UNITED STATES DISTRICT COURT
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-cv-01426-MBS-SVH

PLAINTIFFS' RESPONSE TO DEFENDANT LEXINGTON COUNTY'S OBJECTIONS TO MAGISTRATE JUDGE HODGES' FEBRUARY 5, 2018 REPORT AND RECOMMENDATION

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INTRODUCTION[1]

The Plaintiffs in this case were incarcerated solely because they could not afford to pay fines and fees to the magistrate courts of Defendant Lexington County ("the County"). Plaintiffs were jailed without constitutionally-required assistance of counsel due to the County's policy and practice of failing to fund and provide public defense to indigent people facing incarceration for money owed to magistrate courts.[2] The Report correctly recommended denial of the County's motion for summary judgment on Plaintiffs' damages claim under 42 U.S.C. § 1983 against the County for violation of their Sixth Amendment right to counsel.[3] The County objects, asserting that the claim is barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), that the Court lacks jurisdiction under the *Rooker-Feldman* doctrine, and that Plaintiffs purportedly fail to show the County's actions caused Plaintiffs' incarceration without assistance of counsel. The County's objections are unsupported by law and contradicted by evidence in the record.

Under well-settled law, *Heck* does not bar the damages claim against the County because Plaintiffs had no access to habeas relief while incarcerated. Moreover, neither *Heck* nor *Rooker-Feldman* apply because Plaintiffs are challenging deliberate decisions by the County that

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[1] Pursuant to 28 U.S.C. § 636(b)(1), Rule 72(b)(2) of the Federal Rules of Civil Procedure, and Local Civil Rule 83.VII.08, Plaintiffs Twanda Marshinda Brown, Sasha Monique Darby, Cayeshia Cashel Johnson, Amy Marie Palacios, Nora Ann Corder, Xavier Larry Goodwin, and Raymond Wright, Jr. (collectively, "Plaintiffs") respectfully submit the following response to Objections of Defendant Lexington County to the Report and Recommendation issued by the Honorable United States Magistrate Judge Shiva V. Hodges on February 5, 2018 ("the Report"), ECF No. 74.

[2] Plaintiffs also bring claims against Defendants Gary Reinhart, Rebecca Adams, Albert John Dooley III, and Bryan Koon. These claims are addressed in Plaintiffs' Objections to Magistrate Judge Hodges' February 5, 2018 Report and Recommendation. *See* ECF No. 80.

[3] Plaintiffs have also named Defendant Robert Madsen, the Eleventh Circuit Public Defender, in their Sixth Amendment damages claim, but only for actions in his official capacity as the County's final policymaker for the provision of indigent defense. ECF No. 48 ¶¶ 499–500. Plaintiffs agree with the Report's finding that this claim is functionally equivalent to the Sixth Amendment damages claim against the County itself.

culminated in the *post*-sentencing procedure of unlawful incarceration without representation by counsel. Plaintiffs are *not* challenging their guilty pleas, convictions, or sentences. Finally, Plaintiffs' evidence supports the assertion that the County's gross underfunding and inadequate provision of indigent defense caused Plaintiffs to be incarcerated without any representation by counsel. Because the County fails to offer undisputed evidence to the contrary and there are triable issues of material fact, summary judgment for the County is unwarranted. In the alternative, Plaintiffs request discovery under Federal Rule of Civil Procedure 56(d) to secure specific facts currently unavailable to Plaintiffs that are needed to oppose the County's motion.

I. FACTUAL BACKGROUND

A. Defendant Lexington County's Policy and Practice of Underfunding and Inadequately Providing Indigent Defense

Defendant Lexington County operates a public defense system that fails to provide counsel to indigent people facing post-sentencing incarceration for money owed to its magistrate courts. Public defense in South Carolina is administered through a "county-based system."[4] The South Carolina Indigent Defense Act of 2007 requires each county to appropriate annual funding for indigent defense in at least the amount provided during the previous year.[5] Robert Madsen, the Eleventh Circuit Public Defender, is the County's final policymaker for provision of indigent defense in all County courts.[6] Madsen is responsible for seeking County funding and hiring County employees to ensure "adequate and meaningful representation" in magistrate courts.[7]

[4] S.C. Comm'n on Indigent Def. ("SCCID"), SCCID Public Defenders, https://sccid.sc.gov/about-us/circuit-public-defenders (last visited March 15, 2018).

