SUPERIOR COURT OF CALIFORNIA • COUNTY OF FRESNO Civil Department - Non-Limited	Entered by:
TITLE OF CASE: **Carolyn Phillips va State of California**	
LAW AND MOTION MINUTE ORDER	Case Number: 15CECG02201

Hearing Date: April 12, 2016 — Hearing Type: Demurrer x2/ Motion Strike
Department: 501 — Judge/Temporary Judge: Mark Snauffer
Court Clerk: L. Whipple — Reporter/Tape: Rachael Espinoza

Appearing Parties:

Plaintiff:	Defendant:
Counsel: Novella Coleman, Michael Risher	Counsel: Aaron Jones

☐ Off Calendar

☐ Continued to ☐ Set for _____ at _____ Dept. _____ for _____

☐ Submitted on points and authorities with/without argument. ☒ Matter is argued and submitted.

☐ Upon filing of points and authorities.

☐ Motion is granted ☐ in part and denied in part. ☐ Motion is denied ☐ with/without prejudice.

☐ Taken under advisement

☐ Demurrer ☐ overruled ☐ sustained with _____ days to ☐ answer ☐ amend

☒ Tentative ruling becomes the order of the court. No further order is necessary.

☒ Pursuant to CRC 391(a) and CCP section 1019.5(a), no further order is necessary. The minute order adopting the tentative ruling serves as the order of the court.

☒ Service by the clerk will constitute notice of the order.

☒ See attached copy of Tentative Ruling.

☐ Judgment debtor _____ sworn and examined.

☐ Judgment debtor _____ failed to appear.
Bench warrant issued in the amount of $ _____

Judgment:

☐ Money damages ☐ Default ☐ Other _____ entered in the amount of:
Principal $_____ Interest $_____ Costs $_____ Attorney fees $_____ Total $_____

☐ Claim of exemption ☐ granted ☐ denied. Court orders withholdings modified to $ _____ per _____

Further, court orders:

☐ Monies held by levying officer to be ☐ released to judgment creditor. ☐ returned to judgment debtor.

☐ $ _____ to be released to judgment creditor and balance returned to judgment debtor.

☐ Levying Officer, County of _____, notified. ☐ Writ to issue

☐ Notice to be filed within 15 days. ☐ Restitution of Premises

☐ Other: _____

(20) **Tentative Ruling**

Re: ***Phillips et al. v. State of California et al.***, Superior Court Case No. 15CECG02201

Hearing Date: **April 12, 2016 (Dept. 501)**

Motion: (1) State of California and Governor Edmund Brown, Jr.'s Demurrer

(2) State of California and Governor Edmund Brown, Jr.'s Motion to Strike

(3) County of Fresno's Demurrer

Tentative Ruling:

(1) State of California and Governor Edmund Brown, Jr.'s Demurrer.

To sustain the demurrer to the petition and the entire complaint as to Governor Brown, with leave to amend.

As to the State of California, to sustain the demurrer to the petition for writ of mandate, with leave to amend. To sustain the demurrer to the fifth cause of action with leave to amend. To overrule the demurrers to the first, second, third, fourth, sixth, seventh, eighth and ninth causes of action. (Code Civ. Proc. § 430.10.)

(2) State of California and Governor Edmund Brown, Jr.'s Motion to Strike. To deny. (Code Civ. Proc. § 435.)

(3) County of Fresno's Demurrer. To sustain the demurrer to the petition for writ of mandate, with leave to amend. To overrule the demurrers to the complaint and each cause of action. (Code Civ. Proc. § 430.10.)

Plaintiffs are granted 20 days leave to file the first amended petition and complaint. The time in which the pleading can be amended will run from service by the clerk of the minute order. New allegations in the amended pleading are to be set in **boldface** type. The parties shall meet and confer in accordance with Code Civ. Proc. § 430.41(c).

In the amended pleading, plaintiffs shall separate and clearly distinguish between the petition for writ of mandate and the complaint. The two should be pled separately as independent pleadings, even if bound together in one document.

Explanation:

State of California and Governor Edmund Brown, Jr.'s Demurrer

Plaintiffs in this action filed a Petition for Writ of Mandate and Complaint ("Complaint") against County of Fresno, the State of California and Governor Brown, alleging that the Fresno County Public Defender's Office suffers from systemic and structural deficiencies that prevent it from providing indigent defendants with meaningful and effective assistance of counsel in violation of the federal and California constitutional guarantees of due process and right to counsel, and the constitutional and statutory rights to a speedy trial.

The State of California and Governor Brown will be referred to herein collectively as "the State."

The State's responsibility

Plaintiffs allege that the State has a "constitutional duty to run indigent defense systems" (Complaint ¶ 27); has delegated that duty to the counties; and that the State "does not provide oversight" of the county systems and "leaves counties to shoulder the financial costs." (Id. ¶¶ 27, 29, 31.)

The State contends that the right to counsel does not prescribe any affirmative duty *on the State government* to provide or run a particular indigent defense system or distribution of government powers. (See, e.g., *Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 30 ["The [federal] Constitution does not impose on the States any particular plan for the distribution of governmental powers;" citation omitted].) The State asserts that even if the right to counsel placed an affirmative duty on the State government, the Legislature has enacted a comprehensive system of indigent defense laws, which safeguard the right to counsel. (See, e.g., *Avon v. Municipal Court for Los Angeles Judicial Dist.* (1965) 62 Cal. 2d 630, 632 ["The purpose of section 987a [renumbered 987.2] of the Penal Code is to provide adequate representation for indigent persons charged with crime]; *People v. Chavez* (1980) 26 Cal. 3d 334, 344 [the constitutional right to counsel "is satisfied in California by the statutory provision for the assignment of counsel by the court"].)

The State may be correct that Pen. Code § 987.2 provides an effective backstop to the right to counsel. But at the pleading stage the court cannot determine that this system operates to provide effective assistance of counsel to indigent criminal defendants.

The State contends that the Complaint does not allege that the State failed to perform any specific statutory duty, and thus plaintiffs cannot allege a cognizable as-applied claim against the State.

The Sixth Amendment right to counsel is a provision of the Bill of Rights so "'fundamental and essential to a fair trial'" that it "is made obligatory upon the *States* by the Fourteenth Amendment." (*Gideon v. Wainwright* (1963) 372 U.S.

