state proceedings to go forward. *Cf. Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 491 (1973) (explaining in the context of a speedy trial claim that the petitioner “comes to federal court, not in an effort to forestall a state prosecution, but to enforce the Commonwealth’s obligation to provide him with a state court forum.”); *Cronic*, 466 U.S. at 653 (“An accused’s right to be represented by counsel is a fundamental component of our criminal justice system.”).

To the extent the State cannot provide counsel, granting the writ and ordering release would not enjoin the criminal prosecution. *See Gerstein*, 420 U.S. at 107 n.9 (finding *Younger* inapplicable where the plaintiffs asserted the illegality of pretrial detention that was distinct from the criminal prosecution). Courts have held that challenges to constitutionally inadequate bail hearings are distinct from the merits of the state criminal prosecution for *Younger* purposes. *Page v. King*, 932 F.3d 898, 904 (9th Cir. 2019) (*Younger* not applicable where petitioner’s challenge was to the state’s alleged failure to hold a constitutionally-adequate probable cause hearing); *Arevalo v. Hennessy*, 882 F.3d 763, 766 (9th Cir. 2018) (“*Younger* abstention is not appropriate in this case because the issues raised in the bail appeal are distinct from the underlying criminal prosecution and would not interfere with it”).

Whether a person has counsel is also distinct from a challenge to the underlying prosecution. *Younger* itself involved a First Amendment challenge to the law under which the defendant was being prosecuted, and the relief requested that the prosecutor be enjoined from prosecuting him. *Younger*, 401 U.S. at 39-40. Here, the petitioners' challenge is much more akin to the bail context—they raise no challenge to the actual prosecution—they seek only to require the State to provide them their constitutionally guaranteed counsel for that prosecution. Nor do they seek to litigate the consequences of the federal constitutional violations in individual cases, which is a task for appointed counsel to address on a case-by-case bases.

The petitioners have also requested dismissal without prejudice as relief if counsel is not provided. Because the dismissal is without prejudice, it does not impair the ability of the State to prosecute once counsel is obtained. No valid proceedings are occurring in the absence of constitutionally required representation of the criminal defendant. Even if the Court were to find that dismissal without prejudice would enjoin the criminal prosecutions, because the third *Younger* factor is absent, and extraordinary circumstances exist, the Court need not abstain.

Extraordinary circumstances need not be shown if one of four *Younger* factors is absent. *Duke*, 64 F.4th at 1101-02. The extraordinary circumstances test is met where irreparable injury is threatened. *Dyson v. Stein*, 401 U.S. 200, 203 (1971) (“federal intervention affecting pending state criminal prosecutions, either by injunction or by declaratory judgment, is proper only where irreparable injury is threatened.”); *Brown v. Ahern*, 676 F.3d 899, 903 (9th Cir. 2012) (*Younger* abstention is not warranted in “extraordinary circumstances where irreparable injury can be shown.”). In the TRO context, the Court already found that there are such extraordinary circumstances for the detained class. The Court found this is “a case of rare urgency, presenting the very extraordinary circumstances which demand federal intervention.” ECF 25 at 7.

As petitioners will demonstrate at the preliminary injunction hearing and at any merits hearing, the restrictive-conditions class also faces irreparable harm. Those who are not in jail, but face prosecution without counsel, endure the same hardships regarding trial preparation, preservation of evidence, lack of advice, and inability to negotiate with the prosecution or cooperate with law enforcement. The pending prosecution, even without detention, is harmful: “Arrest is a public act that may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.” *United States v. Marion*, 404 U.S. 307, 320 (1971).