[5] *See* Indigent Defense Act of 2007, S.C. Code Ann. § 17-3-550 ("No county may appropriate funds for public defender operations in a fiscal year below the amount it funded in the immediate previous fiscal year.").

[6] *See id.* § 17-3-5 (recognizing circuit public defender as "the head of a public defender office providing indigent defense representation within a given judicial circuit"); *id.* § 17-3-560

Despite these mandates, the County and Madsen have deliberately and grossly underfunded public defense and deliberately decided not to afford counsel to indigent people facing post-sentencing incarceration for nonpayment of fines and fees to magistrate courts. A highly-publicized April 2016 report highlighted the lack of counsel for indigent people facing incarceration for money owed to South Carolina courts.[8] The County relies on magistrate court fines and fees as a crucial revenue source and has chosen to prioritize collections over protecting the right to counsel.[9] The County provides *less than half* of the funding for indigent defense allocated by Spartanburg and York Counties, which are of comparable population size.[10] Lexington County even provided *less* funding for indigent defense in 2016–2017 than it did in 2015–2016, which is a violation of state law.[11]

The level of funding and staffing that the County and Madsen have chosen to provide for public defense is entirely inadequate in light of the large number of indigent people facing incarceration for money owed to the County's magistrate courts. As detailed in Plaintiffs' Objections to the Report, the administrative decisions of the Chief and Associate Chief Justices

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(requiring circuit public defender to "enter into an agreement with the appropriate county within the judicial circuit to administer the funds" for indigent defense in that county).

[7] *Id*. § 17-3-540; *see id*. § 17-3-570(C) (circuit public defender staff are county employees). For example, in 2016, Madsen requested County funding for a "jail attorney" to represent people with felony charges. Lexington Cty., S.C. Council Budget Session Minutes (May 3, 2016) at 21, http://lexingtoncountysc.iqm2.com/Citizens/FileOpen.aspx?Type=15&ID=1319.

[8] *See, e.g.*, *Poor May Face Trial Without Attorneys: Study Points to Flaws in S.C.'s Lowest Courts*, Post and Courier, Apr. 2, 2016, https://www.postandcourier.com/article_d4af5c41-fccb-5220-baec-640a86d7f307.html; *see also* ECF. No. 48 ¶¶ 66–73.

[9] *See* ECF No. 66 at 8–9, n.5 & n.6.

[10] Lexington County appropriates less than $550,000 annually for indigent defense, while Spartanburg County appropriates roughly $1,000,000 annually and York County appropriates more than $1,300,000 annually for roughly equal or fewer residents. *See* ECF Nos. 66 at 15; Ryan Aff. (ECF No. 66–6) Exs. A & B; U.S. Census Bureau, QuickFacts for Lexington Cty., S.C., Spartanburg Cty., S.C., and York Cty., S.C., https://www.census.gov/quickfacts/fact/table/lexingtoncountysouthcarolina,spartanburgcountysouthcarolina,yorkcountysouthcarolina/AGE135216 [https://perma.cc/JG8K-58W9].

[11] *See* ECF No. 66 at 15; *compare* ECF No. 66–6 Ex. A at 2 *with id.* Ex B at 2.

for Administrative Purposes for the Summary Courts of Lexington County and the Lexington County Sheriff have resulted in the systemic arrest and incarceration of indigent people who cannot pay fines and fees for traffic and misdemeanor offenses handled by the County's magistrate courts.[12] These individual Defendants enforce procedures that include the automatic issuance of payment bench warrants against people who default on payments[13] or do not appear in court and are subsequently sentenced in their absence to jail time suspended on the payment of money.[14] When people arrested on warrants cannot pay what they owe, they are incarcerated.[15]

Despite knowing of these countywide policies and practices, the County deliberately fails to adequately fund defense staff to represent indigent people facing post-sentencing incarceration for money owed to magistrate courts. Further, Madsen neither assigns public defenders to interview people jailed on payment bench warrants nor makes them available to represent people in Bond Court, show-cause hearings, or any post-sentencing proceedings in magistrate court.

B. Plaintiffs' Unlawful Incarceration Without Assistance of Counsel

The County's policies and practices caused Plaintiffs harm. Plaintiffs Twanda Marshinda Brown, Sasha Darby, and Raymond Wright, Jr. are indigent people who owed fines and fees to a County magistrate court and were placed on payment plans they could not afford. After defaulting, each was arrested and jailed on an automatically-issued payment bench warrant without being afforded a post-arrest court hearing or assistance of counsel.[16] Plaintiffs Cayeshia Cashel Johnson, Amy Marie Palacios, Nora Ann Corder, and Xavier Larry Goodwin were

[12] *See* ECF No. 80 at 4–8.