335, 342-43, emphasis added.) The Fourteenth Amendment's Due Process Clause in turn provides: "nor shall any *State* deprive any person of life, liberty, or property, without due process of law." (US. Const, amend XIV (emphasis added).)

The State argues that that the Fourteenth Amendment's reference to the "State" does not does not place the responsibility for providing counsel on state governments because the term the "State" refers to all public entities within the states, at both the state and local levels, citing *DeShaney v. Winnebago County Dept. of Social Services* (1989) 489 U.S. 189, 195 fn. 1.

That is not a holding of the *DeShaney* decision. The Court stated that that the petitioners in that case "contend that the State [1] deprived Joshua of his liberty interest ..." Footnote 1 reads, "As used here, the term 'State' refers generically to state and local governmental entities and their agents." The Court was merely defining the term as used in that opinion. It was not stating that the term "State" as used in the Fourteenth Amendment refers generically to state and local government entities. As the State points out in its reply brief, *Gideon* did not address where the responsibility lies within states for providing counsel." "It is axiomatic that cases are not authority for propositions not considered." (*People v. Avila* (2006) 38 Cal.4th 491, 566.) The State cites to *City of Lafayette, La. v. Louisiana Power & Light Co.* (1978) 435 U.S. 389, 415 fn. 43 for the same proposition. This citation is not on point either.

The State cannot disclaim its constitutional responsibilities merely because it has delegated such responsibilities to its municipalities. (See *Duncan v. Michigan* (Mich. Ct. App. 2009) 774 N.W.2d 89, 97-98, 104-105.) In *New York Cty. Lawyers' Ass 'n v. State of New York* (N .Y. Sup. Ct. 2002) 745 N.Y.S.2d 376, 381, the court issued a preliminary injunction in a case challenging New York's compensation rate for appointed counsel and citing *Gideon* for the proposition that "New York State bears the ultimate responsibility to provide counsel to the indigent."

Nor can the State evade its constitutional obligation by passing statutes. (See *Armstrong v. Schwarzenegger* (9th Cir. 2010) 622 F.3d 1058, 1074 ["a State cannot avoid its obligation under federal law by contracting with a third party to perform its function"].) Counties are "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions," rather than "sovereign entities." (*Reynolds v. Sims* (1964) 377 U.S. 533, 575.)

Plaintiffs point to *Stanley v. Darlington County School Dist.* (4th Cir. 1996) 84 F.3d 707, an equal protection school desegregation case, where the State argued that "the School District lacks standing to sue the State because the School District is a political subdivision of the State and that the State's allocation of governmental expenses is an internal issue of governmental structuring and money." (*Id.* at pp. 712-713.) The court rejected this argument, stating, "[b]ecause the Fourteenth Amendment imposes direct responsibility on a state

to ensure [due process] ... a state's delegation to a political subdivision of the power necessary to remedy the constitutional violation does not absolve the state of its responsibility to ensure that the violation is remedied." (*Id.* at p. 713.)

The State, here, distinguishes *Stanley* by pointing out that the decision did not place responsibility upon states for violations by other governmental entities. The court recognized "[a]t the outset of our discussion ... that illegal segregation was for many years the policy of both the State of South Carolina and the Darlington County School District." (*Id.* at p. 713.)

However, here, if the State created an indigent defense system that is systematically flawed and underfunded, *Stanley* indicates that the State remains responsible, even if it delegated this responsibility to political subdivisions. "Even if a state gives its local school districts the power and means to remedy segregation, it can still be sued by the students in those districts for its failure to take steps to dismantle a dual educational system that it created. (*Id.* at p. 713.)

The State has not produced authority clearly showing that the causes of action premised on deprivation of the right to counsel have no merit. The court will not sustain the demurrer on this ground.

Violation of Individual's Right to Counsel

The State next argues that the Complaint fails to state a claim for violation of any *individual's* right to counsel.

The State contends that plaintiffs must satisfy the test set forth by the Supreme Court in *Strickland v. Washington* (1984) 466 U.S. 668, 691-94: in order to prevail on an ineffective-assistance-of-counsel claim, a defendant must show (1) that an error by counsel was professionally unreasonable and (2) that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different (i.e., prejudice).

However, plaintiffs in this action are not challenging individual convictions. Rather, they claim that the State systematically deprives Fresno County indigent defendants of the right to counsel. They contend that this right can be vindicated through individual suits challenging the validity of particular criminal convictions, or suits seeking prospective systemic relief where structural deficiencies in an indigent defense system constructively deny the assistance of counsel.

Since no individual convictions are being challenged, the court will only address the question of whether there is a claim of systemic deprivation.

Plaintiffs correctly point out that mere token appointment of counsel does not satisfy the Sixth amendment right to counsel. (*Evitts v. Lucey* (1985) 469 U.S. 387, 395.) "The Sixth Amendment requires effective assistance of counsel at

critical stages of a criminal proceeding." (*Lafler v. Cooper* (2012) 132 S.Ct. 1376, 1385.)

Systemic violations of the right to counsel can be remedied through prospective relief. The Supreme Court in *Gideon v. Wainwright* (1963) 372 U.S. 335, held that states are obligated under the Fourteenth Amendment to appoint counsel for indigent criminal defendants. In *Luckey v. Harris* (11th Cir. 1988) 860 F.2d 1012, the Eleventh Circuit held that *Strickland* is an inappropriate standard to apply in a civil suit seeking prospective relief. The court distinguished between the standard used to determine "whether an accused *has been* prejudiced by the denial of a right," which is an issue "that relates to relief," and the question of "whether such a right exists and can be protected prospectively." (*Id.* at p. 1017, emphasis added.) The court emphasized that prospective relief is designed to avoid future harm; as such, "it can protect constitutional rights, even if the violation of these rights would not affect the outcome of a trial." (Id.)

> Prospective relief is designed to avoid future harm. [Citation.] Therefore, it can protect constitutional rights, even if the violation of these rights would not affect the outcome of a trial.

(*Id.* at p. 1017.)

> In a suit for prospective relief the plaintiff's burden is to show the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.... This is the standard to which appellants, as a class, should have been held.

(*Id.* at p. 1018 (internal quotations omitted).)

Addressing the sufficiency of the allegations, the appellate court noted:

> Appellants have 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. Without passing on the merits of these allegations, we conclude that they are sufficient to state a claim upon which relief could be granted.