The respondents argue, based on *O’Shea v. Littleton*, 414 U.S. 488 (1974), that enforcement of the Court’s order would violate *Younger* by calling for continuous monitoring of state court proceedings. ECF 38 at 7-8. *O’Shea* only briefly mentions *Younger* and is inapposite here. *O’Shea* involved a lawsuit by a group of citizens who alleged that they were at risk of discriminatory and retaliatory policing and prosecution. The suit was largely dismissed on standing grounds because none of the plaintiffs had personally suffered any injury. *O’Shea*, 414 U.S. at 495. The Court hypothesized that, if any plaintiff were on trial or awaiting trial, injunctive relief would be inappropriate under *Younger*. *Id.* at 496. But given the hypothetical non-controversy in *O’Shea*, the Court was unable to determine whether each of the *Younger* abstention factors were present, and, if so, whether extraordinary circumstances nevertheless justified the Court’s intervention. *Id.* at 496-97.

But this case does not involve “speculation and conjecture” regarding possible future prosecutions. *Id.* at 497. Here, where the class members are actually suffering ongoing deprivations of their constitutional rights, the Court has already rightly found that *Younger* abstention is

inappropriate. In the context of deprivation of counsel, the court in *Brown v. Lexington Cty.* agreed that *Younger* and *O'Shea* were not implicated when “[p]laintiffs are concerned with the availability, not the quality, of representation, a much less intrusive and more workable request.” No. 3:17-1426-SAL, 2022 WL 3588065, at *84 (D. S.C. Aug. 22, 2022). The Court should maintain its ruling regarding *Younger* with respect to the in-jail class and extend it to the proposed restrictive-conditions class.

C. The Petitioners Need Not Show The Constitutional Violations Are The But-For Cause Of Their Custody.

The respondents argue that the petitioners must demonstrate that each petitioner would not be in custody but for the constitutional violation. ECF 52 at 27-28. The respondents cite a single case in support of this proposition, *Bailey v. Hill*, 599 F.3d 976 (9th Cir. 2010), which is distinguishable for multiple reasons. First, the case is a postconviction section 2254 case challenging a state court conviction, with all the retrospective, finality, and deference issues absent from the present case. Second, the petitioner complained of a restitution order that the court found was not part of his custody. Here, the class members’ custody cannot be untangled from their lack of representation. They are in custody based on ongoing criminal prosecutions during which they have an unqualified, and unmet, right to counsel. “[P]rolonged pretrial detention” is but one of the several harms that can be suffered by an unrepresented defendant. *Kuren v. Luzerne County*, 146 A.3d 715, 743 (Penn. 2016). As explained *infra* at F.1, just as petitioners need not show prejudice from the denial of counsel, the petitioners need not show that it is the but-for cause of their confinement. *Id.* at 743 (“Violations of the right to counsel can occur in many different ways, and remedies for such violations are not limited solely to circumstances where prejudice can be proven. Only the remedy of a new trial requires a showing of prejudice.”).

D. Exhaustion Is Not Required.

Sheriff Garrett, citing cases under 28 U.S.C. § 2254, argues that “[i]t has been long held that a habeas petitioner must exhaust claims by fairly presenting them to the highest state court. . . before a federal court will consider the merits of those claims.” ECF 51 at 2. The Sheriff further suggests that “state habeas” is an available state remedy. *Id.* at 4. However, exhaustion is not a jurisdictional requirement under 28 U.S.C. § 2241 but rather is a prudential consideration. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) (where congress has not specifically mandated exhaustion, “sound judicial discretion governs”); *Brown v. Rison*, 895 F.2d 533, 535 (9th Cir. 1990); *United States v. Woods*, 888 F.2d 653, 654 (9th Cir. 1989). Cases brought under § 2241 do not have the statutory exhaustion requirements of 28 U.S.C. § 2254. *Dominguez v. Kernan*, 906 F.3d 1127, 1135 (9th Cir. 2018) (“[T]he general grant of habeas authority in § 2241 is available for challenges by a state prisoner who is not in custody pursuant to a state court judgment—for example, a defendant in pre-trial detention or awaiting extradition.”). Nor do § 2241 petitions involve the statutory requirements under the Prisoner Litigation Reform Act. *Jones v. Bock*, 549 U.S. 199, 202 (2007); *Grier v. Hood*, 46 F. App’x 433, 440 (9th Cir. 2002), *on remand*, *Bohner v. Daniels*, 243 F. Supp. 2d 1171, 1175 (D. Or. 2003), *affirmed sub nom. Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005).