[13] *See* Brown Decl. (ECF No. 66–1) ¶¶ 4–5, 7; Darby Decl. (ECF No. 66–2) ¶¶ 18–20; Wright Decl. (ECF No. 35–2) ¶¶ 4–6.

[14] *See* Palacios Decl. (ECF No. 66–3) ¶¶ 6–13; Corder Decl. (ECF No. 66–4) ¶¶ 12–16; Goodwin Decl. (ECF No. 66–5) ¶¶ 5–7.

[15] Defendants' own declaration indicates warrants were issued against Plaintiffs without intervening hearings or determination of ability to pay. *See* Long Decl. (ECF No. 29–2) ¶ 3.

[16] ECF No. 66–1 ¶¶ 10–14; ECF No. 66–2 ¶¶ 23–27; ECF No. 29–2 ¶¶ 3a, d, f.

indigent people who were tried, convicted, and sentenced in their absence despite providing a legitimate justification for their inability to appear in court.[17] Each was similarly arrested and jailed on an automatically-issued payment bench warrant without being afforded a court hearing or assistance of counsel.[18] Plaintiffs were jailed for periods ranging from seven to 63 days.[19]

At no point before or during incarceration was any Plaintiff afforded a court hearing into the reasons for nonpayment or appointed counsel to defend against incarceration. No Plaintiff was visited by a public defender or equivalent defense counsel while incarcerated.[20]

II. ARGUMENT

A. *Heck* does not bar Plaintiffs' damages claim against the County.

1. *Heck* is inapplicable because Plaintiffs had no practical access to habeas relief while in custody.

In *Heck*, the Supreme Court held that a current or former prisoner cannot bring a Section 1983 claim for damages "if success will necessarily imply the invalidity" of the person's conviction or sentence, unless there is a showing "that the conviction or sentence has already been invalidated." 512 U.S. 477, 487 (1994). For *Heck* to apply, "the claim *must* be brought by a claimant who is either (i) currently in custody or (ii) no longer in custody because the sentence has been served, but nevertheless could have practicably sought habeas relief while in custody." *Covey v. Assessor of Ohio Cty.*, 777 F.3d 186, 197 (4th Cir. 2015) (emphasis supplied). "[L]awful access to federal habeas corpus is the *touchstone* of [the court's] inquiry." *Griffin v. Baltimore Police Dept.*, 804 F.3d 692, 697 (4th Cir. 2015) (emphasis supplied). The Fourth

[17] ECF No. 48 ¶¶ 223–28; ECF No. 66–3 ¶¶ 6–10; ECF No. 66–4 ¶¶ 12–14; ECF No. 66–5 ¶¶ 5–7.

[18] ECF No. 66–3 ¶¶ 11–18; ECF No. 66–4 ¶¶ 15–20; ECF No. 66–5 ¶¶ 7–9; ECF No. 29–2 ¶¶ 3b–c, e, g.

[19] *See* ECF No. 29–2 ¶ 3.

[20] *See* ECF No. 66–1 ¶ 14; ECF No. 66–2 ¶ 27; ECF No. 66–3 ¶ 20; ECF No. 66–5 ¶ 13.

Circuit has established that *Heck* does *not* bar the Section 1983 claim of a former prisoner who had "only a few months to make a habeas claim . . . [or] at most a little over a year." *Id.*[21]

Here, it is undisputed that Plaintiffs were each incarcerated for only seven to 63 *days*.[22] Plaintiffs were thus "unable to pursue habeas relief because of insufficient time," and *Heck* is "wholly inapplicable." *Covey*, 777 F.3d at 198. The County entirely ignores this requirement. *See* ECF No. 79 at 9–11. *Heck* thus does not bar the claim against the County.[23]

2. *Heck* is also inapplicable because success on Plaintiffs' damages claim would not invalidate their guilty pleas, convictions, or sentences.

The County's invocation of *Heck* fails for a second reason: Plaintiffs' damages claim does not imply the invalidity of their guilty pleas, convictions, or sentences.

