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

**WALTER BETSCHART, JOSHUA SHANE
BARTLETT, CALEB AIONA, TYRIK
DAWKINS, JOSHUA JAMES-RICHARDS,
TANIELA KINI KIN LATU, RICHARD
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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

**RESPONSE IN OPPOSITION TO
STATE RESPONDENTS' MOTION FOR
RECONSIDERATION**

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Introduction

The State of Oregon and the Washington County Circuit Court Judges ask this Court to reconsider its temporary restraining order (TRO) because they argue that indefinitely jailing petitioners pre-trial without the assistance of counsel does not necessarily violate the Constitution. Despite this position, Chief Justice Megan Flynn recently acknowledged that: “As Judge McShane articulates in granting his recent temporary restraining order, the ‘failure to appoint counsel, while incarcerating pretrial detainees indefinitely, violates the Sixth Amendment’s right to counsel and fundamentally impacts the liberty interest a pretrial detainee has under the Due Process Clause of the Fourteenth Amendment,’” concluding that “we have failed to meet our constitutional obligation to those entitled to appointed counsel.” Oregon Judicial Department, Office of the State Court Administrator, *Summary of Circuit Court Unrepresented Defendant Crisis Plans*, Sept. 1, 2023, at 388-89 (letter to Public Defense Service Commission dated Aug. 23, 2023).¹ Washington County Presiding Judge Kathleen Proctor recently characterized that the jailing of indigent defendants without counsel as “obscene”:

These are times where we have people in custody without lawyers to the extent where a federal judge had to step in and tell us how long someone could actually be in custody without a lawyer, which is a—a mark that we didn’t know. We didn’t know because it had never happened before. It was unprecedented. And I, frankly, am really disappointed and angry, in fact, that this court and this system is being put in this position where we have people in custody without lawyers. It’s obscene.

Exhibit A at 44.

Contrary to these public statements condemning the practice of denying counsel to indigent defendants, the State and the Judge’s motion to reconsider questions the fundamental right to court-

¹Available at https://www.courts.oregon.gov/Documents/OSCA%20report_Unrepresented%20Crisis%20Plan_PUBLISHED.pdf (last visited September 22, 2023).

appointed counsel established in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The motion to reconsider falls well short of the necessary showing to warrant change in the Court’s well-reasoned ruling that protects federal constitutional rights.

The motion for reconsideration should be denied for five reasons. First, reconsideration is not available for a TRO where the relevant parties were served and the issues are being litigated in the previously scheduled preliminary injunction proceedings. Second, the respondents fail to meet the standard necessary to reconsider the Court’s ruling in the absence of new facts, clear error, or intervening changes in law. Third, the Court correctly found that the indefinite detention of unrepresented criminal defendants violated the Sixth and Fourteenth Amendments. Fourth, the Court need not revisit its correct ruling that *Younger* abstention does not apply. Finally, the Court appropriately granted provisional class certification because the fundamental right to counsel underlies all claims by all class members.

A. The Respondents’ Complaints About The TRO Are A Proper Subject For The Preliminary Injunction Hearing—Not A Motion For Reconsideration.

The respondents invoke Rule 59(e), which only applies to preliminary injunctions, arguing that the TRO is effectively a preliminary injunction to which they could not have earlier objected. ECF 38 at 4-5. One factor courts consider to determine whether a TRO is functionally a preliminary injunction is the length of its operation. However, the time limits in Federal Rule of Civil Procedure 65(b) that govern the expiration of a temporary restraining order do not apply here because the TRO was not “issued without notice.” See *Innovation Law Lab v. Nielsen*, 310 F.Supp.3d 1150, 1156 n.1 (D. Or. 2018) (“When a temporary restraining order is issued with notice and after a hearing, however, the 14-day limit for such orders issued without notice does not apply.”).

Although the 14-day limit does not apply, the TRO will not extend indefinitely because the Court has already scheduled briefing and a hearing on the petitioners’ motion for preliminary injunction. ECF 33. When “deadlines reflected on the district court docket give every indication that the court intends to promptly rule on the request for a preliminary injunction,” “the district court’s order operates as what it purports to be—a TRO.” *S. Wind Women’s Ctr. LLC v. Stitt*, 808 Fed. Appx. 677, 2020 WL 1860683 (10th Cir. 2020); *see also Geneva Assurance Syndicate, Inc. v. Medical Emergency Servs. Assoc.*, 964 F.2d 599, 600 (7th Cir. 1992) (extension of a TRO by agreement of the parties until a preliminary injunction hearing did not change the order into a preliminary injunction).

The respondents argue reconsideration is warranted because neither the Washington County Circuit Court Judges nor the State of Oregon appeared at the TRO hearing. A noticed non-appearing party or a late-intervening party’s desire to make arguments are not, without more, a sufficient basis to reconsider the court’s ruling.

1. The TRO Hearing Was Contested By The Restrained Party—The Sheriff.

The TRO was litigated at a contested hearing between the petitioners and the Sheriff. The TRO is limited to the in-jail petitioners for whom Sheriff Garrett is indisputably the appropriate respondent. *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (“The federal habeas statute straightforwardly provides that the proper respondent to a habeas petition is ‘the person who has custody over [the petitioner].’”) (quoting 28 U.S.C. § 2242 and citing 28 U.S.C. § 2243). Prior to the hearing, the Sheriff filed a 17-page opposition to the TRO asserting the petitioners failed to meet the requirements of class certification, failed to meet “the threshold requirements for the granting of a TRO,” that *Younger* abstention applied, and the remedy sought “is not appropriate given the factual posture of the case.” ECF 19 at 3. Counsel for Sheriff Garrett was present at the

TRO hearing and argued against the order. ECF 23. The Washington County Circuit Court Judges have apparently conceded that the Sheriff is the proper respondent for the in-jail class. *See* ECF 53 at 3 (“When a petitioner is in physical custody, the proper respondent is the warden, superintendent, or similar official in charge of the facility where the petitioner is being detained.”) (citing *Padilla*, 542 U.S. at 435). Because the restrained party contested the hearing, the desire of non-appearing and intervening parties to belatedly be heard does not warrant reconsideration.

2. The Washington County Circuit Court Judges Cannot Raise Arguments Now They Could Have Raised At The Hearing.

The respondents’ argument that “the state respondents did not have an earlier opportunity to present the arguments in this motion” is not accurate with respect to the Washington County Circuit Court Judges. ECF 38 at 4. The Washington County Circuit Court Judges had adequate notice of the temporary restraining order hearing and thus cannot “raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation.” *Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

The initial petition in this action was filed on July 27, 2023. ECF 1. The Sheriff was named as the respondent for all indigent persons charged in Washington County, whether in jail or on restrictive conditions in the community. *Id.* On August 10, 2023, after a discussion with counsel for the Sheriff, the petitioners added the Washington County Circuit Court Judges as respondents in the First Amended Petition. ECF 18 at 4-5 (“This amended petition is filed with the agreement of counsel for the Washington County Sheriff in order *to foreclose disputes regarding the custody of persons on restrictions in the community* and to expand the scope of potential remedies.”) (emphasis added). The following day, on August 11, 2023, the petitioners hand-delivered to the office of the Washington County Trial Court Administrator the amended petition, motion for temporary restraining order, motion for order to show cause, and motion for provisional class

certification. ECF 27. Further, the TRO hearing was delayed by one day at the request of counsel for Sheriff Garrett. ECF 13. The Judges had four days between service and the TRO hearing.

The Washington County Circuit Court Judges also had months of notice of the issues presented in the federal habeas corpus litigation, as set out in the first amended petition, because they had been deeply involved in decisions to detain indigent criminal defendants despite the absence of counsel and in the face of constitutional objections. The first federal habeas corpus petition raising the Sixth Amendment and other federal constitutional rights was filed almost a year ago in *Donery v. Garrett*, 3:22-cv-01484-AR (D. Or. filed Oct. 3, 2022). After the petitioner dismissed the *Donery* case based on appointment of counsel, five more Washington County unrepresented indigent criminal defendants filed similar federal habeas corpus petitions on May 26, 2023, naming Sheriff Garrett as the respondent.²

As a result of the federal filings, the prosecution and judges in Washington County became deeply involved with cases involving federal petitioners. While the Judges were not named as respondents in these matters, they were nonetheless aware of the habeas proceedings because Washington County prosecutors filed motions asking for immediate identification and appointment of counsel for federal petitioners due to the pendency of the federal habeas corpus petitions. *See* ECF 4 at 4-5 (quoting motion of the prosecutor describing as “insanity” the state defense agency’s interference with the court’s ability to remedy “constitutional rights of defendants and victims”); ECF at 4-1 at 10, 21 (prosecution arguing that, due to the federal habeas petitions, an “outside court system, unaccountable to Washington County [could] come in and take over and take action, that simply can’t be unwrung [sic].”).

² *Applegate v. Garrett*, 23-cv-775-CL; *Berto v. Garrett*, 23-cv-776-CL, *Boyd v. Garrett*, 23-cv-777-CL; *Smith v. Garrett*, 23-cv-778-CL; and *Sanders v. Garrett*, 23-cv-779-CL.

The claim that the Washington County Circuit Court Judges lacked an opportunity to be heard is contradicted by the service of all the relevant documents four days before the hearing, the de facto notice through both the earlier federal habeas litigation and the consequent media coverage,³ and the Sheriff's counsel's agreement to add them as respondents prior to the TRO hearing. Because the Judges could have made their arguments at the TRO hearing, the Court should decline to consider them now.

3. The State's Intervention Does Not Warrant Relitigation Of Decided Issues.

After the Court issued its ruling, the State of Oregon moved on August 23, 2023, without opposition, to intervene in the case as a respondent. ECF 28. On the following day, the parties filed a joint motion for a scheduling order suggesting dates for, among other things, a preliminary injunction motion and a preliminary injunction hearing. ECF 31. Pursuant to the scheduling order, the petitioners submitted the second amended petition for class habeas corpus relief on September 1, 2023. ECF 34.

"Permission to intervene does not carry with it the right to relitigate matters already determined in the case, unless those matters would otherwise be subject to reconsideration." *Arizona v. California*, 460 U.S. 605, 615 (1983). By intervening in the suit, the State of Oregon "is bound by all prior orders and adjudications of fact and law as though [it] had been a party from the commencement of the suit." *Galbreath v. Metropolitan Trust Co.*, 134 F.2d 569, 570 (10th Cir. 1943). Accordingly, Oregon's entrance into the case is not a sufficient basis to warrant

³ See Conrad Wilson, *Federal Public Defender asks for dismissal of charges against Oregonians without a lawyer*, Oregon Public Broadcasting (Aug. 3, 2023); Noelle Crombie, *Lack of lawyers leads 5 criminal defendants to ask federal court to dismiss their sex crime, assault cases*, The Oregonian (June 2, 2023); Conrad Wilson, *Lawmakers say Oregon 'primed' for lawsuit after scathing American Bar Association report*, Oregon Public Broadcasting (Jan. 22, 2022),

reconsideration. The respondents must also show they satisfy Rule 59(e)'s standard, which they have not done.

B. The Respondents Have Not Shown Newly Discovered Evidence, Clear Error, Or An Intervening Change In The Law Warranting Reconsideration.

“Rule 59(e) motions seldom change judicial outcomes.” *Banister v. Davis*, 140 S. Ct. 1698, 1708 (2020). The motion is not to be used to “ask the court to rethink what it has already thought.” *Credit Bureau Connection, Inc. v. Pardini*, 726 F. Supp. 2d 1107, 1132 (E.D. Cal. 2010). Instead, “reconsideration is appropriate only if a court (1) committed a ‘manifest[] error of law,’ (2) precipitated a ‘manifest injustice,’ (3) is presented with ‘newly discovered or previously unavailable evidence,’ or (4) learns about an ‘intervening change in the controlling law.’” *United States v. Walls*, 293 F. Supp. 3d 1251, 1253 (D. Or. 2018) (quoting *Rishor v. Ferguson*, 822 F.3d 482, 491-92 (9th Cir. 2016)).