In the TRO context, the Court found that exhaustion was excused. The Court, citing *Hendricks v. Zenon*, 993 F.2d 664, 672 (9th Cir. 1993), found that exhaustion of state court remedies is not required in habeas corpus proceedings where the deprivation of constitutional rights constitutes irreparable injury. ECF 25 at 7. The Court should extend this ruling to the merits consideration of the habeas claims for both classes. Each group is suffering a deprivation of their constitutional rights that constitutes irreparable harm. *See Hernandez v. Sessions*, 872 F.3d 976,

988 (9th Cir. 2017) (“It is well established that the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’”) (citing *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347 (1976))).

The Court should also maintain its ruling that exhaustion would be futile. “Without the aid of counsel, indigent defendants in custody cannot be expected to properly challenge the constitutionality of their detention, let alone proceed with their underlying criminal cases.” ECF 25 at 8. The same ruling should extend to the restrictive-conditions class who likewise have no counsel to properly raise their constitutional rights in the state court proceeding. The Sheriff suggests that the petitioners attempt state habeas. They likewise would need counsel to pursue that remedy. Yet, the Oregon Judicial Department’s unrepresented individuals dashboard lists that there are currently 93 unrepresented persons pursuing habeas and state postconviction.³ As the Court previously found, the Court should not deny petitioners relief “because of their inability to adhere to ‘arcane and scholastic procedural requirements.’” ECF 25 at 8 (quoting *Hensley v. Municipal Ct.*, 411 U.S. 345, 350 (1973)).

The Court further explained that exhaustion would be futile because “it is apparent that the Circuit Court has already considered and rejected this constitutional matter each time it has held one of the Petitioners in custody without an attorney.” ECF 25 at 8. The same should apply to the restrictive-conditions class. Each of the criminal prosecutions has been maintained in the absence of counsel for the petitioners. Each is subject to restrictive conditions ranging from returning to court to social limitations to GPS monitoring to house arrest. None has court-appointed

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<https://app.powerbigov.us/view?r=eyJrIjoibNDQ2NmMwYWMTNzhiZi00MWJhLWE3MjgtMjg2ZTRhNmNmMjdmIiwidCI6IjYxMzNIYzg5LWU1MWItNGExYy04YjY4LTE1ZTg2ZGU3MWY4ZiJ9> (last visited Sept. 28, 2023).

counsel to challenge those conditions or the ongoing constitutional violations. The Court should decline to require exhaustion under these circumstances.

E. Change In Circumstances Does Not Deprive The Court Of Jurisdiction.

The Sheriff argues that, because some of the named petitioners have received counsel or pled guilty since filing the petition, their claims have been mooted. “The party asserting mootness has the heavy burden of establishing that there is no effective relief remaining for a court to provide.” *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1116-17 (9th Cir. 2003) (citing *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. United States Dep’t of Energy*, 232 F.3d 1300, 1303 (9th Cir. 2000)). In *Mink*, the court declined to find mootness where the “record reflect[ed] that the detention of incapacitated criminal defendants for weeks or months in Oregon county jails is an ongoing, pervasive and systemic problem.” *Id.* at 1117. In a class action, the inherently transitory exception to the mootness doctrine permits the Court to adjudicate issues where “the constant existence of a class of persons suffering the deprivation is certain.” *Gerstein*, 420 U.S. at 110 n. 11. As the Court found in granting the TRO, “[a]lthough named Petitioners Betschart, Latu, Owens Jr., Polaski, and Wilson were recently appointed attorneys, the transitory nature of their claims allows them to represent the fluctuating class of defendants in Washington County detention who face ongoing constitutional violations.” ECF 25 at 10. The Court should find that change in circumstances for named petitioners or class representatives does not deprive it of its jurisdiction to decide the issues presented here.

