IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

Twanda Marshinda Brown, et al, Plaintiffs, v. Lexington County, South Carolina, et al., Defendants.	Civil Action No. 3:17-1426-MBS **PREHEARING BRIEF OF DEFENDANT LEXINGTON COUNTY**

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As directed by the Court, Defendant Lexington County submits this brief on the remaining issues to be heard by the Court on September 19, 2022.

PROCEDURAL HISTORY

The Court has denied both parties' motions for summary judgment on Claim Two, Plaintiffs' claim for prospective relief against the County, holding that "the parties dispute the precise scope of the problem asserted and . . . the record is not clear as to the precise relief that Plaintiffs seek or are entitled." 8/22/22 Order, ECF No. 309 at 82. With regard to Claim Five, Plaintiffs' Sixth Amendment damage claim against the County, the Court noted that Plaintiffs had not moved for summary judgment on that claim. *Id.* at 91 n. 68. Although Plaintiffs argued in passing that the Court should grant them summary judgment on Claim Five anyway, ECF No. 290 at 31, the Court's only action with regard to Claim Five was to deny the County's motion for summary judgment on that claim. ECF No. 309 at 91. The Court also held that "Plaintiffs' evidence could be sufficient to support a claim for nominal damages." *Id* at 88.[1]

FACTS

The facts pertaining to each separate contention below are set forth as part of the section of this brief that deals with each such contention.

SUMMARY OF ARGUMENT

Plaintiffs' remaining claims should be dismissed for the following reasons:

1. None of the seven named Plaintiffs have standing, or ever had standing, to assert Sixth Amendment claims against Lexington County. None of them can show that they were affected

[1] Several pages later, the Order stated that "the court holds nominal damages are available to Plaintiffs." *Id.* at 90. As counsel for the County understand this, it did not foreclose the possibility that nominal damages would not be awarded if, as contended herein, there is no basis for holding the County liable, even for nominal damages, for any failure to provide counsel.

at any time or in any way by any alleged underfunding of the Lexington County public defense system. While it is undisputed that counsel was not appointed for them at any stage of any of their cases, the appointment or nonappointment of counsel is a judicial act. Absent an appointment of counsel or some other fact appearing in some decided cases but not present here, to indicate that counsel would have been appointed but for lack of funding, the named Plaintiffs were unaffected by the funding level for indigent counsel. Any harm to them was therefore not traceable to the County's funding levels for indigent counsel.

2. Even assuming for the sake of argument that standing exists, Plaintiffs have not, until after briefing and argument of the summary judgments motions, presented argument that counsel should have been appointed at the pre-convictions stages of their cases. They have only argued for the appointment of counsel after they were convicted and after nonpayment bench warrants were issued. Having never developed an argument that counsel should have been provided prior to their original convictions, they should not at this late stage of this long-pending case be heard to argue that they are entitled to prospective relief regarding counsel at pre-conviction stages.

Regarding the issue of prospective relief at the post-conviction stage, that is, prospective relief as to counsel for persons subject to incarceration when nonpayment bench warrants are issued, there is no present need for such relief. It is undisputed that the practice of issuing such bench warrants stopped in late 2017 and has not resumed. Even assuming, as the Court has held. that the issue has not been shown to have become moot as a result of Court Administration's 2017-2018 changes, the situation that would warrant prospective relief in that context is not occurring, and the issue of whether prospective relief may be needed in the future is not ripe for adjudication.

3. Again assuming for the sake of argument that standing exists, and further assuming that Plaintiffs can now belatedly argue for the provision of counsel at pre-conviction stages of

magistrate court proceedings (both of which premises are denied), Plaintiffs cannot show that the number of funded positions for magistrates' courts is insufficient. Plaintiffs' previous discussions of Lexington County's funding for indigent defense have for most part been limited to discussion of funding of indigent defense in general, including funding for General Sessions indigent defense and for time periods extending some years prior to the filing of this case. The inquiry now before the Court, however, focuses specifically on magistrate court indigent counsel, including current funding levels for counsel in those courts. In that context, Plaintiffs cannot produce evidence of a funding shortage. To the contrary, just-retired Public Defender Robert Madsen has told County Council that the three currently-funded positions are adequate to the need in the magistrate courts. Again, though, the question is purely abstract, because no Plaintiff was denied counsel because of lack of funding.

WITNESSES AND EXHIBITS

While the facts concerning Points 1 and 2 above are undisputed, if the Court chooses to inquire into Point 3, the County requests an opportunity to call or cross-examine witnesses and present additional exhibits (not previously filed, but disclosed to Plaintiffs several weeks ago) with regard to Point 3. The depositions of Plaintiffs' expert Edward Monahan and now-retired Public Defender Robert Madsen were not taken as *de bene esse* depositions, so those individuals were not subjected to full examination or cross-examination by defense counsel. Also Plaintiffs have indicated that they might call the current Public Defender, Sarah Mauldin. Finally, the County might also want to call one or more witnesses previously noticed who would testify about the rarity of persons being jailed in the first instance as a result of a magistrate court conviction.