(*Id.* at p. 1018.)

Here, plaintiffs allege similar systemic deficiencies: excessive caseloads (Complaint ¶¶ 4, 50-52); Case management practices that create conflicts of interest for attorneys (Complaint ¶¶ 54, 58-59, 80); inadequate resources (Complaint ¶¶ 69, 75, 78-79, 82); inadequate supervision (Complaint ¶ 95).

Plaintiffs allege that these deficiencies cause the indigent defense system to provide for representation that falls below minimum Constitutional and statutory standards through inadequate preparation (Complaint ¶¶ 54, 63, 80, 87-88); lack of conflict-free legal representation (Complaint ¶¶ 36, 48, 54, 64, 66-71, 79, 80, 95, 112); lack of continuous representation (Complaint ¶ 63); inadequate opportunity for consultation (Complaint ¶¶ 64, 66, 68, 69-71); interference with competent representation due to inadequate training and support from supervisors (Complaint ¶¶ 53, 60, 74, 75, 95, 97); inadequate factual investigation (Complaint ¶¶ 78-80); lack of meaningful adversarial testing (Complaint ¶¶ 85, 87).

Pursuant to *Luckey*, plaintiffs need not plead and prove the elements of ineffective assistance as to specific individuals in order to state a cause of action.

The State relies on *Heck v. Humphrey* (1994) 512 U.S. 477, 486, which held that habeas corpus is the exclusive remedy for a plaintiff seeking to collaterally attack a criminal conviction, and that apart from habeas, civil actions "are not appropriate vehicles for challenging the validity of outstanding criminal judgments."

The suit in *Heck* was brought under 42 U.S.C. section 1983 for damages. The Court held that to maintain a section 1983 suit for damages, the plaintiff must prove that the conviction was invalidated. (*Id.* at pp. 486-487.) *Heck* does not apply here because plaintiffs do not seek damages or relief that would imply the invalidity of any convictions; rather they seek purely prospective relief.

Professional Guidelines

The State argues that alleged violations of professional guidelines are insufficient to state a claim for violation of right to counsel. The State points out that professional guidelines and norms such as those discussed in the Complaint are not themselves constitutional standards or minimums, but are only guides to determining what is reasonable. (*Strickland v. Washington* (1984) 466 U.S. 668, 688.)

However, the Complaint does not hold these guidelines and standards out as inexorable commands, but as evidence and guidelines. As indicated by *Strickland*, cited by the State, professional guidelines and norms are relevant, even if not dispositive. (*Strickland, supra*, 466 U.S. at p. 688 [Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ..."].)

Penal Code § 987 (count 5)

The fifth cause of action, asserting violation of Penal Code section 987, fails against the State because the statute does not impose any duty on the State. The statute provides that if a criminal defendant desires and is unable to

employ counsel, "the court shall assign counsel to defend him or her." (Pen. Code § 987(a).)

The only entity on whom a duty is imposed by section 987 is the court. And it only requires that counsel be assigned to defend the defendant. The Complaint does not allege any instance in which a court was required to appoint counsel but failed to do so. Plaintiffs offer no argument as to how this statute was violated. The demurrer to the fifth cause of action with leave to amend.

Right to Speedy Trial (counts 6-8)

The sixth cause of action alleges violation the California Constitution's right to a speedy trial, and the seventh and eighth allege violation of two related statues, Penal Code sections 1382 [sets forth statutory right to a speedy trial] and 859b [codifies the time for a preliminary hearing].

Plaintiffs allege that in Fresno, structural deficiencies in the indigent defense system routinely force criminal defendants to face unreasonable delays in their cases, in violation of their constitutional and statutory speedy-trial rights. (Complaint ¶¶ 6, 17, 98, 110, 112.)

Speedy trial rights can be infringed by deficiencies in the indigent defense system. (See *People v. Johnson* (1980) 26 Cal.3d 557, 571-72 [defendant's right to a speedy trial may "be denied by failure to provide enough public defenders or appointed counsel, so that an indigent must choose between the right to a speedy trial and the right to representation by competent counsel"].)

The State points out that the right is a "personal" one, and "is waived if not properly asserted by a defendant." (*Serna v. Superior Court* (1985) 40 Cal.3d 239, 251.) The State contends that for the same reasons set forth above, plaintiffs cannot collaterally attack the pleas or sentences of the individuals identified in the complaint. Citing to *Heck*, the State contends that a judicial declaration in this case that any plaintiff was deprived the right to a speedy trial "would necessarily imply the invalidity" of the proceedings against them, and thus is barred. (*Heck, supra,* 512 U.S. at p. 486.)

The cases cited the State sought retrospective relief that would overturn or otherwise impugn the validity of convictions previously imposed. (See *Heck v. Humphrey* (1994) 512 U.S. 477 [suit for damages pursuant to 42 U.S.C. § 1983]; *People v. Villaneuva* 196 Cal. App. 4th 411 (2011) [direct appeal of conviction]; *Gibbs v. Contra Costa County*, No. C 11-00403 MEI, 2011 WL 1899406 (ND. Cal. May 19, 2011) [suit for damages pursuant to 42 U.S.C. § 1983].) But here, plaintiffs seek prospective relief based on the systemic violation of Fresno indigent defendants' rights to a speedy trial and hearing. That relief would not overturn the result in any individual criminal case. In *Wilkinson v. Dotson* (2005) 544 U.S. 74, 76, 82, the Supreme Court held that *Heck* did not bar state prisoners from bringing a section 1983 claim challenging the constitutionality of state parole

procedures where the prisoners sought declaratory and injunctive relief. Accordingly, as with the right to counsel issue, *Heck* does not bar the speedy trial claims since only prospective relief is sought, and plaintiffs are not seeking any adjudications that would imply the invalidity of proceedings against any individual defendant.

