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.	Case No. 3:17-cv-01426-SAL

PLAINTIFFS' RESPONSE IN SUPPORT OF RELIEF ON COUNTS TWO AND FIVE

INTRODUCTION

Liability is not in question. The Court already found, after an exhaustive review of the undisputed evidence, that "Lexington County has engaged in policies, procedures, and customs that cause systemic deficiencies in funding, staffing, and assignment of cases to public defenders with the result that indigent people in the LCMC are deprived of court-appointed counsel." ECF No. 309 at 85-86. Despite these findings, and the Court's instruction "to submit briefing on their requested relief," ECF No. 313 (minute entry), Lexington County remains in utter denial. Instead of discussing relief, the County's brief tries to relitigate five-year-old questions of standing, to confuse the record with respect to the scope of Plaintiffs' Sixth Amendment claims, and to repurpose the justiciability doctrine of "ripeness" as a tool for curtailing relief. But perhaps most egregiously, the County has used the Court's request for briefing on *relief* to flagrantly relitigate the facts regarding *liability*. If the County wanted to dispute Plaintiffs' claim that it was underfunding indigent defense in the LCMC or that such underfunding caused indigent people to

be denied counsel, then summary judgment was its opportunity to do so. But the County did not. Now having lost, the County is not entitled to another bite at the apple.

Even if the Court indulges the County's final attempts to shirk liability, those arguments easily fail on the merits. As this Court has repeatedly held, Plaintiffs Goodwin and Wright have standing to advance Claim Two on behalf of the Class. Upon filing of their complaint, both Plaintiffs faced a real and immediate threat of being denied counsel, at least in part because of Lexington County's chronic failure to fund indigent defense in the LCMC. No more must be shown to establish standing.

Lexington County's repeated assertion that Plaintiffs have broadened Claim Two since the case was filed is similarly specious. As is discussed in Plaintiffs' Opening Brief, ECF No. 317 at 2-7, Plaintiffs' articulation of harm and demand for relief on Claim Two has remained constant for the last five years. Lexington County's own behavior during litigation confirms the County has always understood that Plaintiffs and Class members were claiming injuries caused by systemic harms and were, therefore, seeking systemic relief. No matter how many times or in how many ways the County raises it, there is simply no support for a purported misunderstanding. From the beginning until now, Plaintiffs have preserved their demand that Lexington County must ensure the availability of counsel at all critical stages in the LCMC.

Finally, Lexington County's attempts to disparage Plaintiffs' expert and to present new evidence showing that there *are* enough public defenders in the LCMC must be rejected for two reasons. First, Lexington County waived the right to challenge Plaintiffs' factual allegations and expert report when they declined to do so during summary judgment under Fed. R. Civ. P. 56 and Local Civ. Rule 7.05(A)(4) (D.S.C.). Second, the "evidence" presented by the County is both misleading and wholly unreliable.

Plaintiffs expected an honest and forthright discussion about the propriety of various forms of relief. Surely, the Court would have benefited from such an exercise. But instead, Lexington County denies the Court's finding of liability and insists that Plaintiffs are not entitled

to *any* relief. The Court should reject the County's tactics and award the relief sought by Plaintiffs.

ARGUMENT AND AUTHORITY

I. Plaintiffs Goodwin and Wright have standing to seek injunctive relief against Lexington County on behalf of themselves and Class members.

Lexington County argues that Plaintiffs lack standing to assert prospective underfunding claims against the County because they were not appointed counsel in the past. ECF No. 315 at 7. This is not only wrong as a matter of law and logic but also conflicts with the County's own prior concessions and with this Court's prior holdings. *See* ECF No. 29-1 (conceding Goodwin's standing), 39 (same), 84 (holding that Goodwin and Wright have standing on Claim Two), 107 (same), 227 (same). Lexington County's focus on the failures of Johnson, Palacios, and Corder to appear for trial and the written waivers signed by Darby and Brown, ECF No. 315 at 8, is particularly misplaced.[1] As is clear from the complaint, Claim Two was only brought by "Plaintiffs Goodwin and Wright on behalf of themselves and members of the Class," and they neither failed to appear nor waived their right to counsel. ECF No. 48 ¶ 463 (Second Amended Complaint). Plaintiffs Goodwin and Wright both alleged a real and immediate threat that their right to counsel would be violated by Lexington County's systemic underfunding of indigent defense in the LCMC. As such, they are entitled to seek prospective injunctive relief sufficient to remedy the cause of that harm on their own behalf and on behalf of the certified Class they now represent. *See* ECF No. 227 (Order Certifying Class).

"Standing is determined at the commencement of a lawsuit." *Pashby v. Delia*, 709 F.3d 307, 316 (4th Cir. 2013). To establish standing under Article III, a plaintiff must show: (1) injury in fact; (2) traceability; and (3) redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555,

[1] In raising these issues, the County attempts to import Judge Gergel's "concerns" about the adequacy of the class representatives in *White v. Shwedo*, No. 2:19-cv-03083-RMG. But because Goodwin and Wright both attended the trials for the cases that give rise to their standing here and did not waive their right to counsel, *White* is not instructive here. *See* ECF Nos. 35-1 ¶¶ 6–20, 35-2 ¶¶ 1–14.

560–61 (1992). To obtain injunctive relief, a plaintiff must also allege a "real or immediate threat" of future injury. *Griffin v. Dep't of Lab. Fed. Credit Union*, 912 F.3d 649, 653 (4th Cir. 2019) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). Because "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 52 n.2 (2006), the Court need only be satisfied that a single plaintiff has standing for each claim. *See Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018); *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014).