The Sheriff inquires whether Mr. Bartlett and Mr. Polaski seek to invalidate their convictions through this action. They do not seek that remedy through this action. Counsel agrees that any relief those petitioners seek from their convictions would be done in the ordinary course,

by pursuing appeal, state postconviction remedies, and a 28 U.S.C. § 2254 petition if necessary. Those issues are outside the scope of this action.

F. The Petition Alleges Serious Violations Of Several Constitutional Rights.

The Second Amended Petition pleads four violations of the Constitution based on the failure to provide counsel for indigent criminal defendants. To the extent the State of Oregon and the judges contend that the petitioners have failed to “establish” the constitutional violations, this argument contradicts public statements from Oregon officials that the current situation violates the constitutional rights of criminal defendants. *See, e.g.*, August 23, 2023, Letter from Megan Flynn (“we have failed to meet our constitutional obligation to those entitled to appointed counsel”).⁴

1. Lack Of Counsel For Indigent Defendants Violates The Sixth Amendment.

The State argues that the right to counsel is satisfied so long as a criminal defendant has counsel sufficiently in advance to prepare for a “critical stage” court proceeding. ECF 52 at 29-30.⁵ This argument misapprehends the Supreme Court’s Sixth Amendment jurisprudence anchored in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and *Powell v. Alabama*, 287 U.S. 45 (1932). The State fundamentally errs by confusing the ongoing right to counsel from the commencement of adversary proceedings, as required by *Gideon*, *Powell*, and their progeny, with the standard for determining when a conviction must be reversed for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The jurisprudence surrounding critical stages of trial and prejudice determinations are retrospective tools to determine of whether relief should be

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https://www.courts.oregon.gov/Documents/OSCA%20report_Unrepresented%20Crisis%20Plan_PUBLISHED.pdf at 388 (last visited Sept. 28, 2023).

⁵ Sheriff Garrett does not raise arguments disputing the merits of the constitutional claims. ECF 51.

granted after conviction. *See Cronin*, 466 U.S. at 658-59 (delineating when circumstances “are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified[.]” most obviously, “the complete denial of counsel.”). The core right to counsel prohibits actual denial of the right to counsel through failure to appoint counsel after the commencement of adversary proceedings.

The Eleventh Circuit explained the distinction in *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1998), in a suit challenging the adequacy of the public defense system. The court rejected the argument that plaintiffs needed to show that each class member would suffer ineffective assistance of counsel:

The sixth amendment protects rights that do not affect the outcome of trial. Thus, deficiencies that do not meet the ‘ineffectiveness’ standard may nonetheless violate a defendant’s rights under the amendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. *Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively.*

Id. at 1017 (emphasis added). In doing so, the Eleventh Circuit contrasted the Supreme Court’s cases which applied a critical stage analysis and found the strictures when relief can be granted for counsel errors post-trial “do not apply when only prospective relief is sought.” *Id.* (citing *Coleman v. Alabama*, 399 U.S. 1 (1970) (finding preliminary hearing a critical stage); *United States v. Wade*, 388 U.S. 218 (1967) (finding post-indictment line-up a critical stage)).

In *Kuren*, this distinction was well-drawn by the court in adopting the position of the Department of Justice acting as *amici curiae*: “The United States Department of Justice maintains that a civil claim for constructive denial of counsel is cognizable under the Sixth Amendment [and] is ‘both legitimate and rooted in U.S. Supreme Court case law.’” 146 A.3d at 730-31. The

Department of Justice argued that, “when the totality of the circumstances indicates a ‘system-wide problem of non-representation,’” that “prospective relief must be available.” *Id.* at 731.⁶

Kuren draws another helpful distinction. While backward-looking *Strickland* or *Cronic* claims are rooted in counsel’s role in protecting the right to a fair trial, a claim of non-representation simply invokes the Sixth Amendment’s unadorned right to counsel. In this situation, “[t]he denial of the right at *any stage* constitutes a structural defect that must be remedied, because any such error ‘affec[ts] the framework within which the trial proceeds.’” *Kuren*, 146 A.3d at 733-34 (emphasis added) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006)); *see also Hurrell-Harring v. State*, 930 N.E.2d 217, 225 (N.Y. 2010) (The “basic, unadorned question presented by such claims where, as here, the defendant-claimants are poor, is whether the State has met its obligation to provide counsel, not whether under all circumstances counsel’s performance was inadequate or prejudicial.”).

