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THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

DIANE DAVIS, JASON LEE ENOX, JEREMY LEE IGOU, and JON WESLEY TURNER II, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

STATE OF NEVADA; BRIAN SANDOVAL, Governor, in his official capacity.

Defendants.

Case No. 170C02271B

Dept. No. II

MEMORANDUM IN SUPPORT OF PLAINTIFFS' AMENDED MOTION FOR CLASS CERTIFICATION

TABLE OF CONTENTS

Page

INTRODUCTION 1

BACKGROUND 4

I. The Constitution Requires Defendants to Provide Meaningful Counsel to Indigent Persons Accused of a Crime 4

II. Defendants Are Failing to Maintain a System That Ensures Meaningful Representation for the Indigent in Rural Counties 7

III. The System-wide Deficiencies 10

IV. The Plaintiffs 12

V. Plaintiffs' Counsel 15

VI. The Proposed Class 16

LEGAL STANDARD 16

ARGUMENT 17

I. The Proposed Class Satisfies the Requirements of Rule 23(b)(2) 19

II. The Proposed Class Satisfies All Four Requirements of Rule 23(a) 22

A. Numerosity 23

B. Commonality 24

1. The State's Deficient Indigent Defense System Creates Common Questions of Law and Fact 24

2. Courts Have Found Common Questions in Similar Challenges to Indigent Defense Systems 27

3. Plaintiffs' Claims Are Not Based on an Ineffective Assistance of Counsel Theory 28

C. Typicality 30

1. The Class Claims Arise from the Same Unconstitutional Abdication of Duty to Provide Meaningful Representation 31

2. Class Members Make Similar Legal Arguments That Defendants' System Is Unconstitutional 32

D. Adequacy 33

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

Adamson v. Bowen,
855 F.2d 668 (10th Cir. 1988) 21

Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds,
568 U.S. 455 (2013) 17

Armstrong v. Davis,
275 F.3d 849 (9th Cir. 2001), *abrogated on other grounds*, *Johnson v. California*, 543 U.S. 499 (2005) 30, 33

Armstrong v. Schwarzenegger,
622 F.3d 1058 (9th Cir. 2010), *aff'd sub nom. Armstrong v. Brown*, 732 F.3d 955 (9th Cir. 2013), *cert denied*, 134 S. Ct. 2725 (2014) 6

Avery v. Alabama,
308 U.S. 444 (1940) 5

Best v. Grant Cty.,
2004 WL 7198967 (Wash. Sup. Ct. Aug. 26, 2004) 28

Boyland v. Wing,
2001 WL 761180 (E.D.N.Y. Apr. 6, 2001) 18

Crawford v. Honig,
37 F.3d 485 (9th Cir.1994) 20

Davis v. Homecomings Fin.,
2006 WL 2927702 (W.D. Wash. Oct. 10, 2006) 18

Dirks v. Clayton Brokerage Co. of St. Louis Inc.,
105 F.R.D. 125 (D. Minn. 1985) 23

Duncan v. State,
774 N.W.2d 89 (Mich. Ct. App. 2009), *aff'd in result*, 832 N.W.2d 761 (Mich. Ct. App. 2013) 29

Duncan v. State,
832 N.W.3d 752 (Mich. 2013) 6

Exec. Mgmt. v. Ticor Title Ins. Co.,
118 Nev. 46, 38 P.3d 872 (2002) 17

Frank v. United Airlines, Inc.,
216 F.3d 845 (9th Cir. 2000) 20

Gideon v. Wainwright,
372 U.S. 335 (1963) 1, 4, 5, 6

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir.1998) 24, 29

Hernandez v. Cty. of Monterey,
305 F.R.D. 132 (N.D. Cal. 2015) 20

Hurrell-Harring v. State,
914 N.Y.S.2d 367 (N.Y. App. Div. 2011) ..... passim

TABLE OF AUTHORITIES
(continued)

Page

Hurrell-Harring v. State,
930 N.E.2d 217 (N.Y. 2010) 6

In re Checking Account Overdraft Litig.,
718 F. Supp. 2d 1352 (S.D. Fla. 2010) 17

In re Rubber Chems. Antitrust Litig.,
232 F.R.D. 346 (N.D. Cal. 2005) 23

In re Wixom,
12 Nev. 219 (1877) 4

In re Yahoo Mail Litig.,
308 F.R.D. 577 (N.D. Cal. 2015) 16, 22

Jane Roe Dancer I-VII v. Golden Coin, Ltd.,
124 Nev. 28, 176 P.3d 271 (2008) 30, 32, 33

Jimenez v. Allstate Ins. Co.,
765 F.3d 1161 (9th Cir. 2014) 29

Lafler v. Cooper,
566 U.S. 156 (2012) 5

Las Vegas Novelty, Inc. v. Fernandez,
106 Nev. 113, 787 P.2d 772 (1990) 17

Lynch v. Rank,
604 F. Supp. 30 (N.D. Cal.1984) 23

Missouri v. Frye,
566 U.S. 134 (2012) 5

Nicholson v. Williams,
205 F.R.D. 92 (E.D.N.Y. 2001) 23

North Carolina v. Alford,
400 U.S. 25 (1970) 13

O'Connor v. Boeing N. Am., Inc.,
197 F.R.D. 404 (C.D. Cal. 2000) 18, 19

Pabon v. McIntosh,
546 F. Supp. 1328 (E.D. Pa. 1982) 23

Palmer v. Stassinos,
233 F.R.D. 546 (N.D. Cal. 2006) 30

Parsons v. Ryan,
754 F.3d 657 (9th Cir. 2014) ..... passim

Rannis v. Recchia,
380 F. App'x 646 (9th Cir. 2010) 23

Riker v. Gibbons,
2009 WL 910971 (D. Nev. Mar. 31, 2009) ..... passim

TABLE OF AUTHORITIES
(continued)

Page

Riley v. Nev. Supreme Court,
763 F. Supp. 446 (D. Nev. 1991) 22, 32

Rivera v. Holder,
307 F.R.D. 539 (W.D. Wash. 2015) 22

Rivera v. Rowland,
1996 WL 677452 (Conn. Super. Ct. Nov. 8, 1996) 28, 32

Rodriguez v. Hayes,
591 F.3d 1105 (9th Cir. 2010) 21

Roe v. Flores-Ortega,
528 U.S. 470 (2000) 5

Rothgery v. Gillespie Cty.,
554 U.S. 191 (2008) 5

Sali v. Corona Reg'l Med. Ctr.,
2018 WL 6175617 (9th Cir. May 3, 2018) 4

Shuette v. Beazer Homes Holdings Corp.,
121 Nev. 837, 124 P.3d 530 (2005) 23, 32

Stockwell v. City & Cty. of S.F.,
749 F.3d 1107 (9th Cir. 2014) 17, 24

Strickland v. Washington,
466 U.S. 668 (1984) 5

United States v. Cronic,
466 U.S. 648 (1984) 5, 25

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011) ..... passim

Walters v. Reno,
145 F.3d 1032 (9th Cir. 1998) 20, 21

Wang v. Chinese Daily News, Inc.,
737 F.3d 538 (9th Cir. 2013) 24

Wilbur v. City of Mount Vernon,
2012 WL 600727 (W.D. Wash. Feb. 23, 2012) 6

Wilbur v. City of Mount Vernon,
298 F.R.D. 665 (W.D. Wash. 2012) ..... passim

Wilbur v. City of Mount Vernon,
989 F. Supp. 2d 1122 (W.D. Wash. 2013) 6

Xiufang Situ v. Leavitt,
240 F.R.D. 551 (N.D. Cal. 2007) 18

STATUTES

1909 Nev. Stat. 330-33 5

TABLE OF AUTHORITIES
(continued)

Page

Nev. Rev. Stat. § 180.110 (2017) 10, 22

Nev. Rev. Stat. § 260.010 (2017) 10

Nev. Rev. Stat. § 260.040(4) (2017) 11

Nev. Rev. Stat. Ann. § 51.155 4

OTHER AUTHORITIES

ACLU Idaho, Tucker v. State of Idaho, https://www.acluidaho.org/en/cases/tucker-v-state-idaho 16

Nev. S. Ct. ADKT No. 411 (advisory order) 10

Newberg on Class Actions (5th ed.) ..... passim

Senate Bill 377 7

RULES

Fed. R. Civ. P. 23 advisory committee's note to 1966 Amendment, subd. (b)(2) 20

Fed. R. Civ. P. 23(a)(2) 24

Nev. R. Civ. P. 23 ..... 2, 17, 34

Nev. R. Civ. P. 23(a) ..... passim

Nev. R. Civ. P. 23(a)(1) 23

Nev. R. Civ. P. 23(a)(2) 24

Nev. R. Civ. P. 23(b) 16

Nev. R. Civ. P. 23(b)(2) ..... passim

Nev. R. Civ. P. 23(b)(3) 16, 17

CONSTITUTIONAL PROVISIONS

Nev. Const. art. 1, § 8 26

INTRODUCTION

This case is about the systemic denial of the constitutional right of indigent defendants to meaningful representation. In Nevada's Rural Counties,[1] this right exists in theory but not in practice. The cause of the constitutional violations is clear: the State of Nevada and its Governor (collectively, "Defendants") do nothing to ensure that the public defense system in the Rural Counties has the structure, policies, programs, guidelines, or other essential resources to provide meaningful representation to the indigent. The result is a system in which Class[2] Members face substantial risk that they will lose their liberty without receiving constitutionally meaningful representation.