In evaluating standing, courts must "view the evidence in the light most favorable to [the Plaintiff] and draw all reasonable inferences in [their] favor." *United States v. Phillips*, 883 F.3d 399, 405 (4th Cir. 2018); *Buscemi v. Bell*, 964 F.3d 252, 258 (4th Cir. 2020). In civil rights cases, the Fourth Circuit has warned that "[i]t is important that [courts] do not take a cramped view of standing . . . lest we impair the remedial purpose Congress had in mind when enacting civil rights statutes." *Griffin*, 912 F.3d at 653.

A. Plaintiffs Goodwin and Wright plausibly alleged that they faced a 'real or immediate threat' of injury.

When this case was filed, Plaintiff Goodwin was indigent and owed outstanding court debt. As a result, Goodwin faced the substantial and imminent possibility of jail and, therefore, the imminent need for court-appointed counsel. ECF No. 48 ¶ 466; *see also* ECF No. 309 at 13. Given these facts, the County has repeatedly declined to challenge Goodwin's standing and has instead focused on whether his claim was precluded by *Younger*.[2] *See* ECF No. 29-1 at 6; ECF No. 39 at 4.

Five years later, nothing about Plaintiff Goodwin's standing—which is evaluated as of the filing of the complaint—has changed.[3] To the degree the County intends to resurrect its

[2] The County has also (repeatedly) argued that Plaintiffs' claims for injunctive relief are moot. This Court has (repeatedly) rejected that argument.

[3] The Court has reminded the County of this fact already. *See* ECF No. 227 at 13 n.3 (holding that intervening events had not altered the standing of Goodwin or Wright).

mootness argument, the Court has already ruled that it cannot meet its burden under voluntary cessation. ECF No. 309 at 44-49. Because Goodwin still faces the possibility of jail, he also (along with the Class he represents) faces the threat of being denied counsel due to Lexington County's failure to fund indigent defense in the LCMC. Therefore, Claim Two remains a live case and controversy between Goodwin and Lexington County.

Plaintiff Wright's standing analysis is similarly unchanged. At the time this action was filed, Wright was indigent and owed $416.93 in fines and fees to LCMC. ECF No. 48 ¶ 467. Days later, Wright was arrested and incarcerated for nonpayment of outstanding court debt. *Id.* Because Wright faced the imminent threat of arrest and denial of counsel "at the commencement of the lawsuit," *Pashby*, 709 F.3d at 316, he has standing to proceed on Claim Two. As the County knows, any issues related to the fact that Wright *no longer* faces the threat of incarceration and denial of counsel are also long-since resolved. This Court has repeatedly affirmed that "the declaratory and injunctive relief claims in this litigation are of the type encompassed within the 'inherently transitory' doctrine." ECF No. 107 at 9-11 (citing *Gerstein v. Pugh*, 420 U.S. 103 (1975); *see also* ECF No. 84 (denying defendants' motion for summary judgment on declaratory and injunctive relief claims); ECF No. 227 ("the Class Claims fit into the 'inherently transitory' exception to the mootness doctrine."). The County has offered no basis for disturbing these rulings.

B. Plaintiffs Goodwin and Wright's Sixth Amendment injuries are 'traceable' to Lexington County.

To satisfy Article III, a plaintiff need only establish that their injury is "fairly traceable" to Defendants' conduct; a plaintiff need not show that the defendant's conduct was "the sole or even immediate cause of the injury." *Sierra Club v. Dept. of the Interior*, 899 F.3d 260, 283–84 (4th Cir. 2018); *see also Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 212 (4th Cir. 2020). So long as the defendant was "at least in part responsible" for the plaintiff's injury, then traceability is satisfied. *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013).

Here, Plaintiffs Goodwin and Wright alleged that because of Lexington County's grievous underfunding of public defense, they faced an imminent threat that, if arrested for nonpayment of outstanding court debt, they would be denied counsel in the LCMC. *See* ECF No. 48 ¶ 469 ("As the County's final policymakers . . ., the Lexington County Council and Defendant Madsen routinely and systematically deprive indigent people of the right to court-appointed counsel . . . by providing grossly inadequate funding for indigent defense in Lexington County magistrate courts."). This Court subsequently found that Plaintiffs' underfunding allegations are true. ECF No. 309 at 82 ("Plaintiffs have put forth undisputed evidence that Lexington County has underfunded its public defendants' program").

Indeed, both Goodwin and Wright had already been denied counsel in the pretrial setting. ECF No. 48 ¶¶ 336 ("The Bond Court judge did not inform Mr. Goodwin of his right to request the assistance of court-appointed counsel or his right to seek waiver of any public defender application fee. Nor did the judge appoint counsel to represent Mr. Goodwin[.]"), 365 ("Mr. Wright did not know, and the judge did not inform him, that he had the right to request the assistance of a court-appointed attorney before pleading guilty."). Plaintiffs alleged that these prior denials of counsel were due, at least in part, to a general unavailability of counsel caused by Lexington County's failure to adequately fund public defense services in the LCMC. *See*, *e.g.*, *id.* ¶ 427 ("[U]nderfunding of public defense in magistrate courts . . . led to the absence of public defenders from Bond Court proceedings and magistrate court proceedings[.]").