The unpublished case upon which the respondents place primary reliance did not involve the systemic violation of federal constitutional rights as in the present case, nor the type of injury alleged by the petitioners here. ECF 52 at 25-27; *see* Fed. R. App. P. 32-1 (unpublished opinions are non-precedential and thus only relevant to the extent they are persuasive). The Ninth Circuit’s limited discussion of counsel in *Farrow* involved whether the first appearance under California law constituted a critical stage where a second hearing was held within five to thirteen days based

⁶ The distinction between the ongoing right to counsel and the post-conviction evaluation of effectiveness of counsel finds an analogy under *Brady v. Maryland*, 373 U.S. 83 (1963). The Ninth Circuit has rejected prosecutorial arguments that the pretrial obligation to produce exculpatory material requires a showing of materiality, holding that materiality only becomes relevant when the validity of a conviction is being challenged, while, prior to trial, “the absence of prejudice to the defendant does not condone the prosecutor’s suppression of exculpatory evidence.” *United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009) (quoting *United States v. Acosta*, 357 F. Supp. 2d 1228, 1239-40 (D. Nev. 2005)).

on the public defender's policy and where a public defender paralegal interviewed the named defendant within 24 hours. *Farrow v. Contra Costa Cty.*, No. 12-cv-06495-JCS, 2019 WL 78839, *104 (N.D. Cal. 2019) (indicating a paralegal from the public defender office met with Farrow the day after his first appearance).

The court found that the plaintiffs had not proved that their first appearance was a critical stage, but also that they need not prove prejudice from unreasonable delays following attachment of the right to counsel. *Farrow v. Lipetzky*, 637 F. App'x 986, 987-88 (9th Cir. 2016) ("By framing the question in that way, the district court erroneously required the plaintiffs to allege actual prejudice."). The question of whether the first appearance was a critical stage mattered because it was the *only* proceeding in which the defendants appeared without counsel and the unrepresented period was limited to 5-13 days pursuant to the public defender's policy. *Farrow v. Lipetzky*, No. 12-cv-06495-JCS, 2013 WL 1915700, *45 (N.D. Cal. May 8, 2013) ("the Court only addresses the delay at issue in this case, five to thirteen days. At some point, a lengthy delay, or a delay accompanied by other events, may indeed constitute a deprivation of a defendant's Sixth Amendment rights.").

The district court's later disposition of the case only addressed the evidentiary failure to prove the delay was unreasonable under the circumstances where the public defender was involved during the relatively brief delay. *See Farrow v. Contra Costa Cty.*, 799 Fed. Appx. 520, 520-21 (9th Cir. 2020); *Farrow v. Contra Costa Cty.*, No. 12-cv-06495-JCS, 2019 WL 78839 *88 (N.D. Cal. Jan. 2, 2019) (explaining that plaintiffs have not presented evidence to allow the court to determine a fixed time at which delay in provision of counsel is unreasonable). The record indicated that, within the time between the first and second appearance, public defender office staff did meet with the client and steps were taken toward the representation before the next court date.

Farrow does not present the same issues and urgent problem of indefinite non-representation of counsel that, in the present case, warrants this Court’s prospective relief.

The State argues that an assessment of individual circumstances is necessary to determine whether the constitutional right to counsel has been violated. ECF 52 at 26. But that again applies the wrong standard. Neither *Cronic* nor *Strickland* “provide a framework for measuring prospective claims seeking equitable relief.” *Tucker v. State*, 484 P.3d 851, 858-59 (Idaho 2021). Considering whether harm has been wrought in a certain case “reflect[s] the policy considerations at issue in overturning convictions, such as judicial economy and finality—considerations not at stake in the present case because no one is challenging the performance of a specific attorney or the conviction of a specific individual.” *Id.* at 589. Accordingly, the “individualized and fact-intensive” analysis under *Cronic* and *Strickland* are not necessary here where the petitioners argue a complete deprivation of counsel and seek prospective relief. *Tucker*, 484 P.3d at 859; *see Wilbur*, 989 F. Supp. 2d at 1131-32 (granting class-wide relief from “systemic flaws that deprive indigent defendants of their Sixth Amendment right to assistance of counsel).

