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## STATEMENT OF THE CASE

Appellees, Plaintiffs in the trial court, filed a Class Action Petition and Motion for Class Certification, alleging, on behalf of themselves and a proposed class, systematic denial of misdemeanor indigent defendants' rights in the Williamson County courts at law, including the right to counsel under the Sixth and Fourteenth Amendments, the right to a public trial under the First, Sixth, and Fourteenth Amendments, corresponding violations of the Texas Constitution, and violations of the Fair Defense Act of 2001.

Williamson County and the judges who preside over its county courts at law systematically deny criminal defendants the right to counsel, causing serious harm to Appellees and the proposed class. When persons accused of crime are denied the right to counsel, the other criminal trial rights guaranteed by the United States and Texas Constitutions are undermined, leaving unrepresented defendants without knowledge of what those other rights are or how to assert them in court. Appellants' practices, by denying persons accused of crime the assistance necessary to investigate their cases and navigate the legal system, also increase the likelihood of false convictions, leaving the public at continued risk from the true perpetrators. Persons who are accused of crime and denied the right to counsel are likely to receive longer sentences, injecting an arbitrary disproportionality into criminal sentencing and burdening taxpayers by incarcerating defendants not in relation to the threat they pose to public safety but as a result of unfair and unconstitutional court procedures.

The procedural history of the case is as follows: On June 12, 2006, Appellees filed their Original Class Action Petition and a Motion for Class Certification. On June

23, 2006, Appellants filed an Emergency Motion for Temporary Restraining Order.<sup>1</sup> On June 28, 2006, Appellants filed their Answer, Pleas to the Jurisdiction, and Special Exceptions. On July 14, 2006, Appellees filed a Motion to Recuse or Disqualify and an Opposition to Appellants' Motion for Temporary Restraining Order. On July 18, 2006, Appellees filed a First Amended Class Action Petition, adding additional named plaintiffs. On July 21, 2006, Appellees filed a Second Amended Class Action Petition, again adding named plaintiffs. On July 25, 2006, Appellants filed an Opposition to Plaintiffs' Motion to Recuse. On July 31, 2006, Appellants filed Supplemental Pleas to the Jurisdiction. On August 7, 2006, after a hearing on the Motion to Recuse, the Honorable Ken Anderson recused himself. On August 14, 2006, the Honorable Joseph H. Hart was appointed to hear this case.

On August 18, 2006, Appellees requested a hearing date for their Motion for Class Certification, which was set for September 5, 2006, and sent notice to Appellants by fax and U.S. mail on August 19, 2006. Appellees filed their Opposition to Defendants' Pleas to the Jurisdiction and Special Exceptions on August 24, 2006, and received notice that Appellants had also set the Pleas to the Jurisdiction and Special Exceptions for hearing on September 5, 2006. The trial court held a hearing on the motion for class certification, pleas to the jurisdiction, and special exceptions on September 5, 2006. Due to time limitations, after hearing argument on the pleas to the jurisdiction, the trial court decided

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<sup>1</sup> In their TRO Motion, (Clerk's Record (CR) at 29-31), Appellants alleged various ethical violations by Appellees' counsel. Appellants never sought a hearing on their TRO Motion. Appellees dispute Appellants claims that Appellees' counsel has engaged in unethical behavior, and no tribunal or other body has found that counsel engaged in such behavior. Despite their refusal to pursue their unsubstantiated claims before the trial court, Appellants nevertheless revive those claims in the very first paragraph of their brief on appeal. (Appellants' Br. at 7.)

to continue the hearing to October 4, 2006. On September 22, 2006, in response to a request from the district court, Appellees submitted a letter brief, arguing, in part, that judicial efficiency would best be served by considering the motion for class certification at the same time as the Pleas to the Jurisdiction. (CR at 8-9.)

When Appellees arrived for the hearing on October 4, 2006, Appellants served, without prior notice, petitions for writs of mandamus, prohibition, and injunction. Appellants withdrew those motions after the trial court denied Appellants' Pleas to the Jurisdiction and Appellants filed this interlocutory appeal.

### **ISSUES PRESENTED**

**Reply to Issue One:** The trial court has jurisdiction to hear Appellees' challenge to Appellants' unlawful policy and practice of violating indigent misdemeanor defendants' right to counsel and to fashion appropriate equitable relief that will stop this ongoing violation of the rights of Appellees and members of the proposed class. Civil courts have jurisdiction to hear 42 U.S.C. § 1983 challenges to the constitutionality of criminal procedures, and courts in Texas and around the country consistently exercise that jurisdiction to hear challenges that seek to vindicate the pretrial procedural rights of criminal defendants.