Despite these allegations, Lexington County now argues that Goodwin and Wright cannot show that their "past or future injury" is traceable to the County because "no judge ever appointed counsel for any of the Plaintiffs." ECF No. 315 at 7. This is wrong.[4]

[4] *Eggar v. City of Livingston*, 40 F.3d 312 (9th Cir. 1994), cited by the County, does not hold otherwise. There, the plaintiffs argued that the City was liable for violating the Sixth Amendment because a particular municipal judge was refusing to appoint counsel to indigent defendants. *Id.* at 313. The critical question was whether the municipal judge's conduct proved the existence of a municipal policy to deny counsel. *Id.* The court held that because the judge was performing a

First, as to the *future* harm that is the subject of Claim Two, there is no question about traceability. As the County knows, magistrate judges are now on heightened notice that they must appoint counsel *before* imposing jail for nonpayment of court debt. *See* ECF No. 40-1 (Beatty Memorandum). But these appointments will prove pyrrhic unless counsel is available. *See*, *e.g.*, ECF No. 317-1 (Cummings Decl.) (stating that after Sept. 16, 2022, there will be no public defenders assigned to LCMC).[5] The future denial of counsel is therefore directly attributable to Lexington County's constitutionally inadequate funding decisions.

But even with respect to Claim Five (Plaintiffs' request for nominal damages for past harm), Plaintiffs have established traceability. It is reasonable to infer, based on Plaintiffs' allegations, that LCMC judges' decisions with respect to the appointment of counsel were and are affected by the general availability of public defenders. *See Phillips*, 883 F.3d at 405 (requiring that courts view evidence of standing in the light most favorable to the plaintiff). Moreover, the evidence bears this out. Before the first public defender was assigned to the LCMC in 2013, there were 0 public defender appointments in magistrate court. Then in 2014, the first year a public defender was assigned, 450 individuals received counsel. *See* ECF No. 284-61 at 10. When a second position was added, that figure ballooned to 929. ECF No. 284-39 at 42:14-43:15. The depositions of Defendants Adams and Reinhart help explain this phenomenon. Adams testified that judges did not start screening magistrate defendants for the appointment of counsel until public defenders started being assigned to the LCMC. Marshall Response Decl.,

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state judicial function and was not acting as a municipal policymaker, there was no Sixth Amendment liability for the City. *Id.* at 314-15. Here, the allegations and Court findings are obviously different. Plaintiffs alleged, and this Court found, that Lexington County is violating the Sixth Amendment through its own misconduct—failing to adequately fund indigent defense. ECF No. 309 at 85-86.

[5] Ms. Cummings was disclosed to Defendants as a potential witness in March 2021. Decl. of Toby J. Marshall in Support of Plaintiffs' Response in Support of Relief on Counts Two and Five ("Marshall Response Decl."), Ex. 4. Defendants never requested depositions of Plaintiffs' lay witnesses but, instead, chose only to depose Mr. Monahan, Plaintiffs' expert. Marshall Response Decl. ¶ 6.

Ex. 1 at 113:1-15, 226:17-227:7. As additional public defenders became available, judges began appointing counsel in more cases. *Id*., Ex. 2 at 89:18-91:13, 93:6-94:1, 104:2-15. Defendant Reinhart echoed this sentiment, explaining that "for the longest time we only were screening for domestic violence" because those were the only cases in the LCMC that a public defender was available to be appointed on. *Id*., Ex. 3 at 124:17-125:13.

Lexington County is correct that its co-Defendant judges bear some responsibility for the deprivations of counsel that Plaintiffs experienced. But there is plenty of blame to go around. The facts demonstrate that the availability of counsel—which is a function of Lexington County's funding decisions—directly impacts whether an indigent defendant in the LCMC is afforded counsel. Plaintiffs have therefore adequately alleged, and the facts prove, that Lexington County is "at least in part responsible" for their denial of counsel in violation of the Sixth Amendment. *Libertarian Party*, 718 F.3d at 316.

C. Plaintiffs Goodwin and Wright's claim for injunctive relief is redressable against Lexington County.

As with traceability, redressability does not require a showing that the remedy sought will cure their every injury. Rather, plaintiffs "need only show that they 'personally would benefit in a tangible way from the court's intervention.'" *Sierra Club*, 899 F.3d at 284 (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000)).

Here, there is no question that Goodwin—who still faces the possibility of jail for nonpayment—would "personally benefit" by an order requiring Lexington County to adequately fund indigent defense in magistrate court. Likewise, there is no question that such an order would benefit the certified class of "all indigent people who currently owe, or in the future will owe, fines fees, court costs, assessments, or restitution in cases handled by Lexington County magistrate courts," that Goodwin and Wright represent. *See* ECF No. 86, 227 (Order Granting Class Certification). Claim Two is therefore redressable on behalf of Goodwin, Wright, and the Class members against Defendant Lexington County.

II. Lexington County's argument that Plaintiffs "waived" their demand for systemic relief is wholly without merit.

As Plaintiffs already detailed in their Brief in Support of Relief on Claims Two and Five, and as discussed again in Part III below, there is no merit to Defendant's argument that Plaintiffs' Sixth Amendment demand for prospective relief against Lexington County was initially limited to the deprivation of counsel after arrest for nonpayment of fines and fees. ECF No. 317 at 9-13. Rather, the record shows that Plaintiffs' prospective relief claim against Lexington County has always challenged the systemic underfunding and understaffing of public defense in the LCMC and the resulting violation of the Sixth Amendment right to counsel *in all stages* of magistrate court proceedings. *Id*. at 9; *see also, e.g.*, Plaintiffs' Second Amended Complaint, ECF No. 48 at 14, 26, 32, 56, 63, 78, 471 (containing Plaintiffs' first allegations of their prospective relief claims, which have since been proven). Lexington County's conduct through the first five years of this litigation demonstrates that it fully understood the breadth of the claim: it engaged in fact discovery, expert discovery, and settlement negotiations without once challenging as overbroad Plaintiffs' focus throughout those processes on the provision of counsel for all phases of LCMC proceedings. ECF No. 317 at 9-13. It is the County, and not Plaintiffs, who are now seeking to belatedly recast the scope of the prospective Sixth Amendment claim.