For *Heck* to bar a Section 1983 claim, "a judgment in favor of the plaintiff [*must*] *necessarily* imply the invalidity of [a plaintiff's] conviction or sentence." *Covey*, 777 F.3d at 197 (emphasis supplied); *see also Nelson v. Campbell*, 541 U.S. 637, 647 (2004) ("[W]e were careful in *Heck* to stress the importance of the term 'necessarily.'"). A Section 1983 claim challenging post-sentencing procedures falls outside of this bar. *See, e.g.*, *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005) (permitting claim against parole-hearing procedures because success would only entitle prisoners to new hearings); *Skinner v. Switzer*, 562 U.S. 521, 534 (2011) (permitting claim for DNA testing because the "results might prove inconclusive or they might further incriminate [him]").

[21] Only individuals "in custody" may pursue a federal habeas suit challenging legality of their incarceration under the U.S. Constitution. 28 U.S.C. § 2254(a).

[22] ECF No. 29–2 ¶ 3 (attesting Mr. Wright was incarcerated for seven days, Ms. Darby for 20 days, Ms. Palacios for 21 days, Ms. Corder for 54 days, Ms. Johnson for 55 days, Ms. Brown for 57 days); ECF No. 66–5 ¶ 12 (attesting Mr. Goodwin was incarcerated for 63 days).

[23] *See Wilson v. Johnson*, 535 F.3d 262, 268 (4th Cir. 2008) ("[W]e do not believe that a habeas ineligible former prisoner seeking redress for denial of his most precious right—freedom—should be left without access to a federal court.").

Plaintiffs do not contest their guilty pleas or convictions for traffic or misdemeanor offenses or even the fine-or-jail sentences imposed on them for those offenses. Their damages claim against the County attacks only the County's deliberate decision to inadequately fund and provide public defense for indigent people facing incarceration for nonpayment of money to magistrate courts—a decision that led to their incarceration without representation by counsel. Success on this claim does not call into question the validity of Ms. Palacios' conviction for DUS-1, Mr. Wright's guilty plea to DUS-1, or any of the other Plaintiffs' guilty pleas or convictions. Nor would it call into question the validity of the *sentences* imposed on Plaintiffs, which the County asserts required each Plaintiff to serve jail time or, in the alternative, pay fines and fees.[24] Rather, success on the damages claim against the County would establish the County's systemic underfunding of indigent defense, which led to an unlawful *post*-sentencing event—namely, the failure to provide Plaintiffs assistance of counsel after they were arrested and incarcerated on payment bench warrants. Indeed, had they received the assistance of counsel, Plaintiffs could have been lawfully incarcerated upon a determination that they had the means to pay but did not. *See Bearden v. Georgia*, 461 U.S. 660, 668 (1983). *Heck* therefore does not bar Plaintiffs' claim against the County. *See Wilkinson*, 544 U.S. at 82; *Skinner*, 562 U.S. at 534.

Numerous federal courts have held that *Heck* does not bar Section 1983 damages claims comparable to those asserted here. The Sixth Circuit rejected the application of *Heck* to the claim of a former prisoner who challenged procedures that led to his incarceration for

[24] There is no dispute that Plaintiffs Johnson, Palacios, Corder, and Goodwin were sentenced in absentia to jail time or the payment of fines and fees. ECF No. 29–2 ¶¶ 3b–c, e, g. There is a factual dispute as to whether Plaintiffs Brown, Darby, and Wright, who all appeared in court, were similarly given fine-or-jail sentences. *Compare* ECF Nos. 66–1 ¶ 3, 66–2 ¶ 17, 35–2 ¶ 3 *with* ECF No. 29–2 ¶¶ 3a, d, f. Regardless, Plaintiffs Brown, Darby, and Wright do not challenge their sentences; rather, they challenge the County's failure to afford them assistance of counsel once they were arrested because of their inability to pay.

nonpayment of a fine because success meant "only that the failure to grant [the plaintiff] an indigency hearing was wrongful, not that the order committing him to jail was wrongful." *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 604 (6th Cir. 2017).[25] Similarly, a district court ruled in *Ray v. Judicial Corrections Services* that *Heck* was inapplicable to "procedural challenges to [the Town's] conduct—e.g., . . . the lack of providing counsel prior to incarceration"—that did not "attack[] the propriety of . . . confinement." No. 2:12-CV-02819-RDP, 2013 WL 5428395, at *13 (N.D. Ala. Sept. 26, 2013).[26]

The County misses the point by generically asserting that these cases involve "parole, probation or other similar independent actions not related to the original sentence." ECF No. 79 at 11 n.5. *Heck* does not apply to Plaintiffs' damages claim against the County because the County's deliberate decision to underfund and inadequately provide public defense to indigent people facing incarceration for money owed to magistrate courts is separate from their sentences.