**Reply to Issue Two:** Appellees' have no adequate remedy at law for the violation of their right to counsel and right to a public trial. Pro se post-conviction appeals would, at best, result in new trials for indigent defendants who have been unconstitutionally deprived of counsel, unfairly convicted, imprisoned for up to a year, and then successfully appealed their convictions without the assistance of counsel. Even

successful individual appeals, moreover, would do nothing to end systemic problems with Williamson County's indigent defense system. Forcing indigent defendants to individually vindicate their right to counsel through pro se post-conviction appeals would violate Due Process, offer inadequate relief, and fail to stop the systematic violations alleged in this case.

**Reply to Issue Three:** Appellees show irreparable harm and their claims are justiciable. The Supreme Court has repeatedly held that the violation, threatened violation, or delay in providing constitutional rights – exactly what is alleged here – is per se irreparable harm. In addition, controlling case law holds that inherently transitory claims, such as those of pretrial arrestees, are an exception to the mootness doctrine because they are capable of repetition but would otherwise evade review.

**Reply to Issue Four:** Appellees' open courts claim is ripe because Appellants' have adopted an express policy of excluding members of the public from the Williamson County courts at law and have consistently enforced this policy, causing Appellees' to have a reasonable belief that the policy will result in an imminent violation of their constitutional and statutory rights.

## STATEMENT OF FACTS

Pursuant to Texas Rule of Appellate Procedure 38.1(f), Appellees challenge Appellants' Statement of Facts because it is misleading, incomplete, and contains characterizations that constitute argument. Appellees respectfully submit the following statement of facts:<sup>2</sup>

The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county are required to adopt and publish uniform countywide procedures for the timely and fair appointment of counsel to indigent defendants. Tex. Code Crim. Proc. art. 26.04(a) (2005). These procedures must "apply to each appointment of counsel made by a judge or the judges' designee in the county." *Id.* at art. 26.04(b)(2). When Article 26.04 was amended in 2001 to require countywide indigent defense procedures, the statutory county court and district court judges in Williamson County complied with the new law by adopting the "Report of Williamson County, Texas Concerning Indigent Defense: Joint Felony and Misdemeanor Court Rules," which became effective on January 1, 2002.<sup>3</sup>

On August 20, 2002, the Williamson County Commissioners' Court adopted a resolution authorizing Defendant Doerfler to apply for indigent defense grant funding from the Task Force on Indigent Defense. In its resolution, the Commissioners' Court

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<sup>2</sup> In determining whether it has jurisdiction, a court must "construe the pleadings in favor of the plaintiff and look to the pleader's intent." *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002).

<sup>3</sup> Available at <http://tfid.tamu.edu/CountyDocuments/Williamson/2002%20Williamson%20Plan.pdf> (beginning on page 8 of 35). This plan was modified on July 23, 2003, and Appellants Higginbotham Brooks and Wright were county court at law judges when that plan, currently operative with minor amendments, was adopted. The modified plan is available at <http://tfid.tamu.edu/CountyDocuments/Williamson/2003%20Williamson%20District%20and%20County%20Amended%20Plan.pdf>. Excerpts at CR 530-537.

designated Defendant Doerfler as the “Program Director” for the county’s indigent defense program, a position defined in state regulations as the “officer or employee responsible for program operation or monitoring or implementation of the indigent defense plan and who will serve as the point-of-contact regarding the program’s day-to-day operations.” 1 Tex. Admin Code § 173.301. Defendant Doerfler applied for state indigent defense funding for fiscal year 2003 on September 26, 2002, identifying himself as the Program Director on the grant application. (CR at 139-140.) For fiscal years 2004, 2005, and 2006, the Williamson County Commissioners’ Court again designated Defendant Doerfler Program Director and authorized him to apply for state indigent defense grant funds, and Defendant Doerfler applied for those funds as authorized. (Id. at 139.) In exchange for its acceptance of grant conditions that correlate to specific provisions of the Fair Defense Act, Williamson County has been awarded approximately \$540,000 in state grant funds during fiscal years 2003 to 2006. (Id. at 140.)<sup>4</sup>