As "evidence" of their argument, the County now points to Plaintiffs' summary judgment briefings, which it accuses of making no more than "a passing shot at the issue" of systemwide relief. ECF No. 315 at 15 n.9. But in actuality, the opposite is true. Plaintiffs' briefing discussed in great detail the facts proving that Lexington County systemically underfunds public defense in the LCMC and extensively laid out the "U.S. Supreme Court's longstanding precedent that public defenders must be made available to indigent defendants *facing misdemeanor charges* with a potential for incarceration." ECF No. 284-1 at 47 (emphasis added); *see also id.* at 29-37,

40-49; ECF 290 at 30-32.[6] Moreover, the exact same relief Plaintiffs seek now—appointment of an independent consultant to recommend and oversee systemwide relief—was also sought there. *Compare* ECF No. 317 (requesting the appointment of an independent consultant), *with* ECF No. 284-1 at 49 ("Plaintiffs and Class Members ask the Court to order Lexington County to hire an independent consultant to determine the resources necessary to fulfill *Gideon*'s promise *in the LCMC*."). On the record before the Court, there is simply no question that Plaintiffs' Sixth Amendment argument for prospective relief, supported by in-depth factual and legal analysis, was properly advanced in their summary judgment pleading.[7]

To the extent the County is arguing that Plaintiffs somehow waived systemwide relief by asking for an independent consultant, this argument also fails. ECF No. 315 at 15 n.9. The whole purpose of an independent consultant is to tailor solutions—whether financial or otherwise—for the specific deficiencies in Lexington County leading to the unavailability of counsel. As Plaintiffs have already set out in detail, that kind of relief has been ordered by multiple courts facing the kind of unconstitutional public defense system at issue in this case. ECF No. 284-1 at 49-50; ECF No. 317 at 14-21.

Finally, Lexington County's specific argument that Plaintiffs' summary judgment pleadings made an "express disclaimer" of the full scope of their prospective Sixth Amendment

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[6] *Brown v. Nucor Corp.* does not support Defendant's waiver argument. ECF No. 315 at 12 n.9 (citing *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). Defendant cites to the dissenting opinion in that case, which asserted that the plaintiffs had waived an argument that they had failed to mention entirely in their opening brief, and the dissent also cited to *Belk*, which found that an argument was waived when the plaintiff solely made it in the heading and not in the argument portion of its brief. *Nucor*, 785 F.3d at 923; *Belk,* 679 F.3d at 152 n.4. Neither case is applicable to the circumstances at hand. Here, Plaintiffs' factual and legal analysis of its claim for Sixth Amendment prospective relief at all stages of the magistrate courts spans numerous pages of summary judgment briefing. ECF No. 284-1 at 29-37, 40-49; *see also* ECF 290 at 30-32.

[7] In any event, there is no requirement that a party must move for summary judgment on both liability and remedy. In fact, courts sometimes award summary judgment on liability alone. *Cf. Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1976) (summary judgment order which granted judgment as to liability but did not dispose of request for injunction, damages, or fees, held not to be a "final appealable decision").

claim is misleading. ECF No. 315 at 14-15. As the County knows, Plaintiffs brought two Sixth Amendment claims—a claim for prospective relief against the County brought by Plaintiffs Goodwin and Wright on behalf of a Class pertaining to systemic deprivation of the right to counsel at all stages of magistrate court proceedings (Claim Two) and a damages claim brought by all named Plaintiffs with respect to the denial of counsel after their arrest for non-payment of fines and fees (Claim Five). Despite (presumably) knowing the difference, Lexington County now parades a quote from Plaintiffs' brief discussing Claim Five (individual damages) as evidence that Goodwin and Wright were only seeking limited relief on behalf of the Class. That makes no sense. A sentence that begins "The thrust of *Claim Five* is . . ." cannot "expressly disclaim" relief sought on Claim Two. ECF No. 315 at 11 (quoting ECF No. 290 at 30). The County's argument on this point is baseless.

III. There is no "ripeness" issue and Plaintiffs are entitled to system-wide injunctive relief sufficient to remedy the harm common to members of the certified Class.

Yet another permutation of Lexington County's erroneous argument that Claim Two is narrowly limited to the availability of counsel at post-arrest *Bearden* hearings is its new assertion that a lack of such hearings creates a "ripeness" problem with the Court's ability to fashion relief. ECF No. 315 at 12-13. For several reasons, this argument lacks merit.

First, Lexington County is simply misusing the doctrine of ripeness. "Ripeness is a *justiciability* doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.'" *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003) (emphasis added) (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967)). As the Fourth Circuit has explained, "[a]nalyzing ripeness is similar to determining whether a party has standing;" the doctrine merely "prevents judicial consideration of issues until a controversy is presented in 'clean-cut and concrete form.'" *Miller v. Brown*, 462 F.3d 312, 318–19 (4th Cir. 2006) (quoting *Rescue Army v. Mun. Court of L.A.*, 331 U.S. 549, 584 (1947)). A definite controversy has been presented and exhaustively litigated before the Court. Now that the Court has found that the undisputed facts demonstrate a systemic

constitutional violation, the doctrine of "ripeness" has nothing to say about the propriety of relief or the Court's discretion to fashion it. For that reason, it is an ill-suited vehicle for discussing the issue currently pending before the Court.