Defendants alone bear the constitutional responsibility to ensure indigent criminal defendants throughout the State are provided meaningful representation as required by *Gideon v. Wainwright*, 372 U.S. 335 (1963). Defendants, however, have entirely abdicated their responsibility, and placed the burden on the Rural Counties, which in turn use contract attorneys to provide indigent defense services. Defendants do not cover any of the costs, provide any guidance, or oversee or supervise the Rural Counties' system to ensure that the services meet constitutional standards. Defendants' failures have caused structural problems that pervade the Rural Counties' system, including, among other things, the use of flat-fee contracts that disincentivize contract attorneys from devoting sufficient time to litigating cases. The result is deficient representation: clients are incarcerated pretrial and go months without being able to reach their attorneys, cases are not investigated, motions are not filed, and judges impose sentences without the benefit of mitigation advocacy. Defendants have repeatedly failed to address these systemic and well-documented deficiencies. To correct Defendants' inaction, this Court should certify the Class and allow it to challenge and enjoin Defendants' failure to structure

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[1] "Rural Counties," as defined in the First Amended Complaint ("FAC"), means the following Nevada counties: Churchill, Douglas, Esmeralda, Eureka, Lander, Lincoln, Lyon, Mineral, Nye, and White Pine.

[2] The proposed Class is defined as: All persons who are now or who will be under formal charge before a state court in a Rural County of having committed any offense, the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correctional facility (regardless of whether actually imposed) and who are indigent and thus constitutionally entitled to the appointment of counsel.

an indigent defense system that provides meaningful representation in the Rural Counties.

Plaintiffs' action is suitable for class-wide determination. To challenge this system, the Class Members will all rely on common evidence to litigate at least this common issue—whether Defendants have the obligation under *Gideon* to provide the Class with constitutionally meaningful legal representation in their criminal cases, and whether the system that Defendants have allowed to exist in the Rural Counties falls short of that constitutional duty. Moreover, Plaintiffs seek an indivisible remedy that would apply to the entire Class, namely, a declaration that the current system is constitutionality inadequate and injunctive relief to remedy its failures. Without class certification, Plaintiffs' challenge to Defendants' system would be inefficient, if not impossible, because each Class Member would be forced to bring individual claims against Defendants. The Class Members—all of whom are indigent—would be unable to marshal the resources to bring their own individual civil actions. And, even if the Class Members could somehow acquire the necessary resources to bring their own individual actions, the resulting multitudinous litigations would be an unnecessary drain on judicial resources, which would be wasted adjudicating identical issues supported by identical evidence that could ultimately produce conflicting obligations on Defendants. Such a situation is untenable and unnecessary. This case should proceed as a class action to permit Plaintiffs, on behalf of all indigent persons accused of crimes that may result in incarceration in the Rural Counties, to efficiently challenge the flawed system that is the direct result of Defendants' inaction in rural Nevada.

Plaintiffs easily meet all of the requirements of Nevada Rule of Civil Procedure 23. ***First***, Plaintiffs seek only declaratory and injunctive relief against Defendants for their failures to act statewide. Any result would thus be applicable to the Class as a whole and would not involve any individual determinations for damages, therefore meeting the requirements of a NRCP 23(b)(2) class action. ***Second***, Plaintiffs satisfy all of the NRCP 23(a) requirements:

- ***Numerosity.*** The numerosity requirement is satisfied because hundreds of indigent criminal defendants in the Rural Counties are appointed counsel each year from the defective system that Defendants perpetuate.

- ***Commonality.*** The commonality requirement is satisfied because, although only one common question is required, there are numerous questions of fact and law common across the Class, including whether Defendants have the obligation to consistently provide, and whether the resulting system created by the Rural Counties does in fact consistently provide, the Class with constitutionally meaningful legal representation in their criminal cases as required by *Gideon*. To prove their claims, all Class Members would present evidence that Defendants do little, if anything, to meet their constitutional obligations. Defendants do not oversee the administration of indigent defense in the Rural Counties, ensure that the Rural Counties' systems are properly structured, or monitor the quality of the representation provided in the Rural Counties. Defendants' inaction has resulted in the existing contract attorney system created by the Rural Counties, which neither incentivizes nor ensures meaningful representation for the entire Class.
- ***Typicality.*** The typicality requirement is satisfied because the Class's claims all arise from the same conduct—*i.e.*, Defendants' failure to structure a system in the Rural Counties that ensures that the provision of indigent defense complies with constitutional requirements. Defendants' current "system"—leaving to the Rural Counties the burden of providing the representation that Defendants are constitutionally required to provide, while taking no steps to ensure that meaningful representation ***is*** provided—subjects both Class representatives and the rest of the Class to a substantial risk that they will not receive the meaningful representation *Gideon* demands.
- ***Adequacy.*** The adequacy requirement is satisfied because the named Plaintiffs' indigence forces them to rely on Defendants for appointed criminal defense counsel in the Rural Counties, instead of retaining private counsel of their own choosing. Plaintiffs therefore have the same interest as the Class in enjoining Defendants' constitutionally deficient system and are eager to seek reform. Plaintiffs' counsel also

have significant combined experience litigating class actions, including substantially similar litigations to reform indigent defense systems in other jurisdictions.

Plaintiffs now ask this Court to grant their motion to certify the Class as a Rule 23(b)(2) class action because it requests systemic declaratory and injunctive relief. Plaintiffs request class certification based on the Exhibits[3] filed in support of Plaintiffs' motion and the detailed allegations set forth in their First Amended Complaint (the "FAC") and accompanying exhibits, filed October 15, 2018.

BACKGROUND

Plaintiffs Diane Davis, Jason Lee Enox, Jeremy Lee Igou, and Jon Wesley Turner II bring this class action on behalf of themselves and all those similarly situated to challenge the failure of the State of Nevada and the Governor, in his official capacity, to create and maintain a system that ensures that indigent criminal defendants in the Rural Counties receive meaningful legal representation as required under *Gideon*.

I. The Constitution Requires Defendants to Provide Meaningful Counsel to Indigent Persons Accused of a Crime

The State of Nevada was a trailblazer in recognizing an indigent person's right to appointed counsel in criminal cases. Nevada's Supreme Court first recognized this right in 1877, observing that "a statute (Laws of 1875, 142) passed since the trial of this petitioner, has made provision for compensation of attorneys appointed to defend in such cases. Probably since this statute, if not before, ***a failure to assign professional counsel for a poor defendant would be deemed a fatal error on appeal***." *In re Wixom*, 12 Nev. 219, 219-24 (1877) (emphasis added). This right was formally codified in 1909: "If the defendant appears for arraignment without

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[3] Plaintiffs need not support their Amended Motion for Class Certification with admissible evidence. *Sali v. Corona Reg'l Med. Ctr.*, 2018 WL 6175617, at *7 (9th Cir. May 3, 2018). Rather, an inquiry into the evidence's ultimate admissibility should only "go to the weight that evidence is given at the class certification stage." *Id.* As the Declaration of Amy Rose ("Rose Decl.") shows, however, all of the Exhibits supporting this Motion, even if they are hearsay, are in fact admissible. Exhibit 1 is admissible as a public record or report pursuant to section 1 of Nevada Revised Statutes Annotated § 51.155. Exhibits 2-3, 14-17, and 19 are admissible as public records or reports pursuant to section 3 of Nevada Revised Statutes Annotated § 51.155. All other Exhibits are not hearsay and are admissible.

counsel, he must be informed by the court that it is his right to have counsel before being arraigned and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him." 1909 Nev. Stat. 330-33.

In *Gideon*, the United States Supreme Court made clear that all states were constitutionally required to provide indigent defendants with meaningful legal representation. This obligation stems from a long-standing interpretation of the Sixth Amendment as guaranteeing a "fundamental" right to counsel that is "essential to a fair trial." *Id.* at 342-44. A state does not satisfy its obligation under *Gideon* simply by appointing someone with a law license to represent indigent defendants. *See Avery v. Alabama*, 308 U.S. 444, 446 (1940) (the "mere formal appointment" of a lawyer does not satisfy the constitutional right to counsel). An unconstitutional denial of counsel occurs when, among other things, a defendant is denied ***meaningful*** assistance of counsel at a critical stage of the proceedings, when defense counsel fails to investigate the underlying facts of a case, or when defense counsel fails to subject the prosecution's case to meaningful adversarial testing. *United States v. Cronic*, 466 U.S. 648, 659 (1984). The right to counsel attaches for all defendants at their initial appearances, *see Rothgery v. Gillespie Cty.*, 554 U.S. 191 (2008), and plea bargaining also constitutes a "critical stage" of any criminal proceeding, *see Lafler v. Cooper*, 566 U.S. 156 (2012); *Missouri v. Frye*, 566 U.S. 134 (2012).

Here, Plaintiffs seek system-wide relief from the actual or constructive denial of counsel under *Gideon*. Plaintiffs do not seek individualized relief for claims of ineffective assistance of counsel under a separate line of cases flowing from the United States Supreme Court's opinion in *Strickland v. Washington*, 466 U.S. 668 (1984). In a *Gideon* denial-of-counsel claim, the plaintiff alleges ***not*** that counsel made specific errors in the course of representation, but rather that during the judicial proceeding he was—either actually or constructively—denied the assistance of counsel altogether. *Roe v. Flores-Ortega*, 528 U.S. 470, 483 (2000). In other words, a denial-of-counsel claim is an assertion not of substandard representation but of nonrepresentation. In contrast, a *Strickland* claim alleges that an individual lawyer's performance was constitutionally ineffective. *Strickland*, 466 U.S. at 692 (distinguishing between ineffectiveness claims and

claims of "[a]ctual or constructive denial of the assistance of counsel"). Ineffective-assistance-of-counsel claims under *Strickland* are, by definition, backward-looking and limited to remedying the injury caused by a single lawyer's performance in a single case. Therefore, such "case-by-case requests for new counsel, appeals, and/or malpractice actions [under *Strickland*] would not resolve the systemic problems identified by plaintiffs, making a request for injunctive and declaratory relief necessary." *Wilbur v. City of Mount Vernon* ("*Wilbur II*"), 2012 WL 600727, at *1 (W.D. Wash. Feb. 23, 2012). In other words, if this type of claim was limited to an action for post-conviction relief (*i.e.*, a claim for ineffective assistance of counsel under *Strickland*), it would prevent courts from effectively remedying systemic *Gideon* violations (*i.e.*, actual or constructive denials of counsel due to systemic failures), like those occurring in Nevada's Rural Counties.