ARGUMENT

1. Because counsel was never appointed for, or sought by, any of the seven named Plaintiffs, none of them have standing to pursue their underfunding claims against the County.[2]

In its Order filed on August 22, 2022, the Court "dismiss[ed] all claims except Plaintiffs' claims for violations of their Sixth Amendment rights brought against Lexington County, South Carolina. . . . ." ECF No. 309 at 2. Those two remaining claims, for prospective relief and for nominal damages, are both based on Plaintiffs' allegations that they were injured, or might by injured in the future, by Lexington County's alleged underfunding of indigent defense. However, the undisputed facts of all of Plaintiffs' cases show that no judge ever appointed counsel for any of the Plaintiffs. This means that the question of whether there would have been funding to provide for counsel in the event of an appointment never arose. Plaintiffs therefore cannot establish "traceability," or causation, between any act of Lexington County and any alleged past or future injury to them. As a result, Plaintiffs lack standing to pursue the remaining claims against Lexington County, that is, the claims for alleged underfunding of indigent defense.[3]

The County does not contend that no one could ever have standing to make such a challenge. Indeed, in other "underfunding" cases discussed herein or in previous filings, it was

[2] Previous briefs and orders in this case have not focused on the standing of Plaintiffs with regard to the specific issue of underfunding of indigent defense by the County, although standing was mentioned in defense counsel's post-argument response letter, ECF No. 305 at 3, ¶¶ 1 and 2 and n.2. However, it is axiomatic that "[b]ecause objections to standing are jurisdictional in nature, they may be raised at any time." *Ctr. State Farms v. Campbell Soup Co.*, 58 F.3d 1030, 1038 (4th Cir. 1995).

[3] The Court noted (*id.* at 82) the parties' disagreement over "the precise scope of the problem asserted," that is, whether this action should extend beyond issues of the provision of counsel during the now-ended procedure of incarcerating criminal defendants on bench warrants for failure to pay fines and fees. However, assuming without conceding that this lawsuit has ever properly involved the right to counsel at the pre-conviction stage of Plaintiffs' cases, their lack of standing applies to all stages of their magistrate court cases.

expressly or impliedly held that persons had standing if they were waiting undue lengths of time for indigent counsel service, usually after counsel had been appointed, before their cases could proceed. In the present case, however, there has never been such a plaintiff, that is, a person who was appointed counsel prior to having his or her case heard (or who was waiting on an appointment), but had not received the services of counsel because of insufficient funding for indigent defense. If such persons exist among the thousands of persons who at any given time have cases pending in the Lexington County Magistrates' Courts at any given time, they have not been heard from.

The absence of standing of the named Plaintiffs to make certain claims renders this case similar to *White v. Shwedo*, No. CV 2:19-3083-RMG (D.S.C.) another action filed by most of the same plaintiffs' counsel as in the present case. In *White*, which raised a number of issues about the license suspension procedures of the South Carolina Department of Motor Vehicles where the plaintiffs were indigent individuals, Judge Gergel noted that he had previously "expressed concern regarding the Plaintiffs' pending motion for class certification because the named Plaintiffs appeared not to be appropriate class representatives due to the fact that they failed to appear at their summary court trials and, thus, did not seek the benefit of the indigency protection provisions set forth in S.C. Code Section 17-25-350. . . ." 8/18/20 Order in *White*, ECF No. 94 in that case at 2-3 Exhibit 1, attached. In effect, this was a comment by Judge Gergel on the issue of traceability and standing, because if the plaintiffs in that case had appeared in their magistrate court cases and asserted their rights under the cited statute, the claims they were seeking to assert in the federal case might have been prevented, and there would have been no injury traceable to the DMV. Eventually, after the case had been stayed for about a year because a similar case from North Carolina was pending in the Fourth Circuit, the three named Plaintiffs satisfied all requirements to regain their suspended drivers' licenses. As a result, they voluntarily dismissed the case in September 2021.