Second, Plaintiffs' claim for prospective relief against Lexington County for underfunding indigent defense in the LCMC is *not limited to post-arrest Bearden hearings. See* Part II; *see also* ECF No. 317 at 3-8. Plaintiffs' filings in support of class certification, and the Court's Order granting the same, are instructive on this point. As the Court recognized, one of the key practices challenged by Plaintiffs is the Defendant Magistrate Judges' Trial in Absentia policy. ECF No. 227 at 10. Under that policy, magistrate judges convict indigent criminal defendants of jailable offenses in their absence and, therefore, without the appointment of counsel. *Id.* This policy is, by its plain terms, a policy that unconstitutionally denies the provision of counsel *before and after trial*.

Even more to the point, Plaintiffs' certified Class is not limited to individuals entitled to counsel in a post-conviction posture. Rather, the certified Class consists of:

> "All indigent people who currently owe, *or in the future will owe*, fines fees, court costs, assessments, or restitution in cases handled by Lexington County magistrate courts."

ECF No. 86 at 1 (emphasis added); *see also* ECF No. 227.

Importantly, anyone charged with a crime in the LCMC faces the possible future imposition of fines, fees, and court costs. Whether a person is arrested for DUI or DV, or issued a citation for a jailable traffic offense, they fit neatly into the class of people who "in the future will owe" money to the courts. Nothing about the certified Class suggests that membership is only available when a person *actually* owes money—*i.e.*, after they are convicted. This is particularly notable given that, in certifying the Class, the Court held that "this lawsuit seeks relief that would offer redress to and benefit the entire proposed Class." ECF No. 227 at 21-22 (discussing Fed. R. Civ. P. 23(b)(2)). Indeed, such a finding is a legal requirement in a class action certified under Fed. R. Civ. P. 23(b)(2).

Years later, after the Court has found that Lexington County has indeed chronically and systemically underfunded indigent defense in violation of the Sixth Amendment, the County now begs the Court not to enter any relief because of its convenient and mistaken impression that this case was only ever about obtaining relief for *some* of the Class members. Having brought no justification for such an absurd result, the Court should decline the County's invitation.

Third, even if the Court finds that Lexington County's failure to fund indigent defense in violation of the Sixth Amendment only injured Plaintiffs in the denial of counsel prior to incarceration for nonpayment, there is still no basis for narrowing Plaintiffs' remedy in the manner proposed by Lexington County. The nature and scope of a remedy is tethered not to the injury, but to the "nature and scope of the constitutional *violation*." *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995). For the purposes of fashioning a remedy, the pertinent question is simple: what *caused* the injury? *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("The remedy must of course be limited to *the inadequacy that produced* the injury.") (emphasis added). Where, as here, an injury is caused by "policies or practices pervading the whole system, . . . an overhaul of the system is the only feasible manner in which to address the class's injury." *Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001) (abrogated on other grounds by *Johnson v. California*, 543 U.S. 499 (2005)).

Plaintiffs did not allege that Lexington County merely failed to fund indigent defense at *Bearden* hearings. Rather, Plaintiffs alleged—and then this Court found—that "the undisputed evidence . . . indicates that Lexington County has engaged in policies, procedures, and customs that cause systemic deficiencies in funding, staffing, and assignment of cases to public defenders with the result that indigent people in the LCMC are deprived of court-appointed counsel." ECF No. 309 at 85-86. Because "the nature and scope of the constitutional violation" is systemwide, the remedy must be as well. *See Jenkins*, 515 U.S. at 88.

Finally, there is a glaring factual misunderstanding embedded in Lexington County's argument. The County insists that Plaintiffs' injuries (if narrowly construed) can only justify adding public defense capacity commensurate with what would be necessary to provide counsel

at *Bearden* hearings, but Lexington County magistrate public defenders are not divided into "bond court public defenders," "trial public defenders," and "*Bearden* hearing public defenders." Rather, there are only: the public defender(s) assigned to handle all LCMC cases at all critical stages. At present, there is one such public defender. ECF No. 317-1 ¶¶ 2 and 16. By next week, there will be none. *Id.* at 19.

In short, there is no way to parcel out relief in the bizarre and myopic manner proposed by Lexington County. If counsel is not available to *any indigent defendant* in the LCMC at *any critical stage* of their case, then counsel will surely also be unavailable for any future *Bearden* hearing. Because, as this Court has held, arrests for failure to pay court costs could resume, there is no way to ensure adequate access to counsel at the post-arrest stage except to ensure, *at minimum*, that there is adequate access to counsel within the magistrate courts generally. To accomplish that task, the Court must enter robust systemwide relief.

IV. Plaintiffs have demonstrated that the number of funded public defender positions for magistrate court is insufficient.

A. The County's new arguments against Plaintiffs' expert report are improper and untimely and should not be entertained by this Court.

Plaintiffs explicitly set forth facts in their summary judgment briefing demonstrating Lexington County has grossly underfunded its public defense system for at least a decade. ECF No. 284-1 at 32-38. They also argued such underfunding has resulted in the unavailability of an adequate number of public defenders in magistrate court in violation of the Sixth Amendment to the Constitution. Id. at 40-49. The County was obligated under both Fed. R. Civ. P. 56 and Local Civ. Rule 7.05(A)(4) (D.S.C.) to address any material facts it believed to be in dispute, including those set forth in Plaintiffs' expert Ed Monahan's report, which was filed along with Plaintiffs' initial motion for summary judgment. *See* ECF No. 284-4. But the County failed at any point to challenge Mr. Monahan's conclusions, and the Court ultimately held that "Lexington County has engaged in policies, procedures, and customs that cause systemic deficiencies in funding,

staffing, and assignment of cases to public defenders with the result that indigent people in the LCMC are deprived of court-appointed counsel." ECF No. 309 at 85-86.