The Supreme Court has held that, even in the post-conviction context, deprivation of counsel of one’s choice is not subject to a prejudice analysis in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). The Court contrasted the right to effective counsel, which derives from the Sixth Amendment right to a fair trial, with the right to counsel of one’s choice, and found the latter to be “regarded as the root meaning of the constitutional guarantee” to counsel. *Id.* at 147-48. The complete denial of counsel, as the class members are experiencing, is an even greater claim to the “root meaning of the constitutional guarantee.” *Id.*

Because the instant case presents a simple claim of nonrepresentation under the Sixth Amendment and *Gideon*, the Court may grant prospective relief consistent with the decisions in

Wilbur, Kuren, Hurrell-Harring, Tucker, and the amicus curiae position of the United States Department of Justice described in *Kuren*.

2. The Petitioners Have Established Violations Of Constitutional Rights Related To, And Independent Of, The Sixth Amendment Right To Counsel.

The respondents also dispute petitioners' non-Sixth Amendment claims. ECF 52 at 28. The petitioners have asserted violations of rights under the Due Process Clause and Eighth Amendment's protection of liberty, the Due Process Clause's procedural due process protections, and the Due Process and Equal Protection Clauses' prohibition of discrimination based on indigency. ECF 61 at 27-28. Contrary to the State's argument negating the independent value and application of each constitutional right, the ongoing denial of the constitutional right to counsel implicates an array of rights related to, and independent of, the Sixth Amendment. This Court has the authority to vindicate those rights.

First, the interest in liberty and the related right to be free of unreasonable pretrial restraints provide an independent basis for injury. *See United States v. Salerno*, 481 U.S. 739, 755 (1987) (to be constitutional, pretrial detention requires procedural safeguards and an adversarial hearing); *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) (the Due Process Clause protects freedom from unlawful restraint). The State claims that the Court in *Salerno* discussed provision of counsel only regarding the procedural necessities for pretrial restraint. ECF 52 at 29. But that is exactly the point: without counsel arguing for lesser restraints prior to trial, the Bail Reform Act would violate the Eighth Amendment's prohibition of excessive bail and the requirements of substantive and procedural due process. The reasoning of the Supreme Court in *Salerno* guides this Court's application of the relevant constitutional principles to the present case. *See Ramos v. Louisiana*,

140 S. Ct. 1390, 1404 (2020) (“It is usually a judicial decision’s reasoning—its ratio *decidendi*—that allows it to have life and effect in the disposition of future cases.”).

Relying on *Salerno* as establishing the framework for the constitutional analysis, the Ninth Circuit applied substantive due process in striking down Arizona’s prohibition on pretrial release of certain non-citizens. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) (en banc). The Court stated that the governing substantive due process standard is a familiar one: “The Due Process Clause provides heightened protection against government interference with certain fundamental rights and liberty interests, forbidding the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” (simplified) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997), and *Reno v. Flores*, 507 U.S. 292, 302 (1993)). The lack of counsel to argue for less restrictive pretrial conditions implicates the substantive liberty interest protected by the Due Process Clause and the Eighth Amendment as well as the Sixth Amendment.

Second, the State argues that it may hold proceedings in the absence of counsel without violating procedural due process, arguing that the State is “not aware of any case holding that due process requires that counsel be appointed at a detention hearing or any other pretrial proceeding that is not a ‘critical stage.’” ECF 52 at 29. On the contrary, “[t]he Supreme Court has long recognized constitutional limits on pretrial detention.” *Lopez-Valenzuela*, 770 F.3d at 777 (listing Supreme Court cases prohibiting excessive bail, barring pretrial detention as punishment, and requiring that restrictions on pretrial release must be carefully limited to serve a compelling governmental interest). These constitutional interests cannot be vindicated without advocacy by defense counsel.