The respondents’ motion fails to chin this high bar. The respondents do not appear to directly argue that they have newly discovered evidence, that the TRO was clearly erroneous or manifestly unjust, or that there has been an intervening change in the controlling law. The State asserts that, in the absence of meeting the standard, reconsideration can be granted in other “unusual circumstances.” ECF 38 at 4-5. The respondents do not cite a single case where these other unusual circumstances have been found to exist. Nor does the State does not offer any case law to support the proposition that the addition of a defendant constitutes a “highly unusual circumstance” warranting reconsideration. The law is to the contrary. *See Arizona*, 460 U.S. at 615 (intervention does not justify relitigation of decided issues). Thus, the motion fails because the State has not shown manifest error in law, a manifest injustice, newly discovered evidence or previously unavailable evidence, or an intervening change in the law.

1. The Respondents Do Not Point To Newly Discovered Evidence Warranting Reconsideration.

The State has failed to point to any newly discovered evidence that would undermine the Court's strong finding of ongoing federal constitutional violations. To warrant reconsideration, the respondents must show "that the evidence was discovered after the judgment, that the evidence could not have been discovered earlier through due diligence, and that the newly discovered evidence is of such magnitude that had the court known of it earlier, the outcome would likely have been different." *Dixon v. Wallowa County*, 336 F.3d 1013, 1022 (9th Cir. 2003). The respondents do not come close to this high standard.

The respondents point to a few minor factual discrepancies that do not meet the newly discovered evidence standard. All points mentioned by the respondents were available on the State's electronic docketing system and are not newly available. The Judges' decision not to appear at the hearing, despite notice, demonstrates a lack of diligence in presentation of this evidence. Finally, the evidence would not have made a difference to the Court's decision.

The State argues that the habeas corpus petition incorrectly pleads that Mr. Aiona did not have counsel at his arraignment and that the docket sheet lists "Lewis" as his counsel. ECF 38 at 3. The issue of arraignment counsel was thoroughly discussed at the hearing. TRO Tr. at 28-29. The Court was aware that Metropolitan Public Defenders provide an attorney with a limited role at arraignments and considered the declaration of Metropolitan Public Defender arraignment supervisor Zac Hvalaty. TRO Ex. C. Whether Mr. Aiona had a person briefly stand next to him at his arraignment does not undercut the Court's findings that the failure to provide counsel for indigent defendants violates the Sixth and Fourteenth Amendments. Separately, Mr. Aiona is on house arrest, and is not part of the class certified by the district court at the TRO hearing. However, the recording of his arraignment, which counsel can provide to the Court at the preliminary

injunction hearing shows that “Lewis” did not perform any advocacy role on the record with respect to Mr. Aiona’s release conditions. The State moreover cannot dispute that many indigent defendants in Washington County have release hearings without counsel.

The State also offers that Mr. Bartlett had counsel on August 10, 2023, and that, contrary to the Court’s statement in the TRO order, he had counsel when he pled guilty. ECF 38 at 3. The State fails to mention that guilty plea occurred two weeks after the initial petition was filed on July 27, 2023. The first amended petition was filed with the express purpose to add the judicial defendants with the agreement of the Sheriff Garrett’s counsel. Mr. Bartlett is one of several named petitioners and class members. Pursuant to Rule 15(c), the amended petition relates back to the date of initial filing. *Estate of Thomason ex rel. Perez v. County of Klamath*, No. Civ. 01-3004-CO, 2004 WL 1598802, at *22-23 (D. Or. July 16, 2004); *see also Mayle v. Felix*, 545 U.S. 644, 656, 664 (2005) (Rule 15(c), in civil cases in general and specifically under habeas corpus rules, “provides that pleading amendments relate back to the date of the original pleading when the claim asserted in the amended plea ‘arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.’”).

The State otherwise concedes that Mr. Bartlett was without counsel after his arraignment on June 26th until July 28th and that he had a release hearing without counsel. ECF 52 at 4-5. The State’s recitation of Mr. Bartlett’s procedural history concedes that, at the time the initial petition was filed, he was without counsel. *Id.* In any event, as discussed at the TRO hearing, there are several people who did plead guilty without counsel. Ex. G to TRO Hearing. The Court found the possibility that a person would plead guilty without counsel a part of the likelihood of success on the merits. ECF 25 at 12. Because the TRO focused on preventing future harm, it is not relevant whether this particular harm injured Mr. Bartlett.

Minor quibbles with the facts are insufficient to “set forth facts or law of a strongly convincing nature to induce the Court to reverse its prior decision.” *Donaldson v. Liberty Mutual Ins. Co.*, 947 F. Supp. 429, 430 (D. Haw. 1996). The factual record underlying the TRO has not been materially challenged.

2. The Court Correctly Issued A Temporary Restraining Order.

The respondents have likewise failed to marshal arguments necessary to show that the Court committed a manifest legal error in granting the TRO. The Court correctly considered and found all the prerequisites for issuance of an injunction preventing ongoing violation of a federal constitutional right.

a. Constitutional Violations Weigh Heavily In The Balance Of Factors Warranting Injunctive Relief.

The respondents’ recitation of the preliminary injunction standard ignores the key aspect of the case before the Court: the petitioners claim that they are in custody in violation of an array of federal constitutional rights. The constitutional implications of the litigation elevate the likelihood of success factor in the determination of whether injunctive relief should issue:

It is well-established that the first factor is especially important when a plaintiff alleges a constitutional violation and injury. If a plaintiff in such a case shows he is likely to prevail on the merits, that showing usually demonstrates he is suffering irreparable harm no matter how brief the violation. And his likelihood of succeeding on the merits also tips the public interest sharply in his favor because it is “always in the public interest to prevent the violation of a party’s constitutional rights.”

Baird v. Bonta, ___ F.4th ___, No. 23-15016, 2023 WL 5763345, at *3 (9th Cir. Sept. 7, 2023) (citations omitted). Therefore, “likelihood of success, ‘is a threshold inquiry and is the most important factor’ in any motion for a preliminary injunction,” which “holds especially true for cases where a plaintiff seeks a preliminary injunction because of an alleged constitutional violation.” *Id.* at *4 (quoting *Env’t Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020)).

“[T]he deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’” *Id.* (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))). When an alleged violation of a constitutional right is involved, “most courts hold that no further showing of irreparable injury is necessary.” *Id.* (citation omitted). Further, where the respondent is the government, “the last two *Winter* [*v. Natural Res. Def. Council*, 555 U.S. 7 (2008)] factors ‘merge.’” *Id.* at *3 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). The likelihood of succeeding on the constitutional merits “tips the public interest sharply” in favor of the petitioners because it is “always in the public interest to prevent the violation of a party’s constitutional rights.” *Id.* at *3 (quoting *Riley’s Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 731 (9th Cir. 2022) (quoting *Melendres*, 695 F.3d at 1002)).

The government “cannot reasonably assert that it is harmed in any legally cognizable sense by being enjoined from constitutional violations.” *Id.* at *4 (quoting *Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1983)). Plaintiffs who are able to “establish[] a likelihood that [a] policy violates the U.S. Constitution . . . have also established that both the public interest and the balance of the equities favor a preliminary injunction.” *Id.* (quoting *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014)). “[I]t is no surprise that ‘our caselaw clearly favors granting preliminary injunctions to a plaintiff . . . who is likely to succeed on the merits of his [constitutional] claim.’” *Id.* (quoting *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009)).

“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.” *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1133 (W.D. Wash.

2013). The respondents gave short shrift to controlling Ninth Circuit law heavily weighting the individual's interest in constitutional protections as inevitably causing irreparable harm and furthering the public interest in protecting individual constitutional rights. Even under the Ninth Circuit's alternative balancing test, the petitioners are entitled to injunctive relief. ECF 37 at 3 n.1.

b. The TRO Is Proper Whether Considered Mandatory Or Prohibitive.

The State argues that the temporary restraining order is a "mandatory injunction" that requires a heightened showing. ECF 38 at 11. Because the relevant status quo is the provision of counsel to the indigent accused, the temporary restraining order is properly viewed as prohibitive. *See Arizona Dream Act Coal.*, 757 F.3d at 1060 (holding the status quo is "the legally relevant relationship between the parties before the controversy arose."). The petitioners seek to prohibit the respondents from unlawfully restricting their freedom without providing counsel. Whether mandatory or prohibitive, the Court properly granted relief from the ongoing violations of federal constitutional rights.

In *Hernandez v. Sessions*, the Ninth Circuit noted the distinction between the two types of injunctions and the difficulty deciding into which category requested relief falls. In the context of preventing (or prohibiting) unconstitutional detention, the court in *Hernandez* held that injunctive relief is prohibitory. 872 F.3d 976, 997-98 (9th Cir. 2017). (an injunction that "prevents future constitutional violations" is "a classic form of prohibitory injunction.") (citing *Arizona Dream Act Coalition*, 757 F.3d at 1060-61).

However, the Court need not linger long on the "vexing" question of whether the injunction is prohibitory or mandatory. *Id.* (quoting *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 1006 (10th Cir. 2004)). Even if the TRO calls for the Sheriff to "take action," the order should stand. "To obtain a mandatory injunction, a plaintiff must 'establish

that the law and facts *clearly favor* her position, not simply that she is likely to succeed.” *Innovation Law Lab*, 310 F. Supp. 3d at 1157 (emphasis in original) (quoting *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015)). The Court’s ruling establishes that the law and facts clearly favor the class. As the Court found: “There is simply no dispute that Washington County’s failure to appoint counsel, while incarcerating pretrial detainees indefinitely, violates the Sixth Amendment’s right to counsel and fundamentally impacts the liberty interest a pretrial detainee has under the Due Process Clause of the Fourteenth Amendment.” ECF 25 at 11.⁴

Mandatory injunctions “are permissible when ‘extreme or very serious damage will result’ that is not ‘capable of compensation in damages,’ and the merits of the case are not doubtful.” *Hernandez*, 872 F.3d at 999 (quoting *Marlyn Nutraceuticals v. Mucos Pharma*, 571 F.3d 873, 879 (9th Cir. 2009)). The Court’s ruling meets this requirement. The Court found that this was a case of “rare urgency” and “no money damages could possibly restore the liberty that is lost.” ECF 25 at 7, 12. Accordingly, even if the higher mandatory injunction standard were to apply, the Court’s opinion sufficiently addressed the requirements of that standard and reconsideration is not warranted.

3. The Court Correctly Identified Constitutional Violations.

The respondents offer no compelling reason why the Court should revisit its decision that there is “no dispute” that Washington County is violating the rights of detained, unrepresented indigent defendants. ECF 25 at 11. The Court explained how the absence of counsel from the early

⁴ In its objection to the motion for a temporary restraining order, the Sheriff-Respondent recognized the potential for serious violations of federal constitutional rights that would clearly favor the petitioners’ claims for relief. ECF 19 at 2 (“Respondent Garrett agrees that the lack of appointed defense counsel for indigent defendants in custody at critical stages may constitute serious violations of Sixth Amendment rights.”). Such constitutional concerns appear to be absent from the State’s request for reconsideration.

stages of representation implicated the constitutional rights of the class members: “They are unable to adequately argue for conditional release, secure witnesses, review discovery, challenge the charging instrument, intervene in the Grand Jury process, negotiate with the prosecution in an arms-length fashion, request the preservation of evidence, or challenge the length of their confinement through speedy trial statutes.” ECF 25 at 12. The Court can easily dispose of the respondents’ arguments that ask the Court to “rethink” its unwavering identification of a constitutional violation.

a. The Sixth Amendment Guarantees Representation By Counsel Throughout The Prosecution Of Indigent Defendants.

The State argues that the Court’s order requiring appointment of counsel within ten days of arraignment misconceives the right to counsel, contending that, while the right to counsel attaches at arraignment, the constitutional minimum only requires appointment within a reasonable time before a critical stage and presence of counsel at a critical stage. ECF 38 at 15. This argument misapprehends the Supreme Court’s Sixth Amendment jurisprudence anchored in *Gideon* 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* and *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 granted after conviction. *See United States v. Cronin*, 466 U.S. 648, 658-59 (1984) (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 effective 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 v. Luzerne County*, 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 715, 730-31 (Penn. 2016). 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. This Court’s constitutional analysis is consistent with the *Kuren* court’s analysis as well as with that of the Department of Justice.⁵

Kuren helpfully draws another 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 invokes simply 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*, 15 N.Y.3d 8, 930 N.E.2d 217, 225 (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 38 at 11-12; *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

⁵ 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, warranted 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 38 at 12-13. 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.” *Id.* at 147-48. The complete denial of counsel, as the class members are experiencing, is a greater claim to the “root meaning of the constitutional guarantee,” rather than a retrospective view of the quality of the representation received. *Id.*

Because the instant case presents a simple claim of nonrepresentation under the Sixth Amendment and *Gideon*, the Court properly intervened to provide prospective relief consistently with the decisions in *Wilbur*, *Kuren*, *Hurrell-Harring*, *Tucker*, and the amicus curiae position of the United States Department of Justice. The Court should easily find that the facts presented at the TRO hearing supported its finding of constitutional violations and leave its order undisturbed.

b. The Court Need Not Revisit Other Constitutional Claims.