The County attempts to correct its failures by asserting that it is merely "drawing . . . legitimate inferences" from undisputed facts in its opening brief on summary judgment. ECF No. 315 at 17 n.10. But the County goes well beyond inference and instead attacks the methodology underpinning many of Mr. Monahan's conclusions and recommendations. Such attacks are inappropriate at this late stage, after the Court has ruled on the parties' cross-motions and both sides have agreed that a trial was unnecessary because there are no material facts in dispute. Accordingly, the Court should not entertain the County's attacks on Mr. Monahan's report or the evidence on which it is based.

B. Plaintiffs have proven, and this Court has already concluded, that indigent people have suffered and continue to suffer a systemic deprivation of the right to counsel because of Lexington County's chronic underfunding of indigent defense.

Lexington County argues, without authority, that "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." ECF No. 315 at 17. But Plaintiffs have already demonstrated, and this Court has already concluded, that they and other indigent defendants were repeatedly and routinely denied court-appointed counsel by the County's chronic underfunding of indigent defense. Where a systemic deprivation of the constitutional right to counsel occurs, harm is evident, and Plaintiffs are not required to further demonstrate that they or others were prejudiced by such deprivation.

The Court held in its summary judgment order that "the undisputed evidence, put forth by Plaintiffs, indicates that Lexington County has engaged in policies, procedures, and customs that cause systemic deficiencies in funding, staffing, and assignment of cases to public defenders with the result that indigent people in the LCMC are deprived of court-appointed counsel." ECF No. 309 at 85-86. The Court further held that "[i]f a defendant is denied the actual assistance of counsel at any critical stage, there can be no conclusion other than that representation was not

provided." ECF No. 309 at 80 (citing *United States v. Cronic*, 466 U.S. 648, 659 (1984)). In these situations, "prejudice is presumed." *Glover v. Miro*, 262 F.3d 268, 275 (4th Cir. 2001) ("prejudice is presumed when the defendant is completely denied counsel 'at a critical stage of his trial.'" (quoting *Cronic*, 466 U.S. at 659)); *Bairefoot v. City of Beaufort, S.C.*, 312 F. Supp. 3d 503, 512 (D.S.C. 2018) ("[a] structural error like denial of counsel does not require a showing of prejudice"). Thus, no further showing of "harm" is necessary.

C. Plaintiffs' expert report is sound, and the County's untimely challenge should be rejected.

The County argues "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." ECF No. 315 at 17 (punctuation altered). This argument fails for several reasons.

First, as noted above, the County's criticism of Mr. Monahan's report is too little, too late. Indeed, the County had an opportunity and was obligated under the federal and local rules to address any material facts it believed were in dispute at the time of summary judgment briefing. The County failed to dispute Mr. Monahan's methodology, and the Court found the County systematically underfunds indigent defense, resulting in constitutional violations. The County should not—*after* the Court ruled on summary judgment that this finding is undisputed—get another bite at the apple.

Second, to the extent the Court is willing to entertain the County's untimely arguments, such assertions are no longer relevant because Plaintiffs have stood behind Mr. Monahan's conclusions and recommendations, including both in their briefing on summary judgment and in their request for relief. ECF No. 284-1 at 36-38, 47; *see also* ECF No. 317 at 22-29 (detailing Plaintiffs' three alternative requests for injunctive relief). Indeed, Plaintiffs' second alternative proposal for relief asks the Court to "[o]rder the implementation of specific measures by set deadlines based on the conclusions and recommendations of expert Ed Monahan." *Id*. at 27.[8]

[8] Plaintiffs request for implementation of Mr. Monahan's recommendations is made as an

Thus, the County's central argument for discarding Mr. Monahan's results is incorrect.

D. The County's representation of public defense appointments in the LCMC is gravely unreliable and should be discarded.

The County offers a table of so-called "statistical information" to support its argument that there are an adequate number of public defenders representing indigent people in the LCMC. ECF No. 315 at 19. But the County's representations are rife with false premises and mischaracterizations.

First, the County has confusingly chosen to separate the total number of individuals to whom counsel was appointed in the LCMC (Column B) each year from 2018 to 2021 from the snapshot of indigent people the LCPDO represented with open LCMC cases as of early February of each of those years (Column D). Doing so provides an inaccurate picture of the actual caseloads public defenders in the LCMC shouldered—making it seem like they were lower than they actually were. For example, in 2018, the County asserts that there were 432 appointments of counsel in the LCMC and suggests that 297 of those clients had open cases as of February 2018. Taken separately, these numbers imply a caseload that was well below (297) or a reasonable number above (432) the ABA standard of 400 cases per year. But in order for the attorney to have handled no more than 432 cases, 297 or 69 percent of the annual LCPDO magistrate court