Kerry Heckman was arrested on March 26, 2006, for driving while intoxicated. (CR at 124.) Mr. Heckman is indigent and cannot afford to hire an attorney. (*Id.*) The Williamson County Attorney’s office filed an information against Mr. Heckman on April 24, 2006. (CR at 452.) During his first court appearance in May 2006, court officials

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<sup>4</sup> The Appellants claim that the Task Force on Indigent Defense has “reviewed and approved” the County’s Indigent Defense Plan. (Appellants’ Br. at 8, n.1.) Appellants never made this argument at the trial court level and they have not introduced any record evidence to support this assertion. No such evidence exists. The Task Force on Indigent Defense has never reviewed, let alone approved, Williamson County’s actual practices for appointing counsel to indigent misdemeanor defendants. It is true that Williamson County has agreed to include certain provisions in its written indigent defense plan adopted under Article 26.04 of the Code of Criminal Procedure as a condition for receiving indigent defense grant funds from the Task Force. These provisions correspond to some, but not all, of the requirements of the Fair Defense Act. However, the Task Force has not audited Williamson County’s plan for compliance with the Fair Defense Act or in any way reviewed whether the plan is consistent with constitutional

from Williamson County encouraged Mr. Heckman to plead guilty or no contest without consulting an attorney, and encouraged him to speak to prosecutors without the aid of an attorney. (*Id.* at 124.) After court personnel made these announcements, the presiding judge appeared and immediately began to call the defendants to the bench to hear their pleas, without any admonishment of rights. (*Id.*)<sup>5</sup>

Mr. Heckman was not told of the process or procedures for requesting a court-appointed attorney, that an attorney would be provided if the court found that he was indigent, or the standards the court used to determine eligibility for a court-appointed attorney. (*Id.*) Although he was not properly advised of his right to a court-appointed attorney, Mr. Heckman informed the court that he could not afford an attorney and requested a court-appointed attorney.<sup>6</sup> (*Id.*) The court responded to the request by commenting on Mr. Heckman's physical appearance, implying that because Mr. Heckman looked healthy and had worn his best clothes to court that he did not qualify for a court-appointed attorney. (*Id.*) The court did not ask questions about Mr. Heckman's financial situation. (*Id.*)

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requirements concerning the right to counsel. The Task Force also has not reviewed whether Williamson County is implementing its indigent defense plan as written.

<sup>5</sup> Pursuant to TEX. CODE CRIM. PROC. art 26.04(b)(2), the uniform indigent defense procedures developed by the County's sitting judges control each appointment of counsel made in Williamson County, including those made by visiting judges. Judge Jones was assigned to preside for two days, May 24 and 25, 2006, before and after which date the Appellant Brooks presided over the cases of Appellees Heckman, Peterson, and Maisenbacher.

<sup>6</sup> In their Statement of Facts, Appellants repeatedly reference forms signed by Appellees stating that they would hire a lawyer. The circumstances under which those forms were signed, as pleaded in the Second Amended Petition and discussed in the main text, raise serious questions about whether any alleged waiver was knowing and voluntary. In any event, each Appellee withdrew any such waiver when he or she subsequently attempted to request court-appointed counsel. Appellants' effectively concede that Mr. Heckman withdrew any alleged waiver of his right to appointed counsel when they note that, subsequent to his appearance before the magistrate, he submitted a request for appointed counsel and the request was denied. (Appellant's Br. at 10.)

Despite providing proof that he is indigent and requesting a court-appointed attorney, Mr. Heckman still had not been appointed an attorney on June 12, 2006, when the Original Class Action Petition was filed. (*Id.*) After this suit was filed, Mr. Heckman appeared at a hearing and was appointed an attorney. (RR Vol. 2 at 16.) On July 21, 2006, with assistance of counsel, Mr. Heckman pled no contest. (RR Vol. 2 at 18.)

Monica Maisenbacher was arrested on or about April 5, 2006, for an assault arising from a domestic dispute, and shortly thereafter was charged in Williamson County with a misdemeanor offense punishable by imprisonment. (CR at 125.) Ms. Maisenbacher is indigent and cannot afford to hire an attorney. (*Id.*) She is a former health care professional with a serious chronic illness that prevents her from working. (*Id.*) Her illness has and will continue to require extensive treatment. (*Id.*)

On or about April 5, 2006, Ms. Maisenbacher appeared before a magistrate at the Williamson County Jail. (*Id.*) The magistrate did not inform Ms. Maisenbacher that she had a right to a court-appointed attorney, did not provide any information about how to apply for a court-appointed attorney, did not provide forms that would allow her to ask for a court-appointed attorney, and did not inform her of the county or state standards for determining financial eligibility for court-appointed counsel. (*Id.* at 125-126) On April 13, 2006, the Williamson County Attorney's office filed an information against Ms. Maisenbacher. (*Id.* at 456.)