The respondents offer that no other constitutional claim warrants a TRO. ECF 38 at 13-14. The Court appropriately found that the deprivation of counsel “fundamentally impacts the liberty interest a pretrial detainee has under the Due Process Clause of the Fourteenth Amendment” because “no reliable process” is available “when an indigent defendant is required to proceed against the power of the state without counsel.” ECF 25 at 11-12. This danger was well documented by the uncounseled preventative detention hearings introduced at the TRO hearing. The respondents again resort to “critical stage” analysis to argue against this claim—but for the reasons already explained, that analysis is inapt when evaluating a prospective claim of nonrepresentation.

c. The Court May Presume A Nexus Between The Petitioners’ Custody And The Constitutional Violations.

The respondents argue that the petitioners must demonstrate that each petitioner would not be in custody but for the constitutional violation. ECF 38 at 15. The respondents cite a single case in support of this proposition, *Bailey v. Hill*, 599 F.3d 976 (9th 2010), which is distinguishable for multiple reasons.

First, *Bailey* is a postconviction case under 28 U.S.C. § 2254 involving a prior 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 from 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*, 146 A.3d at 743. Just as they need not show prejudice from the denial of counsel, the petitioners need not show that it is the but-for-cause of their confinement. *See Kuren*, 146 A.3d 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.").

4. The Court Already Considered *Younger* Abstention And Correctly Determined It Did Not Apply.

The respondents contend that *Younger v. Harris*, 401 U.S. 37 (1971), warrants reconsideration of the TRO. *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). But where extraordinary circumstances exist in the form of pretrial constitutional violations antecedent to the criminal prosecution, federal court intervention is necessary and appropriate. *See Gerstein v. Pugh*, 420 U.S. 103, 107 n.9 (1975) (finding *Younger* inapplicable because "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").

The Court need not "rethink what it has already thought" about *Younger*. *See Credit Bureau Connection, Inc.*, 726 F. Supp. 2d at 1132. The Court has already considered and rejected *Younger* abstention. *See* ECF 19 at 14-16 (Sheriff Garrett's Response to Mot. for TRO); TRO Tr. at 69. The

Court’s opinion discussed exhaustion, explicitly noting that the requirement stems from the doctrine of *Younger* abstention and found this to be “a case of rare urgency, presenting the very extraordinary circumstances which demand federal intervention.” ECF 25 at 7.

However, should the Court consider the arguments raised by the State and the Judges regarding *Younger*, they can be easily rejected. The State argues that “[p]etitioners further do not demonstrate any reason why they would not be able to adequately raise their constitutional challenges in [ongoing] state proceedings.” ECF 38 at 12. On the contrary, the petitioners have demonstrated a reason—they have no counsel to raise constitutional challenges. *See Cronin*, 466 U.S. at 654 (“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*, the federal 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 at 1135. Further, as detailed in the motion for a show cause order, and in the exhibits presented at the TRO hearing, the Washington County Circuit Court and prosecutors appear to have acknowledged that the failure to provide counsel is unconstitutional. However, the practice continued unabated until this Court’s temporary restraining order. In addition, as explained in Section B.3, the Sixth Amendment protects rights that do not affect the outcome of a trial. Thus,

any post-conviction method of raising the deprivation of counsel is necessarily insufficient to remedy the injuries suffered by the class.

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.

A better comparison is to challenges to constitutionally inadequate bail hearings, which have been held distinct from the merits of the state criminal prosecution for *Younger* purposes. *Page*, 932 F.3d at 904 (*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, 776 (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”). Similarly, the Court in *Gerstein* found no *Younger* problem in addressing the Fourth Amendment right to a “prompt” judicial review of probable cause. 420 U.S. at 107 n.9.

Younger abstention is not warranted, and exhaustion should be excused, in “extraordinary circumstances where irreparable injury can be shown.” *Brown v. Ahern*, 676 F.3d 899, 903 (9th Cir. 2012); *see also Page*, 932 F.3d at 903. The Court has already found extraordinary circumstances from the irreparable injury from constitutional violations. ECF 25 at 7. The respondents have not provided any compelling reason why the Court should depart from this determination.

5. The Respondents Present No Valid Reason For Reconsidering The Provisional Class Certification Of The In-Jail Class Detained In Washington County Without Counsel.

Finally, the respondents urge the Court to reconsider its decision to provisionally certify a class of indigent defendants who are detained in the Washington County detention centers without counsel. The respondents claim, incorrectly, that the Court’s certification order was improper because the class (1) does not satisfy the numerosity requirement, (2) does not satisfy the commonality requirement, or (3) was not properly certified under Rule 23(b)(2). None of the respondent’s points are persuasive.

a. The Numerosity Requirement Is Satisfied.

The class that this Court provisionally certified—all indigent defendants who are detained in a Washington County detention center for more than 10 days without counsel—is sufficiently numerous such that “joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). As this Court knows, Rule 23(a)(1)’s so-called “numerosity” requirement is not tied to any fixed numerical threshold—it “requires examination of the specific facts of each case and imposes no absolute limitations.” *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980). Generally

speaking, however, courts have found that the numerosity requirement is satisfied when a class includes at least 40 members. *Cf. Giles v. St. Charles Health Sys., Inc.*, 294 F.R.D. 585, 590 (D. Or. 2013) (noting that, as a rule of thumb, 40 class members is sufficient to satisfy the numerosity requirement); *see also Jordan v. Los Angeles Cty.*, 669 F.2d 1311, 1319 (9th Cir.), *vacated on other grounds by* 459 U.S. 810 (1982) (class of 39 members satisfies numerosity requirement); *McKenzie Law Firm, P.A. v. Ruby Receptionists, Inc.*, No. 3:18-cv-1921-SI, 2020 WL 1970812, at *4 (D. Or. Apr. 24, 2020) (same). Where, as here, “only declaratory and injunctive relief is sought for a class,” courts generally “rela[x] the requirement of a rigorous demonstration of numerosity.” *McCuin v. Sec’y of Health & Human Servs.*, 817 F.2d 161, 167 (1st Cir. 1987).

The respondents first contend that the numerosity requirement is not met because, on September 7—just before respondents filed their motion for reconsideration—“there were 10 individuals in Washington County detention facilities who were indigent, facing criminal charges in Washington County, and had not yet been appointed an attorney.” ECF 38 at 23–24. That, of course, was well *after* this Court ordered the relief that the petitioners initially sought. At the time that this Court ruled on petitioners’ motion, the record established that at least 56 people were detained in Washington County jails without counsel. ECF 6 at 4. And the number of individuals grows as new class members are taken into custody while others are released.

The record established that the number of people who are detained in Washington County jails without counsel fluctuates, such that the numbers are lower at the beginning of the month when “the attorneys in Washington County who have public defense contracts often have capacity to absorb new appointments.” Ex. C to TRO Hr’g, Declaration of Zac Hlavaty (“Hlavaty Decl.”) ¶ 13. By the middle of the month, “it is common for most, if not all, of the attorneys with public defense contracts to be at capacity.” Hlavaty Decl. ¶ 13. Thus, during the second half of any given

month, “it is more common for defendants to go unrepresented after arraignment.” Hlavaty Decl. ¶ 13. Where, as here, the number of members of the provisional class fluctuates, and will continue to do so “at indeterminate points in the future,” joinder becomes not merely impracticable but effectively “impossible.” *Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass. 2014) (citing William B. Rubenstein, *Newberg on Class Actions* § 3.15 (5th ed. 2013)). In those circumstances, the numerosity requirement is met.

Additional factors further support the conclusion that joinder is impracticable. On this point, the respondents contend that because class members “are not geographically diverse or difficult to contact,” and, for unexplained reasons, “need not fear retaliation from Respondents,” numerosity is also not satisfied. ECF 38 at 4. The Court should reject that argument. “In addition to class size, courts consider other factors to determine whether joinder is impracticable, including ‘the ease of identifying and contacting class members; the geographical spread of class members; and the ability and willingness of individual members to bring claims, as affected by their financial resources’” *J.N. v. Or. Dep’t of Educ.*, 338 F.R.D. 256, 264 (D. Or. 2021) (quoting *Chastain v. Cam*, No. 3:13-cv-01802-SI, 2016 WL 1572542, at *5 (D. Or. Apr. 19, 2016)); *see also* William B. Rubenstein, *Newberg on Class Actions* § 3:12 (5th ed.) (same). Considerations relating to judicial economy are also relevant. *See Chastain*, 2016 WL 1572542, at *5; *see also Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993) (citing cases).

Here, the class that this Court certified includes indigent criminal defendants—that is, individuals who lack the financial resources to retain an attorney to represent them in their criminal cases. That status of course directly affects class members’ abilities to bring their own individual cases, which further counsels in favor of class treatment. *Robidoux*, 987 F.2d at 936. These facts, combined with the fact that this case seeks prospective injunctive relief on behalf of future class

members, all weighs heavily in favor of a finding that joinder in this case is impracticable. *See id.* (citing *see Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.”)).

b. The Commonality Requirement Is Satisfied.

The focus of the commonality analysis is “the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). Respondents acknowledge that the members of the provisional class “all claim violation of the same constitutional rights to counsel,” ECF 38, at 24-25, they go on to urge that commonality is not satisfied because, in respondents’ view, “[a] consideration of the totality of each detainee’s circumstances is necessary to resolve the central issue in their claims.” In other words, respondents urge the Court to consider facts more appropriate to a predominance analysis of a proposed Rule 23(b)(3) class than to a case—here—seeking to enjoin a common policy or practice. Petitioners here seek to certify a class under Rules 23(b)(2) and 23(b)(1)(A)—not Rule 23(b)(3). The individualized considerations respondents raise do not defeat commonality.

Courts in the Ninth Circuit recognize that the “commonality requirement is construed less rigorously than the ‘predominance’ requirement of Rule 23(b)(3).” *Gold v. Lumber Liquidators, Inc.*, 323 F.R.D. 280, 287 (N.D. Cal. 2017) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998)); *see also Munguia-Brown v. Equity Residential*, 2017 WL 4838822, at *4 (N.D. Cal. Oct. 23, 2017). This includes cases where, as here, petitioners seek injunctive relief and class-wide treatment under Rule 23(b)(2). *Rodriguez v. Gates*, No. CV99–13190GAF, 2002 WL

1162675, at *6 (C.D. Cal. May 30, 2002) (“The Ninth Circuit has held that the commonality requirement may be relaxed when the plaintiff seeks certification of a class for injunctive relief under Rule 23(b)(2).”) (citing *Walters v. Reno*, 145 F.3d 1032, 1045-48 (9th Cir. 1998)).

Accordingly, courts have recognized that in civil rights suits seeking injunctive relief, where the “lawsuit challenges a system-wide practice or policy that affects all of the putative class members, . . . individual factual differences among class members pose no obstacle to commonality.” *Parsons v. Ryan*, 754 F.3d 657, 682 (9th Cir. 2014); *see also Hernandez v. Lynch*, No. 16-cv-00620-JGB, 2016 WL 7116611, at *19 (C.D. Cal. Nov. 10, 2016) (granting certification in response to a challenge to U.S. immigration officials’ policies and practices surrounding bond requirements for detainees, even though the outcome of individual bond cases would depend on the facts of each case). Because class members’ claims in this case may be resolved through the resolution of a central question—whether holding indigent defendants in custody without counsel based on pending criminal charges violates their federal constitutional rights—commonality is satisfied.

c. The Class Was Properly Certified Under Rule 23(b)(2).

Finally, the respondents argue that the class was not properly certified under Rule 23(b)(2). For support, respondents make largely the same arguments they make in contending that commonality is not satisfied—that is, that a single injunction (an answer to a common question) cannot possibly remedy the constitutional violations that the respondents’ current practice creates, and, therefore, class treatment is somehow improper. For the reasons explained above, however, that argument rests on a flawed understanding of the nature and scope of the constitutional rights at issue in this case. This Court correctly held that the indefinite detention of unrepresented

criminal defendants violates the Sixth and Fourteenth Amendments. Remedying those rights through injunctive relief can be accomplished on a classwide basis.