Under the well-known tests set forth in In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992), a plaintiff must show, in order to satisfy Article III's standing requirements that (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. As the Fourth Circuit has held, "[t]he burden of establishing these elements falls on the party invoking federal jurisdiction, and all three elements are necessary prerequisites to establish standing." *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 343 (4th Cir. 2017), citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 337 (2016).[4]

The Court in this case has held that "Plaintiffs' incarcerations occurred without *Bearden* hearings and without either notice of the right to request counsel or the assistance of court appointed counsel." ECF No. 309 at 14 (footnotes omitted). There is no dispute concerning those facts. But there is also no evidence whatsoever to indicate that any alleged underfunding of counsel was the reason why counsel was not appointed for any of the Plaintiffs. Instead, the reasons for the absence of appointments of counsel were either that the Plaintiffs themselves waived counsel at the pre-conviction stage of their cases (either expressly or by not appearing) or that no judge ever appointed counsel for them at any stage of their cases. Decisions of judges regarding notice of the right to counsel and the appointment (or nonappointment) of counsel are undoubtedly judicial actions of state judges, and therefore are not chargeable to, or redressable by, the County.[5]

[4] The absence of standing of the named class representatives for purposes of prospective relief also defeats their ability to represent a class. *See, e.g., Mayor of Baltimore v. Actelion Pharms. Ltd.*, 995 F.3d 123, 133 (4th Cir. 2021)("[t]o have Article III standing, the plaintiffs 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class.'")(quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

[5] It should be noted that the County's relation to the magistrate courts is unlike the situation in *Bairefoot v. City of Beaufort*, Civil Action No. 9:17-2759-RMG, where the defendants were

See, e.g., Eggar v. City of Livingston, 40 F.3d 312, 314–15 (9th Cir. 1994)(affirming district court decision that municipal judge "was performing a state judicial function and not acting as a final decision maker for the City when deciding how or whether to advise the plaintiffs of their rights, and whether to appoint counsel"). As a result, the court in *Eggar* concluded, the defendant municipality was not liable to the convicted plaintiffs even though the city had a budget of only $1,000 a year for indigent defense, that 229 persons were convicted without counsel, and that the judge had failed to advise indigent defendants of their rights. *Id. Accord, e.g., McCullough v. Finley,* 907 F.3d 1324, 1331 (11th Cir. 2018)(judge's duty to advise indigent defendants of their rights and the appointment of counsel, or failure to do so, are judicial acts); *Clay v. Yates*, 809 F. Supp. 417, 423 (E.D. Va. 1992), aff'd, 36 F.3d 1091 (4th Cir. 1994)(appointment of counsel is a judicial act).

Again, in the present case, it is undisputed that "Plaintiffs' incarcerations occurred without *Bearden* hearings and without either notice of the right to request counsel or the assistance of court appointed counsel." ECF No. 309 at 14 (footnotes omitted). Plaintiffs' incarcerations following their arrests on nonpayment bench warrants were therefore the result of judicial acts. The extent to which Lexington County funded, or did not fund, indigent counsel simply did not arise in the cases of the named Plaintiffs.

Additionally, even if the issue of the provision of counsel at the pre-conviction stages of Plaintiffs' criminal cases is regarded as properly an issue in this case, which is denied, it is equally

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municipalities and the Sixth Amendment issue arose in connection with municipal courts, over which the municipalities had complete control. That municipal control was discussed at length by Judge Gergel. *Bairefoot*, 312 F. Supp. 3d 503, 510–11 (D.S.C. 2018). By contrast, counties do not exercise control over magistrates courts. *Reed v. Town of Lexington*, 902 F.2d 1566 (4th Cir. 1990)(Table)(Lexington County magistrates are not subject to the control of the County of Lexington).

undisputed that counsel was not appointed for any of the seven named Plaintiffs at that stage of their cases. As previously pointed out in earlier fillings, four of the seven Plaintiffs (Johnson, Palacios, Goodwin (2016 cases) and Corder) did not appear and were tried in their absence. In two of the four remaining cases, Ms. Darby and Ms. Brown both waived the right to counsel in writing. ECF No. 283-8 (Darby); ECF No. 283-4 at 7 (Brown). As for the other two cases, it is undisputed that there was no appointment of counsel in the original proceedings in the case of Mr. Wright and in Mr. Goodwin's 2017 case. Second Amended Complaint, ECF No. 48 ¶¶ 366 (Wright), 341 (2017 Goodwin case).

In summary, no judge ever appointed counsel for any of the seven Plaintiffs at any stage in any of their cases. As a result, none of their cases ever reached a stage whether the sufficiency of funding for appointed counsel became an issue.

The facts of this case therefore differ materially from those cases in which, regardless of their ultimate outcome, the cases proceeded beyond the issue of standing. Typically, the plaintiffs in those cases (sometimes acting as class plaintiffs) were persons who had been charged with a crime, and for whom a court appointed indigent counsel. Their Sixth Amendment claims were based on the fact that inadequate funding for indigent defense had caused undue delay in their ability to obtain counsel and to have their cases proceed to disposition.