Writ of Mandate

> Code of Civil Procedure section 1085, subdivision (a), provides: "A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station...." A writ of mandate "will issue against a county, city, or other public body.... [Citations.]" (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1558, 55 Cal.Rptr.2d 465.)
>
> To obtain writ relief under Code of Civil Procedure section 1085, the petitioner must show there is no other plain, speedy, and adequate remedy; the respondent has a clear, present, and ministerial duty to act in a particular way; and the petitioner has a clear, present and beneficial right to performance of that duty. (*Morgan v. City of Los Angeles Bd. of Pension Comrs.* (2000) 85 Cal.App.4th 836, 842, 102 Cal.Rptr.2d 468.) A ministerial duty is one that is required to be performed in a prescribed manner under the mandate of legal authority without the exercise of discretion or judgment. (*Id.* at p. 843, 102 Cal.Rptr.2d 468; *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 618, 113 Cal.Rptr.2d 309.)

(*County of San Diego v. State* (2008) 164 Cal.App.4th 580, 593 [fn omitted].)

"A writ of mandate will lie to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station (citation) upon the verified petition of the party beneficially interested, in cases where there is not a plain, speedy, and. adequate remedy, in the ordinary course of law." (*Cal. Corr. Supervisors Org., Inc. v. Dep't of Corr.* (2002) 96 Cal.App.4th 824, 827 [citing Code Civ. Proc., §§ 1085-1086, quotations omitted].) "Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent [citations]; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty[.]" (*Ibid.*; see also *Cal. Assn. of Prof Scientists v. Dept. of Finance* (2011) 195 Cal.App.4th 1228, 1236 [writ of mandate is to compel "the performance of a clear, present, and ministerial duty where the petitioner has a beneficial right to performance of that duty"].)

"A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists." (*Cal. Assn. of Professional*

Scientists v. Dept. of Finance (2011) 195 Cal.App.4th 1228, 1236.) Mandamus "will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner." (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 232-233.)

Plaintiffs identify no *ministerial* duty owed by the State or Governor.

While plaintiffs cite *Jenkins v. Knight* (1956) 46 Cal.2d 220, for the proposition that "[t]he provisions of our Constitution are mandatory and prohibitory" (*id.* at p. 224), *Jenkins* did not rule that all constitutional provisions set forth ministerial duties for purposes of mandamus. It addressed former article IV, section 12, of the State Constitution, which provided that when vacancies arise in the Legislature, the Governor "shall issue writs of election to fill such vacancies." (*Id.* at p. 222.) This imposed a ministerial duty, because the Governor was "commanded by the Constitution to issue a proclamation" and had "no discretion" in the matter. (*Id.* at p. 224.) Plaintiffs identify no ministerial duty comparable to this one. Plaintiffs also cite *Harn v. County of Ventura* (1979) 24 Cal.3d 605, but *Horn* did not address what constitutes a "ministerial" duty for purposes of mandamus. Finally, *Molar v. Gates* (1979) 98 Cal.App.3d 1, involved a challenge to specific practices of county officials, and the writ simply ordered them to end the practices. (*Id.* at p. 6.) Plaintiffs challenge no specific State acts and instead allege only a general duty to comply the Constitution.

Additionally, mandamus cannot issue against the State. "The state acts only through its officers or agents," and mandamus thus should be directed "to compel an officer or agent of the state to perform an act that 'the law specifically enjoins.'" (*County of San Diego* v. State of California (2008) 164 Cal.App.4th 580, 593 n. 12.)

For these two reasons, the demurrer to the petition for writ of mandate should be sustained. However, plaintiffs' tactic of commingling the petition for writ of mandate with complaint for declaratory and injunctive relief makes it somewhat difficult to fashion an order, as it is unclear whether plaintiffs intended the various counts to be part of the petition or complaint. There is no distinction in the pleading between petition and complaint. In the amended pleading, the two should be pled separately even if bound together in one document.

The State also contends that the writ petition is not properly verified. A petition for writ of mandate must be verified based on personal knowledge. (Civ. Proc. §§ 1069, 1086, 1103(a); *Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204.) The petition is verified only by Petitioner Phillips, not by Petitioners Yepez or Estrada. Phillips verified only paragraphs 14-16 [describing her residence and employment in background] of the Complaint based on personal knowledge. The rest she verifies on information and belief.

However, Code of Civil Procedure section 446 (applicable to petitions for mandamus by section 1109) provides that "[a] person verifying a pleading need not swear to the truth or his or her belief in the truth of the matters stated therein

but may, instead, assert the truth or his or her belief in the truth of those matters 'under penalty of perjury.'" The verification is sufficient at the pleading stage.

Taxpayer Claim

The State next contends that the complaint fails to state a claim under the taxpayer action statute. Two of the three plaintiffs, Phillips and Estrada, assert claims as taxpayers under California's taxpayer-action statute, Code of Civil Procedure section 526a (Claim 9). (See Complaint ¶¶ 16, 20 [alleging taxpayer standing].)

Section 526a provides that a taxpayer may bring "[a]n action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of" a public entity. The "essence" of the action, though, is "an illegal or wasteful expenditure of public funds or damage to public property." (*Humane Society of the US. v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 355, citation omitted.) Therefore, to survive demurrer, "the plaintiff must cite specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur." (*Ibid.*)

However, "[i]t is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds." (*Wirin v. Parker* (1957) 48 Cal.2d 890, 894 [taxpayer suit proper in constitutional challenge to practice of police conducting surveillance using concealed microphones]; *Blair v. Pitchess* (1971) 5 Cal.3d 258, 269 ["county officials may be enjoined from spending their time carrying out" an unconstitutional statute, even though that conduct "actually effect[s] a saving of tax funds"].)

The demurrer to count 9 should be overruled.

Governor Brown

Plaintiffs fail to state a claim against Governor Brown. The Complaint alleges that Governor Brown has a duty to "see that the law is faithfully executed" (Cal. Const. Art. I, § 1), which includes a duty to ensure the State respects the Constitutional and statutory provisions guaranteeing the right to counsel.

No California or federal law does prescribes any role for the Governor in ensuring the legal representation of indigent criminal defendants. The proper defendant in a challenge to a state law or policy is the officer charged with implementing the challenged measure. (*Wolfe v. City of Fremont* (2006) 144 Cal.App.4th 533, 551.) The State points out that courts have issued writs to compel action by the governor only when tied to a specific statutory or constitutional duty directed to that office that leaves him no discretion, citing *Jenkins v. Knight* (1956) 46 Cal. 2d 220, 224; *Harpending v. Haight* (1870) 39 Cal. 189, 209-10.)