Indeed, contrary to the respondents’ arguments, this is *precisely* the type of case for which Rule 23(b)(2) exists. Certification of a class under Rule 23(b)(2) requires that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). In the Ninth Circuit, “[i]t is sufficient” that “class members complain of a pattern or practice that is generally applicable to the class as a whole.” *Walters*, 145 F.3d at 1032, 1047. “‘The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.’” *Lyon v. ICE*, 308 F.R.D. 203, 213 (N.D. Cal. 2015) (quoting *Wal-Mart*, 564 U.S. at 360).

In contrast to Rule 23(b)(3) classes, “the focus [in a Rule 23(b)(2) class] is not the claims of the individual class members, but rather whether [the defendants] ha[ve] engaged in a ‘common policy.’” *In re Yahoo Mail Lit.*, 308 F.R.D. 577, 599 (N.D. Cal. 2015) (quotation marks omitted). Thus, that some class members may have suffered different injuries from the challenged policy or practice does not prevent the class from meeting the requirements of Rule 23(b)(2). *See Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) (emphasizing that, although “the claims of individual class members may differ factually,” certification under Rule 23(b)(2) is a proper vehicle for challenging “a common policy”).

Rule 23(b)(2)’s requirements plainly are met here. Here, every member of the provisional class has suffered a violation of their federal constitutional rights by respondents’ failure to appoint counsel to represent them in their criminal case, including during their ongoing detention in

Washington County jails. This Court’s injunction provides classwide relief—it seeks to remedy those violations by compelling respondents to immediately appoint counsel or release the class member from jail. That injunctive relief is appropriate respecting the class as a whole. Accordingly, the provisional class was properly certified under Rule 23(b)(2). *See, e.g., Walters*, 145 F.3d at 1047 (certifying Rule 23(b)(2) class based on the defendants’ practice of providing deficient notice of deportation procedures); *Parsons*, 754 F.3d at 689 (finding declaratory and injunctive relief proper as to the whole class where “every [member] in the proposed class is allegedly suffering the same (or at least a similar) injury and that injury can be alleviated for every class member by uniform changes in . . . policy and practice”).

Conclusion

The respondents’ motion for reconsideration provides the Court with a dismal example of why federal intervention is necessary. The State—obligated to protect the rights of all its citizens, including the petitioners—denies that federal constitutional rights are even at issue. Without this Court’s intervention, the Sixth Amendment and all the rights contingent on its exercise in criminal cases become dead letters in Oregon for criminal defendants in jail without counsel. Because the respondents failed to carry their substantial burden, the motion to reconsider should be denied.

Respectfully submitted this 29th day of September, 2023.

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1 IN THE CIRCUIT COURT FOR THE STATE OF OREGON

2 IN THE COUNTY OF WASHINGTON

3
4 STATE OF OREGON,)
5 Plaintiff,)
6 v.) Case No. 23CR35850
7 KEVIN LAWRENCE GALLAGHER,)
8 Defendant.)
9
10

11 TRANSCRIPT OF PROCEEDINGS

12 TRANSCRIBED FROM AUDIO MEDIA FILES

13 August 29, 2023

14 Portland, Oregon

15 Courtroom 202C
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22

23 BEFORE: Hon. Kathleen J. Proctor

24 Transcribed by Holly Goodwin,
25 Professional Court Reporter

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Also Present: Defendant, in custody

1 P-R-O-C-E-E-D-I-N-G-S

2 (Whereupon the following proceedings were
3 held:)

4 (TRANSCRIBER'S NOTE: Sentence ends
5 mid-sentence:)

6 THE COURT: -- zero. Thank you,
7 Mr. Gallagher. You're welcome to have a seat.

8 MR. IZAGUIRRE: Judge, good
9 afternoon. Christian Izaguirre on behalf of
10 Mr. Gallagher. Does it make more sense to address
11 all three matters because I have the same --

12 THE COURT: I think that we're going
13 to address them one at a time, if that's okay with
14 you. Is that okay --

15 MR. IZAGUIRRE: Yes, Your Honor.

16 THE COURT: -- with you, Mr. McKey?
17 One at a time?

18 MR. McKEY: Whatever the court would
19 prefer, Judge. I do have the same questions and
20 arguments for all three.

21 THE COURT: Well, I understand. But
22 these are individual cases, and I might do something
23 different in one case versus another case. And so
24 that's why I want to review them differently. But I
25 need to look at something real quick here. If you

1 could just bear with me for just one second.

2 All right. Mr. Izaguirre, what would
3 you like me to tell -- what would you like to tell
4 me about the appointment? And it looks like you are
5 specifically appointed on Mr. Gallagher's case.

6 MR. IZAGUIRRE: Well, Your Honor, I
7 don't think -- I think MPD's appointed; I don't know
8 if I am specifically.

9 THE COURT: Well, your name's on the
10 docket, so I don't know why your name's on the
11 docket.

12 MR. IZAGUIRRE: I wouldn't know
13 either, but --

14 THE COURT: Okay.

15 MR. IZAGUIRRE: So, in any event, as
16 a representative of Metropolitan Public Defender, we
17 are moving to withdraw because we can't ethically
18 represent Mr. Gallagher nor Ms. Shields or
19 Mr. McClarrin (phonetic), and that's because
20 we're --

21 THE COURT: Well, we're going to do
22 one at a time, okay?

23 MR. IZAGUIRRE: I -- okay.
24 Apologies.

25 So we can't ethically take on

1 Mr. Gallagher's case. I can give some backdrop.
2 My -- my understanding is that the Honorable McShane
3 issued an order from federal district court saying
4 that if people were not represented and in custody
5 for 10 days, that they shall be released. That was
6 on August --

7 THE COURT: What does that have to do
8 with this case, Mr. Izaguirre?

9 MR. IZAGUIRRE: Well, I'm giving
10 backdrop, Your Honor, if I could --

11 THE COURT: Okay.

12 MR. IZAGUIRRE: -- get there.

13 So that was on August 15th. On
14 August 18th, my office was given appointments, not
15 in the normal course, and I'll explain that. I was
16 given appointments on nine cases, most of which were
17 major felony cases. My understanding is that's
18 never occurred on one day, to get nine major
19 felonies.

20 Part of that is the entire major
21 felony team is five attorneys, and we just don't
22 have capacity, typically, to handle that, never mind
23 where we're at right now. We were given those
24 appointments. We had meetings. We did everything
25 we could.

1 And based on those meetings, based on
2 assessing, not only the max attorney caseload, but
3 the basis for my motion, which is not a MAC, which
4 is one factor of many, but the ethical obligations.
5 Can we meet these with these clients? We've decided
6 that we couldn't on four cases.

7 One of those cases, we actually
8 discovered in current client conflict. We
9 represented the alleged victim, who was --

10 THE COURT: Which one is that?

11 MR. IZAGUIRRE: That is Mr. -- he's
12 not here today. Mr. Burrell (phonetic).
13 Judge Menchaca --

14 THE COURT: Okay. So we're not --
15 we're not talking about that one today.

16 MR. IZAGUIRRE: Right.

17 THE COURT: Okay.

18 MR. IZAGUIRRE: I was just giving the
19 backdrop. So --

20 THE COURT: I get really confused if
21 you talk about stuff that isn't relevant right in
22 front of me. Sorry.

23 MR. IZAGUIRRE: Respectfully, I think
24 it is relevant because --

25 THE COURT: It's not relevant because

1 you have a conflict, so that's a different
2 situation. The relevancy to me is whether or not,
3 not your firm, but the -- each individual
4 attorney -- and that's why I want to take these
5 cases individually -- are completely and totally
6 professionally unable to handle these cases.

7 And so I do want to have more
8 conversation with you about it, and I do want to be
9 respectful about it. You know, but I -- I have
10 to -- and I do very much understand that that was a
11 big ask, a (indiscernible). It wasn't really an
12 act, it was, "Here. Here are some cases."

13 I really get that. But at the same
14 time, I did have rationale for why I did what I did
15 as far as caseloads. I do respect the fact -- and I
16 understand that Metropolitan Public Defenders is a
17 little bit of a different entity than, for example,
18 Oregon Defense Attorney Consortium because you're a
19 nonprofit and you are 1.0 FTEs, not 1. plus. I
20 really understand all of that.

21 Really what I want to know is really
22 the nuts and bolts and the reality of the situation
23 as to the workload because I don't want to overwork
24 your lawyers. I don't want you guys to be
25 completely and totally professionally compromised.

1 I want these people to have adequate
2 representation. I think that I, as the presiding
3 judge in this county, have been exceedingly --
4 exceedingly patient and careful and thoughtful and
5 mindful of all of the constraints and problems with
6 the defense attorney crisis. But, at the same time,
7 I am going to weigh all of the factors that I know
8 exist.

9 And so, Mr. Izaguirre, I know that
10 you are talented in your arguments. I'm ready to
11 hear it, but let's please stay talking about the
12 case that we're talking about right now, which is
13 Mr. Gallagher. Okay?

14 MR. IZAGUIRRE: Okay. We're talking
15 about Mr. Gallagher, and we're talking about me.
16 I've exceeded my maximum attorney caseload. I work
17 60-plus hours a week. There is no way that I can
18 responsibly take Mr. Gallagher's case.

19 And I want to start from the preface
20 that I think everybody in this courtroom, including
21 Mr. McKey and his office, would like Mr. Gallagher
22 to have representation, constitutionally effective
23 representation. He's not waiving that right, and
24 that's what he wants and that's what he's entitled
25 to.

1 I cannot provide that. I cannot
2 provide that, and if I can't provide it in accord
3 with the Rules of Professional Conduct, then we have
4 a conflict. And so I am prepared to address any
5 questions this court may have for myself or the
6 team, as a whole. But I give you the backdrop
7 Your Honor, respectfully, because this wasn't
8 something we take lightly. I want --

9 THE COURT: I understand.

10 MR. IZAGUIRRE: -- I want everyone in
11 this jury box to have effective representation. We
12 cannot ethically do it. And so that's why we didn't
13 just wholesale when we were force-appointed. I hate
14 using that term, and I just don't have another -- a
15 better term at this point.

16 We didn't just file -- fire off these
17 motions. We had meetings. We talked about it. We
18 talked with every attorney. What can they handle?
19 What can they take on? We looked at these cases.
20 And it's not just a quantitative approach because
21 these aren't apples for apples.

22 These cases aren't, you know, one in,
23 one out. It depends -- you know, one attempted
24 murder with two civilian witnesses and some body cam
25 is not the same as sex abuse with CARES, three

1 victims over a decade, and perhaps back on appeal.

2 THE COURT: Mm-hmm.

3 MR. IZAGUIRRE: And so we have to
4 take that qualitative approach. We also have to
5 look at the experience of attorneys, which I
6 outlined.

7 THE COURT: Mm-hmm.

8 MR. IZAGUIRRE: No one on my team
9 has, first, shared a Measure 11 case. The major
10 felony team has been completely gutted in the last
11 year. Five members have left for various reasons.
12 And so everyone on my team, with the exception of me
13 and one other person, has not been on the team for
14 more than a year or doesn't have that experience for
15 more than a year.

16 And so all of that factors into this
17 conclusion that we just ethically cannot handle
18 these cases without violating their right to
19 effective counsel and the Rules of Professional
20 Conduct, which govern not only each member of my
21 team and member of the bar but also me as a
22 supervisor, which has a different ethical
23 obligation. So I'm ready to answer --

24 THE COURT: And you're able to take
25 less cases because you're a supervisor, and I

1 understand that. Right?

2 MR. IZAGUIRRE: I'm able to -- I'm --
3 I don't understand the question.

4 THE COURT: You're less able to take
5 a higher number of cases because you're being a
6 supervisor; is that true? You're less able to take
7 maybe the same number of cases as someone else
8 because you're a supervisor, your supervisory
9 duties.