To resolve a *Gideon* denial-of-counsel claim, courts determine whether the markers of traditional representation are typically absent or significantly compromised and whether such absence is caused by systemic structural limitations. Factors to consider include insufficient staffing, excessive workloads, lack of training and supervision, lack of independence, and lack of resources. In *Wilbur v. City of Mount Vernon* ("*Wilbur III*"), 989 F. Supp. 2d 1122 (W.D. Wash. 2013), for example, the court highlighted several structural limitations—insufficient staffing, excessive caseloads, and almost nonexistent supervision—that resulted in a system "broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned." *Id.* at 1127. Additionally, even if a State delegates its obligation to another governing body (*i.e.*, the Rural Counties) to provide meaningful indigent defense representation, the State retains ultimate responsibility for protecting defendants' Sixth Amendment rights and ensuring that the representation is meaningful. *Gideon*, 372 U.S. at 342 (holding that the right to counsel is "made obligatory upon the States by the Fourteenth Amendment"); *see also Duncan v. State*, 832 N.W.3d 752 (Mich. 2013) (mem.) (holding that an indigent defense class action could proceed against Michigan although the state had delegated responsibility to counties); *Hurrell-Harring v. State*, 930 N.E.2d 217, 227 (N.Y. 2010) (allowing class action to proceed against New

York even though indigent defense obligations had been delegated to counties); *cf. Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1062-63 (9th Cir. 2010), *aff'd sub nom. Armstrong v. Brown*, 732 F.3d 955, 957 (9th Cir. 2013), *cert denied*, 134 S. Ct. 2725 (2014) (holding that California retained the ultimate responsibility for providing reasonable accommodations to disabled prisoners and parolees regardless of whether it had delegated the operation of jails to the counties).

II. Defendants Are Failing to Maintain a System That Ensures Meaningful Representation for the Indigent in Rural Counties

Despite its trailblazing history and the clear constitutional mandate, Nevada has taken several steps back in safeguarding the right to counsel for the poor. The State of Nevada and the Governor have known for years that systemic deficiencies plague indigent defense services in the Rural Counties. Indeed, the Nevada Supreme Court created the Indigent Defense Commission ("IDC") over ten years ago in response to "concerns about the current process for providing indigent defendants . . . with counsel and whether the attorneys appointed are providing quality and effective representation." FAC ¶ 120; Ex. 1.[4] The IDC was tasked with studying Nevada's indigent defense system and making recommendations to the Supreme Court. FAC ¶ 120; Ex. 1. At its first meeting on May 15, 2007, the IDC identified what remains a pervasive constitutional violation in rural Nevada: "Rural courts are getting inadequate counsel. There seems to be different levels of justice throughout Nevada that must be changed." FAC ¶ 122; Ex. 2 at 5. The IDC recognized that the State's abdication of its constitutional responsibilities is the core issue in Nevada's indigent defense system, and recommended that "the State of Nevada accept its constitutional responsibility to totally fund all aspects of the delivery of indigent services in all counties of Nevada." FAC ¶ 124; Ex. 3 at Tab 3. Today, however, the IDC's recommendations sit unimplemented, because, despite its mandate to observe and diagnose systemic problems, the IDC was granted no enforcement or oversight power to fix the problems. *See* FAC ¶ 125; Ex. 9 (order from Nevada Supreme Court creating a "study" committee).

[4] "Ex. __" citations refer to exhibits attached to Index of Exhibits in Support of Plaintiffs' Amended Motion for Class Certification ("Index of Exhibits"). *See also* Ex. 25 ("Rose Decl.").

More recently, the legislative and executive branches also acknowledged the persistent deficiencies in the State's indigent defense system. On June 8, 2017, the Governor signed Senate Bill 377, which created the Nevada Right to Counsel Commission ("NRTCC"), giving it similar responsibilities to the IDC, including "conduct[ing] a ***study*** during the 2017-2019 interim" and "***mak[ing] recommendations*** to the Legislature" to improve indigent defense services and ensure they are provided in a constitutionally sufficient manner. FAC ¶ 131; Ex. 4 at 4 (emphasis added). Acting on this mandate, in 2017 the NRTCC commissioned the Sixth Amendment Center to conduct a study of indigent defense in Nevada's rural counties.[5] *See* Ex. 14. In August 2018, the Sixth Amendment Center published its 180-page final report, which confirmed that Defendants' system is ***currently*** failing to provide meaningful representation in the Rural Counties. *Id.* For each of the fifteen counties—which include the Rural Counties—that it studied, the Six Amendment Center collected statistical information, policies, and procedures; observed court procedures; and interviewed judges, county officials, prosecutors, indigent defense attorneys, court clerks, and law enforcement. *Id.* at 41–42. The final report concluded that:

- "The State of Nevada has a Fourteenth Amendment obligation to ensure effective Sixth Amendment services in every court at every level everywhere in the state." *Id.* at 164. But "[t]he State of Nevada has no governmental agency charged with ensuring that local governments can and are meeting the parameters of the Sixth Amendment in providing services." *Id.* at iii.
- "[W]ithout guidance from the State of Nevada on how to create local structures that meet the parameters of the Sixth Amendment the" Rural Counties' indigent defense systems suffer from "a pervasive lack of institutionalized attorney supervision and training," "a pervasive lack of attorneys at initial appearance to advocate for pretrial release of defendants," "a pervasive lack of independent defense investigations," "a pervasive lack of support services," "fixed fee contracts," and "excessive caseloads." *Id.* at 164–65. The Rural Counties also suffer from a "pervasive lack of

[5] The Sixth Amendment Center studied all 15 of Nevada's rural counties, whereas Plaintiffs' claims focus on only 10 of those counties (*i.e.*, the Rural Counties). *See supra* note 1.

independence," *id.* at 164, meaning that appointed attorneys have to cater to local officials who either (1) are not lawyers with criminal defense expertise, (2) are subject to political pressures, or (3) may even be involved in prosecuting indigent criminal defendants, and therefore may not prioritize or demand the delivery of constitutionally meaningful representation for indigent rural defendants. *Id.* at 111-16. For example, in Churchill County, attorneys' applications in response to the County's 2017 Request for Qualifications for Public Defense Services were evaluated by the County Manager, Comptroller, and Chief Civil Deputy District Attorney. Ex. 18.

- "The State of Nevada does not require uniform indigent defense data collection and reporting. Without objective and reliable data, right to counsel funding and policy decisions are subject to speculation, anecdotes and, potentially, even bias." Ex. 14 at 164. Additionally, "[w]ithout the State of Nevada tracking which attorneys are providing representation in which courts and/or which public defense attorneys are employed in other court functions (*e.g.*, magistrates, prosecutors) it is impossible for local policymakers to gauge workloads even in those jurisdictions trying to review excessive caseloads." *Id.* at 165.
- "The vast geographic distances, the paucity of attorneys in many areas of the state, [and] the structure of Nevada's courts . . . seems to render it nearly impossible for the individual counties and cities ***alone*** to provide public defense systems that can ensure effective assistance of counsel." *Id.* at 165 (emphasis added).

The report included seven recommendations directed to the State of Nevada to "overcome the[se] systemic deficiencies." *Id.* at 166. Generally, these recommendations direct the State of Nevada to create a structure to "oversee the provision of defender services in the state"; "promulgate standards" for attorney qualifications, training, workload, supervision and contracting; "qualify, train, and supervise attorneys that local governments may contractually engage"; "collect uniform data" on the representation and "conduct on-going system evaluations against [the] standards"; and "review, approve, and fund requests for trial-related expenses (investigators and experts)." *Id.* at 166–80. The Sixth Amendment Center's recommendations

are ***not*** directed to the Rural Counties, because it is the State's obligation to ensure meaningful representation to indigent criminal defendants. But like the IDC before it, the NRTCC is not empowered to implement the recommendations contained in the report it commissioned. And, as history has shown, without teeth, the reports and recommendations of such commissions do little to remedy any of the underlying problems.

III. The System-wide Deficiencies

Under Defendants' indigent defense system, all counties with fewer than 100,000 residents, which includes every one of the Rural Counties at issue in this action, may either pay for the services of the State Public Defender or create their own county public defender's office. FAC ¶ 117; Nev. Rev. Stat. § 260.010 (2017); Nev. Rev. Stat. § 180.110 (2017). Instead of utilizing either of these statutorily approved options, the Rural Counties have opted for a third, cheaper option—contracting with private attorneys to represent indigent defendants. FAC ¶¶ 117-18; Exs. 5-13 (county contracts). The State does not reimburse the counties for any of the contractual costs, provide any resources to the counties, or supervise the counties' systems to ensure constitutionally required meaningful representation or compliance with any other professional standard. FAC ¶ 140; *see also* Ex. 14 at 66-69 (Mineral County funds and administers its own indigent defense services), 69-71 (same for Lander County), 72-75 (same for Churchill County), 75-79 (same for Lyon County), 79-83 (same for Nye County), 84-85 (same for Esmeralda County), 85-88 (same for Douglas County), 88-91 (same for Lincoln County), 91-93 (same for White Pine County), 93-95 (same for Eureka County).