Plaintiffs cite four decisions for the proposition that the Governor is routinely named in constitutional challenges, but those cases all involved specific acts by the Governor or legal duties placed upon the Governor. (*Hotel Employees & Rest. Emp. Int'l Union v. Davis* (1999) 21 Cal.4th 585, 590 [Governor was obligated to execute a gaming compact]; *Cal. Correctional Peace Officers Assn. v. Schwarzenegger* (2008) 163 Cal.App.4th 802, 808 [Governor's acts pursuant to declared state of emergency]; *Raven v. Deukmejian* (1990) 52 Ca1.3d 386; 340 [Governor charged with implementing challenged law]; Bd. of Adm. v. Wilson (1997) 52 Cal.App.4th 1109, 1119 [Governor's duties concerning the budget process].)

This case presents no analogous circumstances. The demurrer to the petition and complaint should be sustained as to Governor Brown.

State of California and Governor Edmund Brown, Jr.'s Motion to Strike

The State separately moves to strike paragraphs 11, 16, 18, 20, 114 and 115, each count of the Complaint, and each paragraph of the prayer for relief. The State then offers no argument in its memorandum in support of moving to strike any of these portions of the Complaint. It merely references the demurrer, and asserts that each count is legally unsupportable. In other words, the motion to strike basically says, "We move to strike everything. See demurrer." The State points out that a motion to strike may be appropriate where a portion of a cause of action is defective (*PH II, Inc. v. Superior Court* (1995) 33 Cal.App.4th 1680, 1682-83), but the motion to strike identifies no portion of the complaint to be stricken.

A motion must be supported by a memorandum of points and authorities. (Cal. Rules of Court, Rule 3.1113(a).) The memorandum "must contain a statement of facts, a concise statement of the law, evidence and arguments relied on, and a discussion of the statutes, cases and textbooks cited in support of the position advanced." (Cal. Rules of Court, Rule 3.1113(b); see *Quantum Cooking Concepts, Inc. v. LV Assocs., Inc.* (2011) 197 Cal.App.4th 927, 934 [trial court not required to "comb the record and the law for factual and legal support that a party has failed to identify or provide"].) The memorandum in support of the motion to strike fails in this regard. Neither the court nor plaintiffs should be required to comb through the memorandum in support of the demurrer for arguments supporting the motion to strike.

Moreover, the motion to strike is entirely duplicative of the demurrer, which is being sustained as to any count that fails to state a cause of action.

County of Fresno's Demurrer

Judicial Notice

For the purpose of testing the sufficiency of the cause of action, the demurrer admits the truth of all material facts properly pleaded (i.e., all ultimate facts alleged, but not contentions, deductions or conclusions of fact or law). (*Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 966-967; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) The sole issue raised by a general demurrer is whether the facts pleaded state a valid cause of action - not whether they are true. Thus, no matter how unlikely or improbable, plaintiff's allegations must be accepted as true for the purpose of ruling on the demurrer. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) However, the allegations of the complaint are not accepted as true if they contradict or are inconsistent with facts judicially noticed by the court. The court may consider matters outside the complaint if they are judicially noticeable under Educ. Code §§ 452 or 453. (See *Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1474.)

In support of its demurrer the County of Fresno presents the most expansive and excessive request for judicial notice ever seen by this court. The County treats its demurrer as a plaintiff's opposition to a defendant's summary judgment motion, but in this case expecting to have the case dismissed by raising triable issues of fact.

The County's requests for judicial notice goes so far beyond the proper reasonable use of procedure, that they are denied in their entirety pursuant to Evidence Code section 352:

> It is well recognized that the purpose of judicial notice is to expedite the production and introduction of otherwise admissible evidence. . . . the matter to be judicially noticed must be relevant . . . . judicial notice [is] likewise qualified by Evidence Code, section 352, which permits the exclusion of any otherwise relevant evidence in the discretion of the trial court 'if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

(*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578.)

Writ of Mandate

The County contends that the writ petition is demurrable because the County Board has no *ministerial* duty to ensure that Public Defenders' caseloads do not exceed any particular caseload cap number.

Traditional mandate will issue to compel action by a governmental body or official when the action is a ministerial duty – one which a public agency is

required to perform. (*Women Organized for Employment v. Stein* (1980) 114 Cal.App.3d 133, 139.)

"A 'ministerial duty' is one generally imposed upon a person in public office who, by virtue of that position, is obligated 'to perform in a prescribed manner required by law when a given state of facts exists. [Citation.]' [Citations.]" (*City of King City v. Community Bank of Central California* (2005) 131 Cal.App.4th 913, 926.) It is a duty that a governmental or private body, by or through a public or private board, agency, official, or employee, is required to perform without the exercise of independent judgment or opinion. (*Ellena v. Department of Ins.* (2014) 230 Cal.App.4th 198, 205.) Ministerial actions '"are essentially automatic based on whether certain fixed standards and objective measurements have been met."' (*Sustainability of Parks, Recycling & Wildlife Legal Defense Fund v. County of Solano Dep't of Resource Mgmt.* (2008) 167 Cal.App.4th 1350, quoting *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 623.) In general, a ministerial act does not entail the exercise of judgment or discretion. "A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given set of facts exists." (*California Ass'n of Prof. Scientists v. Department of Fin.* (2011) 195 Cal.App.4th 1228, 1236, quoting *Kavanaugh v West Sonoma County Union High Sch. Dist.* (2003) 29 Cal.4th 911, 916.)

Plaintiffs cite to case law in which a writ of mandate issued to compel the performance of a constitutional duty, and argue that the cases stand for the proposition that mandate will issue notwithstanding a governmental actor's discretion.

In *Molar v. Gates* (1979) 98 Cal.App.3d 1, the county permitted male prisoners to access minimum security jail facilities with their attendant privileges, while denying such facilities and privileges to female inmates. (*Id.* at p. 6.) The petitioners sought a writ of mandate challenging this practice. Though the court acknowledged that county officials have discretion in this area, it held that this discretion did not preclude mandamus relief to remedy a violation of constitutional equal protection rights. (*Id.* at pp. 19, 20, 23, 25.)