10 MR. IZAGUIRRE: Well --

11 THE COURT: Is that true?

12 MR. IZAGUIRRE: I don't understand
13 the question. If the Court's referring to a max
14 attorney caseload at number --

15 THE COURT: Mm-hmm.

16 MR. IZAGUIRRE: -- which is a
17 ceiling, not a floor, yeah, supervisor less. But
18 even my caseload, I believe considering that, is
19 well above what my --

20 THE COURT: Okay.

21 MR. IZAGUIRRE: -- max should be.

22 THE COURT: Okay. So I would like to
23 ask you some questions.

24 MR. IZAGUIRRE: Sure.

25 THE COURT: So I am looking at the

1 attorneys that have -- that I think work for MPD. I
2 don't have them sorted right now for -- firm, but I
3 could look at them in a minute. But I'm looking at
4 the available appointments, weighted appointments,
5 and -- and we may be looking at available
6 appointments for September when we're in August --
7 is possible -- that I'm looking at, you know,
8 available appointments that might be available for
9 September, and here we're in August. Okay? Keeping
10 that in mind.

11 MR. IZAGUIRRE: Okay.

12 THE COURT: And today being
13 August 29th. Okay?

14 So I know that -- let's see. I
15 see -- and I don't want you to feel obligated to
16 talk about personal leave situations. That's not
17 what I'm asking you. Okay?

18 MR. IZAGUIRRE: Understood.

19 THE COURT: If you say that, you
20 know, you're not able to give me information about
21 that person because of their privacy. That's fine.
22 I don't need that information. But so -- so, for
23 example, I have Ms. Gutierrez. She is major felony
24 qualified, and she works for MPD; right?

25 MR. IZAGUIRRE: Yep.

1 THE COURT: Okay. And I show that
2 she has 66 available appointments weighted and a
3 Jessica law case and a murder case are weighted at
4 50. A Measure 11 case is weighted at 6.67. And a
5 major felony is 2.17. So that makes me think that
6 Ms. Gutierrez, who is major felony qualified, has
7 some available appointments.

8 And when I'm looking at her details,
9 I also see, you know, she's not slacking at all.
10 She has a total open caseload of 30 -- whoops. Let
11 me go back up. That might not be her. Gutierrez.
12 Open caseload of 30. She has five probation
13 violations, six misdemeanors, two minor felonies,
14 seven major felonies, and nine Measure 11s.

15 A lot of attorneys I know -- for
16 example, in Washington County, are doing 14 -- they
17 have a 14 where it's contract appointments weighted.
18 In the current month, Ms. Gutierrez's is eight. So
19 why can't Ms. Gutierrez take this case?

20 MR. IZAGUIRRE: Because what
21 you're -- you're using, Your Honor, which is -- I
22 understand is the metric that you have before you --
23 is one measure among many.

24 THE COURT: Okay.

25 MR. IZAGUIRRE: So a MAC, if that's

1 what you're referring to, it's a max attorney
2 caseload.

3 THE COURT: Mm-hmm.

4 MR. IZAGUIRRE: Anywhere you look at
5 that number it says 'balanced against ethical
6 obligations'.

7 THE COURT: Yes.

8 MR. IZAGUIRRE: And so the basis of
9 my motion or basis of my declaration is not that
10 they have a (indiscernible), for example. And also
11 (indiscernible) for over 10 years. It's that,
12 ethically, the attorneys on my team cannot take
13 those cases for various reasons.

14 Because the MAC -- for example, a
15 Measure 11, just as I explained it, a
16 (indiscernible) weighs the same as a sex abuse, but
17 it doesn't take into effect the qualitative nature
18 of whether that's on appeal, the attorney's level of
19 experience, what they have going on personally, what
20 their trial schedule's like. So what I have to
21 do --

22 THE COURT: I understand.

23 MR. IZAGUIRRE: -- as a supervisor,
24 and as we do at MPD, is we meet with these people
25 and say, "Can you handle this?" Now, we push back.

1 It's not just a simple inquiry. But, at the same
2 time, I have an ethical duty. Do I feel -- do I
3 feel that these people can handle these cases in a
4 way that they get the effective representation that
5 they need?

6 THE COURT: I understand.

7 MR. IZAGUIRRE: And, if not, I can't
8 accept that appointment, which is why we took the
9 cases we could and then filed the motion that we
10 did.

11 THE COURT: I appreciate that. So,
12 for example, Mr. Theo Erde-Wollheim was in my
13 courtroom -- I think it was --

14 MR. IZAGUIRRE: Yesterday.

15 THE COURT: -- yesterday.

16 MR. IZAGUIRRE: It was yesterday.

17 THE COURT: And he withdrew from a
18 case.

19 MR. IZAGUIRRE: He did.

20 THE COURT: And I asked him, "So,
21 Mr. Erde-Wollheim, does that mean that you're able
22 to take another case?" And he said, "I'm not able
23 to answer that question." And I asked him a little
24 bit further inquiry. He did not appear able to
25 answer the question, and that concerns me because I

1 also know that when I've asked attorneys from your
2 firm, "Do you know what a MAC is?" And they'll say,
3 "No."

4 And that's fine because I don't
5 expect them to necessarily understand that. But, at
6 the same time, I -- I worry a little bit that --
7 that an attorney, a specific attorney, might feel
8 that they could take on more but that they're not
9 being given the opportunity because management is in
10 there directing what's going to happen, but the
11 attorney themselves might be willing and able but
12 they're not here to tell me what -- whether or not
13 they feel that they're willing and able.

14 And I would assume that an attorney
15 would know whether they're willing and able to take
16 a case because they're the ones who have to manage
17 their time and figure out, "Am I going to be able to
18 talk to this client today? When am I coming up?"
19 So that's -- that's my question, is are these -- are
20 these attorneys in your firm able to speak for
21 themselves as to their ability to take on additional
22 cases?

23 MR. IZAGUIRRE: The short answer is
24 no. And I'll give you an analogy. I served in the
25 Marine Corps. And as a private first class, if I

1 would have told you, "I can raid that house by
2 myself," and a sergeant would tell me, "No, you
3 can't. That's stupid."

4 And there's an ethical obligation
5 that that sergeant will tell me that. The same
6 thing with a motivated public defender or prosecutor
7 at a law school would, "Yeah, I can handle a murder.
8 I'm ready for that." And the job of our staff
9 attorneys, for example, Mr. Erde-Wollheim, is to
10 focus on his cases, to provide the representation
11 that he's supposed to provide, not on case
12 appointments, not on what cases he should get.

13 He gets the cases that we give him.
14 That's being a member -- a staff attorney. And as a
15 supervisor, that is my job to worry about what a MAC
16 is, whether he's at his caseload, whether he's
17 being -- you know, maybe he's -- if you have someone
18 who's a bit lazy on your team -- that's not what I'm
19 saying at all -- and you have to push that a little
20 bit.

21 So Mr. Erde-Wollheim, what he said
22 yesterday was, "That is -- I don't handle that. I
23 have to ask my supervisor." Because I was sitting
24 in the courtroom. And so with respect to that case
25 that we're talking about specifically, he filed that

1 motion, I believe, on August 15th.

2 I filed my declaration after that,
3 and I already -- I already knew that this was part
4 of the analysis that that case was going to be
5 withdrawn from. So, in that instance, he may think,
6 "Well" -- it makes sense from the Court's point of
7 view. One out, one in; right? Even though I know
8 nothing about the cases, again, assuming apples for
9 apples, these cases are exactly the same.

10 But I knew after we had our meeting
11 that that case -- because part of my inquiry is do
12 you have cases that are going to be withdrawn? And
13 the numbers I'm looking at, the facts that I know
14 about this case, based on our weekly meeting that we
15 have every week about their cases, so I know what
16 these cases are about, is it -- am I missing
17 something? And, for example, that case, I knew that
18 he was going to withdraw from it. The motion had
19 been filed. We were just waiting for the hearing,
20 which occurred yesterday.

21 THE COURT: Okay. Sorry; I still
22 have more questions. Mr. Izaguirre, here's some
23 more questions that I have for you. Because when I
24 assigned all these cases to Metropolitan Public
25 Defenders --

1 MR. IZAGUIRRE: Mm-hmm.

2 THE COURT: -- I had a conversation
3 with Mary Brewington, a private conversation because
4 she was very upset that all these cases went to MPD.
5 And what I said to Ms. Brewington was, "Please let
6 me know how the court can help. You know, we're not
7 all-powerful, but we can do the best that we can to
8 try to help."

9 And one of the things that I, first
10 of all, did do, but I would also ask you all to do,
11 and I want to find out if you did this. I vacated
12 the appointments for all cases that were in warrant
13 status for 30 days or more.

14 In the future, I will probably be
15 considering that for 60 days. But at that time, we
16 were in a really desperate situation and so I said,
17 "Please look and see if there are any cases out
18 there that have been -- that could be resolved, you
19 know, if you could just get them in front of a
20 judge. If you could just get them to trial.

21 If, you know, the judge could get you
22 and the district attorney's office together and for
23 some reason, this isn't just coming together and --
24 we could help with that. I could schedule a
25 hearing. We could get you in here. We can resolve

1 those cases. Did you do that analysis in your
2 office?

3 MR. IZAGUIRRE: I can't say for every
4 single case. I can say, on my team, if there's a
5 case that we could have -- like, specifically, if
6 there was an offer that could be made or if there
7 was an offer outstanding, follow up on it, let's get
8 these cases closed out.

9 THE COURT: Yeah.

10 MR. IZAGUIRRE: And I'm -- I'm not
11 considering -- yes, part of the analysis is the
12 number. But more for my consideration is what are
13 the things -- so if you have an outstanding offer,
14 usually -- I think we can agree on this -- we're
15 basically waiting for that to get staff.

16 That's not something that's
17 necessarily going to take a lot of time, especially
18 if we think it's a good-faith offer. Maybe there's
19 going to be some back-and-forth, but we think that
20 will probably resolve.

21 What I'm more concerned about are
22 cases that are actively -- that they are busy on,
23 that they just don't have -- that they're actively
24 engaged in. So if they could get -- to answer your
25 question, yes. If they could get rid of a case,

1 yes, I think that happened to the best of their
2 ability, or "get rid of" is a bad verb, but --

3 THE COURT: So you don't feel like
4 you have cases that are languishing and need to be
5 resolved or are ripe for resolution, that if
6 resolved, could enable one of your attorneys to take
7 these cases?

8 And I'm going to just say, I --
9 because of the way you're talking to me, I'm going
10 to allow us to talk about all the cases. And I'll
11 call case numbers here in just a second, but -- so
12 could you answer me that? That you had -- you
13 didn't identify cases that could be resolved, and if
14 they were resolved it would enable your attorneys to
15 take one or more of these cases.

16 MR. IZAGUIRRE: I think we've done
17 everything with can to this point, which is why I
18 stand by the -- if that changed, I would take one of
19 these cases myself or another attorney. I just --

20 THE COURT: Okay.

21 MR. IZAGUIRRE: -- I think we
22 followed up with the district attorneys that we
23 could or these offers had been made or things have
24 been done. I --

25 THE COURT: I have one more question.

1 It might really be two more questions, but you know
2 how that goes.

3 MR. IZAGUIRRE: We're here,
4 Your Honor.

5 THE COURT: All right. So today is
6 August 29th, and it's my understanding that when
7 the -- the contract period ended in July, that it
8 has been extended every 30 days and that firms are
9 reconsidering their ability to take cases every 30
10 days. Can these be September cases?

11 MR. IZAGUIRRE: Sorry, Your Honor.
12 You're gonna have to flush it out. With these --
13 we're talking about these three cases
14 (indiscernible) September cases?

15 THE COURT: These -- I think these
16 are four cases. Yeah, can these cases -- I mean,
17 we're about ready to roll into September. Can I
18 appoint these cases on the September MAC? And, yes,
19 I'm talking about MAC, because it's been hammered
20 into my head that the MAC is important. Are we able
21 to go into September and use that MAC?

22 MR. IZAGUIRRE: I guess with the
23 framing of the question, I --

24 THE COURT: Well --

25 MR. IZAGUIRRE: If we can take this

1 case Monday, one of these cases Monday --

2 THE COURT: Yes.

3 MR. IZAGUIRRE: -- we will. I am
4 saying, at this point, I do not believe, in good
5 faith, that -- if I could just hold off and -- we
6 cannot -- at this point in this year, I cannot say
7 that we, MPD, can provide effective constitutional
8 reputation to the people here. That's what I can
9 say.