While Ms. Maisenbacher was at the courthouse for her first appearance on May 24, 2006, court officials from Williamson County encouraged Ms. Maisenbacher to plead guilty or no contest without consulting an attorney, and encouraged her to speak to

prosecutors without the aid of an attorney. (*Id.* at 126) Despite advice from the presiding judge and other court personnel that she plead guilty or no contest, Ms. Maisenbacher pled not guilty and asked for a court-appointed lawyer at her first appearance. (*Id.*) When she requested a court-appointed attorney, the court asked, “Why should Williamson County pay for your mistake? You look like you can work.” (*Id.*) Ms. Maisenbacher explained her medical condition to the court and stated that she would be unable to work for an extended period of time. (*Id.*) The court then ordered her to fill out a financial eligibility form, but denied her request for an attorney. (RR Vol. 2 at 19.)

Despite providing proof that she is indigent and requesting a court-appointed attorney, Ms. Maisenbacher still had not been appointed an attorney as of the time the Original Class Action Petition was filed. (CR at 126.) The criminal charges against Ms. Maisenbacher were dismissed on July 25, 2006, after she had been afforded the assistance of counsel appointed to her case after this lawsuit was filed. (RR Vol. 2 at 20.)

Sylvia Peterson was arrested in February 2005 for Driving While Intoxicated and shortly thereafter was charged in Williamson County with a misdemeanor offense punishable by imprisonment. (CR at 126.) Ms. Peterson is indigent and cannot afford to hire an attorney. (*Id.*) Ms. Peterson is the mother of two minor children and suffers from sarcoidosis, a form of cancer, and this serious and painful disease prevents her from working. (*Id.*) Her husband also is disabled. (*Id.*) Her household supports itself with disability payments issued to her husband and with food stamps. (*Id.*) The total amount of all the benefits the household of four receives is less than \$1000 per month. (*Id.* 127.)

After she was released on bond for her DWI charge, Ms. Peterson was arrested on a subsequent charge for assault after a dispute with her husband. (*Id.*) She was unable to post bond and remained in jail for several weeks. (*Id.*) During her time in jail, Ms. Peterson's multiple requests to speak to an attorney were ignored by Williamson County jail officials and the magistrate judge. (*Id.*)

During her time in jail, Ms. Peterson made an appearance before the presiding judge, but was sent back to confinement because of the court's confusion over her unrelated assault and DWI charges. (*Id.*) A few weeks later, Ms. Peterson again appeared in court and was informed that she already had been appointed a lawyer, although this lawyer had not yet contacted her. (*Id.*) Within a few days of this second court appearance, Ms. Peterson was released from jail and understood that the assault charge had been dropped. (*Id.*)

On February 11, 2005, the Williamson County Attorney's office filed an information charging Ms. Peterson. (CR 454-455) A second information realleging the offense was filed on March 3, 2006. (*Id.*) In or around April 2006, Ms. Peterson's appointed attorney withdrew from her DWI case. (*Id.* at 127.) Ms. Peterson's financial circumstances had not materially changed since the initial appointment was made in her case and she still could not afford to hire an attorney. (*Id.*) Nevertheless, the court failed to appoint a new attorney to replace the withdrawing attorney. (*Id.*)

During her court appearance in Williamson County in May 2006, court officials from Williamson County encouraged Ms. Peterson to plead guilty or no contest without consulting an attorney, and encouraged her to speak to prosecutors without the aid of an

attorney. (*Id.*) After court personnel made these announcements, the presiding judge appeared and immediately began to call the defendants to the bench to hear their pleas, without any admonishment of rights. (*Id.* at 128)

At her May 2006 court appearance, Ms. Peterson requested a new court-appointed lawyer to replace the appointed lawyer who had withdrawn from her case. (*Id.*) After Ms. Peterson informed the court about her illness, the presiding judge said to Ms. Peterson, “you look ok to me,” and refused her request for a court-appointed attorney. (*Id.*)

On June 29, 2006, almost four months after the lawyer originally appointed to her criminal case withdrew and two weeks after the amended petition adding her to this case was filed, Appellants appointed an attorney to Ms. Peterson (RR Vol. 2 at Tab 6), and, with assistance of counsel, her charges were disposed of on September 8, 2006. (Appellants’ Br. at 11.)