However, this case does not aid plaintiffs. While the county had discretion whether "to provide minimum security facilities or outdoor work opportunities at all" (*id.* at 25), once a facility or privilege was offered to the male inmates, the county was mandated, under equal protection principles, to offer it to female inmates as well. That was reflected in the language of the writ "to refrain from providing facilities and programs to one sex which are not provided to the other and to provide like criteria in offering branch jail privileges to the two sexes . . ." (*Id.*) Hence, in *Molar*, once the county made any discretionary decision to provide facilities or privileges to one gender of inmates, the county had absolutely no discretion to refuse to provide facilities or privileges to the other.

Plaintiffs rely on *Horn v. County of Ventura* (1979) 24 Cal.3d 605, where the plaintiff filed a petition for writ of mandate challenging the constitutionality of the county's procedures for notifying landowners of governmental conduct affecting their property interest. The issue before the court was whether the board's action in approving the subdivision map was legislative (requiring no notice to landowners) or adjudicatory (requiring notice to landowners) in nature. The Subdivision Map Act mandates rejection of a subdivision plan "if it is deemed unsuitable in terms of topography, density, public health and access rights, or community land use plans." (*Id.* at pp. 614-615.) The court noted that resolution of these issues involve exercise of judgment and balancing of conflicting interests, hallmarks of the adjudicative process. The court rejected the concept that subdivision approvals are purely ministerial acts requiring no precedent notice or opportunity for hearing. (*Id.* at p. 615.) Therefore, the petitioner was entitled to notice. (*Id.*)

Plaintiffs rely on *Horn* because the California Supreme Court granted the plaintiffs' writ, despite finding that the challenged conduct involved the exercise of judgment and was not a purely ministerial act. But the discussion of discretionary versus ministerial acts did not involve the mandate to provide notice, but whether notice was required in the first place (i.e., whether it was an adjudicatory decision). *Horn* is not supportive of plaintiffs' position here. Clearly there is a constitutional duty, but it does not appear to be a ministerial duty. For that reason the demurrer to the petition for writ of mandate should be sustained.

The County also argues that Penal Code section 987.2(a) provides for a Sixth Amendment backstop, because it permits the public defender to decline cases for "any ...", which could include workload.

> When a public defender reels under a staggering workload ... [t]he public defender should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him, and order the employment of private counsel (Pen.Code, s 987a) at public expense.

(*Ligda v. Superior Court* (1970) 5 Cal.App.3d 811, 827-28.)

It is *possible* that Penal Code § 987.2(a)(3) ensures protection of the right to counsel, and renders plaintiffs' claims of systemic deficiencies in the indigent criminal defense system meritless. But such a determination would require a much more detailed record and level of review than can be afforded at this stage.

The County also contends that the petition is speculative because plaintiffs rely upon isolated acts to assert the existence of a systemic problem.

While plaintiffs do give examples, they are not the only allegations supporting the ultimate allegations of denial of right to counsel. The County complains that while 42,000 criminal cases are initiated in this court every year (Complaint ¶ 40), plaintiffs give a mere six examples of alleged Sixth Amendment

violations (Complaint ¶¶ 98-112). Plaintiffs do not need to allege more than that in the Complaint. "[T]he complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872.) If anything, the Complaint alleges too many facts and statistics. The demurrer will not be sustained on the ground that the examples pled are insufficient to establish *systemic* deficiencies. The County relies on *Rizzo v. Goode* (1976) 423 U.S. 362, for the proposition that plaintiffs' showing of a relatively few instances of violations by individual peace officers, without any showing of a deliberate policy, did not provide a basis for injunctive relief. But *Rizzo* did not involve an attack on the complaint. It was an appeal of orders entered after parallel trials of separate actions. It does not address what is required at the pleading stage.

The County continues to attack the existence of systemic deficiencies by contending that the writ petition is speculative because per-attorney caseloads cannot be reliably predicted, and because the Office's increasing capacities to handle work should be the result of recently-expanded PD training budgets. The County points to Proposition 47 (requiring misdemeanor sentence instead of felony sentence for certain offenses, the full impacts of which are not yet known), new positions added since the low point of the Great Recession, increase in the training budget. Basically, the County contends that the Complaint is speculative because there have been some changes, and caseloads could change in the future. The Complaint alleges many structural deficiencies in the indigent defense system: excessive caseloads (Complaint ¶¶ 4, 50-52); Case management practices that create conflicts of interest for attorneys (Complaint ¶¶ 54, 58-59, 80); inadequate resources (Complaint ¶¶ 69, 75, 78-79, 82); inadequate supervision (Complaint ¶ 95). Plaintiffs allege that these deficiencies cause the indigent defense system to provide for representation that falls below minimum Constitutional and statutory standards through inadequate preparation (Complaint ¶¶ 54, 63, 80, 87-88); lack of conflict-free legal representation (Complaint ¶¶ 36, 48, 54, 64, 66-71, 79, 80, 95, 112); lack of continuous representation (Complaint ¶ 63); inadequate opportunity for consultation (Complaint ¶¶ 64, 66, 68, 69-71); interference with competent representation due to inadequate training and support from supervisors (Complaint ¶¶ 53, 60, 74, 75, 95, 97); inadequate factual investigation (Complaint ¶¶ 78-80); lack of meaningful adversarial testing (Complaint ¶¶ 85, 87). These allegations are sufficient to state a claim against Fresno County under counts one through five and nine for systemically depriving Fresno County indigent defendants of assistance of counsel, despite the factual disputes raised by the County.

Separation of Powers

The County then argues that the writ petition is demurrable because it requires the court to violate the separation of powers doctrine.

"Managing a county government's financial affairs has been entrusted to . . . [the] county board of supervisors, and is an essential function of the board." (*Citizens for Jobs and the Economy v. County of Orange* (2002) 94 Cal.App.4th 1311, 1332-1333.) The County contends that the Board had to balance the budget during the Great Recession, and in doing so had to limit the number of employees. That power was vested in the board of supervisors. (See *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 234.)

However, authorities cited by the County indicate that the separation of powers issue is not a hard-and-fast bar to the relief sought here. The County cites to *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d. 317, 330:

> [T]o state a cause of action warranting judicial interference with the official acts of defendants, [the plaintiffs] **must allege much more than mere conclusions of law; they must aver the specific facts** from which the conclusions entitling them to relief would follow.

This citation indicates it becomes more of a sufficiency-of-the-pleading issue. Moreover, the County's reply shifts the separation of powers argument somewhat. Instead of arguing simply that the cannot issue the orders requested because it would violate the separation of powers doctrine, it argues in the reply that even if the *Strickland* test for violation of the right to counsel does not apply[1], and plaintiffs are not required to plead and prove prejudice, plaintiffs are still required to allege actual injury.