The County also erroneously contends that *Heck* applies because Plaintiffs purportedly could have raised an inadequate provision of counsel claim against the County "in the criminal proceedings." ECF No. 79 at 9. That is false. Not only were Plaintiffs incarcerated on automatically-issued warrants without any court hearing at which they could assert such a claim, Plaintiffs were incarcerated for periods of time too short to access to federal habeas relief.[27]

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[25] *See Powers*, 501 F.3d. at 605 (plaintiff's "incarceration is not 'necessarily invalid' because [he] may have willfully refused to pay a fine he was capable of paying").

[26] Another district court ruled that *Heck* did not bar challenges to post-judgment fine and fee collection because "[s]uccess would mean only a change in the City's procedures prior to incarceration," and "Plaintiffs may still have been found to have willfully refused to pay a fine they were capable of paying and thereafter lawfully incarcerated." *Fant v. Ferguson*, 107 F. Supp. 3d 1016, 1028 (E.D. Mo. 2015), *on reconsideration*, 2015 WL 4232917 (E.D. Mo. July 13, 2015); *see also Cain v. City of New Orleans*, 186 F. Supp. 3d 536, 547–48 (E.D. La. 2016).

[27] Defendant misstates controlling Fourth Circuit law by asserting that *Heck* applies because success on Plaintiffs' inadequate provision of counsel claim in state proceedings "*could have* [] led to the invalidations of their convictions or sentences, including their imprisonment on bench

Finally, the cases on which the County relies are inapposite. *See* ECF No. 79 at 9–11. In those decisions, the courts held *Heck* applied because the claimants either challenged denials of counsel at proceedings leading to *convictions* or challenged a judgement and commitment order—claims distinguishable from Plaintiffs' challenge to denial of counsel in *post-sentencing debt collection procedures*.[28] The County fails to show that success on Plaintiffs' claim would necessarily imply the invalidity of pleas, convictions, or sentences as required for *Heck*.

B. *Rooker-Feldman* does not apply because Plaintiffs do not attack their underlying guilty pleas, convictions, or sentences.

The County contends that Plaintiffs' damages claims are barred for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine, which prohibits "state-court losers" from "inviting district court review and rejection of those judgments." *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). The County makes the same arguments raised in support of *Heck*. *See* ECF No. 79 at 11–12 (claiming Plaintiffs "challenge[] . . . their convictions and sentences"). But as described above, the County misconstrues Plaintiffs' claims. Plaintiffs do not contest their convictions or sentences; rather, Plaintiffs challenge the County's inadequate

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warrants." ECF No. 79 at 9 (emphasis supplied). The County is required to show that success would "*necessarily* imply the invalidity" of Plaintiffs' convictions or sentences, which the County fails to do as detailed above. *Covey*, 777 F.3d at 197 (emphasis supplied).

[28] *See Custis v. United States*, 511 U.S. 485, 496 (1994) (considering "denial of the effective assistance of counsel" claim by prisoner "attack[ing] his previous convictions"); *Carver v. County*, No. CV 1:16-2528-TMC, 2016 WL 4771287, at *1 (D.S.C. Sept. 14, 2016) (considering pre-trial detainee's claim of denial of legal materials and attorney contact information prior to conviction); *Kilbane v. Huron Cty. Comm'rs*, No. 3:10 CV 2751, 2011 WL 1666928, at *1–2 (N.D. Ohio May 3, 2011) (addressing claim for failure to appoint counsel at trial that led to conviction); *Groves v. City of Darlington*, No. 4:08-cv-00402-TLW-TER, 2011 WL 825757, at *3 (D.S.C. 2011) (considering former prisoners' "challeng[e to] the underlying basis for their arrests and subsequent convictions"); *Addison v. South Carolina Dept. of Corrs.*, No. CA 8:11-2705-CMC-JDA, 2011 WL 5877017, at *3 (D.S.C. 2011) (considering prisoner's challenge to judgment and commitment order). Plaintiffs do not challenge any *pre*-conviction deprivation of the right to counsel that would call into question guilty pleas, convictions, or sentences.

funding and provision of defense to indigent people facing post-sentencing incarceration for money owed to magistrate courts. *Rooker-Feldman* simply does not apply.