10 If that changes, as I've been doing
11 since I've started this work, I will let the court
12 know, and we will take who's unrepresented. And we
13 want to do that. That's -- I understand that the
14 court's looking at a -- at a number. But it's one
15 factor, and the basis of my -- of our withdrawal is
16 not based on the MAC, it's based on the effort.
17 Every time you look at MAC, whether it's a contract
18 or legislation or whatever it is, it is balanced
19 against the ethical obligation. They go --

20 THE COURT: I understand and --

21 MR. IZAGUIRRE: -- hand-in-hand, so
22 you can't --

23 THE COURT: -- then that's why --

24 MR. IZAGUIRRE: Sorry, Your Honor.

25 THE COURT: -- that's why I asked you

1 about whether -- and you're speaking not as an
2 individual, you're speaking as a supervisor, which
3 kind of bothers me a little bit, you know, because
4 I've seen your lawyers and -- that work for your
5 firm and I think they're very talented and
6 hardworking people.

7 MR. IZAGUIRRE: I do too.

8 THE COURT: And I think that they're
9 able to speak for themselves on some level. And I
10 feel a little bit frustrated that I'm not actually
11 able to speak with them and that I'm speaking with
12 you. That's not meant to be disrespectful. It's
13 just I'm -- I feel like you're a barrier to me being
14 able to have a conversation with someone.

15 And I -- my inquiry really has to be
16 whether you are completely and totally
17 professionally unable to take these cases, and I
18 think that you personally can answer that question
19 for yourself. I feel a little bit less confident
20 that you're able to answer that question for every
21 other lawyer in your firm.

22 MR. IZAGUIRRE: I answer that for the
23 firm, for the team. I am their supervisor.
24 That's -- I stand by my declaration. And they are
25 not meant to make those -- they are assigned cases,

1 that is the way it works. They are meant to have
2 supervisors, as I'm sure happens in the DA's office
3 and any other office.

4 THE COURT: So you know how the
5 appointment of attorneys works; right? That -- do
6 you agree that at the 1st of each month, at least
7 during this period when the contract has been
8 extended for 30 days each month, do you agree that
9 MPD opens up more MACs for new cases at the
10 beginning of the month?

11 MR. IZAGUIRRE: We -- we don't open
12 up -- it's not a monthly thing for us. I think
13 that's some contractual speak. It's if the court
14 has cases. If there are clients and we are able to
15 take them, we take them whenever it is --

16 THE COURT: Okay.

17 MR. IZAGUIRRE: -- whether it's a
18 Monday or the end of the month or the beginning of
19 the month, we take them.

20 THE COURT: Okay.

21 Mr. McKey, I've asked all my
22 questions. Do you have anything to add?

23 MR. McKEY: I do, Judge. I have
24 quite a bit to add. And I think that the starting
25 point is there are additional unanswered questions

1 that I think the Court is in the best position to
2 ask. But I'm not sure necessarily, given the way
3 that this back-and-forth has gone today, that we are
4 necessarily going to get those answers.

5 I do think it is a complex issue, and
6 I do think the Court should demand answers to these
7 questions. And really what we're talking about is
8 not just the three cases here, but in anticipation
9 that this is going to be an ongoing conversation, an
10 ongoing issue, some of these questions should be
11 permanently answered.

12 The first is I -- I think if you look
13 at the history, the maximum attorney caseload is an
14 artificial number that was created largely in part
15 by Metropolitan Public Defenders as part of the
16 Sixth Amendment project.

17 And to me, it always seemed like a
18 very arbitrary number because the idea was if
19 you're -- if you exceed that number, you are acting
20 unethically. And if you are not at that number --
21 or if you are at that number, you're acting
22 ethically. And there's different weights for
23 different cases, as we've heard today.

24 Some Measure 11s are weighted
25 differently than -- you know, C felonies are

1 weighted differently than misdemeanors. But
2 everyone who's practiced law knows that there are
3 some times when we have an Assault 1, Measure 11,
4 stabbing, and it's a two-page police report and
5 there are two witnesses. And there are some C
6 felonies that take much more time and are much more
7 intensive. It's a serial property criminal, for
8 example. So I think those are very arbitrary
9 numbers.

10 But at the same time, you know, we've
11 heard two different things. We've heard that we're
12 at the MAC or we've exceeded the MAC, and we've also
13 heard that -- that the -- the supervisor has to take
14 the word of his attorneys.

15 I think it's going back to
16 Ms. Gutierrez, where some of her cases are more
17 complicated than others, and so maybe she's not at
18 the MAC. We can't have it both ways though. We
19 either have to have a MAC and use that, which the
20 public defenders have requested and they've asked
21 for, and that's why that number is in place, going
22 back a few years now with Lane Borg's Sixth
23 Amendment project.

24 Or we have to take the attorneys as
25 professional at their word and allow them to

1 determine their caseload. But the reality is, as
2 you heard yesterday with Theo Erde-Wollheim, the
3 attorneys are not being allowed to do that at this
4 point.

5 And so that is a great concern to us
6 when it comes to in-custody defendants because we
7 think the ultimate level of -- of ethics requires
8 that the in-custody defendants be represented. And
9 we think that the one firm that, apparently,
10 according to paper at least, has not met their
11 contractual obligations with OPDS, is Metropolitan
12 Public Defenders.

13 Because if you look at the latest
14 numbers from -- the latest numbers from the court,
15 from OPDS with MAC, every other firm on here, the
16 Cornerstone Law Group, the -- the Hillsboro Law
17 Group, the Oregon Defense Attorney's Consortium,
18 Risa Ripeholge (phonetic), Vicki Vernon, and
19 Heninger Law Group are all within one of their MAC.

20 But Metropolitan Public Defenders is
21 at 14.65 available. So those -- you know, we could
22 say -- we could talk about attorneys in these other
23 firms being on leave or MPD being on leave, but the
24 reality is all of those numbers are within a decimal
25 point of each other.

1 And then MPD, according to the latest
2 numbers, is at 14 available MAC. And so if -- if
3 the MAC is the numbers that MPD set out to use, then
4 they need to use it. So here's what we do know.
5 When the court relieved attorney's representation on
6 cases where defendants had been on bench-warrant
7 status for over 30 days, that was 588 cases.

8 And a significant amount of those,
9 not all, but a significant amount, were with
10 Metropolitan Public Defenders. In the hundreds.
11 And it boggles the mind to suggest that that doesn't
12 free up the availability for a few dozen cases when
13 you're talking about freeing up hundreds, which the
14 court has done with -- with this.

15 Next, if you look at the OJD data
16 statewide -- remember, Metropolitan Public Defender
17 is not just a Washington County office. They are an
18 entity that contracts with the State. And if you
19 look at the data statewide, OJD, case filing is down
20 41 percent from 2001 to 2022.

21 In the last three years, from 2019 to
22 2022, case files statewide are down 25 percent. And
23 active pending cases are down 12 percent from 2019
24 to 2022 statewide. In the area where Metropolitan
25 Public Defenders practice is, which is Washington

1 and Multnomah County, the total volume is down both
2 for case filings and active pending cases,
3 particularly in Multnomah County.

4 The other thing that has happened,
5 Judge, is we have attorneys that have -- that are
6 MPD attorneys that have gone from Washington County
7 to -- to the capital litigation team at a time when
8 the capital litigation -- capital litigation in
9 Oregon is nonexistent.

10 There is no such thing anymore.
11 There are no death penalty cases in Oregon because
12 the legislature redefined aggravated murder.
13 Qualifying for the death penalty is essentially a
14 crime that has to be committed on the move.

15 It's almost impossible for there to
16 be a state prosecution at this point for an
17 aggravated murder case. The few remaining
18 exceptions, like an act of terrorism, are going to
19 be prosecuted federally. So those are nonexistent.

20 THE COURT: Do you know the names of
21 those attorneys on that capital murder team?

22 MR. McKEY: That would be an inquiry
23 for the court to Metropolitan Public Defenders.

24 THE COURT: Okay. Go ahead.

25 MR. McKEY: Judge, there are also

1 attorneys that at a time when -- there are attorneys
2 that have been assigned to the Washington County
3 office that are now being resigned to the Multnomah
4 County office of Metropolitan Public Defenders at a
5 time when Multnomah County case filings are
6 dramatically down.

7 And you can look at the OJD numbers
8 for that for the last three years. They're just not
9 prosecuting the number of felony cases they used to
10 prosecute, not even close. So the -- the
11 questions -- and, again, this is not meant as --
12 these are systemic issues, these aren't meant in any
13 way as criticisms of the two MPD attorneys here in
14 the room, who I have no doubt are working hard and
15 doing their job.

16 But, at a systemic level, when OPDS
17 contracts with Metropolitan Public Defenders, they
18 need to fulfill that contract and the Court should
19 inquire as to why they are not in a position to do
20 so, given some of the issues we're talking about.

21 THE COURT: Not in a position to
22 fulfill their contract?

23 MR. McKEY: Correct.

24 THE COURT: Okay.

25 MR. McKEY: And it appears, if you

1 look at the numbers, that -- the latest numbers,
2 where, like I said, everybody else is within one
3 case of their maximum attorney caseload, and MPD is
4 at 14 available, that that availability is there,
5 even within the Washington County office.

6 So I guess what I would ask the Court
7 to do is -- I don't think that -- I think the
8 Court's going to make whatever call the Court makes
9 today on these three, and I do have some additional
10 information I want to provide on why these three
11 should never leave here without an attorney today.

12 But, really, the question is is OPDS
13 doing enough to -- to make these inquiries and
14 provide this information to the Court, to answer
15 these questions, questions that deserve to be
16 answered. And I think the Court should hold another
17 hearing where the Court requires OPDS to answer
18 these questions.

19 And if that requires OPDS appointing
20 a special master to look into this issue, then I
21 think they should do that. And the Court has the
22 ability to make that request, to either require OPDS
23 to do what they are statutory obligated --
24 statutorily obligated to do, which is to provide
25 attorneys for all indigent defense in the state or

1 appoint a special master to investigate why this
2 isn't happening with the issues that I've raised
3 here today.

4 Judge, the last thing I would say is
5 if you look at the most important cases, the
6 individuals that never should be without an attorney
7 are individuals that are actually in custody. So if
8 the Court gets to the point today where it believes
9 that even with the attorneys on the capital
10 litigation team, even with people like Ms. Gutierrez
11 that the Court points out is at a fraction of her
12 maximum caseload, if the Court believes that
13 ethically they can't take three more, then require
14 them to withdraw on three out-of-custody cases so
15 that these three defendants keep their attorneys
16 because there is no higher responsibility than for
17 the Court to ensure that in-custody defendants have
18 that.

19 So let's -- let's take three
20 out-of-custody cases if we have to. But I really
21 don't think we're at that point until the Court gets
22 answers to the questions that you have raised today
23 that haven't been entirely answered and that I've
24 suggested to the Court -- that the Court require
25 OPDS to get answers for. Thank you.

1 THE COURT: So I do have some
2 questions for you, Mr. McKey. So you suggest that
3 the Court has the ability to appoint a special
4 master. Can you point to the authority for that?

5 MR. McKEY: So you require OPDS to
6 answer these questions.

7 THE COURT: Okay.

8 MR. McKEY: And I think, in the
9 interest of justice, the Court could require OPDS to
10 appoint a special master to answer these if they
11 can't -- if they can't adequately fulfill their
12 statutory responsibility.

13 THE COURT: Okay. So, Mr. McKey,
14 what if the answer to those questions, to the
15 question about -- from OPDS -- what if OPDS answers,
16 "We can't fulfill our obligation under the statute
17 because our data's not good, attorneys aren't giving
18 us adequate information, we don't have enough
19 employees, we don't have enough money to pay
20 people?" What if they just come in here with a
21 bunch of excuses but aren't -- then still are unable
22 to fulfill their obligation? Then what?

23 MR. McKEY: Well, Judge, they just
24 got another hundred million dollars from the
25 legislature. They are statutorily mandated to

1 provide the service. It's not a discretionary
2 service. The Court has the ability, as has happened
3 with Oregon State Hospital -- the Court has the
4 ability, ultimately, if it came to that, to hold
5 them in contempt and make them do their job.

6 This is what the -- the legislature
7 has said: "By law, you are obligated to provide
8 this service." It's not a "if I feel like it" or on
9 a whim. It's a requirement. And I think we might
10 get to the point here where the Court has to do
11 that.

12 THE COURT: Well, I mean, that's
13 certainly something that the court has considered.
14 I -- it is very frustrating. I feel like I'm trying
15 to squeeze blood out of a turnip.

16 Mr. Izaguirre, who are the attorneys
17 with MPD that are on the capital murder team?

18 MR. IZAGUIRRE: Judge, I'd have to --
19 I don't know all of them offhand. I'd be
20 speculating because there's some downtown as well.
21 So I can follow up with that.