In the reply, the County argues that two cases apply the *Strickland* test in the context of Sixth Amendment systemic deficiency claims: *Platt v. State* (1996) 664 N.E.2d 357 and *Kennedy v. Carlson* (1996) 544 N.W.2d 1, 7.

In *Platt*, the plaintiff sought to enjoin the Marion County public defender system on the ground that it effectively denies indigents the effective assistance of counsel. The court found the claim for equitable relief inappropriate because a violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial, relying on *Strickland*. "This prejudice is essential to a viable Sixth Amendment claim and will exhibit itself only upon a showing that the outcome of the proceeding was unreliable. Accordingly, the claims presented here are not reviewable under the Sixth Amendment as we have no proceeding and outcome from which to base our analysis." However,

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[1] This was discussed above in the State's demurrer. *Strickland v. Washington* (1984) 466 U.S. 668, 691-94 held that in order to prevail on an ineffective-assistance-of-counsel claim, a defendant must show (1) that an error by counsel was professionally unreasonable and (2) that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different (i.e., prejudice). I agreed with plaintiffs that, pursuant to *Luckey v. Harris* (11th Cir. 1988) 860 F.2d 1012, the *Strickland* standard does not apply since plaintiffs are seeking prospective relief.

I'm not clear on the procedural posture of the case. And there is no mention of *Luckey*.

Kennedy was a suit by a chief public defender, contending that the public defender funding system violates the constitutional rights of indigent criminal defendants to the effective assistance of counsel by not providing sufficient funds for the operation of the Fourth Judicial District Public Defender's Office. "[C]onstrained by Minnesota's caselaw and the facts before us in this case," and because the plaintiff failed to show "injury in fact" to support his claim "as required under Minnesota law," the court rejected his request for judicial intervention.

The appeal was of the district court's order granting the plaintiff's motion for summary judgment. "The court acknowledged that it could not determine whether Kennedy's attorneys had provided ineffective assistance of counsel in any particular cases, but nevertheless found that judicial relief was necessary to prevent this from occurring in the future."

This decision was reversed on appeal. The appellate court did not apply *Strickland*, but the state's law regarding the requirement of a justiciable controversy in order to issue a declaratory judgment regarding the constitutionality of a statute. The court held that there was no justiciable controversy. Moreover, the appeal was of a decision fully evaluating the evidence in support of the claims being raised, not an attack on the pleadings. Furthermore, the court stated:

> In those cases where courts have found a constitutional violation due to systemic underfunding, the plaintiffs showed substantial evidence of serious problems throughout the indigent defense system. By comparison, Kennedy has shown no evidence that his clients actually have been prejudiced due to ineffective assistance of counsel. To the contrary, the evidence establishes that Kennedy's office is well-respected by trial judges, it is well-funded when compared to other public defender offices, and its attorneys have faced no claims of professional misconduct or malpractice.

Here, there are plenty of allegations of negative consequences of the systemic deficiencies alleged. As the County points out in its reply, in *Luckey v. Harris* (11th Cir. 1988), the Eleventh Circuit Court of Appeals stated that "[i]n a suit for prospective relief the plaintiff's burden is to show 'the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.'" It did not say that irreparable injury must be shown to have already occurred, which is what the County is arguing.

In the reply the County also relies on *Lewis v. Casey* (1996) 518 U.S. 343 in support of the contention that plaintiffs seeking systemic relief must plead and prove actual injury. The United States Supreme Court has "consistently required States to shoulder affirmative obligations to assure all prisoners meaningful

access to the courts." (*Bounds v. Smith* (1977) 430 U.S. 817, 824.) In *Lewis,* the Supreme Court concluded, however, that actual injury is required to state a claim for denial of access to the courts. (518 U.S. at pp. 351-352.) Such injury will be shown when an inmate can "demonstrate that a non-frivolous legal claim has been frustrated or was being impeded." (*Id.* at p. 353.) The Court likewise rejected the argument that the mere claim of a systemic defect, without a showing of actual injury, presented a claim sufficient to confer standing. (*Id.* at p. 349.)

While this is a compelling argument, the demurrer will not be sustained on this ground for the multiple reasons. First, the County's moving papers never argue this pleading injury requirement in the context of separation of powers. The court may refuse to consider new evidence or arguments first raised in reply papers, or it may grant the other side time for further briefing. (See *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538 ["The general rule of motion practice ... is that new evidence is not permitted with reply papers"].) Making the argument for the first time in the reply deprived plaintiffs of the opportunity to address it in their opposition. Second, *Lewis* arose from a different body of law (access to the courts) than is applicable here. *Luckey,* which arises in the context alleged deficiencies in provision of indigent defense services, does not require plaintiffs seeking prospective relief to show injury. Third, the appeal was of an injunction issued after a three-month bench trial. It was not an attack on the pleadings. The Court in *Lewis* found that the plaintiffs in that case had not set forth sufficient evidence to support a conclusion of systemwide violation and imposition of systemwide relief. (*Lewis, supra,* 518 U.S. at pp. 359-60.) Here, such a determination is premature. Fourth, plaintiffs allege that indigent defendants regularly experience wrongful conviction of crimes, guilty pleas to inappropriate charges, waiver of meritorious defenses, compelled waiver of right to speedy trial, harsher sentences than the facts of the case warrant, and waiver of appeal and post-conviction rights. (Complaint ¶ 98.) Plaintiffs allege that Yepez suffered harm as a result of deficiencies in the County's public defense system. (Complaint ¶¶ 99-106.) This and other examples (Complaint ¶¶ 107-112) allege injury.

Unclean hands

The County contends that the writ petition is demurrable as to Petitioner Yepez, relying on the doctrine of unclean hands and judicial notice of records related to plaintiff Yepez's criminal case. However, as noted above, the request for judicial notice of these records is denied. Even if the request were granted, the court could not conclusively say on such a scant record that allegations as to Yepez are false.

Other Available Remedies

The County contends that the writ petition is demurrable because plaintiffs have other remedies.