The contracts used by the Rural Counties are all explicit or *de facto* flat-fee contracts, meaning that the attorney receives a fixed annual fee regardless of the number or complexity of the cases that the attorney litigates during the contract term. FAC ¶¶ 141-55; Ex. 5 § 6; Ex. 6 § 4; Ex. 7 ¶ 6; Ex. 8 ¶ 3; Ex. 9 § XII; Ex. 10 Part J; Ex. 11 ¶ 4; Ex. 12 § 4; Ex. 13 § XII; *see also* Ex. 14 at 145–50; Ex. 15 at 25–32; Ex. 16. This is in direct violation of the Nevada Supreme Court's Order ADKT No. 411 that counties "shall not use a totally flat fee contract." FAC ¶ 136. These flat-fee contracts create a serious conflict of interest because they discourage attorneys from thoroughly investigating and litigating on behalf of their clients; indeed, they ***encourage*** attorneys

to spend as little time and money as possible on individual cases. Monahan Decl.[6] ¶¶ 77-88; Ex. 14 at 145–50; Ex. 15 at 25–32. Attorneys, who are not reimbursed for travel expenses, are disincentivized to meet with clients who are located in geographically dispersed jails and courtrooms. FAC ¶¶ 146, 153-55; Exs. 5–13; Ex. 14 at 146, 149–50; Ex. 15 at 28–30; Ex. 16. The contracts do not prohibit attorneys from concurrently maintaining a private practice, which diverts attorneys' attention from indigent clients to paying clients. FAC ¶¶ 148-49; Exs. 5–13; Monahan Decl. ¶¶ 47-49; Ex. 14 at 149–50; *see also* Nev. Rev. Stat. § 260.040(4) (2017) (public defenders in counties with populations of fewer than 100,000 "may engage" in private practice). The contracts do not provide a way to reallocate an attorney's workload should a defendant wish to take his or her case to trial, which means that attorneys are incentivized to counsel against doing so and opt for a plea agreement, even if their indigent clients have strong trial defenses. Monahan Decl. ¶¶ 64-76; Ex. 14 at 149; Exs. 5–13. Many of the contracts also do not reimburse contract-appointed attorneys for the costs of support staff, investigative costs, expert witness fees, or other services, unless those costs are extraordinary and ordered by a court. FAC ¶¶ 141-61; Exs. 5-13; Ex. 15 at 28-30; Ex. 16. This means that to obtain an investigator or an expert witness, a contract-appointed attorney must either pay the expense out of his or her own fee, or take the additional step to petition the court (and incur the costs for doing so).[7] Monahan Decl. ¶¶ 41-46, 59-60.

By allowing these flat-fee and *de facto* flat-fee contracts to exist without requiring any safeguards or exercising any oversight, Defendants have abdicated their duty under *Gideon*. Defendants have essentially done nothing to ensure that the indigent defense provided pursuant to these flat-fee and *de facto* flat-fee contracts is constitutionally sufficient. *See, e.g.*, Ex. 21 at 4-6 (identifying only the Nevada State Public Defender's Office as providing oversight to the Rural Counties, but only for those counties that "retain its services," ignoring that none of the Rural

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[6] All declarations in support of Plaintiffs' Amended Motion are included as Exhibits in the Index of Exhibits.

[7] There is also a strategic disincentive in addition to the financial disincentive to filing a petition. The petition, with no guarantee of success, could reveal case strategy to the prosecution to the detriment of the accused.

Counties retain its services). Defendants do not monitor attorneys' workloads or performance, train and supervise them, or hold them accountable if they fail to perform. Monahan Decl. ¶¶ 22-40, 50-58, 64-76. Defendants do not require attorneys to have criminal defense experience or any specific qualification other than a Nevada Bar license. FAC ¶¶ 162-68; Exs. 5-13; Monahan Decl. ¶¶ 50-55; Ex. 15 at 28-30. Nor do Defendants provide resources for training or mentorship to remedy an attorney's inexperience after the attorney is contracted or ensure that attorneys are indeed receiving training relevant to providing criminal defense services. FAC ¶¶ 162-68; Exs. 17-18. Because Defendants abandoned their role in the Rural Counties' indigent defense system, county employees—who are not attorneys and therefore may not know what meaningful criminal defense requires—are tasked with hiring and managing contract attorneys. FAC ¶ 172; Monahan Decl. ¶¶ 22-40, 56-58; Exs. 17-18. No State official exercises oversight to ensure the contract-appointed attorneys' caseloads are manageable or to hold the attorneys accountable for the quality of their representation. FAC ¶ 139; *see also* Ex. 14 at 164; Ex. 21 at 4-6.

In short, Defendants abdicated their constitutional obligation without providing any mechanisms to ensure meaningful representation in the Rural Counties. Although told repeatedly that the indigent defense system has reached crisis levels in the Rural Counties, Defendants have done and continue to do nothing to satisfy their constitutional obligations to remedy, structure, and oversee the broken indigent defense system in the Rural Counties.

IV. The Plaintiffs

Each of the named Plaintiffs is facing, or has faced, serious criminal charges and is entitled under the U.S. and Nevada constitutions to meaningful representation. But each cannot afford to pay for a private attorney of his or her choosing, and each is exposed to a substantial risk of a constructive denial of counsel created by Defendants' failure to structure an indigent defense system that provides meaningful representation.

Diane Davis. Plaintiff Diane Davis was convicted in Nye County of one count of first-degree arson. FAC ¶ 57; Davis Decl. ¶ 4. Ms. Davis is now facing 1-20 years of imprisonment at her sentencing, which is scheduled to take place in January 2019. FAC ¶ 57; Davis Decl. ¶ 18. Because she is indigent, Ms. Davis had a right to rely on the State to provide her with meaningful

representation. FAC ¶ 32; Davis Decl. ¶ 4. Ms. Davis has been represented by five different attorneys at different times over the five years that her case has been pending. FAC ¶¶ 28-58; Davis Decl. ¶ 4. All of Ms. Davis's attorneys worked on a contract with Nye County, which uses a flat-fee contract system. FAC ¶¶ 28-58, 201; *see also* Ex. 14 at 79-83. In Nye County, appointed attorneys are paid a fixed sum for an unlimited amount of cases. FAC ¶ 153; Ex. 12 § 4. This sum must cover salaries for the attorney, any associates or co-counsel, and administrative staff, plus investigative and expert fees, unless the attorney moves for—and a court orders—additional reimbursement on an extraordinary basis. Ex. 12 § 4; *see also* Ex. 14 at 80-81.

Because of this system, Ms. Davis has not received meaningful representation. For example, during the time her case has been pending, Ms. Davis has been represented by five different attorneys at different times, preventing any one attorney from devoting time to developing her defense, causing a series of continuances. Davis Decl. ¶ 4, 8, 13, 17. Moreover, Ms. Davis's third appointed attorney explicitly stated that his caseload prevented him from focusing on Ms. Davis's case until her trial was imminent. Davis Decl., Ex. A at 5. Because of her experiences, Ms. Davis is committed to being a Plaintiff in this lawsuit and is eager to reform Defendants' indigent defense system. *Id.* ¶¶ 19-21.

Jason Lee Enox. Plaintiff Jason Lee Enox was charged in Churchill County with being a habitual criminal, trafficking, possession, and other drug-related charges, in addition to failure to stop and possession of a billy club and stun gun. FAC ¶ 60; Enox Decl. ¶ 4. Before entering a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), he faced a possible life sentence as a habitual offender. FAC ¶ 60; Enox Decl. ¶ 4. Because he is indigent, Mr. Enox had a right to rely on the State to provide him with meaningful representation. FAC ¶ 63; Enox Decl. ¶ 5. Mr. Enox has been appointed two different attorneys at different times. FAC ¶¶ 65-66; Enox Decl. ¶¶ 5, 8. Like Nye County, Churchill County relies on contract-appointed attorneys who are paid an annual fixed fee to represent an unlimited amount of indigent criminal defendants being prosecuted within its jurisdiction. FAC ¶¶ 61-62; Ex. 5 § 6; *see also* Ex. 14 at 72-75. This fee must cover salaries for the attorney, any associates, and any staff, as well as all investigative and

expert fees, unless a court orders reimbursement. Ex. 5 § 6; *see also* Ex. 14 at 72-73.

Mr. Enox has been deprived of meaningful representation as a result of this system. For example, one of Mr. Enox's attorneys did so little on his case that the judge openly chastised the attorney in court. FAC ¶ 65; Enox Decl. ¶ 7. Additionally, Mr. Enox has gone long lengths of time without being able to reach his attorney, even after calling him multiple times before entering a plea deal. Enox Decl. ¶¶ 6, 11. In fact, after Mr. Enox took his plea and during his sentencing hearing, Mr. Enox's attorney acknowledged that, due to his caseload, he had not met with Mr. Enox prior to sentencing except for a very brief meeting immediately before the hearing. FAC ¶ 74; Enox Decl. ¶ 15. Because of his experiences, Mr. Enox is committed to being a Plaintiff in this lawsuit and is eager to reform Defendants' indigent defense system. Enox Decl. ¶¶ 16-18.

Jeremy Lee Igou. Plaintiff Jeremy Lee Igou is charged in Nye County with being an ex-felon in possession of a firearm, two counts of an offense involving stolen property, unlawful use of a controlled substance, two counts of possession of a controlled substance, two counts of the unlawful destruction of a vehicle, six counts of possession of a firearm by a prohibited person, two counts of possession of a short-barreled rifle or shotgun, and with being a habitual criminal. FAC ¶ 77; Igou Decl. ¶ 4. If convicted of all charges, Mr. Igou faces life in prison. FAC ¶ 77; Igou Decl. ¶ 4. Because he is indigent, Mr. Igou had a right to rely on the State to provide him with meaningful representation. FAC ¶ 79; Igou Decl. ¶ 5. Mr. Igou has been appointed two different attorneys at different times. FAC ¶¶ 79-80; Igou Decl. ¶¶ 5, 12. Like Ms. Davis's attorneys, both of Mr. Igou's attorneys work on a flat-fee contract with Nye County to represent an unlimited number of indigent defendants. FAC ¶ 78; *see also* Ex. 14 at 80-81.