22 THE COURT: Are they working on
23 capital murder cases?

24 MR. IZAGUIRRE: They -- my
25 understanding is they work on murder cases, that's

1 their contract. Not just capital; it's murder
2 throughout the state.

3 THE COURT: Oh, okay. So their
4 contracts are to just work on murder cases?

5 MR. IZAGUIRRE: And that is outside
6 my -- I don't speak for the capital team. My
7 understanding is they work on homicides throughout
8 the state.

9 THE COURT: Is there a supervisor for
10 the capital team?

11 MR. IZAGUIRRE: Yes.

12 THE COURT: Who's that supervisor?

13 MR. IZAGUIRRE: It's Mr. Scholl.

14 THE COURT: Greg Scholl?

15 MR. IZAGUIRRE: Yes.

16 THE COURT: Okay.

17 MR. IZAGUIRRE: Your Honor, may I
18 respond to a few things?

19 THE COURT: Go ahead.

20 MR. IZAGUIRRE: So I want to be
21 clear. It's not that I'm stating that MAC is
22 arbitrary. I'm saying it's one factor of many. So
23 any time you read about the MAC, it is a ceiling, it
24 is not a floor --

25 THE COURT: Right.

1 MR. IZAGUIRRE: -- meaning --

2 THE COURT: I already understand
3 that. Can we move on to something else? Because I
4 understand that.

5 MR. IZAGUIRRE: The way it was
6 framed, Your Honor, I just want to be clear.

7 THE COURT: Right. I understand that
8 the MAC is not the ethical --

9 MR. IZAGUIRRE: It's not a minimum.

10 THE COURT: It's -- it's not -- it's
11 not a statement of ethics, it's a contract term;
12 right?

13 MR. IZAGUIRRE: Yes, Your Honor. And
14 it's not a minimum, so I --

15 THE COURT: I understand.

16 MR. IZAGUIRRE: And I -- we're
17 talking about -- the fundamental question here is
18 whether we, as MPD, have the ability to ethically
19 represent these three individuals, and we are making
20 the -- you know, we can debate about what the
21 resolution is to that, what we need to do further,
22 but the issue before the Court today is do we have
23 that capacity -- or do we have -- can we ethically
24 do that?

25 And there's nothing I'm hearing that

1 is contradicting except citing the MAC, which I --
2 we've all already said, is one factor among many.
3 And so if MPD is kept on these cases, then these
4 people are not receiving representation.

5 They're only receiving representation
6 in name only, which is defying the federal court's
7 order, which required that they be represented. And
8 he actually spoke about it in the hearing, that you
9 can't just appoint people who are not
10 constitutionally able to provide representation.
11 And that's exactly what's going to happen if we --

12 THE COURT: I need more clarification
13 from you.

14 MR. IZAGUIRRE: -- stay on it.

15 THE COURT: I need more clarification
16 from you on what you believe is adequate
17 representation because it's my understanding that --
18 that Defendants are entitled to adequate
19 representation, not perfect representation.

20 MR. IZAGUIRRE: That's correct.

21 THE COURT: So what are we talking
22 about here?

23 MR. IZAGUIRRE: It's cited in my
24 motion. They were -- they are entitled to
25 competence under 1.1. They are entitled to

1 diligence under 1.3, which means meeting with them,
2 getting their story, investigating.

3 They are entitled to communication
4 under 1.4, which means, again, communicating with
5 them, keeping them up to speed. 1.7, it would
6 create a conflict of interest because I believe in
7 representing them we would not be able to represent
8 our other clients in the constitutional way that we
9 are mandated.

10 Under 1.6 -- or 1.16, we are required
11 to decline or terminate representation if we believe
12 we cannot ethically represent people. And under
13 5.1, RPC 5.1, as a supervisor, if I believe -- if
14 I'm supervising attorneys, I have a duty to do
15 everything I can to avoid them violating other Rules
16 of Professional Conduct and in keeping them on -- or
17 appointing them to cases I believe they would
18 violate the Rules of Professional Conduct.

19 So all of those rules, none of which
20 is more important than the other, are key here. And
21 so if we are kept on these cases when we are stating
22 that we cannot constitutionally represent these
23 people and abide by those rules, it's only in --
24 it's in name only, which is against the federal
25 order.

1 THE COURT: Well, your argument is
2 that it's in name only.

3 MR. IZAGUIRRE: Yes.

4 THE COURT: I don't think that's
5 necessarily been established yet because you're the
6 only one I've talked to, and you have lots of
7 attorneys in your firm and there are other people in
8 your firm that I have not talked to, including
9 Greg Scholl, the attorneys that are on the capital
10 murder team, and do they -- are they able to take
11 cases? Because I don't know what their caseloads
12 are.

13 MR. IZAGUIRRE: No, Your Honor.
14 They're not contracted to do this. They are
15 different --

16 THE COURT: Oh, now you want to talk
17 about the contract.

18 MR. IZAGUIRRE: No.

19 THE COURT: See, that's my problem
20 right there, is that this is about ethics and being
21 able to take cases, you know, because of your
22 ability to be able to handle these cases.
23 Previously, you were telling me that's a contractual
24 term, and now you want to talk about contract.

25 MR. IZAGUIRRE: Well, but that would

1 be like saying, "Are there major felony qualified
2 attorneys in Portland that could take these cases?"
3 That's not --

4 THE COURT: I don't think that's the
5 same --

6 MR. IZAGUIRRE: -- where we're
7 talking about major felony attorneys that are
8 qualified to take the cases here.

9 THE COURT: I don't think that's the
10 same at all because I think that those -- those
11 attorneys on your capital team would be taking
12 murders out of Washington County if necessary.

13 MR. IZAGUIRRE: And other counties.

14 THE COURT: And other counties.

15 MR. IZAGUIRRE: They don't take major
16 felony cases, that's the point.

17 THE COURT: Okay.

18 MR. IZAGUIRRE: And that's why we're
19 here.

20 THE COURT: I am objecting to that
21 characterization because these people are in custody
22 today right now needing attorneys, and you've just
23 told me -- earlier that you don't have attorneys
24 that can take these cases, and now --

25 MR. IZAGUIRRE: We don't.

1 THE COURT: I -- I don't -- I don't
2 agree with you.

3 MR. IZAGUIRRE: The Metropolitan
4 Public Defender office --

5 THE COURT: I don't think that
6 you've --

7 MR. IZAGUIRRE: -- and Washington
8 County does not --

9 THE COURT: -- proven that.

10 MR. IZAGUIRRE: -- have the capacity
11 to do that.

12 THE COURT: I don't think you've
13 proven that.

14 So here's what I'm going to do. So
15 I'm looking at the -- I'm looking at a dashboard
16 that's a little bit different than --

17 MR. IZAGUIRRE: May I sit,
18 Your Honor? Or do you have other --

19 THE COURT: Oh, yes, please. No,
20 you -- please.

21 MR. IZAGUIRRE: Okay.

22 THE COURT: So -- and I want you to
23 understand, Mr. Izaguirre, that at all times, while
24 I may disagree with you, I respect the job that
25 you're doing, but I -- I need these answers. Okay?

1 And so -- so, for example, I know
2 that Ms. Ashley Needham is a very competent lawyer.
3 She has 25 weighted monthly maximum. She's got 25
4 available, so she could take a major felony. And
5 Gutierrez could take a major felony now.

6 I'm skipping over an attorney that I
7 know is not available to take a major felony. I see
8 another attorney who she probably would struggle if
9 she was taking a major felony, even though she's got
10 a lot of experience and she's murder co-counsel
11 qualified.

12 I see a very competent -- in fact,
13 Mr. Lavaty (phonetic) is here. He's got a lot of
14 cases. I can see that he's got some heavily
15 weighted cases, but I think that he probably has
16 some room. I think --

17 You're Mr. Lavaty; right?

18 MR. LAVATY: I am Mr. Lavaty, Judge.

19 THE COURT: You are. Okay. I just
20 want to make sure I get your name right.

21 And -- and, of course, I mentioned
22 Mr. Erde-Wollheim. I haven't heard from these
23 people individually about their ability to take
24 these cases, and that's my problem. So here's what
25 I would like to do. I am going to defer my ruling.

1 I am going to ask OPDS to appear to
2 talk about this with you being present, and I'm
3 going to look at the individual attorneys on these
4 cases. I am not at the point of asking you to
5 withdraw from open cases, but I might get there.

6 And I know that you're going to
7 object to that because you feel like you have an
8 ethical obligation to the cases that you already are
9 on, but these are very different times. These are
10 times where we have people in custody without
11 lawyers to the extent where a federal judge had to
12 step in and tell us how long someone could actually
13 be in custody without a lawyer, which is a -- a mark
14 that we didn't know.

15 We didn't know because it had never
16 happened before. It was unprecedented. And I,
17 frankly, am really disappointed and angry, in fact,
18 that this court and this system is being put in this
19 position where we have people in custody without
20 lawyers. It's obscene.

21 And so this is not an easy decision
22 for me, and especially based upon your last remark
23 about they aren't contracted to do this. I -- I
24 very much am upset by that remark. And so I am
25 going to deny your motion to withdraw in all of

1 these cases today.

2 But I'm going to reconsider that
3 after I have gotten more information, and I would
4 suggest that you bring your people, whoever can
5 speak to whether or not these people who are on the
6 capital murder team -- are, in fact, qualified and
7 able to take these cases.

8 I'm also going to ask Oregon Public
9 Defense Services to be here at the next hearing to
10 talk about, you know, their efforts to find lawyers
11 for people. And I do agree that this is a problem
12 that we're going to keep running into.

13 And, unfortunately, I don't think
14 that this is a judge's job to fix this problem, but
15 we're kind of in the unenviable position of having
16 to deal with this and try to fix it, which I resent.
17 And so I'm going to schedule another hearing for you
18 all to come back.

19 And, Mr. Izaguirre, I would like you
20 to bring -- if I appoint specific individual
21 attorneys to these cases, I want those specific
22 individual attorneys to be here. And I also want --
23 I think it would be advisable for you -- for you to
24 have Mr. Greg Scholl here, but also any individual
25 attorneys on that capital murder team.

1 And I will ask a representative from
2 OPDS to be here as well.

3 And, let's see, I think we'll have to
4 do this on maybe September 6th. Let me look.

5 MR. McKEY: Judge, I'm in -- I'm
6 scheduled for trial --

7 THE COURT: Okay.

8 MR. McKEY: -- next week. I'd
9 suggest -- I mean, they're not getting
10 representation, so I would ask that we do it this
11 week, if possible.

12 THE COURT: I'm going to appoint
13 individual attorneys to them if you cannot provide
14 representation to them this week and individual
15 attorneys from your firm. And I will pick them
16 myself, and those attorneys can come tell me why
17 they can't take these cases.

18 MR. IZAGUIRRE: Judge, I think that's
19 wholly inappropriate for the Court to just appoint
20 attorneys. You can appoint the firm.

21 THE COURT: It's not -- it's not
22 inappropriate for me because I have the numbers, and
23 I have seen these attorneys. I understand their
24 capabilities. These are not, you know, incompetent
25 or unprofessional, or attorneys that don't do their

1 job. These are competent people.

2 MR. IZAGUIRRE: Judge, you don't have
3 all the information, and I think it's impossible for
4 the Court -- or I would say it would be unheard of
5 for the Court to instead of assigning an
6 organization -- force-appointing an organization
7 where we make the internal decisions as to who gets
8 what case. Instead, picking --

9 THE COURT: I --

10 MR. IZAGUIRRE: -- picking --

11 THE COURT: I --

12 MR. IZAGUIRRE: -- who gets -- you're
13 deciding unilaterally -- you're making the decision
14 instead of the firm making the decision. You're
15 deciding (indiscernible) who can handle what case.

16 THE COURT: I 100 percent disagree
17 with what you've just said to me because, in fact, I
18 am aware of the caseloads for individual attorneys
19 and --

20 MR. IZAGUIRRE: Which is not the full
21 picture, Your Honor, respectfully. It's just not.

22 THE COURT: How is that not the full
23 picture?

24 MR. IZAGUIRRE: It's a number. It's
25 one number.

1 THE COURT: I still don't understand
2 that.

3 MR. IZAGUIRRE: We've gone over this.
4 It's one number. It is one variable among many.
5 You don't know what other cases they're carrying,
6 you don't know their personal lives, you don't
7 know --

8 THE COURT: I do know what other
9 cases they're carrying. I can look right here and
10 see what other cases they're carrying. For example,
11 Mr. Brendan Hooks has --

12 MR. IZAGUIRRE: You're seeing
13 charges. Respectfully, Your Honor --

14 THE COURT: -- has 10 Measure 11
15 cases.

16 MR. IZAGUIRRE: You're seeing
17 charges, you're not seeing how many witnesses --

18 THE COURT: How come attorneys in
19 other counties can take more cases than this? How
20 come attorneys in other firms can take more cases
21 than this?