Thus, for instance, in *Yarls v. Bunton*, 231 F. Supp. 3d 128, 129 (M.D. La. 2017), the plaintiffs, persons with outstanding criminal charges, had been placed on a waiting list by the public defenders. Similarly, in *Bender v. Wisconsin*, No. 19-CV-29-WMC, 2019 WL 4466973, at *1 (W.D. Wis. Sept. 18, 2019), the plaintiffs were persons who were "eligible for representation from the Wisconsin State Public Defender's Office," but who "each also waited for months before receiving counsel, delaying the progress of their cases and forcing them to appear in court without

counsel, as well as otherwise disrupting their lives." In *Luckey v. Harris*, 860 F.2d 1012, 1018 (11th Cir. 1988) (later dismissed based on federalism concerns, *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992)), the plaintiffs alleged that "systemic delays in the appointment of counsel deny them their sixth amendment right to the representation of counsel at critical stages in the criminal process, hamper the ability of their counsel to defend them, and effectively deny them their eighth and fourteenth amendment right to bail, that their attorneys are denied investigative and expert resources necessary to defend them effectively, that their attorneys are pressured by courts to hurry their case to trial or to enter a guilty plea, and that they are denied equal protection of the laws." In each complained-of instance, counsel had been appointed.

In *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013), frequently cited by Plaintiffs in this case, all three named plaintiffs had had indigent defense counsel assigned to them. *See* Amended Complaint in *Wilbur*, ¶¶ 15-17. Exhibit 2, attached (Complaint only, without exhibits).[6] Thus, *Wilbur*, like other cases cited by Plaintiffs, is factually inapposite. The challenge in *Wilbur* was to the quality of the services of counsel once appointed, rather than to situations where, as here, counsel was not appointed at all.[7]

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[6] The opinion in *Wilbur* did not refer to the facts of the plaintiffs' cases, but it did note that "*counsel are appointed in a timely manner* [but], the sheer number of cases has compelled the public defenders to adopt case management practices that result in most defendants going to court for the first time—and sometimes accepting a plea bargain—never having had the opportunity to meet with their attorneys in a confidential setting." 989 F. Supp. 2d at 1131 (emphasis added).

[7] To the same effect are the older federal cases cited by Plaintiffs in prior briefings. *Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 506 (M.D. Ala. 1976)(plaintiffs were "representatives of a class of indigent defendants who have cases in Montgomery Municipal Court for which they desire but are not furnished appointed counsel because none are promptly available"); *Gilliard v. Carson*, 348 F. Supp. 757, 759 (M.D. Fla. 1972)(class consisted of indigent citizens facing prosecution in the Municipal Court of Jacksonville and who, if they requested counsel, were held in jail until a lawyer was appointed); *Johnson v. Solomo*n, 484 F. Supp. 278, 281 (D. Md. 1979)(plaintiffs were 76 children confined in mental hospitals under the continuing jurisdiction of the Maryland Juvenile Court, and whose civil commitments were subject to periodic review without the assistance of counsel).

It should also be emphasized that Plaintiffs' underfunding claims do not involve the situation in which the plaintiff had standing to present a claim at the time the civil case was filed, but in which the criminal case proceeded to judgment in the meantime, thereby giving rise to a conclusion that the claims were still justiciable because of their transient nature.[8] Even assuming that Plaintiffs Goodwin or Wright (the only class representatives for prospective relief purposes), either individually or on behalf of class members, had standing to bring some of their *non*-Sixth-Amendment claims at the time this action was filed, and that those claims were not later rendered moot, neither of those two Plaintiffs ever had standing to challenge the underfunding of counsel, again because, not ever having had counsel appointed for them, their cases never reached a point where the staffing level of the Lexington County Public Defender affected them in any way. For all of the reasons stated above, Plaintiffs' Sixth Amendment claims should be dismissed for lack of standing.

The state court cases cited by Plaintiffs also involved plaintiffs who were seeking counsel at the pretrial stages of their cases, but were receiving little or no such assistance because of inadequate funding. In *Kuren v. Luzerne Cnty*., 637 Pa. 33, 41, 146 A.3d 715 (2016), the plaintiffs identified themselves as persons charged with crimes in Luzerne County, each of whom qualified for s services. In *Tucker v. State*, 162 Idaho 11, 20, 394 P.3d 54, 63 (2017), indigent counsel had been appointed for the plaintiffs, but plaintiffs were unable to obtain services because of counsels' workloads. Finally, in *Hurrell-Harring v. State*, 15 N.Y.3d 8, 930 N.E.2d 217 (2010), the plaintiffs were described (in the lower court's opinion) as "more than 20 indigent persons who were or currently are being represented by assigned counsel in criminal actions." *Hurrell-Harring v. State*, 66 A.D.3d 84, 86, 883 N.Y.S.2d 349, 350 (2009), aff'd as modified, 15 N.Y.3d 8, 930 N.E.2d 217 (2010).