Tammy Newberry was arrested on or about June 29, 2006, for an assault arising from a domestic dispute and shortly thereafter was charged in Williamson County with a misdemeanor offense punishable by imprisonment. (CR at 128.) Ms. Newberry is indigent and cannot afford to hire an attorney. (*Id.*) Ms. Newberry has a dependent son. (*Id.*)

On or about June 30, 2006, Ms. Newberry appeared before a magistrate at the Williamson County Jail. (*Id.*) The magistrate did not inform Ms. Newberry that she had a right to a court-appointed attorney, did not provide any information about how to apply for a court-appointed attorney, did not provide forms that would allow Ms. Newberry to

ask for a court-appointed attorney, and did not inform Ms. Newberry of the county or state standards for determining financial eligibility for court-appointed counsel. (*Id.* at 128-129.) On August 6, 2006, the Williamson County Attorney's office filed an information against Ms. Newberry. (*Id.* at 458.)

While Ms. Newberry was before the magistrate, Ms. Newberry observed the magistrate fill out paperwork indicating that Ms. Newberry would hire her own lawyer. (*Id.* at 129.) Ms. Newberry never stated to the magistrate that she intended to hire her own lawyer. (*Id.*)

When Ms. Newberry was returned to the "holding tank" after appearing before the magistrate, she noticed that another inmate had a court-appointed attorney request form. (*Id.*) Ms. Newberry took this form to the jailer and asked him to get a copy of the form for her. (*Id.*) The jailer refused, saying that Ms. Newberry would have to get a copy of the form from the courts. (*Id.*) The other inmate then informed Ms. Newberry that she could keep the court-appointed attorney request form, and Ms. Newberry completed it. (*Id.*) Ms. Newberry attempted to give the completed form to the jailer, but the jailer informed her that the form was not accepted in the "holding tank," and that Ms. Newberry would have to turn the form in to the courts. (*Id.*)

On October 20, 2006, subsequent to the filing of the amended petition adding her to this lawsuit, Ms. Newberry was appointed an attorney. (Appellants' Br. at 12.) The charges against her are still pending. (*Id.*)

Elveda Vieira was arrested in or about June 2006 for assault and resisting arrest and shortly thereafter was charged in Williamson County with misdemeanor offenses

punishable by imprisonment. (CR at 130.) Ms. Vieira is indigent and cannot afford to hire an attorney. (*Id.*) She has a disability that prevents her from working, and receives Social Security Disability Insurance payments. (*Id.*) On June 16, 2006, Dain Johnson, Justice of the Peace for Precinct 1 in Williamson County, found that Ms. Vieira was indigent and unable to pay the costs of a civil appeal in an unrelated case. (*Id.*)

In or about June 2006, Ms. Vieira appeared before a magistrate at the Williamson County Jail. (*Id.*) When Ms. Vieira appeared before the magistrate, he told her that she had a right to an attorney, and Ms. Vieira replied that she could not afford one. (*Id.*) The magistrate told Ms. Vieira that she could request an attorney at her first appearance before a judge. (*Id.*) Although Ms. Vieira was in custody at the time of her conversation with the magistrate, the magistrate informed Ms. Vieira that she had no right to a court-appointed attorney until her first appearance. (*Id.*) The magistrate did not provide forms that would allow Ms. Vieira to ask for a court-appointed attorney, and did not inform Ms. Vieira of the county or state standards for determining financial eligibility for court-appointed counsel. (*Id.*) The Williamson County Attorney's office filed an information against Ms. Vieira on July 27, 2006. (*Id.* at 459.) On October 20, 2006, Ms. Vieira appeared in court for her first appearance and was denied a court-appointed attorney, but was given the opportunity to resubmit her application at a hearing scheduled for December 15, 2006. (Appellants' Br. at 12.) The misdemeanor charges against her remain pending. (*Id.*)

Plaintiff Kelsey Stempko appears through her Next Friend Jessica Stempko. Ms. Kelsey Stempko was arrested on or about June 15, 2006, for possession of marijuana and

shortly thereafter was charged in Williamson County with a misdemeanor punishable by imprisonment. (CR at 132.)