The Fourth Circuit has emphasized the narrowness of the *Rooker-Feldman* doctrine: "If [the plaintiff] is not challenging the state-court decision, the *Rooker-Feldman* doctrine does not apply." *Davani v. Virginia Dept. of Transp.*, 434 F.3d 712, 718 (4th Cir. 2006) (recognizing that *Exxon* "undercut[] the broad interpretation of the *Rooker-Feldman* doctrine" previously applied). The *Rooker-Feldman* doctrine does not apply where the "claim of injury rests not on the state court judgment itself, but rather on the alleged violation of [the plaintiff's] constitutional rights by [the defendant]." *Washington v. Wilmore*, 407 F.3d 274, 280 (4th Cir. 2005).

As discussed above, Plaintiffs' claims do not invite federal court review and rejection of any magistrate court judgments accepting Plaintiffs' guilty pleas, convicting them of traffic or misdemeanor offenses, or imposing fine-or-jail sentences. Defendant has not produced a judgment imposing a conviction and/or sentence in any Plaintiff's magistrate court case, much less shown that the damages claim challenges decisions set forth in such documents. Plaintiffs contest only systemic conduct that resulted in Plaintiffs being incarcerated post-sentencing without representation by counsel when they could not pay money. Because Plaintiffs' claim "rests not on the state court judgment itself" but on conduct by the County that violated Plaintiffs' rights, *Rooker-Feldman* does not apply. *Washington*, 407 F.3d at 280.

Numerous federal courts have rejected the application of *Rooker-Feldman* to similar claims with reasoning that has equal force here. *See, e.g.*, *Fant*, 107 F. Supp. 3d at 1022–24, 1030 (holding that *Rooker-Feldman* did not apply "[b]ecause Plaintiffs [did] not complain of injuries caused by the state court judgment, but rather by the post-judgment procedures

employed to incarcerate persons who are unable to pay fines").[29] Because Plaintiffs do not invite federal court rejection of their convictions and sentences, *Rooker-Feldman* is inapplicable.[30]

C. Plaintiffs' Sixth Amendment claim against the County for inadequate provision of indigent defense must be permitted to go forward.

The County argues for denial of the damages claim based on two erroneous assertions: (1) the County's inadequate funding of indigent defense cannot be the proximate cause of Plaintiffs' injuries; and (2) the County "cannot be held liable in damages for any denial of counsel." ECF No. 79 at 6. These assertions are erroneous and contradicted by the record.

1. Plaintiffs' Section 1983 claim properly pleads that the County's underfunding policy is the moving force behind their Sixth Amendment violations.

The County incorrectly argues that its own failure to fund indigent defense cannot cause a Sixth Amendment violation because judges may appoint members of the bar to represent indigent defendants without compensation. ECF No. 79 at 2–5. This is wrong. First, as a matter of law, the County is required to fund and provide indigent defense, and its failure to do so can cause a Sixth Amendment injury. Second, Plaintiffs have adequately pled and raised questions of fact as to whether the County's failure to meet this obligation was a concurrent cause of their injuries, which satisfies causation under Section 1983.

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[29] *See also Powers*, 501 F.3d at 606 (rejecting *Rooker-Feldman* "because [the plaintiff did] not allege that he was deprived of his constitutional rights by the state-court judgment, but rather by the Public Defender's conduct in failing to ask for an indigency hearing as a prerequisite to his incarceration[]"); *Ray*, 2013 WL 5428395 at *10–11 (rejecting *Rooker-Feldman* because claims against "post-judgment probationary program" leading to jailing for inability to pay did not contest "merits" of court decisions).

[30] Defendants argue for *Rooker-Feldman* dismissal based on two easily distinguishable cases. *See* ECF No. 79 at 12. *Jones v. Cumberland Cty. Municipality* is distinguishable because it concerned a plaintiff's challenge to the "imposition of an excessive fine and term of imprisonment." No. 5:14-CV-550-FL, 2015 WL 3440254, at *5 (E.D.N.C. 2015), *report and recommendation adopted*, 2015 WL 3440258 (E.D.N.C. 2015). *Shahid v. Borough of Eddystone* is inapposite because the plaintiff sought to secure a ruling of wrongful conviction. No. CIV.A. 11-2501, 2012 WL 1858954, at *9 (E.D. Pa. 2012). But Plaintiffs do not contest their convictions and sentences.

A local government's failure to adequately fund and provide indigent defense violates the Sixth Amendment.[31] To establish a municipality's liability under Section 1983 for such a violation, the plaintiff must show that the municipality's "policies were the 'moving force' behind the injury alleged." *Robinson v. Balog*, 160 F.3d 183, 190 (4th Cir. 1998) (citation omitted). Those policies may stem from "relevant municipal action" or "inaction . . . taken with deliberate indifference to a plaintiff's rights." *Id.* at 190–91. Proof that an "action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will . . . determine that the municipal action was the moving force behind the injury of which the plaintiff complains." *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 405 (1997).