[8] The Court's Order of March 5, 2021 (ECF No. 227, 2021 WL 856878), certifying the class, noted that Plaintiff Wright at the time of the amended complaint "faced a real and immediate threat of being arrested and jailed without a predeprivation hearing on his ability to pay, [and] without representation by court-appointed counsel. . . ." ECF No. 227 at 13-14, 2021 WL 856878 at *6. However, that Order did not address the issue of whether Plaintiffs Wright and Goodwin would have standing with specific regard to the underfunding claims against Lexington County. The alleged threat still did not include an allegation that the potential absence of appointed counsel would be fairly traceable to funding decisions of Lexington County. Any such allegation, even if made, would be completely speculative, because it would not describe what actually happened to either of the class representatives.

2. Even if Plaintiffs are deemed to have standing, they have only belatedly claimed that they are entitled to prospective relief in the pre-conviction stages of magistrate court cases.

The Order of August 22 noted that "the parties dispute the precise scope of the problem asserted," and also noted that "the record is not clear as to the precise relief that Plaintiffs seek or are entitled." ECF No. 309 at 82.

Regarding the first point, the Court should decline to consider Plaintiffs' belatedly-argued claim for prospective relief at the pre-conviction stages of magistrates' court proceedings. As pointed out in detail by defense counsel in ECF No. 305, the July 5, 2022 letter to the Court, responding to ECF No. 303, Plaintiffs' post-argument letter of June 30, 2022, Plaintiffs have repeatedly failed to present argument for the broad relief they now seek. As the Court pointed out in the August 22 Order, "Plaintiffs, in this letter, do not argue or cite supporting case law in support of their position," i.e., their position that they always intended to seek Sixth Amendment relief for pre-conviction stages of prosecutions. ECF No. 309 at 82 To the contrary, Plaintiffs specifically stated as late as their opposition brief on summary judgment, filed on May 9, 2022, that "Plaintiffs' legal claims . . . concern the denial of Plaintiffs' constitutional rights *after they were convicted and sentenced*. . . ." ECF No. 290 at 4 (emphasis in original). The point was emphasized even more strongly later on in the same brief: "The thrust of Claim Five is *not* that Plaintiffs were *convicted* without being afforded counsel—rather, it is that they "were arrested and incarcerated in the Detention Center for nonpayment of magistrate court fines and fees without being . . appointed counsel as an indigent person facing incarceration for nonpayment, despite prima facie evidence of indigence." ECF No. 290 at 30, quoting Second Amended Complaint, ECF No. 48, ¶ 498

(emphases in original).[9] This goes beyond a mere waiver of argument on the point—it is an express disclaimer of an intent to argue it.

In short, this attempt to make a broad expansion of the scope of the case, five years after the case was filed, should be rejected. This is particularly true given that none of the named Plaintiffs have ever tried to show that they were affected by any alleged underfunding of counsel *prior* to their convictions. Should Plaintiffs' counsel later locate any individuals who were effectively denied counsel because of underfunding (that is, individuals who were appointed counsel but who suffered long delays because of unavailability of counsel), the dismissal of this claim in this case would not prejudice any such future claim. But this sprawling case has gone on for long enough regarding the claims that have actually been argued. It should not be expanded to cover other claims at this late date.

3. Even if Plaintiffs are deemed to have standing, they are not entitled to relief in connection with post-conviction incarcerations on nonpayment bench warrants, because any such claim for relief is not ripe for adjudication.

The Court has recognized that "In the summary judgment hearing held by the court on June 29, 2022, the parties agreed that as of that time LCMC's relevant practices were constitutional following the issuance of the Beatty Memorandum and the LCMC and SCCA response thereafter." ECF No. 309 at 33 n. 27. As quoted in ECF No. 283-1 at 23-27, several deponents testified that

[9] This sentence refers to Claim Five, the Sixth Amendment damage claim, but the allegations of Claim Two, the Sixth Amendment prospective relief claim, provide nothing specific enough to afford any notice that this lawsuit was intended to involve all aspects of indigent defense in the Magistrates' courts. And while this was discussed by Plaintiffs' expert Monahan in his report, Plaintiffs' vague request for relief, ECF No. 284-1 at 39 (asking the Court to "order Lexington County to hire an independent consultant to determine the resources necessary to fulfill *Gideon*'s promise in the LCMC"), provided no amplification of the relief they belatedly seek. This was at most no more than "a passing shot at the issue" (in the course of a total of three briefs totaling 140 pages), and one that waived the argument by failing to develop it. *Brown v. Nucor Corp.*, 785 F.3d 895, 923 (4th Cir. 2015) (quoting *Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 152 n.4 (4th Cir. 2012).

nonpayment bench warrants are simply no longer being issued, and have not been issued since late 2017 at the latest. Plaintiffs have not contended otherwise. Because nonpayment bench warrants are no longer being issued, the issue of whether prospective relief should now be awarded whenever anyone "face[s] incarceration for nonpayment of magistrate court fines and fees," ECF No. 309 (quoting the pertinent part Plaintiffs' prayer for relief against the County, ECF No. 48 at 120–21), is not currently ripe for adjudication.