Where the primary right of a plaintiff is of a legal and not an equitable nature, and where a remedy for the invasion of that right is provided by law, equitable relief will not be granted if the legal remedy is adequate and capable of affording the plaintiff a complete measure of justice. (*Philpott v. Superior Court* (1934) 1 Cal.2d 512.) To be entitled to equitable relief in such circumstances, the plaintiff must show that he or she cannot obtain adequate or complete relief at law. (*Id.*) Equity will refuse to come to a plaintiff's assistance when he or she has lost his or her legal remedy by failing to take advantage of it where possible. (*Hogan v. Horsfall* (1928) 91 Cal.App.37.)

The County primarily focuses its unclean hands arguments on Yepez. For the reasons discussed above, the court will not sustain any demurrers based on the requests for judicial notice.

Moreover, an alternative remedy is only adequate if "it is capable of directly affording and enforcing the relief sought" in the writ. (*Dufton v. Daniels* (1923) 190 Cal. 577, 582.) Avenues for individual recourse are not an adequate alternative in suits seeking systemic relief for "wholesale deficiencies." (*See Knoff v. City and County of San Francisco* (1969) [rejecting argument that taxpayers should have pursued individual challenges to assessments of their own properties in writ action challenging misconduct in tax assessor's office].) As in *Knoff*, plaintiffs have pled individual examples "as symptomatic of the much broader problem the action is designed to relieve." Plaintiffs in this action do not seek to relieve the Public Defender as counsel in any particular case, but to correct wholesale deficiencies in the indigent defense system. Since a *Marsden* motion would provide relief only to the individual who filed it, that alternative is not capable of directly affording a systemic remedy. Accordingly, any failure by Yepez failure to file a *Marsden* motion does not render the writ petition demurrable.

The County argues that the writ petition is demurrable because injunctive relief, also sought in the Complaint, is an adequate remedy. The fact, however, "that an action in declaratory relief lies ... does not prevent the use of mandate." (*Brock v. Superior Court* (1952) 109 Cal. App. 2d 594, 603; accord *Glendale city Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 343 n.20 [citing *Brock*].) "Where relief is sought against a public body, however, the availability of injunctive relief is not a bar to mandate. (*Cal. Teachers Assn. v. Nielsen* (1978) Cal.App.3d 25, 28-29, citing *County of L. A. v. State Dept. Pub. Health* (1958) 158 Cal.App.2d 425, 446, and *Brock, supra.*) For the first time in its reply, the County cites to authority addressing this point. However, none of the authority cited indicates that dismissal of a petition for writ of mandate is warranted for the simple reason that injunctive relief is also sought.

Taxpayer Standing

The County argues that plaintiffs Phillips and Estrada lack taxpayer standing.

The County argues, like the State, that plaintiffs are not alleging wasteful or illegal expenditure of public funds; rather, they allege that not enough money is devoted to public defense. However, "[i]t is immaterial that the amount of the illegal expenditures is small or that the illegal procedures actually permit a saving of tax funds." (*Wirin v. Parker* (1957) 48 Cal.2d 890, 894 [taxpayer suit proper in constitutional challenge to practice of police conducting surveillance using concealed microphones]; *Blair v. Pitchess* (1971) 5 Cal.3d 258, 269 ["county officials may be enjoined from spending their time carrying out" an unconstitutional statute, even though that conduct "actually effect[s] a saving of tax funds."]) Thus, I would reject this particular attack on plaintiffs' taxpayer standing.

The County argues that plaintiffs lack taxpayer standing because the relief sought would violate the separation of powers doctrine. It argues that it would violate the separation of powers doctrine because plaintiffs attack the Board's discretionary budgetary decisions. The County contends that *Thompson v. Petaluma Police Department* (2014) 231 Cal.App.4th 101, 106, introduced separation of powers into the taxpayer standing issue by stating, "Courts should not interfere with a local government's legislative judgment on the ground that its funds could be spent more efficiently." However, the court never explicitly addressed or applied the separation of powers doctrine. For application of this concept, the County relies on *San Bernardino County v. Superior Court* (2015) 239 Cal.App.4th 679. However, *San Bernardino County* does not discuss separation of powers doctrine either.

In *San Bernardino County*, taxpayer organizations brought suit challenging a settlement agreement between the County and a private entity after a former county supervisor pled guilty to receiving bribes from the private entity in exchange for his vote approving the 2006 settlement agreement. The taxpayer organizations sought to have the settlement agreement declared void under the state law governing conflicts of interest of government officials. The County demurred on the grounds that the taxpayers lacked standing to bring the suit. The taxpayer organizations argued that they had standing under section 526(a). The trial court overruled the County's demurrer and the County filed a writ petition regarding the denial of its demurrer. The court of appeal for the Fourth Appellate District disagreed with the trial court, rejecting the taxpayer organizations' standing theories. (*Id.* at pp. 684-688.) The court held that "[t]axpayer suits are authorized only if the government body has a duty to act and has refused to do so. If it has discretion and chooses not to act, the courts may not interfere with that decision." (*Id.* at p. 686, internal citations omitted.)

Here, the County clearly has Constitutional duties to provide effective counsel for indigent criminal defendants. It has acted, but allegedly not in a manner that satisfies the Constitutional command. *San Bernardino County* addresses situations where the governmental body has the discretion whether or not to pursue legal action. The court found that there was no provision of law requiring it to pursue any claim. (*Id.* at p. 687.) For that reason the plaintiffs did not have taxpayer standing. (*Id.* at p. 688.) The case is not instructive on the

issue of whether plaintiffs in this case have standing to sue as taxpayers in this case. The demurrer on this ground will be overruled.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MMS **on** 4/11/16.
(Judge's initials) (Date)

SUPERIOR COURT OF CALIFORNIA - COUNTY OF FRESNO Civil Department, Central Division 1130 "O" Street Fresno, California 93724-0002 (559) 457-2000	*FOR COURT USE ONLY*
TITLE OF CASE: Carolyn Phillips vs.State of California	
CLERK'S CERTIFICATE OF MAILING	CASE NUMBER: 15CECG02201

I certify that I am not a party to this cause and that a true copy of the:

Minute Order

was placed in a sealed envelope and placed for collection and mailing on the date and at the place shown below following our ordinary business practice. I am readily familiar with this court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

Place of mailing: Fresno, California 93724-0002

On Date: 04/13/2016 Clerk, by L. Whipple, Deputy

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