A plaintiff may also show a "sufficient causal link" between municipal inaction and the challenged violation. *Brown v. Mitchell*, 308 F. Supp. 2d 682, 693, 695 (E.D. Va. 2004). And the well-established principle of concurrent causation permits pleading and proving that *multiple defendants* caused a constitutional injury. "[M]any factors or things or the conduct of two or more persons can operate at the same time either independently or together to cause injury or damage and in such a case each may be a proximate cause." *Jones v. Williams*, 297 F.3d 930, 937 n.6 (9th Cir. 2002) (affirming jury instructions for concurrent liability under Section 1983).[32]

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[31] *See, e.g.*, *Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122, 1124, 1132 (W.D. Wash. 2013) (finding city policymakers' "deliberate choices" regarding public defense violated Sixth Amendment); *see also Church v. Missouri*, 268 F. Supp. 3d 992, 1017 (W.D. Mo. 2017) (recognizing Sixth Amendment claim for inadequate funding of public defense); *Kuren v. Luzerne Cty.*, 627 Pa. 33, 38 (2016) (same); *Tucker v. State*, 394 P.3d 54, 63 (Idaho 2017) (recognizing Sixth Amendment claim for alleged systemic inadequacies in public defense); *Hurrell-Harring v. State*, 15 N.Y.3d 8, 22–23 (2010) (same).

[32] *See also Lippoldt v. Cole*, 468 F.3d 1204, 1219 (10th Cir. 2006) ("Where multiple 'forces are actively operating' . . . plaintiffs may demonstrate that each defendant is a concurrent cause by showing that his or her conduct was a 'substantial factor in bringing [the injury] about.'"); *Brown*, 308 F. Supp. 2d at 695 n.13 (whether individual actors and official city policy were "concurrent causes" leading to inmate's death was "quintessential question of fact" for jury) (citing *Cohen v. Boxberger*, 544 F.2d 701, 704 (4th Cir. 1976)).

The County is mistaken in asserting that its deliberate actions and inactions cannot, as a matter of law, cause a Sixth Amendment injury purportedly because judges may appoint counsel to represent indigent defendants without pay. ECF No. 79 at 4 n.1. The South Carolina Indigent Defense Act of 2007 requires the County and Madsen, as the County's final policymaker, to provide "adequate and meaningful" indigent defense within the County.[33] Although the state provides some funding, South Carolina's indigent defense system is county-funded and administered.[34] State law requires that compensation be paid to all attorneys who represent indigent defendants, even private members of the bar. *See Ex Parte Brown*, 393 S.C. 214, 223 (2011) ("[W]e hold that a court's inherent power to appoint a lawyer to serve is subject to the lawyer's entitlement to just compensation."). Such compensation is arranged through Madsen.[35]

Plaintiffs allege, and have submitted evidence showing, that the County and individual Defendants are concurrently liable for Plaintiffs' incarceration without representation by counsel for failure to pay money to magistrate courts. First, the County has *grossly* underfunded indigent defense in comparison to comparably-sized counties, despite the state law requirement to ensure adequate and meaningful defense in the County's magistrate courts.[36] Second, Madsen has failed to assign *any* staff to represent indigent people facing post-sentencing incarceration for money they cannot pay to magistrate courts.[37] Plaintiffs attest that no public defenders were present or available to represent them once they were arrested and incarcerated and that no

[33] *See discussion supra* note 7.

[34] *See discussion supra* notes 4–7.

[35] *See, e.g.*, S.C. Code Ann. § 17-3-520(B)(8) (circuit public defender must "enter[] into contracts . . . with independent counsel . . . for the provision of indigent defense" in case of a conflict of interest); *id.* § 17-3-540 (circuit public defender is responsible for personnel for each county public defender's office); *id.* § 17-3-560 (circuit public defender is responsible for spending and distributing all funds, including compensation for all employees).

[36] ECF No. 48 ¶¶ 47–79. The County provides less than half the funding appropriated by York and Spartanburg counties. *See discussion supra* note 10.

[37] ECF No. 48 ¶¶ 11, 51, 63.

public defenders met with them in jail to help them secure a hearing regarding their ability to pay.[38] The County has provided nothing to rebut this evidence or otherwise show that it affords defense to indigent people facing incarceration for money owed to magistrate courts.