If magistrates were later to resume the practice of issuing nonpayment bench warrants and then ordering incarcerations without counsel and ability-to-pay hearings, an unlikely prospect now that Court Administration has issued definitive statements (whether viewed as binding or not) about the requirements of *Bearden v. Georgia*, 461 U.S. 660 (1983), that would be the time for a court to order that funding for counsel would be required. In other words, even though this Court has held that issues regarding future use of nonpayment bench warrants has not been shown to be moot, the issue of whether a remedy is now needed in that context is currently not ripe for adjudication. *See, e.g., In re Grand Jury, April, 1979*, 604 F.2d 69, 72 (10th Cir. 1979)(even if the questions presented were not moot, the case was nonetheless not ripe for decision because an uncertain future event had to occur before the issue originally presented would become ripe again). As expressed in the Wright and Miller treatise, "As compared to mootness, which asks whether there is anything left for the court to do, ripeness asks whether there yet is any need for the court to act." 13B Fed. Prac. & Proc. Juris. § 3532.1 (3d ed.). Here, in the undisputed absence of a current practice of incarceration on nonpayment bench warrants, there clearly is not "yet is any need for the court to act." *Id.*

4. Even if they can overcome the obstacles referenced above, Plaintiffs cannot show that the number of funded public defender positions for magistrates' courts is insufficient. [10]

If the Court elects to consider the merits of the issue of the need for prospective relief, Plaintiffs still must prove that Lexington County's alleged underfunding of indigent defense services resulted in actual harm to persons charged with crimes triable in the LCMC. Although the financial information set forth in the Lexington County budgetary documents and Public Defender budget requests cited by Plaintiffs and by the Court is uncontroverted, that information was focused primarily on broader questions of Lexington County Public Defender (PD) funding at all levels, and including a number of years preceding the filing of this case. The more detailed review herein of the facts specific to the magistrates' courts indicates that at a minimum, Plaintiffs have not met their burden of showing that the current number of three funded PD positions for magistrates' courts is insufficient. In the absence of such a showing by Plaintiffs, the burden does not shift to the County to show that those three positions are sufficient to meet the need. Nevertheless, the County submits, for the reasons set forth below, that in funding those three positions, the County has provided enough funding to meet the specific needs of persons charged in the LCMC.

At the outset, there can be no question that the methodology used by Plaintiffs' expert Edward Monahan can be discarded, because it led to an extreme result that Plaintiffs' counsel themselves have not advocated. Mr. Monahan concluded that, in the Court's words, "Lexington County should employ 13–15.5 public defender attorneys for use in the magistrates' court." ECF

[10] At the summary judgment stage, counsel for the County limited the County's contentions on this claim to legal issues, that is, federalism issues. The issue about funding now before the Court arguably involves "the drawing of legitimate inferences from the facts," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986), which were not necessarily subject to resolution on summary judgment.

No. 309 at 52 n. 38.[11] As the Court observed in that same footnote, "Plaintiffs have not requested the implementation of this recommendation. . . ." *Id.* Plaintiffs have so far provided no details as to the relief they actually seek, other than to have the Court order that "an independent consultant [should determine] how many additional public defenders are need in LCMC, that number being reported back to the court and the court issuing an order as to that number." *Id.*[12]

Regardless of what relief Plaintiffs might seek, the evidence they have presented so far and that they have indicated they may present at this stage of the case is insufficient to show (a) what the actual need is, and (b) why the current number of funded positions does not meet that need. It must be remembered that the 400-case number cited in various filings in this case is described in ABA Standards for Criminal Justice 5-5.3 as nothing more than a "rough measure," based on the "most rudimentary method" of measuring caseloads. *Id.* Exhibit 3, attached, at 3, 4. The larger goal, identified in Principle 5 of the ABA Ten Principles, Exhibit 4, attached, at is that

> Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.

Defense counsel have not located any cases on Westlaw that cite ABA Standard 5-5.3 in a context such as that of the present case, that is, a civil case seeking injunctive relief with regard to PD caseloads. The few cases that do cite that standard are criminal cases involving individuals.

[11] That number is tied to the number of "jailable offenses," with some downward adjustments by Mr. Monahan..

[12] Their requested relief, once disclosed, will be addressed in the County's response brief.