22 MR. IZAGUIRRE: I cannot answer that.
23 What I can answer --

24 THE COURT: That's the problem.

25 MR. IZAGUIRRE: I can't -- that would

1 be speculation. What attorneys are we talking about
2 and what counties? I don't ...

3 THE COURT: In Marion County,
4 generally attorneys are able to take 14 major
5 felonies. You'd -- we don't have -- the only person
6 that we have in our county that has even close to
7 that number is an attorney that's not with your
8 firm, and he has a crazy number of them that I would
9 not ask somebody to do, but apparently, he must be
10 an excellent attorney because he's doing them.

11 But --

12 MR. IZAGUIRRE: I don't think taking
13 the number -- the number of cases speaks to the
14 quality of the attorney, and practices are different
15 throughout the country.

16 THE COURT: Well, I'm familiar with
17 this attorney, and so I do happen to have confidence
18 in that person's abilities.

19 MR. IZAGUIRRE: I understand,
20 Your Honor, but I would ask if you're going to
21 force-appoint -- appoint the organizations so we can
22 do our due diligence as to who can handle what since
23 we have the information.

24 THE COURT: Okay. So I'm going to
25 ask you to take another look at your due diligence,

1 especially in light of the fact that I signed -- or
2 I asked to have attorneys vacated off our 588 cases,
3 many of those who were being represented by
4 Metropolitan Public Defenders.

5 MR. IZAGUIRRE: We've considered
6 that, and we are -- we're standing by what we filed.
7 If that changes and we can take one of these cases,
8 we will.

9 MR. McKEY: I think part of the
10 problem, Judge, is that -- you know, I -- and I
11 understand everything he's saying and I understand
12 the reasons. But at the same time, attorneys
13 individually are in the best position to understand
14 their bandwidth.

15 And you can't have a situation where
16 today the supervisor is saying that he understands
17 where everybody's at, but at the same time having
18 somebody like Mr. Erde-Wollheim come in. And nobody
19 is more familiar with Mr. Erde-Wollheim's caseload
20 than Mr. Erde-Wollheim.

21 And he has a case that's a major
22 felony that's taken away, and he's not allowed to
23 say whether or not he can take another case because
24 he has to check in with his supervisor. So it
25 really can't be both ways.

1 THE COURT: I could probably reset
2 this for Friday at 1:30.

3 MR. IZAGUIRRE: One moment,
4 Your Honor.

5 That's fine. Fine.

6 THE COURT: Okay.

7 MR. McKEY: That's fine, Judge.

8 THE COURT: Okay. So we're going to
9 reconsider all these motions to withdraw on Friday
10 at 1:30.

11 Mr. Izaguirre, I would like you to
12 re-evaluate your firm's ability to take on any of
13 these cases. I'm also going to ask OPDS to appear.
14 And I will also ask them if they have other
15 attorneys that are able to be appointed on these
16 cases just in case I am able to let you off. But I
17 would also ask that you require Mr. Greg Scholl to
18 be here as well or any of the attorneys on the
19 major -- the capital murder team.

20 MR. IZAGUIRRE: Judge, I -- I will
21 speak with them, but, you know, you can't just
22 demand that somebody -- I don't know Mr. Scholl's --

23 THE COURT: Okay. Well --

24 MR. IZAGUIRRE: -- schedule.

25 THE COURT: -- he might find himself

1 appointed on a case so that he finds more incentive
2 to show up in court.

3 MR. IZAGUIRRE: So the Court's saying
4 that if he doesn't show that you're going to
5 force-appoint --

6 THE COURT: Right.

7 MR. IZAGUIRRE: -- specific
8 attorneys?

9 THE COURT: I -- I may do that. I'll
10 do that after inquiry with OPDS. And, after looking
11 at my caseload analysis, I just may do that because
12 these people have the right to an attorney.

13 MR. IZAGUIRRE: I understand,
14 Your Honor, but the Court can't just force-appoint
15 specific attorneys with a firm. It would be the
16 same as the court saying --

17 THE COURT: I think I do have the
18 ability --

19 MR. IZAGUIRRE: -- in the DA's
20 office --

21 THE COURT: -- to do that, actually.

22 MR. IZAGUIRRE: Well, we'll deal with
23 that if it comes. I think it would be -- the court
24 would never do that in the DA's office, to say,
25 "Well, Mr. McKey, you're on this misdemeanor because

1 I say you're on this misdemeanor." That does -- it
2 doesn't work that way.

3 THE COURT: Well, I take your point,
4 but Mr. McKey does not provide constitutional
5 representation to criminal defendants. These people
6 have a constitutional right to an attorney.

7 MR. IZAGUIRRE: An effective
8 attorney.

9 THE COURT: Mr. McKey's not going to
10 provide that.

11 MR. IZAGUIRRE: An effective
12 attorney.

13 THE COURT: Do you want me to -- do
14 you want me to -- are you suggesting that I appoint
15 deputy district attorneys as criminal defense
16 attorneys on cases?

17 MR. IZAGUIRRE: No, Your Honor. My
18 point is that it's wholly inappropriate for the
19 Court to not appoint a firm so that we can make the
20 internal decisions that we need to with the
21 information that we have and what are our attorneys
22 capable of.

23 THE COURT: That sounds like a
24 contractual argument to me, which you already said
25 is not part of this analysis. And if I see an

1 individual attorney within your firm who that
2 individual attorney -- by the way, that individual
3 attorney is obligated personally regarding their
4 ethics, not the firm having the ethical duty. It's
5 the individual attorney that has the ethical duty
6 and so, therefore, it makes sense to me that the
7 individual attorney would be considered, not just
8 the firm.

9 MR. IZAGUIRRE: Well, I am stating
10 that as part of -- I am appearing on behalf of these
11 three people in custody, and I'm saying that we
12 cannot ethically represent them, nor can anyone on
13 my team.

14 THE COURT: So your firm is not going
15 to have to ethically respond to the bar. Each
16 individual attorney in your firm has an ethical duty
17 to respond to the bar.

18 MR. IZAGUIRRE: I understand.

19 THE COURT: That's why it's -- should
20 be on an individual basis, not on a firm basis.

21 MR. IZAGUIRRE: Right. And I'm
22 making that representation to the bar.

23 THE COURT: No. I don't think that
24 you can make that representation. You are in a
25 different situation than those individual attorneys,

1 and I think it is very important for those
2 individual attorneys to be able to make that
3 representation to me about their ethical ability to
4 take on a case. And so that's going to be my
5 expectation when we come back on Friday.

6 Anything else, Mr. McKey?

7 MR. McKEY: No, Judge. Thank you.

8 MR. IZAGUIRRE: What exactly is the
9 expectation that we're coming --

10 THE COURT: That I want to hear from
11 the individual attorneys. I may be appointing --
12 I'm going to -- I'm going to confer with OPDS. I'm
13 going to look at these numbers before Friday. I may
14 appoint individual attorneys. And if I do, I would
15 like to hear from those individual attorneys.

16 And it's going to be based on, yes,
17 numbers and what I understand those numbers to mean.
18 And I know that those numbers do not equate
19 necessarily with ethical ability to professionally
20 represent somebody within their ethical obligations.

21 But, at the same time, they are --
22 this is the reason why we're here because the Sixth
23 Amendment project indicated that there was a certain
24 number, and I understand your argument is that
25 these -- that the MAC is not the ethics. I do get

1 that.

2 But they are somewhat correlated
3 because that's how we got the MAC, because of this
4 project that said, "This is about the number that we
5 think attorneys ethically should take." And so, you
6 know, you're trying to have it both ways. I
7 appreciate that. It's not an easy argument.

8 It's not an easy decision for me
9 because I want people to ethically represent people.
10 I also want people to have attorneys. And I also
11 want our community to be safe. And so I don't think
12 this is a really easy answer, you know.

13 I -- I'm going to give some time for
14 it because if I just made a decision today, my
15 decision would be denied. You better figure out a
16 way to talk to these people. And I hope that you're
17 not just deciding that you're not going to talk to
18 them because you think you're going to be removed
19 from these cases because I don't know that yet, you
20 know.

21 And you have other cases that, you're
22 right, I don't know what -- these other cases you're
23 doing. I don't know if they're going to resolve
24 today, tomorrow, or the next day. I don't know what
25 cases you're working on settling.

1 But I also really expect a real
2 answer about the open cases, particularly, for
3 people who are not in custody that you're actively
4 working to resolve, and if there's anything that the
5 Court can do to help you resolve these cases so that
6 you can ethically take the cases of these people who
7 are in custody that need lawyers.

8 MR. McKEY: Judge, can I offer one
9 suggestion?

10 THE COURT: Sure.

11 MR. McKEY: So I -- I do think -- you
12 know, understanding that Metropolitan Public
13 Defender is an indigent defense firm that provides
14 the bulk of indigent defense for Washington County
15 defendants and understanding that they are
16 contractually obligated with the State to provide
17 this service, the Court absolutely has the authority
18 to appoint individual attorneys. They may not like
19 it, but, you know, you do.

20 So the -- what I would suggest though
21 is to give individual attorneys an opportunity --
22 we've established today that -- that counsel does
23 not have capacity personally for this. I think
24 we've -- we understand that, but --

25 THE COURT: He's here representing

1 that, and so I believe him.

2 MR. McKEY: So -- but to give these
3 other individual attorneys a chance to state their
4 position -- I think it might be helpful if when the
5 Court goes through the numbers that you provide --
6 or you indicate to MPD and to the State which
7 attorneys you're considering appointing so they have
8 an opportunity to be here Friday.

9 And then if, perhaps, counsel can
10 provide to the Court the list of the capital
11 attorneys, which he does not have here today, so
12 that the Court can consider appointing those
13 attorneys on these cases. And then, you know, they
14 won't necessarily --

15 THE COURT: I'm happy to do that if
16 Mr. Izaguirre will assure me that he will ask those
17 people to be here. But the reason why I was going
18 to appoint specific people is because I didn't have
19 confidence in him bringing those people here unless
20 I did that.

21 MR. McKEY: Well, I guess that -- you
22 know, one suggestion would be that if we had that
23 list and the Court issues the appointment, if for
24 some reason they don't have the capacity, then they
25 can file a motion to withdraw individually.

1 THE COURT: Yeah, that's -- that's
2 exactly right. Yeah. That's exactly my thought on
3 that.

4 Mr. McKey, here's something that I
5 would ask the district attorneys to do, to -- your
6 office to do because I don't want to pick on
7 Mr. Izaguirre just, you know, lopsidedly. But if
8 you -- your office has identified any cases that the
9 Metropolitan Public Defenders are working that --
10 where an offer hasn't been responded to or it looks
11 like a case that you could resolve that maybe you
12 could put a little bit of extra work into so that
13 they could free up some capacity, I would really
14 suggest that that happen. You may already be doing
15 that, but --

16 MR. McKEY: We are, Judge, but I will
17 communicate that. I will reiterate that message --

18 THE COURT: Right.

19 MR. McKEY: -- to our attorneys.

20 THE COURT: I appreciate that because
21 I do want to make sure that this is a fair and
22 balanced evaluation and opportunity to resolve cases
23 so that people can have the proper representation.
24 Okay? So 1:30 on Friday. Thank you.

25 (End of transcribed proceedings.)

1 CERTIFICATE

2
3 I, Holly L. Goodwin, do hereby
4 certify that I transcribed the conversation from
5 digital recordings; the foregoing transcript, pages
6 1 through 59, constitutes a full and true record of
7 the digitally recorded proceedings had and of the
8 whole thereof.

9
10 IN WITNESS HEREOF, I have
11 hereunto set my hand this 26th of September 2023.

12
13
14
15
16
17
18
19 A handwritten signature in black ink, reading "Holly Goodwin". The signature is written in a cursive, flowing style.

20
21
22 Holly Lynn Goodwin
23 Professional Court Reporter
24
25

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