Because the County and Madsen are obligated to fund and provide indigent defense, their deliberate decisions to inadequately fulfill these duties constitute municipal policies. *See Brown*, 520 U.S. at 405. Plaintiffs' evidence raises triable issues of fact as to whether these policies exist and are the moving force behind violation of their right to counsel and, ultimately, as to whether the County is concurrently liable with the individual Defendants for Plaintiffs' Sixth Amendment injuries. *See Jones*, 297 F.3d at 937.[39] Summary judgment for the County is unwarranted.

2. Section 1983 affords a damages remedy for the County's constitutional violation.

The County incorrectly asserts that it "cannot be held liable in damages for any denial of counsel." ECF No. 79 at 6. It is well-established that municipalities "can be sued directly under § 1983 for *monetary* . . . relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy or custom." *Los Angeles Cty. v. Humphries*, 562 U.S. 29, 37 (2010) (emphasis supplied). "[M]unicipalities have no immunity from damages liability flowing from their constitutional violations." *Burtnick v. McLean*, 76 F.3d 611, 613 (4th Cir. 1996).

The County cites a line of inapposite cases holding that a county cannot be held responsible for the conduct of judges who "are not county officials." ECF No. 79 at 8 (quoting *Hamill v. Wright*, 870 F.2d 1032, 1037 (5th Cir. 1989)). But Plaintiffs seek to hold the County liable for its *own* failure to fund, hire, assign, and compensate attorneys to represent indigent

[38] *See* ECF No. 66–1 ¶¶ 6, 14; ECF No. 66–2 ¶¶ 15, 27; ECF No. 66–3 ¶ 20; ECF No. 66–5 ¶¶ 13–14.

[39] Contrary to the County's assertion, Plaintiffs are not required to show they would not have been convicted or jailed had counsel been provided. ECF No. 79 at 4. The *absence* of counsel constitutes a Sixth Amendment injury. *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984) ("The Court has uniformly found constitutional error without any showing of prejudice when counsel was . . . totally absent[.]");*United States v. Ragin*, 820 F.3d 609, 618 (4th Cir. 2016).

people facing incarceration for unpaid debts to magistrate courts as required by the Indigent Defense Act—not for the conduct of individual judges. ECF No. 48 ¶ 499. Plaintiffs do not dispute that South Carolina's magistrate judges are state officers.[40] But because the County enjoys "no immunity from damages liability flowing from [its own] constitutional violations," *Burtnick*, 76 F.3d at 613, Plaintiffs' Sixth Amendment claim against the County must proceed.

D. Plaintiffs are entitled to discovery under Rule 56(d).

Should this Court find the record contains no genuine issues of fact as to whether the County's inadequate funding and provision of indigent defense is the moving force behind the Sixth Amendment violation, the Court should grant Plaintiffs' timely request for discovery under Rule 56(d).[41] No discovery has been exchanged, and Plaintiffs' declaration identifies discovery that will further establish that the County and Madsen's funding and resource allocation decisions proximately caused Plaintiffs' incarceration without representation by counsel.[42]

CONCLUSION

Plaintiffs thus respectfully request that the Court adopt the Report's recommendation to deny the County summary judgment or, in the alternative, grant Plaintiffs Rule 56(d) discovery.

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[40] The County relies on inapposite cases. *Reed v. Town of Lexington*, 902 F.2d 1566 (4th Cir. 1990) (unpublished), was issued before passage of the Indigent Defense Act of 2007 and did not address the County's obligation to fund and provide indigent defense under that law. And unlike *Reed*, Plaintiffs do not seek to hold the County liable for the actions of magistrate judges. *Dunbar v. Metts* concerned claims challenging unconstitutional "[b]ond setting and sentencing" against defendants not named in this action. No. CA 2:10-1775-HMH-BHH, 2011 WL 1480279, at *4 (D.S.C. Mar. 31, 2011). *Hamill v. Wright* sought to hold a county responsible for a single failure to advise a defendant of the right to counsel, which is distinct from Plaintiffs' claim challenging systemic failure to provide indigent defense. 870 F.2d at 103.

[41] Rule 56(d) provides: "If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order."

[42] *See* ECF No. 66 at 45; Choudhury 56(d) Decl. (ECF No. 66–7) ¶¶ 27, 34–35, Ex. A at RFP Nos. 9, 25–28.

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Respectfully submitted by,

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