Because of this system, Mr. Igou is not receiving meaningful representation. For example, because of the lack of progress Mr. Igou's first attorney made in the case, the attorney requested a continuance at almost every court appearance, despite the fact that Mr. Igou has been sitting in jail since 2017. FAC ¶ 85; Igou Decl. ¶¶ 7, 10-11. Additionally, although Mr. Igou was appointed a second attorney after his first attorney relinquished his public defense contract with Nye County on July 24, 2018, Mr. Igou had not met, spoken with, or even learned the identity of

his new attorney until December 6, 2018 (nearly five months later), when Mr. Igou met his attorney for the first time minutes before a court hearing that day. Igou Decl. ¶ 13. Because of his experiences, Mr. Igou is committed to being a Plaintiff in this lawsuit and is eager to reform Defendants' indigent defense system. Igou Decl. ¶ 15-17.

Jon Wesley Turner II. Plaintiff Jon Wesley Turner II is charged in Nye County with felony sexual assault, battery with the intent to commit sexual assault, battery with the intent to kill, assault and battery with the use of a deadly weapon, and battery by strangulation. FAC ¶ 91; Turner Decl. ¶ 3. Mr. Turner faces life in prison. FAC ¶ 91; Turner Decl. ¶ 3. Because he is indigent, Mr. Turner had a right to rely on the State to provide him with meaningful representation. FAC ¶ 92; Turner Decl. ¶ 4. Mr. Turner was appointed an attorney in December 2017. FAC ¶¶ 92-93; Turner Decl. ¶ 4. Like Ms. Davis's and Mr. Igou's attorneys, Mr. Turner's attorney worked on a flat-fee contract with Nye County to represent an unlimited number of indigent defendants. FAC ¶ 94; *see also* Ex. 14 at 80-81.

Because of this system, Mr. Turner is not receiving meaningful representation. For example, as of the date of this Motion, Mr. Turner has not appeared in court or spoken with his attorney since his last hearing on February 6, 2018—over ten months ago—despite the fact that Mr. Turner has been sitting in jail since November 2, 2017. FAC ¶ 96; Turner Decl. ¶¶ 6-7. Mr. Turner's trial date is set for March 2019, and Mr. Turner is unaware of whether his attorney plans to try the case on the current trial date, or whether his attorney is making efforts to prepare for trial. FAC ¶ 97; Turner Decl. ¶ 7. Because of his experiences, Mr. Turner is committed to being a Plaintiff in this lawsuit and is eager to reform Defendants' indigent defense system. Turner Decl. ¶¶ 8-10.

V. Plaintiffs' Counsel

On October 15, 2018, the named Plaintiffs filed their FAC through their attorneys: the American Civil Liberties Union of Nevada and the national American Civil Liberties Union's Criminal Law Reform Project (collectively, "ACLU"); the law firm of O'Melveny & Myers LLP; and Franny Forsman, a former Federal Public Defender of the District of Nevada and former member of the IDC. Together, these attorneys possess substantial expertise both in prosecuting

class actions generally and in the specific context of litigating reforms to indigent defense systems. *See* Andersson, Carter, Forsman, and Rose Decls. For example, the ACLU has litigated class actions in multiple states dealing with indigent defendants' rights to counsel. Rose Decl. ¶ 5.[8]

VI. The Proposed Class

The Class consists of all persons who are now or who will be under formal charge before a Nevada state court in a Rural County of having committed any offense the penalty for which includes the possibility of confinement, incarceration, imprisonment, or detention in a correctional facility (regardless of whether actually imposed) and who are unable to pay for an attorney based on their indigence. FAC ¶ 103. In 2016, over 900 indigent defendants in the Rural Counties were appointed counsel through their county's indigent defense contracts. Ex. 19. In 2017, there were over 800 such appointments. *Id.* There have been nearly 600 additional appointments this year as of June 6, 2018. *Id.*

LEGAL STANDARD

Class certification should be granted where all of the requirements of Nevada Rule of Civil Procedure 23(a) and one of the three situations defined in Rule 23(b) are met. Rule 23(b)(2), under which this Class seeks certification, requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Nev. R. Civ. P. 23(b)(2). "Rule 23(b)(2) contains no predominance or superiority requirements," unlike Rule 23(b)(3).[9] Newberg on Class Actions § 4:35 (5th ed.); *see also In re Yahoo Mail Litig.*, 308 F.R.D. 577, 587 (N.D. Cal. 2015) ("Unlike Rule 23(b)(3), a plaintiff does not need to show predominance of common issues or superiority of class adjudication to certify a Rule

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[8] *See, e.g.*, ACLU Idaho, Tucker v. State of Idaho, https://www.acluidaho.org/en/cases/tucker-v-state-idaho (last visited Oct. 8, 2017).

[9] "An action [under Rule 23(b)(3)] may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Nev. R. Civ. P. 23(b)(3).

23(b)(2) class."). Rule 23(a) states that certification is appropriate where (1) the class is so numerous that joinder is impractical; (2) questions of law or fact are common to Class Members; (3) claims and defenses of the representative are typical of those of the class; and (4) the representative will fairly and adequately protect the interests of the class. Nev. R. Civ. P. 23(a).

Although the party seeking class certification must demonstrate his compliance with the Rule 23 requirements, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), the purpose of class certification is "merely to select the method best suited to adjudicat[e] the controversy fairly and efficiently," not to conduct a "mini-trial" on the merits or adjudicate the case. *Stockwell v. City & Cty. of S.F.*, 749 F.3d 1107, 1112 (9th Cir. 2014); *see also Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013). Additionally, the Court should interpret the Rule 23 requirements to further the policy goals behind the rule: to "avoid[] multiplicity of litigation, save[] members of the class the cost and trouble of filing individual suits[,] and . . . also free[] the defendant from the harassment of identical future litigation." *In re Checking Account Overdraft Litig.*, 718 F. Supp. 2d 1352, 1357 (S.D. Fla. 2010) (internal quotation marks omitted).

Because Nevada Rule 23 is identical to its federal counterpart, Nevada courts have held that federal case law is "strong persuasive authority" in assessing whether the class action requirements have been met. *See Exec. Mgmt. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (citing *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)).

ARGUMENT

Plaintiffs seek system-wide changes to the manner in which Defendants—in violation of their constitutional duty—have permitted indigent defense services to be delivered in Nevada's Rural Counties. Defendants' permitting the Rural Counties to contract with private attorneys without providing any structure to oversee, provide guidance to, or hold accountable the attorneys creates a substantial risk that indigent defendants will not receive meaningful representation in ***all*** the Rural Counties. Defendants' inaction fails each Rural County and each Class Member in the same way.

These claims for systemic reform are exactly the kind that should be litigated as a class

action in a single forum pursuant to Rule 23(b)(2). *See* Newberg on Class Actions § 4:26 (5th ed.) (rule makers drafted Rule 23(b)(2) to aid in resolving systemic civil rights issues, like those stemming from the civil rights movement of the 1960s). Indeed, courts have been hard-pressed to "identify a single case involving claims of systemic deficiencies which seek widespread, systematic reform that has not been maintained as a class action." *Hurrell-Harring v. State*, 914 N.Y.S.2d 367, 372 (N.Y. App. Div. 2011). Class certification is even more appropriate here because for a class as large as Plaintiffs' Class, many of whose members are in jails geographically dispersed across the State and many of whom have no resources to bring individual lawsuits, joinder would be impracticable. *See Xiufang Situ v. Leavitt*, 240 F.R.D. 551, 560 (N.D. Cal. 2007) ("[I]ndicia favor[ing] a finding of impracticability," and thus certification, include "class members who are "geographically dispersed" and, "by definition, on low incomes and therefore have limited financial resources that would make it difficult or impossible for them to bring individual lawsuits"); *Boyland v. Wing*, 2001 WL 761180, at *7 (E.D.N.Y. Apr. 6, 2001) ("plaintiffs reasonably suggest that the contemplated class size is large enough that joinder of all class members would be impracticable, especially considering the indigent status and geographical dispersal throughout the five boroughs of New York City of many of the proposed class members").

Moreover, all of the Rule 23 requirements are satisfied. ***First***, this Class is maintainable under Rule 23(b)(2). Plaintiffs are challenging the system promulgated by Defendants that fails to provide constitutionally meaningful representation to indigent criminal defendants, and at the same time provides no meaningful oversight or structure. Defendants' actions are generally applicable to the entire Class, who by definition are all indigent, facing criminal charges, and thus subject to the challenged system. This Court can therefore enter declaratory and injunctive relief (the only relief Plaintiffs seek) "with respect to the class as a whole" in a single forum. Nev. R. Civ. P. 23(b)(2).[10]

[10] Some courts outside of Nevada discuss a "cohesiveness" requirement for 23(b)(2) classes. Neither the Ninth Circuit nor Nevada, however, has ever held that "cohesiveness" is required for a Rule 23(b)(2) class. The inquiry is not whether common issues predominate, but rather only whether Defendants have acted on grounds generally applicable to the class. *Davis v. Homecomings Fin.*, 2006 WL 2927702, at *7 (W.D. Wash. Oct. 10, 2006); *see also O'Connor v.*

Second, the Class meets the four criteria of Nevada Rule of Civil Procedure 23(a). The numerosity requirement is satisfied because hundreds of indigent defendants in the Rural Counties are subjected to Defendants' system each year. The commonality requirement is satisfied because there is at least one common question of fact or law across the Class, including whether the systemic deficiencies (*i.e.*, the lack of resources, oversight, and accountability, while permitting the use of fixed-fee contracts with private attorneys) in the Rural Counties' indigent defense systems promulgated by Defendants have resulted in the actual or constructive denial of the Class Members' constitutional rights under *Gideon*. The typicality requirement is satisfied because the Class claims all arise from the same conduct—Defendants' failure to adequately oversee, hold accountable, or structure the provision of indigent defense in the Rural Counties. Each named Plaintiff and Class Member is exposed to substantial risk that their constitutional rights will be violated as a result of Defendants' inaction. The adequacy requirement is satisfied because the named Plaintiffs are similarly situated to the Class, and thus have the same interest in the outcome of this litigation as the Class. Because of this alignment of interests and their commitment to effecting change in how indigent defense is provided in the Rural Counties, the named Plaintiffs are able to fairly and adequately protect the interests of the Class. Additionally, the named Plaintiffs' counsel have significant experience in class action litigation generally and specifically in the context of indigent-defense-reform litigation.