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alternative to Plaintiffs' preferred relief: the appointment of an independent consultant. While Mr. Monahan's expertise on indigent defense is unchallenged by the County and his methodology is sound, the recommendations in his 2020 expert report are based on 2019 and 2020 data and records, information that may not accurately capture current indigent defense needs. For example, there were two public defenders dedicated to representing indigent persons in the LCMC in 2020. By next week, there will be none. ECF No. 317-1 ¶¶ 2, 8-19. Moreover, while Mr. Monahan's conclusions are based on well-founded and widely accepted standards set forth by the ABA, those are ultimately generalized standards that do not consider the specific needs of individual public defender offices. This is precisely why an independent consultant is necessary to survey Lexington County's public defender and magistrate court systems together to develop solutions tailored specifically for Lexington County and the challenges the LCPDO faces in the LCMC. But taking such an iterative approach in no way diminishes the veracity or reliability of Mr. Monahan's report. Rather, it would build on and fine tune his recommendations and establish a system that would meet the LCPDO's current and future needs for indigent defense in the LCMC.

appointments would have had to occur in January 2018, with the remaining 135 appointments spread out over the next eleven months (432 – 297 = 135). This is wholly implausible. It is far more likely that 36 appointments were made in January 2018 (432 / 12 = 36) and that another 396 appointments were spread out over the remaining eleven months of 2018. This means that the sole LCMC public defender, Katherine Taylor Cummings, had 261 open cases to the start the year (297 – 36 = 261) before another 432 were appointed to her the same year. Understood correctly, the numbers in the County's table demonstrate that Ms. Cummings handled 693 LCMC cases in 2018, which is 73% more than the ABA maximum of 400 per year.

Similarly, in 2019, Ms. Cummings (still working alone at that point) had 378 open cases as of February. A total of 795 cases were appointed in 2019. Again, it is very unlikely that 378 appointments were made in January and just 417 were made in the remaining eleven months of the year (795 – 378 = 417). Rather, it is far more likely no more than 66 appointments were made in January 2019 (795 / 12 = 66 average per month in 2019). This means that Ms. Cummings began 2019 with 312 open cases (378 – 66 = 312) and another 795 were appointed throughout the year. Thus, there were actually 1,107 cases in 2019 in which a public defender represented an indigent defendant in the LCMC. The second public defender began on September 23, 2019, and was thus available for no more than 14 weeks—or 27 percent—of the year (14 / 52 = 0.269). When 1,107 cases are divided among 1.27 public defenders, it results in an average full-time-equivalent caseload of 872 cases per attorney in 2019, which is 118% above the ABA maximum.

The same calculations can be made for 2020: (790 cases per attorney)[9] and 2021 (734 cases per attorney),[10] demonstrating substantially higher caseloads than the County represents.

Likewise, the information in Column E is incorrect for two reasons. First, it relies on the accuracy of the information in Column D, which as explained above, is incorrect because it does not account for both the hundreds of open cases that carried over from the previous year and the hundreds of additional appointments in the year in question. Second, regarding at least the 2021 representations, the County incorrectly presumes that the public defender positions listed in Column C were filled by actual public defenders throughout the entire year. But this is an untrue premise and thus skews the number in Column E substantially (e.g., 734 cases per attorney in 2021, not 273. *See* n.10, *supra*. In fact, because Lexington County has failed to adequately provide a salary commensurate with other public defender offices and Lexington County's Solicitors Office, the LCPDO was unable to retain an attorney for its third position for more than two months in 2021 and has been unable to fill this position since that attorney quit the LCPDO to work for a public defender's office that pays more. See ECF No. 317-1 ¶ 42.

[9] The formula here is (Column B) / 12 = JA (# of cases appointed in January); (Column D) – JA = OC (# of Open Cases at start of year); (Column B) + OC = WC (# of Worked Cases that year); WC / EA (# of Employed Attorneys) = Cases per attorney that year. Thus, for 2020: 929 / 12 = 77 cases appointed in January; 728 – 77 = 651 open cases to start 2020; 929 + 651 = 1,580 cases in 2020; 1,580 / 2 = 790 cases per attorney in 2020.

[10] For 2021, when there were two full-time public defenders the entire year and a third for only two months (i.e., 17% of the year), ECF No. 317-1 ¶ 42, the calculations are as follows: 843 / 12 = 70 cases appointed in January; 819 – 70 = 749 open cases to start 2021; 843 + 749 = 1,592 cases in 2021; 1,592 / 2.17 = 734 cases per attorney in 2021.

Here is a table that shows the proper methodology:

AA	BB	CC	DD	EE	FF	GG	HH	II
Year	**Total # of Assigned Open Cases As of Feb. 1st**	**Estimated # of Cases Newly Assigned in January** FF ÷ 12 mos. = Est. cases per month	**# of Assigned Open Cases Rolled Over from Previous Year** BB - CC	**Estimated # of Cases Newly Assigned Feb – Dec**	**Total # of Cases Newly Assigned During Entire Year** CC + EE	**Total # of Cases Worked by Magistrate Court Public Defenders** DD + FF	**Total # of Full-Time-Equivalent Public Defenders**	**Total # of Cases Worked by Each Full-Time-Equivalent Public Defender** GG ÷ HH
2014	No Data	No Data	No Data	No Data	450	**No Data**	**1**	**No Data**
2015	No Data	No Data	No Data	No Data	425	**No Data**	**1**	**No Data**
2016	No Data	No Data	No Data	No Data	388	**No Data**	**1**	**No Data**
2017	No Data	No Data	No Data	No Data	373	**No Data**	**1**	**No Data**
2018	297	36	261	396	432	**693**	**1**	**693**
2019	378	66	312	729	795	**1,107**	**1.27**	**872**
2020	728	77	651	852	929	**1,580**	**2**	**790**
2021	819	70	749	773	843	**1,592**	**2.17**	**734**