Ms. Kelsey Stempko is indigent and cannot afford to hire an attorney. (*Id.*) She is a high school student and has and will continue to have very little income. (*Id.*) On or about June 16, 2006, Ms. Kelsey Stempko appeared before a magistrate in the Williamson County Jail. (*Id.*) The magistrate informed Ms. Kelsey Stempko that she had a right to an attorney. (*Id.*) The magistrate did not provide any information about how to apply for a court-appointed attorney, did not provide forms that would allow her to ask for a court-appointed attorney, and did not inform her of the county or state standards for determining financial eligibility for court-appointed counsel. (*Id.*)

While Ms. Kelsey Stempko was before the magistrate, the magistrate gave her paperwork indicating that she would hire her own lawyer. (*Id.*) Ms. Kelsey Stempko never stated to the magistrate that she intended to hire her own lawyer. (*Id.*) Ms. Kelsey Stempko wanted to request a court-appointed attorney when she appeared before the magistrate, but never was given an opportunity to do so. (*Id.*)

After Ms. Kelsey Stempko was released from the Williamson County Jail on personal bond, Ms. Jessica Stempko called Defendant Brooks' chambers, indicated that Ms. Kelsey Stempko needed a court-appointed attorney to assist her in her case, and asked for information regarding the procedures she needed to follow to obtain a court-appointed lawyer before her first appearance. (*Id.* at 132-133,) A Williamson County court official answering the phone in Defendant Brooks' chambers informed Ms. Jessica Stempko that Ms. Kelsey Stempko could not obtain a court-appointed lawyer before her

first appearance. (*Id.*) On July 20, 2006, the Williamson County Attorney's office filed an information charging Ms. Stempko. (*Id.* at 460.)

Despite her efforts, and her mother's efforts on her behalf, to submit a written request for court-appointed counsel and provide proof that she is indigent, Ms. Kelsey Stempko was not allowed to submit a written request for counsel until September 8, 2006. On September 8, 2006, subsequent to the filing of the amended petition adding her to this lawsuit, Ms. Kelsey Stempko was appointed an attorney. The misdemeanor charges against her remain pending. (Appellants' Br. at 13.)

Jessica Stempko's seventeen year-old daughter, Ms. Kelsey Stempko, is charged with a misdemeanor offense punishable by imprisonment in Williamson County. (CR at 134.) Ms. Jessica Stempko desires to accompany her minor daughter Ms. Kelsey Stempko to Ms. Kelsey Stempko's appearances in the Williamson County court at law, and has a reasonable belief that she will suffer imminent harm based on Williamson County court officials' routine practice of denying members of the public access to court proceedings.<sup>7</sup>

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<sup>7</sup> In the final paragraph of their Statement of Facts, Appellants attempt to litigate the issue of special exceptions. (Appellants' Br. at 13.) While not an issue in this appeal, Appellants' special exceptions lack merit. (CR at 291-304.) Furthermore, the primary complaints raised by Appellants in their discussion of the special exceptions focus on (1) the trial court's failure to rule on the special exceptions, and (2) evidentiary issues relevant to individual Appellants' liability. These complaints are without merit. It is Appellants' own interlocutory appeal that prevented the trial court from reaching the pending special exceptions after the hearing on the same was continued to October 4, 2006. Furthermore, the question of whether Appellees can "produce evidence substantiating" (Appellants' Br. at 13) their pleaded claims against the sitting county court at law judges is one appropriately raised in a motion for summary judgment rather than in special exceptions.

## SUMMARY OF THE ARGUMENT

In “our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.” *Gideon v. Wainwright*, 372 U.S. 335, 343, 9 L. Ed. 2d 799, 805 (1963). This case is about Williamson County’s systematic failure to implement *Gideon* and its progeny, and Appellants’ policy and practice of denying the right to counsel to indigent misdemeanor defendants. The allegations in Appellees’ Second Amended Petition state a cause of action, establish jurisdiction, demonstrate irreparable harm, and conclusively show that this case is justiciable. This Court should affirm the trial court’s ruling and return this case to the district court for resolution of pending motions and adjudication on the merits.