Plaintiffs' expert, Mr. Monahan, was unable to claim that that standard represented a constitutional floor. Exhibit 5, 79:5-80:11. He was not aware of a court ever requiring a system to comply with the 400-case workload standard. *Id.* at 99:3-8. He was unable at his deposition to identify more than four or five other jurisdictions where PD systems have caseloads of under 400 per attorney, *id.,* 100:23-101:11, and did not disagree that the majority of public defender systems in the country have more than·400 cases per attorney in misdemeanor situations. *Id.* at 101:12-25. Finally, the Supreme Court, in the context of a criminal case involving another ABA caseload standard, held that "Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ("The Defense Function"), *are guides to determining what is reasonable, but they are only guides. Strickland v. Washington,* 466 U.S. 668, 688 (1984)(emphasis added). While Mr. Monahan is obviously a passionate advocate for the extensive public defense systems he believes to be both ideal and necessary, his bias in favor of unrealistically-high numbers of attorneys should be sufficient to disregard, or at least give minimal weight to, his report and any testimony he might provide.

Even if the Court were to use the 400-case limit as some sort of rough, rudimentary, guideline, Plaintiffs have not provided the Court with an adequate factual basis to use that number as a measure. Before examining that omission, the County offers the following chart as a summary of the pertinent statistical information relevant to magistrate court cases:

A	B	C	D	E
Year	**Individuals for whom counsel was appointed in Magistrate Court**	**PD positions assigned to Magistrate Court and funded**	**Current PD Magistrate Court clients, as of February of each year[13]**	**Average "current caseload" per PD attorney position[14]**
2014	450	1[15]	No information	No information
2015	425	1	No information	No information
2016	388	1	No information	No information
2017	373[16]	1	No information	No information
2018	432	1	297[17]	297
2019	795	1 (2 as of fall of 2019)[18]	378[19]	378
2020	929	2	728[20]	364
2021	843	3 (third one approved as of 7/1/21)[21]	819[22]	273

If Plaintiffs seek to base the relief they seek on the numbers of appointments and the snapshot caseload numbers compiled above, as apparently they plan to do (*see* ECF No. 284-1 at

[13] Presumably this number represents a snapshot of the caseloads on the day in February of each month when the PD submitted his budget request.

[14] This number is based on the February snapshot in Column C

[15] Madsen deposition 64:6-9.

[16] Madsen deposition 129: 5.

[17] ECF No. 284-4 at 19-20.

[18] Madsen deposition 124: 10-17.

[19] ECF No. 284-4 at 19-20.

[20] ECF No. 284-4 at 19-20.

[21] *See* Order, ECF No. 309 at 42.

[22] PD 2022-2023 budget request, to be supplied if necessary.

28), those numbers simply do not provide enough information. The most glaring omission in those numbers cited by Plaintiffs' counsel is the lack of information about the number of unique individuals in each case counted in the caseloads (Column D). To cite just one example, Plaintiff Goodwin was charged in five separate cases on July 20, 2016. Ex. 7, attached. If counsel had been appointed for him for those five cases, and each of the five cases was counted as a "case," the caseload count would be inflated, because the attorney's workload would almost surely not have increased by a factor of five in order to handle five cases rather than one. Again, it is Plaintiffs' burden to show that the caseloads were excessive. Without knowing the number of unique defendants represented, as opposed to the number of cases handled, it is impossible to reach an accurate conclusion about the indigent counsel workload.

Another unreliable starting point is to use a mere count of "jailable" offenses. As Mr. Monahan's report shows, this leads to an inordinately high baseline for measuring the need for counsel.

On the other hand, there are several other factors that can provide some degree of reliable assistance in determining how many PD positions are needed to (a) ensure adequate representation for those who seek it, while (b) not expending public funds on excessive numbers of positions to serve in magistrate courts, especially when General Sessions cases carry larger penalties and should normally get the highest priority for PD funding. These factors include the following:

a. The Public Defender's own estimate of the needs of his office in this regard, as well as that office's actual practice in being able to accept appointments.

b. The number of appointments actually made by the judges, and whether waiting lists exist.

c. The extent to which persons charged with "jailable offenses" are actually sent to jail.

d. The extent to which an attorney from the Solicitor's Office, as opposed to the arresting officer, prosecutes the case in court, and

e. The number of cases compared to the number of attorney positions, even taking into account that the number of "cases" is likely to be significantly too high because of multiple cases involving the same defendant.

With regard to (a), the Public Defender's own estimate of the needs of his office in this regard, as well as that office's actual practice in accepting appointments, the recently-retired PD, Mr. Madsen, unequivocally agreed with a County Council member in an August 2021 public session that if the three attorney positions were filled, those positions were enough to satisfy the PD's needs for the magistrates courts. (This information is on a video clip which the County has proposed to use as an exhibit, and to which Plaintiffs have objected.) He testified in his deposition that absent a conflict, he had never "turned down representation in magistrates court when appointed by a magistrate," and, as logically follows, had not turned anyone down "because of reason of caseload or overload. . . ." Madsen dep. 156: 11-19.[23]

As for (b), the number of appointments actually made by the judges, that number has averaged around 855 annually for the three years 2019-2021. That would indicate that about 265 new appointments would come to each of three attorney positions each year. There has been no evidence that this rate of appointments has led to delays or waiting lists.