I. The Proposed Class Satisfies the Requirements of Rule 23(b)(2)

Plaintiffs seek to certify their class action under Rule 23(b)(2), which was specifically designed for civil rights cases challenging a common course of conduct like the Plaintiffs' challenge against Defendants' inaction here. *See* Fed. R. Civ. P. 23 advisory committee's note to

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Boeing N. Am., Inc., 197 F.R.D. 404, 411–12 (C.D. Cal. 2000) (same). In any event, the result is the same: "if the class proponents can satisfy the textual requirements of Rule 23(b)(2)—that the defendant has acted in a manner that affects the class members generally such that injunctive relief would be appropriate for all—they ought to be able to meet the cohesiveness test as to that same injunctive relief. Cohesiveness has therefore tended to filter out money damage cases or the occasional injunctive case that fails to meet the underlying terms of Rule 23(b)(2)." Newberg on Class Actions § 4:35 (5th ed.); *see also O'Connor*, 197 F.R.D. at 412 ("Accordingly, for purposes of Rule 23(b)(2) certification, a class is cohesive if plaintiffs meet the requirements of Rule 23(a).").

1966 Amendment, Subdivision (b)(2) (noting "various actions in the civil-rights field" are appropriate for (b)(2) certification); *see also Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014) ("the primary role of [Rule 23(b)(2)] has always been the certification of civil rights class actions").

Rule 23(b)(2) asks only one key question: whether "the party [here, the Governor and the State of Nevada] opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Nev. R. Civ. P. 23(b)(2). "In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes*, 564 U.S. at 360. "These requirements unquestionably are satisfied when putative class members seek uniform injunctive or declaratory relief from policies or practices generally applicable to the class as a whole." *Hernandez v. Cty. of Monterey*, 305 F.R.D. 132, 162 (N.D. Cal. 2015); *see also Riker v. Gibbons*, 2009 WL 910971, at *4 (D. Nev. Mar. 31, 2009) ("A court may certify a class under Rule 23(b)(2) if class members complain of a pattern or practice that is generally applicable to the whole class.") (citing *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)). Notably, the Rule 23(b)(2) inquiry "does not require an examination of the viability or bases of the class members' claims for relief, does not require that the issues common to the class satisfy a Rule 23(b)(3)-like predominance test, and does not require a finding that all members of the class have suffered identical injuries." *Hernandez*, 305 F.R.D. at 162.

Plaintiffs here seek exactly what Rule 23(b)(2) envisions in its text and in its notes—uniform injunctive and declaratory remedies for civil rights violations.[11] Plaintiffs allege that Defendants affirmatively permitted uncorrected a system of public defense that, by its very nature, creates a substantial risk that the entire Class of indigent criminal defendants will be deprived of their constitutional right to counsel under *Gideon*. Plaintiffs seek an injunction

[11] Because this is a civil rights action for injunctive and declaratory relief, rather than damages, all Class Members need not be notified of the case in order to satisfy due process concerns. *See Crawford v. Honig*, 37 F.3d 485, 487 n.2 (9th Cir.1994); *see also Frank v. United Airlines, Inc.*, 216 F.3d 845, 860 (9th Cir. 2000).

requiring Defendants to establish a public defense system that provides sufficient oversight and structure in the Rural Counties to satisfy the basic elements of the right to counsel for every Class Member. "Because the relief sought is systemic, rather than individual, classwide injunctive or declaratory relief [under Rule 23(b)(2)] may be appropriate." *Wilbur v. City of Mount Vernon* ("*Wilbur I*"), 298 F.R.D. 665, 669 (W.D. Wash. 2012).

Courts consistently certify Rule 23(b)(2) class actions seeking injunctions for systemic relief. For example, in *Walters*, the Ninth Circuit upheld Rule 23(b)(2) class certification for a group of immigrants who brought a due process challenge to the Immigration and Naturalization Service's ("INS") practice of providing inadequate notice of possible deportation following charges of document fraud. 145 F.3d at 1047. The court held that certification was proper under Rule 23(b)(2) because plaintiffs (1) challenged INS's official policy that existed system-wide (in the federal agency's case, throughout the United States), and (2) sought injunctive, not monetary, relief. *Id.* For the purposes of certification, it did not matter that the "actual experiences of the class members" in the system may not have been similar since some INS offices and agents disregarded the INS policy in dispute. *Id.* at 1045. Rather, "[i]t is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate." *Id.* at 1047 (citing *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")).

Here, too, "[t]he fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). Rather, "it is sufficient to meet the requirements of Rule 23(b)(2) that class members complain of a pattern or practice that is generally applicable to the class as a whole," because "all class members seek the exact same relief as a matter of statutory or, in the alternative, constitutional right." *Id.* at 1125-26 (internal quotations marks and citation omitted). All Class Members seek the exact same relief of an injunction and declaration to vindicate their constitutional right to counsel under

Gideon.

In a host of other cases, courts have reached the same result and have certified a class under Rule 23(b)(2) to challenge a system-wide policy. *See, e.g.*, *Riker*, 2009 WL 910971, at *5 (it was "appropriate" to certify under Rule 23(b)(2) the plaintiffs' Eighth Amendment challenge to inmate medical system); *Riley v. Nev. Supreme Court*, 763 F. Supp. 446, 451 (D. Nev. 1991) (certification granted under Rule 23(b)(2) for class of criminal defendants charged with capital offenses challenging procedures in capital cases); *see also Wilbur I*, 298 F.R.D. at 669 ("Because the relief sought is systemic, rather than individual, classwide injunctive or declaratory relief may be appropriate. Certification under Rule 23(b)(2) is also appropriate."); *Parsons*, 754 F.3d at 689 (Rule 23(b)(2) is satisfied where "every inmate 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 [state department of corrections] policy and practice"); *Rivera v. Holder*, 307 F.R.D. 539, 551 (W.D. Wash. 2015) (finding Rule 23(b)(2) satisfied where the suit centered on "a single policy applicable to the entire class that (if unlawful) subjects class members to unnecessary detention").

Because this case falls squarely within Rule 23(b)(2)'s definition, the Court should certify the Class pursuant to Rule 23(b)(2).[12]

II. The Proposed Class Satisfies All Four Requirements of Rule 23(a)

The proposed Class satisfies Rule 23(a)'s four requirements: (1) the Class is at least in the hundreds; (2) at least one (and in fact many) of the questions raised by this suit are common to all members of the Class, and a decision by this Court on those questions would resolve the Class's claims in one strike; (3) the named Plaintiffs' claims and interests are aligned with and "typical" of those of the Class Members; and (4) the named Plaintiffs and their counsel will adequately and zealously represent the Class.

[12] Because they are seeking only declaratory and injunctive relief, not monetary relief, Plaintiffs need not address the separate predominance and superiority requirements of a Rule 23(b)(3) class action. *E.g.*, *Yahoo Mail*, 308 F.R.D. at 587.

A. Numerosity

The numerosity requirement is satisfied here because joinder would be impracticable given the sheer number of Class Members. Rule 23(a)(1) permits a class action when "the class is so numerous that joinder of all class members is impracticable." Courts analyze the number of class members, as well as other factors, to determine if joinder is impracticable, but the decision ultimately is "a subjective determination based on expediency and the inconvenience of trying individual suits." *Dirks v. Clayton Brokerage Co. of St. Louis Inc.*, 105 F.R.D. 125, 131 (D. Minn. 1985) (citing *Pabon v. McIntosh*, 546 F. Supp. 1328, 1333 (E.D. Pa. 1982). If the exact number of class members is unknown or unascertainable, courts will use common sense to draw reasonable inferences from the facts and evidence of each case to evaluate numerosity. *See In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005) ("Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied.") (citation omitted); *Nicholson v. Williams*, 205 F.R.D. 92 (E.D.N.Y. 2001) (courts can make commonsense assumptions to support a finding of numerosity); *Lynch v. Rank*, 604 F. Supp. 30 (N.D. Cal.1984) (courts may draw reasonable inference of class size from pleaded facts).

There can be no question that the size of the Class meets the numerosity requirement. In 2016, over 900 indigent defendants in Rural Counties received appointed counsel because they could not afford to pay for a lawyer of their choice. Ex. 19. In 2017, that number was over 800. *Id.* And in 2018, as of June 6, 2018 there have already been nearly 600 additional appointments. *Id.* Courts have consistently held that classes of over 40 plaintiffs are sufficiently numerous. *See Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010) ("In general, courts find the numerosity requirement satisfied when a class includes at least 40 members."); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 846, 124 P.3d 530, 537 (2005) ("putative class of forty or more generally will be found numerous"). With hundreds of indigent defendants relying on appointed counsel every year, and with indigent defendants languishing in jail for months at a time and unable to communicate with their attorneys, the existence of at least that many putative class members is all but certain and joinder would be impracticable.

B. Commonality

The Class also meets Rule 23(a)'s commonality requirement, which requires that a class action involve "questions of law or fact common to the class." Nev. R. Civ. P. 23(a)(2); Fed. R. Civ. P. 23(a)(2). Only a "single significant question of law or fact" need be common to the class. *Stockwell*, 749 F.3d at 1111 (citation omitted); *cf. Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013) ("Plaintiffs need not show that every question in the case, or even a preponderance of questions, is capable of classwide resolution."). This commonality requirement is construed "permissively," *Riker*, 2009 WL 910971, at *3 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.1998)), and is "not usually a contentious one." Newberg on Class Actions § 3:18 (5th ed.). The Court should thus find that the Class satisfies this element, given that there is at least one question that, "if tried separately, would have to be answered as to each potential class member . . . ." *Wilbur I*, 298 F.R.D. at 667.