When using the proper methodology, it's clear the public defenders in the LCMC shouldered much heavier caseloads than the County's patchwork of numbers lets on. To the extent the County attempts to argue its numbers are focused on public defender *positions* funded by the County, rather than by actual public defenders filling those positions, such arguments are unavailing. A "position" does not equate to representation unless it is filled by an attorney. And Plaintiffs have already put forth testimony from Ms. Cummings that the County's failure to fund

these positions with salaries that are sufficient to retain qualified attorneys has prevented the LCPDO from filling new positions and has caused an exodus of existing public defenders from the LCPDO. See ECF 317-1 paras. 10-19, 42. In fact, even Ms. Cummings—a seven-year public defender in the LCMC—is leaving the LCPDO for a higher paying public defender position with more support staff in York County because Lexington County has refused to fund a position commensurate with her experience and the needs of the LCPDO. See *Id*. 2-9, 16, 42.

The County further argues that Plaintiffs' understanding of caseloads is inflated because it focuses only on jailable offenses and does not account for the possibility that multiple charges against the same LCMC defendant disposed at the same time would only require one public defender appointment. But Mr. Monahan's report does, in fact, account for this exact possibility. Specifically, Mr. Monahan's analysis consolidates multiple charges against the same defendant that are disposed on the same day into one "case" for which one public defender would be appointed. ECF No. 284-4 at 12, ¶ 6. Thus, Mr. Monahan's conclusion that between 5,312 and 6,185 indigent defendants did not receive assistance of counsel in 2019 in the LCMC is accurate.

The County's representation of public defense appointments in the LCMC and their attack on Mr. Monahan's report are untimely, inaccurate, and improperly rely on false premises. The Court should disregard them.

E. The County's five factors are unsupported by authority or evidence and should be given no weight.

Without providing any authority to support its assertions, and without providing any testimony or evidence from an actual expert, the County lists five so-called factors that it argues the Court should give greater weight than the recommendations contained in Mr. Monahan's 67-page expert report. But many of these issues have already been addressed, and the County's remaining arguments are irrelevant.

1. **The public defender's own estimates.**

The County argues that the recently retired Eleventh Circuit Public Defender Robert Madsen made statements at a Lexington County Council meeting regarding the sufficiency of

public defense needs in the LCMC. But these statements are not in the record and even if there were, they would be hearsay. For this reason alone, the assertion should be disregarded. But even if the Court were to view the video of Mr. Madsen's statements to the Council, it would see that Mr. Madsen was coerced into agreeing with the Council member's statements about LCMC public defense needs to get approval for separate funding he requested. Indeed, Mr. Madsen has already testified that given the history of underfunding by the Lexington County Council, he regularly asked for less than what was needed for the LCPDO just so he could get his most critical funding needs approved by the Council. ECF No. 309 at 39-40. It is readily apparent in the video that Mr. Madsen was employing a similar strategy when making those statements. Plaintiffs presume that the County has chosen to simply make representations about the video, rather than submit the video as evidence, because all of this would be obvious to the Court.

2. **The number of appointments made by judges.**

The County's argument that the sufficiency of public defense needs can be determined by whether a waiting list for appointment of counsel exists overlooks critical facts already in evidence in this case. Indeed, Plaintiffs have already demonstrated that every time a public defender is hired to represent indigent defendants in the LCMC, their caseload quickly exceeds the ABA standard of 400 misdemeanor cases annually. ECF No. 284-1 at 38. And Judge Adams testified that when an additional public defender was assigned to the LCMC, more appointments were made. Marshal Response Decl., Ex. 1 at 247:16-248:18. Thus, the County's lack of funding is itself the direct cause for the lack of appointments.

3. **Jailable offenses.**

The Court has already held that "the Sixth Amendment requires access to counsel for every criminal defendant who faces the possibility of incarceration; and if the defendant is indigent, counsel must be appointed free of charge." ECF No. 309 at 80. (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Court further held that "[a] criminal defendant's right to counsel attaches at their initial appearance, *Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 199 (2008), and extends to all critical stages of the criminal prosecution." ECF No. 309 at 80 (citing

Cronic, 466 U.S. at 654–56). Thus, the extent to which persons charged with jailable offenses are actually sent to jail is not a relevant consideration where the Sixth Amendment right to counsel is concerned.[11]

4. **Solicitor's Office representation.**

Without any evidentiary support whatsoever, the County claims the Solicitor's Office receives no unfair advantage just because the County provides greater funding to it as compared to the LCPDO. While the Court should disregard such unverified claims out-of-hand, Plaintiffs have provided substantial proof that the LCPDO is at a significant disadvantage due to its comparably low funding. *See, e.g.,* ECF No. 317-1 ¶¶ 15-16, 34.

5. **Number of cases vs. number of attorney positions**

Plaintiffs dispose of the County's argument on this issue in Section IV.D, *supra*, and need not devote space to repeating it here.

CONCLUSION

Lexington County has systematically underfunded public defense in the LCMC, resulting in systemic deprivations of the right to counsel under the Sixth Amendment to the United States Constitution—deprivations that continue to this day. Plaintiffs Goodwin and Wright and the Class members are entitled to prospective relief, and all Plaintiffs are entitled to nominal damages.

[11] The County also misstates that Mr. Monahan's expert report relies only on an indigency percentage of courts in Eugene, Oregon. ECF No. 315 at 23. Rather, Mr. Monahan based his percentage primarily on the indigency rate in Lexington County General Sessions Court and made certain comparisons to municipal courts in Eugene to verify his conclusions. ECF No. 284-4 at 23-24.

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Respectfully submitted by,

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