[23] The next page of the deposition has been added, given the Court's noting the need for context in this deposition (ECF No. 309 at 86, n. 63), but the quotes above represent practically the entire substance of the testimony on this point.

Factor (c), the extent to which persons charged with "jailable offenses" are actually sent to jail, reflects an important practical consideration. If the Court permits additional evidence, the County can show through data samples and testimony that very few people go to jail as a result of their original convictions in magistrate courts (this excludes those who, prior to the 2017-208 changes, went to jail on nonpayment bench warrants). Even if no additional evidence is received on this issue, former Public Defender Madsen agreed in his deposition that "the vast majority of the people who appear in magistrates courts do not ever go to jail." Madsen deposition, 172:22-24. It is not expected that Plaintiffs will claim otherwise.

Plaintiffs' expert Monahan, using a definition of "jailable" that he deemed "conservative." calculated that in the sample year 2019, there were 8,725 cases involving at least one jailable offense, as calculated by him. ECF No. 284-4 at 7. Mr. Monahan reduced that number to 5,312 to 6,185 persons, based on an indigency percentage in Eugene, Oregon. *Id.* at 17-18. He then divided those numbers by 400, and came up with the recommendation that Lexington County should fund 13 to 15.5 PD lawyers in the magistrates' courts. While the County does not necessarily accept the premise that there were as few as 5,312 to 6,185 indigent persons who were charged with jailable offenses, any decision to fund counsel for that many persons at the rate of 400 cases per PD lawyer (i.e., having a total of 13-15.5 positions for the magistrates' courts) would result in the employment of an excessive and unnecessary number of attorneys, that is, 10-13 more than the three that Mr. Madsen has agreed are adequate.

Regarding Factor (d), the extent to which an attorney from the Solicitor's Office, as opposed to the arresting officer, prosecutes the case in court, Mr. Madsen agreed in his deposition that for "the vast majority of the charges that are prosecuted in the magistrate court, there is no solicitor present. . . ." Madsen deposition at 173: 7-9. Plaintiffs have made frequent reference to

the fact that the PD receives only a fraction of the funding received by the Solicitor's Office, but this point is not relevant to the caseload in the magistrate courts. This factor is mentioned here only to show that the prosecution receives no unfair advantage by having lawyers prosecute cases in magistrates' courts, because that generally does not happen.

The final factor, (e), examines the number of cases compared to the number of attorney positions, even taking into account that the number of "cases" is likely to be significantly too high because of multiple cases involving the same defendant. As already mentioned, Plaintiffs have offered little information that would be useful for this important analysis. The only number in the record that might be enlightening is Mr. Madsen's deposition testimony that in 2020, the two public defenders assigned to magistrate courts "touched over 1300 cases." *Id.* at 130:13–14. It is unclear how Mr. Madsen arrived at that number of 1,300, and it is not necessarily supported by the data Mr. Madsen appears to have relied on. As a result, it is impossible to calculate a comparable number for 2021, the most recent full year. In any event, accepting Mr. Madsen's calculation of the 2020 number, however unfounded it may be, the addition of a third attorney would reduce the number of cases "touched" to about 433 per attorney. That number is close enough to 400 to remove any reason for any remedial action.[24] In other words, even assuming the standard advocated by Plaintiffs and the number of cases "touched" in 2020, there does not appear to be a problem in need of remediation, even if Plaintiffs have standing and have properly raised this issue. The three attorney positions are enough to reasonably handle the caseload.

[24] Defense counsel have been advised that as of the date of this brief, there are vacancies in the positions, but this temporary condition should not affect the need for relief.

5. For the same reasons set forth above, the County is not liable for nominal damages.

As set forth above, the County did nothing that caused even theoretical damage to Plaintiffs As a result, they lack standing to be awarded nominal damages. The County would also note one aspect of *Via v. Cliff*, 470 F.2d 271 (3d Cir. 1972), cited in a portion of *Bairefoot v. City of Beaufort, S.C.*, 312 F. Supp. 3d 503 (D.S.C. 2018) that in turn was quoted in this Court's Order, ECF No. 309 at 87. While *Via* held that an alleged deprivation of counsel can support a claim for damages, the alleged deprivation in that case involved allegations that prison officials had interfered with plaintiff's consultation with his counsel six days before his criminal trial. That action, unlike the facts of the present case, involved alleged wrongdoing that was directly traceable to one of the defendants in that case. Neither that case nor any other case cited by Plaintiffs on this issue (discussed by Defendants in ECF No. 292 at 21 n. 16) involved a governmental body being held liable in a Sixth Amendment claim for damages based on alleged underfunding of indigent counsel by the local governing body.

CONCLUSION

For the foregoing reasons, Defendant Lexington County respectfully submits that the remaining claims in this action should be dismissed.

Respectfully submitted,

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