1. The State's Deficient Indigent Defense System Creates Common Questions of Law and Fact

The core question in this case—whether Defendants' pervasive conduct of not overseeing, holding accountable, or structuring the provision of indigent defense in the Rural Counties violates its constitutionally mandated responsibility under *Gideon*—is common to the Class. This core common question is alone sufficient to fulfill the commonality requirement. *See, e.g.*, *Hurrell-Harring*, 914 N.Y.S.2d at 370.

In *Hurrell-Harring*, plaintiffs sought to certify a class of "[a]ll indigent persons who have or will have criminal felony, misdemeanor, or lesser charges pending against them in New York state courts" in five counties. *Id.* at 369. The plaintiffs alleged that the State of New York's system of delegating public defense to these counties was "systemically deficient and pose[d] a grave risk that indigent criminal defendants are being or will be denied their constitutional right to counsel." *Id.* After the court of appeals "dismissed the complaint to the extent that it was premised on performance based claims of ineffective assistance of counsel, thereby obviating any need to conduct individualized inquiries into the performance of the class members' individual attorneys," the court held that the commonality requirement was satisfied by the one "concrete

legal issue" of whether "in one or more of the five counties at issue, the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being unmet because of systemic conditions" created by the State. *Id.* at 370.

Here, Plaintiffs seek to certify an identical class asserting an identical legal theory that the systemic conditions created by the State deprive the Class of its rights under *Gideon*. There is thus no doubt that the legal question found common in *Hurrell-Harring*—whether the systemic deficiencies created by the state constructively deny indigent defendants of their right to counsel under *Gideon*—is equally present here. And the commonality does not stop there. This question in turn gives rise to a number of related common questions, any one of which is also sufficient to fulfill the commonality requirement:

1. Whether Defendants are required under both the United States and the Nevada constitutions to provide meaningful representation to indigent persons charged with crimes in Nevada's Rural Counties;
2. Whether Defendants have systemically denied Plaintiffs and Class Members meaningful representation at critical stages of their cases;
3. Whether Defendants have created circumstances such that even where counsel is nominally available, "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is small," thereby constructively depriving Plaintiffs of counsel in violation of *Cronic*, 466 U.S. at 660;
4. Whether Defendants are in violation of their obligations under the Sixth and Fourteenth Amendments to the United States Constitution to ensure that defense counsel appointed for Class Members have the resources, oversight, supervision, and training necessary to provide Class Members with constitutionally sufficient representation;
5. Whether Defendants are in violation of their obligations under Article 1, Section 8, of the Nevada Constitution to ensure that defense counsel appointed for Class Members have the resources necessary to provide Class Members with constitutionally sufficient representation;

6. Whether, within the public defense system that Defendants have established and enabled, counsel for indigent defendants in the Rural Counties are able to meaningfully represent their clients by performing such functions as regularly communicating with clients, investigating cases, hiring necessary experts, advocating for pretrial release, filing necessary pretrial motions, holding the government to its burden at trial where appropriate, advising clients on guilty pleas—including the immigration consequences of guilty pleas—and advocating during sentencing proceedings;

7. Whether Defendants' delegation and abdication of responsibility for providing counsel to indigent defendants creates disparate access to the fundamental right to counsel;

8. Whether Defendants have failed to ensure that defense counsel appointed to represent Class Members have been provided with the resources necessary to adequately challenge the State's charges against the Class Members; and

9. Whether, as a result of Defendants' actions and omissions, Class Members are currently being harmed based on the State's failure to provide them with meaningful representation.

FAC ¶ 107.

These questions are common because they are capable of Class-wide resolution and have to be answered as to each Class Member, no matter how the representation of each Class Member may have varied. *See Hurrell-Harring*, 914 N.Y.S.2d at 370 ("the fact that questions peculiar to each individual may remain after resolution of the common questions is not fatal to the class action") (internal quotation marks and citation omitted). That is because the Class seeks a common remedy—an injunction to reform an inadequate system that harms the Class as a whole—and ***not*** damages that may require individualized determinations of the harm that Defendants have caused each Class Member. FAC at 52. Additionally, if the Class Members were required to proceed in separate lawsuits against Defendants, they would each be required to seek the same injunctive and declaratory relief, but different courts could impose conflicting

obligations and deadlines on Defendants if more than one such lawsuit prevailed. Such duplicative efforts would also be an unnecessary drain on judicial resources because of the common evidence that each Class Member would present to support its claims, including evidence that Defendants do not provide any structure for the Rural Counties' indigent defense services, Defendants do not oversee the administering of indigent defense in the Rural Counties, and the resulting contract attorney system created by the Rural Counties does not incentivize meaningful representation. Accordingly, the Court should permit the Class Members to proceed in one class action on their common questions to achieve one common remedy for the entire Class.

2. Courts Have Found Common Questions in Similar Challenges to Indigent Defense Systems

In addition to *Hurrell-Harring*, other courts considering the same issue—class certification in a civil rights challenge under *Gideon* to a state's indigent defense system—have held that there was at least one common question of law or fact. These courts have found the commonality requirement fulfilled by both (1) the question of whether the government's system failed to provide the class with meaningful legal representation in their criminal cases (the issue found common in *Hurrell-Harring*), and (2) the numerous questions that flow from that central question.

For example, in *Wilbur I*, the court certified a class of indigent persons who have been or will be charged with a crime and have been or will be appointed a public defender in their challenge to the cities' public defense system. 298 F.R.D. 665 (W.D. Wash. 2012). The class alleged that the system-wide deficiencies (*i.e.*, underfunding, use of fixed-fee contracts with private attorneys, and a lack of oversight over those attorneys) caused a systemic denial of the right to counsel to indigent persons. *Id.* at 665-67. In doing so, the court identified "a number of common questions of both law and fact," for which "[t]he answers to most, if not all," were "capable of classwide resolution." *Id.* These questions included determining (1) "the demand for public defender services [in the jurisdiction] and the level of resources provided to meet that demand," (2) "which, if any, stages of criminal pre-trial process are critical and whether indigent

defendants are represented during those stages," (3) whether the indigent defense system "affords indigent defendants constitutionally adequate representation," and (4) whether the government has "a duty to monitor the public defenders or to ensure that the defenders satisfy the minimum requirements of their contract and the state and federal constitutions." *Id.* (citing *Dukes*, 564 U.S. at 350). Because this class action is based on the same theory (*i.e.*, that an indigent defense system that permits fixed-fee contracts with private attorneys, while providing no oversight mechanisms or structure for the system, constructively denies indigent defendants meaningful representation) that will require the same supporting evidence, these same common questions are present across the Class here.

3. Plaintiffs' Claims Are Not Based on an Ineffective Assistance of Counsel Theory

Plaintiffs' claims are premised on the theory that the systemic conditions in the Rural Counties—*i.e.*, permitting the use of fixed-fee contracts with private attorneys, while providing no oversight mechanisms or structure for the system—perpetuated by Defendants constructively deny Class Members of their right to counsel at critical stages of their criminal proceedings. In other words, Plaintiffs' claims challenge Defendants' "system" under *Gideon* and ***are not*** "performance based claims of ineffective assistance of counsel" under *Strickland*, "obviating any need to conduct individualized inquiries into the performance of the class members' individual attorneys." *Hurrell-Harring*, 914 N.Y.S.2d at 370. Accordingly, any variations in how individual appointed defense counsel are representing individual Class Members do not preclude a finding of commonality here. As the *Hurrell-Harring* court observed, the "concrete legal issue" of whether the state's system is failing to meet its constitutional obligation, "and the constitutional right to counsel sought to be vindicated, [ ] is common to all members of the class and transcends any individual questions." *Id.*; *see also Rivera v. Rowland*, 1996 WL 677452, at *3 (Conn. Super. Ct. Nov. 8, 1996) ("The common question presented ***is not*** whether plaintiffs are each individually receiving effective assistance from their public defender based on inadequate representation in their individual cases. The common question plaintiffs raise . . . is whether the plaintiffs are being injured due to the alleged overload of cases and under-allocation

of resources."); *Best v. Grant Cty.*, 2004 WL 7198967, at *6 (Wash. Sup. Ct. Aug. 26, 2004) (same).

This action is no different. The root question here is whether Defendants, in foisting public defense obligations onto the Rural Counties without the resources to meet them, have failed to meet their constitutional obligations "to implement a system that safeguards the right to counsel for indigent defendants." *Duncan v. State*, 774 N.W.2d 89, 136 n.24 (Mich. Ct. App. 2009), *aff'd in result*, 832 N.W.2d 761, 765 (Mich. Ct. App. 2013). "Class certification does not require uniformity." *Wilbur I*, 298 F.R.D. at 666-67. Rather, common questions "may center on 'shared legal issues with divergent factual predicates [or] a common core of salient facts coupled with disparate legal remedies.'" *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014) (quoting *Hanlon*, 150 F.3d at 1019). Plaintiffs need only show that Class Members were harmed by the same conduct, *Jimenez*, 765 F.3d at 1168, such that "determination of [the] truth or falsity" of Plaintiffs' claims "will resolve an issue that is central to the validity of each one of the claims in one stroke," *Dukes*, 564 U.S. at 350. Where that is the case, "disparities in how or by how much [class members] were harmed [do] not defeat class certification." *Jimenez*, 765 F.3d at 1168.