The State does not address *Salerno*'s adoption of the procedural due process balancing test as applicable to bail hearings. 481 U.S. at 746 ("When government action depriving a person of life, liberty, or property survives substantive due process scrutiny, it must still be implemented in a fair manner.") (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). In balancing the individual interest involved, the Ninth Circuit held in *Lopez-Valenzuela* that pretrial detention involved fundamental liberty interests that were entitled to "heightened scrutiny" to protect against arbitrary government action. 770 F.3d at 780-81.

In the procedural due process balancing test, the private interest of the individual is great because pretrial detention may "imperil the suspect's job, interrupt his source of income, and impair his family relationships," affect "the defendant's ability to assist in preparation of his defense," and, without the "traditional right to freedom before conviction," does not permit "the unhampered preparation of a defense." *Lopez-Valenzuela*, 770 F.3d at 781 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975), and *Stack v. Boyle*, 342 U.S. 1, 4 (1951)). An unrepresented defendant may be erroneously deprived of his or her rights without counsel to subject the positions of the prosecution and pretrial personnel to "reliable adversarial testing." *Strickland*, 466 U.S. at 688. And no "additional or substitute procedural safeguards" are necessary given the well-established constitutional right to counsel. *Mathews*, 424 U.S. at 335. At the same time, every time the petitioner attends a hearing without defense counsel present, basic procedural safeguards are missing: the judge and prosecutor have contact with unrepresented persons while the unrepresented persons are forced to either maintain silence or advocate for themselves in violation of their Fifth Amendment right to remain silent. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.").

Third, the respondents misread *Bearden v. Georgia*, 461 U.S. 660 (1983), to claim that discrimination based on lack of wealth “effectively merges” with the substantive due process and Eighth Amendment claims. ECF 52 at 29. Not so. The constitutional prohibition on discrimination based on wealth in the administration of criminal justice is a separate right with roots in both the Due Process and Equal Protection Clauses. *Id.* at 664-65; *see Williams v. Illinois*, 399 U.S. 235 (1970) (it is unconstitutional for a state to add time to the maximum prison term solely because the defendant involuntarily failed to pay fine or costs); *Tate v. Short*, 401 U.S. 395, 398 (1971) (jailing the defendant for involuntary failure to pay fines on non-jail offenses unconstitutionally imprisons solely because of indigency).

The Equal Protection Clause prohibits greater punishment based on indigence. The Ninth Circuit held that, under *Bearden*, additional criminal history points based on failure to pay state law fines were unconstitutional. *United States v. Parks*, 89 F.3d 570, 572-73 (9th Cir. 1996); *see also Hernandez*, 872 F.3d at 991 (applying the *Bearden* line of criminal cases to immigration detention and confirming “the common-sense proposition that when the government detains someone based on his or her failure to satisfy a financial obligation, the government cannot reasonably determine if the detention is advancing its purported governmental purpose unless it first considers the individual’s financial circumstances and alternative ways of accomplishing its purpose[]”). To the same effect, the denial of counsel after the commencement of adversarial proceedings in a criminal case, implicates the Equal Protection Clause’s prohibition of harsher treatment based on indigence.

“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” *Griffin v. Illinois*, 351 U.S. 12, 19 (1956). While the Sixth Amendment plays a critical role, it does not diminish other constitutional rights trampled on by the failure to provide

appointed counsel to indigent criminal defendants once the prosecutor begins formal proceedings against the defendant. Accordingly, as set forth in Claims 2, 3, and 4 of the Second Amended Petition, failure to provide counsel to indigent defendants violates multiple constitutional rights.

Conclusion

For the foregoing reasons and those stated in the petitioners' other briefing to the Court, the relief sought in the Second Amended Petition should be granted.

Respectfully submitted this September 29, 2023.

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