And that is the case here. Each member of the Class, including the Plaintiffs, relies on Defendants to provide them with meaningful representation in their criminal cases. But Defendants have abdicated that responsibility and have left it to the Rural Counties to contract with attorneys to represent each Class Member. These contract-appointed counsel are not overseen, monitored, or funded by Defendants. Because of Defendants' absence, this system currently suffers from "a pervasive lack of independence," "a pervasive lack of institutionalized attorney supervision and training," "a pervasive lack of attorneys at initial appearance to advocate for pretrial release of defendants," "a pervasive lack of independent defense investigations," "a pervasive lack of support services," "fixed fee contracts" that incentivize allocating minimal time to any one case, and "excessive caseloads." Ex. 14 at 164–65. Moreover, "[t]he vast geographic distances, the paucity of attorneys in many areas of the state, [and] the structure of Nevada's courts . . . seems to render it nearly impossible for the individual counties and cities

alone to provide public defense systems that can ensure effective assistance of counsel." *Id.* at 165. Plaintiffs' claims are not claims against their individual attorneys (whose representation may or may not be ineffective), but rather against the ***system*** under which those appointed attorneys serve. That system does not include the oversight or structure necessary to provide the constitutionally mandated meaningful representation to indigent defendants in the Rural Counties. Accordingly, because each Class Member is subject to the same constitutionally deficient system that is promulgated by Defendants, all Class Members' "claims [ ] depend upon a common contention." *Dukes*, 564 U.S. at 350.

C. Typicality

The Class satisfies the typicality requirement, which "tend[s] to merge" into the commonality requirement but is "stated differently." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *abrogated on other grounds*, *Johnson v. California*, 543 U.S. 499 (2005). The typicality requirement is satisfied by showing that "each class member's claim arises from the same course of events and each class member makes *similar* legal arguments to prove the defendant's liability." *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*, 124 Nev. 28, 36, 176 P.3d 271, 276 (2008); *see also Hurrell-Harring*, 914 N.Y.S.2d at 370 ("[I]nasmuch as the named plaintiffs' claims derive from the same course of conduct that gives rise to the claims of the other class members and is based upon the same legal theory, the prerequisite of typicality is also satisfied."); *Armstrong v. Davis*, 275 F.3d at 868 (same). "The commonality inquiry focuses on what characteristics are shared among the whole class while the typicality inquiry focuses on the desired attributes of the class representative." Newberg on Class Actions § 3:31 (5th ed.). "The hurdle imposed by the typicality requirement is not great." *Palmer v. Stassinos*, 233 F.R.D. 546, 549 (N.D. Cal. 2006); *see also Parsons*, 754 F.3d at 685 (typicality inquiry is permissive); *Riker*, 2009 WL 910971, at *3 (same).

Here, the typicality requirement is satisfied because each Class Member is or could be subject to Defendants' constitutionally inadequate system because they are all indigent and all are entitled to appointed contract attorneys to defend them in their criminal cases. Each Class Member also makes a similar legal argument to prove Defendants' liability—Defendants have a

constitutional obligation to provide meaningful representation, and they are failing to provide an adequate structure to do so in the Rural Counties.

1. The Class Claims Arise from the Same Unconstitutional Abdication of Duty to Provide Meaningful Representation

The claims of Plaintiffs and unnamed Class Members arise from the same course of conduct: Defendants have established and enabled a deficient system of indigent defense that fails to provide meaningful representation to the Class Members. For each Class Member, Defendants' system is deficient, because for each, Defendants have impermissibly abdicated their duty to provide an indigent defense system to the Rural Counties. Defendants do not oversee or structure the representation, and they allow the Rural Counties to enter into flat-fee contracts that disincentivize meaningful representation. As a result, all Class Members receive representation from a system that suffers from "a pervasive lack of independence" between the appointed attorneys and the officials (in some cases including the prosecutors of the cases the appointed attorneys defend) that appoint them, "a pervasive lack of institutionalized attorney supervision and training," "a pervasive lack of attorneys at initial appearance to advocate for pretrial release of defendants," "a pervasive lack of independent defense investigations," "a pervasive lack of support services," "fixed fee contracts," and "excessive caseloads." Ex. 14 at 164–65. All Class Members are subject to Defendants' unconstitutional course of conduct because all must seek appointment of counsel within this system.

Other courts have found that similar challenges to state policies satisfy the typicality requirement. In *Parsons v. Ryan*, for example, prisoners challenged various health policies and practices of the Arizona Department of Corrections for failure to provide necessary medications and medical devices. *See* 754 F.3d at 664. Although various health policies may have affected each inmate with unique medical needs differently, the court nevertheless found typicality based on each of the named plaintiffs' declarations that they were subject to the same course of conduct, *i.e.*, being "exposed, like all other members of the putative class to a substantial risk of serious harm by the challenged . . . policies and practices." *Id.* at 685. Similarly, in *Riker*, prisoners at Ely State Prison ("ESP") complained that ESP lacked a constitutionally sufficient health care

system. 2009 WL 910971, at *1. Despite differences in individual prisoners and policies, the court focused on the common questions—"the same injurious course of conduct" and "ESP's inadequate medical system." *Id.* at *4 (citation omitted). In *Riley*, the class asserted that the Nevada Supreme Court acted unconstitutionally in its procedures for capital cases, and sought to enjoin all such practices. *See Riley*, 763 F. Supp. at 448. That court observed that not much was required to show typicality in that case; the requirement was met merely because one plaintiff had standing to challenge all of the contested procedures. *Id.* at 452.

2. Class Members Make Similar Legal Arguments That Defendants' System Is Unconstitutional

The named Plaintiffs' legal arguments are also similar to, and thus typical of, the Class's. The named Plaintiffs—like the Class Members—receive representation from Defendants' same system. Likewise, both the named Plaintiffs and the Class Members are appointed counsel that are contracted with the Rural Counties and are subject to a substantial risk of being denied meaningful representation. As a result, the named Plaintiffs are asserting the same legal argument as the Class—that Defendants' system is unconstitutional because it fails to consistently provide meaningful representation for indigent criminal defendants. This shared theory is enough to satisfy the typicality requirement. *See, e.g.*, *Parsons*, 754 F.3d at 664 (the declaration that the class representative "is being exposed, like the putative class, to a substantial risk of serious harm by the challenged . . . policies and procedures" was sufficient); *Rivera*, 1996 WL 677452, at *3-4; *see also Riker*, 2009 WL 910971, at *4 (typicality was satisfied because "[e]ach plaintiff [prisoner] claims he has been injured by the risk of physical injury and unnecessary infliction of pain due to [a prison's] inadequate medical system").

That there may be differences in the individual cases of the class representatives does not change this result. Injuries of named plaintiffs need not be "identical" to the injuries of other class members; only a similar legal theory is required. Certification is not defeated by mere factual variations among class members' underlying individual claims. *E.g.*, *Jane Roe Dancer I-VII v. Golden Coin, Ltd.*,124 Nev. 28, 176 P.3d 271 (2008); *see also Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005); *Riker*, 2009 WL 910971, at *4 ("We do not

insist that the named plaintiffs' injuries be identical with those of other class members, only that the unnamed class members have injuries similar to those of the named plaintiffs and that the injuries result from the same injurious course of conduct.") (quoting *Armstrong*, 275 F.3d at 868–69). Here, Plaintiffs' claims all challenge the system under which their appointed attorneys serve, not the adequacy of the representation of their individual attorneys. *See* Argument, Section II.B.3, *supra*. The Plaintiffs are all harmed from the fact that their representation is provided by the same system that is characterized by fixed-fee contracts that disincentivize zealous representation and is not overseen by Defendants. Accordingly, Plaintiffs are typical of the Class.

D. Adequacy

The Class fulfills Rule 23(a)'s adequacy requirement because the named Plaintiffs have the same interest in the outcome of this litigation and thus are able to fairly and adequately protect the interests of the Class.

To satisfy the adequacy requirement, the class representatives "must be able to fairly and adequately protect class members' interests . . . . Generally, then, to satisfy this requirement, the class representative must have the same interest in the outcome of the litigation and have the same injury as the other class members." *See Jane Roe Dancer I-VII*, 124 Nev. at 36.

The named Plaintiffs have no interest antagonistic to or divergent from the Class on the claims asserted or remedies sought. *See generally* FAC; Davis, Enox, Igou, and Turner Decls. Quite the opposite: Plaintiffs seek systemic reform applicable to the entire Class. *See* Davis, Enox, Igou, and Turner Decls. The named Plaintiffs have every incentive to pursue this litigation vigorously on behalf of themselves and the Class as a whole because they seek an indivisible remedy to the entire system. FAC at 52; *see generally* Davis, Enox, Igou, and Turner Decls. In fact, because of their experiences within Defendants' system, every Plaintiff is committed to his or her role of being a named Plaintiff in this lawsuit and all are eager to reform Defendants' indigent defense system. *See* Davis, Enox, Igou, and Turner Decls. This will remain true even if some of the named Plaintiffs' criminal cases are completed before the resolution of this litigation. *See Hurrell-Harring*, 914 N.Y.S.2d at 371 ("The fact that the criminal cases of the named plaintiffs have terminated does not . . . suggest that they will not adequately pursue the action[.]").

The Class will also be represented by highly experienced, well-resourced counsel. *See id.* (finding adequacy element satisfied where Plaintiffs presented evidence that "class counsel is highly experienced in class action litigation and has sufficient resources available to adequately protect and represent the class"). For example, the ACLU and its affiliates are and have been counsel in similar indigent defense reform cases in states including California, New York, Idaho, Utah, Missouri, Pennsylvania, Washington, Montana, and Michigan. Andersson Decl. ¶ 5. Additionally, O'Melveny is a large, international law firm with the resources to litigate this class action to its conclusion. Carter Decl. ¶ 4. The lead counsel from O'Melveny has served as counsel in major, complex litigations in areas of significant public interest or developing law, in both state and federal court, in her work at O'Melveny and during her eight years as a prosecutor in the United States Attorney's Office for the Central District of California. *See id.* ¶ 5. Lastly, Ms. Forsman served for over 22 years as the Federal Public Defender for the District of Nevada, where she had extensive experience investigating and defending criminal cases for indigent clients, and thus has firsthand experiences with the issues at the center of this litigation. Forsman Decl. ¶ 4.

CONCLUSION

For the foregoing reasons and those set forth in Plaintiffs' FAC, Plaintiffs respectfully request that this Court grant their motion for class certification under Nev. R. Civ. P. 23

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