Appellants’ main argument – that Appellants’ practice of denying indigent defendants’ right to counsel does not cause irreparable harm and cannot be remedied by the trial court because indigent defendants may be successful in vindicating their rights on a pro se appeal – lacks merit and is absurd in its consequences. Appellants essentially contend that it is acceptable that indigents be denied counsel, found guilty, imprisoned, and then forced to navigate the difficult appellate process pro se, all in order to receive the benefit of a right to counsel they have possessed all along. *Gideon* and common sense stand in stark contrast to Appellants’ position, however, and authority from Texas state courts, the Supreme Court, and other courts across the country demonstrate that the right to counsel may be vindicated through equitable relief.

As the district court found, Appellees' pleadings demonstrate that this Court has jurisdiction under 42 U.S.C. § 1983, the Declaratory Judgment Act, the Fair Defense Act, the Texas Code of Criminal Procedure, and the Texas Constitution. Appellees cite numerous cases in which courts have found nearly identical cases to be within their jurisdiction and justiciable. This case law shows that there is no requirement that Appellees bring their claims in their criminal cases. Courts take jurisdiction over these claims because the issues Appellees' raise – systematic Sixth Amendment violations – may not be raised in a criminal case. Appellees' allege a violation of their rights, no adequate remedy at law, and irreparable harm, and thus establish that the trial court has jurisdiction to grant equitable relief. The trial court's ruling should be affirmed.

### **ARGUMENT**

#### **ISSUE ONE: APPELLEES HAVE ALLEGED ALL ELEMENTS REQUIRED TO ESTABLISH THE TRIAL COURT'S JURISDICTION OVER APPELLEES' SUIT FOR EQUITABLE RELIEF.**

Appellees' pleadings demonstrate unequivocally that the trial court has jurisdiction over this case. Texas courts, like their federal counterparts, have jurisdiction to hear systemic challenges to unlawful criminal procedures and to enter relief for those denied their constitutional and statutory pretrial rights.

In determining whether it has jurisdiction, a court must “construe the pleadings in favor of the plaintiff and look to the pleader's intent.” *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002). In deciding a plea to the jurisdiction, a court may not weigh the claims' merits but must consider only the plaintiffs' pleadings and the evidence pertinent to the jurisdictional inquiry. *Id.*

Appellees' allegations are sufficient to state a cause of action and give the district court jurisdiction over this case. Under 42 U.S.C. § 1983, Appellees have a cause of action if they allege that Appellants acted "under color" of state law to deprive Appellees of "any rights, privileges, or immunities secured by the Constitution . . ." Appellees allege that Williamson County and the judges who preside over its county courts at law, acting in their official capacities, follow a policy and practice of routinely failing to inform persons accused of crime of their right to counsel, providing inaccurate and inadequate information about the right to appointed counsel in order to discourage requests for counsel, encouraging defendants to waive their right to counsel and speak directly to prosecutors; threatening defendants who assert the right to counsel, and delaying or denying appointment of counsel to individuals who request an attorney and are eligible for court-appointed counsel under Texas and federal law.

Appellees further allege that, in violation of federal and state law, Appellants refuse to appoint counsel to indigent accused persons who have requested counsel because, among other reasons, the accused persons are not physically disabled, or the accused persons' family or friends post bond on their behalf. This conduct amounts to a systematic denial of basic civil rights to an entire class of individuals in Williamson County. Appellees allege acts and omissions taken under color of state law to deny individuals their rights, thereby stating a cause of action under § 1983, and these allegations are plainly sufficient to give the district court jurisdiction.

In this section, Appellees will demonstrate that courts routinely hear systemic challenges to allegedly unconstitutional pretrial criminal procedures, and that the few cases Appellants rely on to challenge the trial court's jurisdiction are inapplicable here.

**A. Texas Civil Courts Have Jurisdiction Over Pretrial Challenges to the Constitutionality of Criminal Procedures.**

Appellees are challenging unconstitutional and illegal practices in the pretrial handling of their criminal cases, which is a question of criminal procedure. Appellees' challenge is of a kind with numerous civil cases seeking equitable relief that have been litigated in state and federal courts in Texas and across the country. Appellants' argument that the trial court may not exercise jurisdiction over Appellees' lawsuit is based on cases limiting courts' jurisdiction to review the constitutionality of penal statutes, and ignores the many cases holding that courts may exercise equitable jurisdiction over cases involving procedural issues in criminal cases.

The Texas Constitution plainly grants jurisdiction to the trial court to hear this matter, because Texas district courts' "jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies" unless specifically denied in the Texas Constitution or statutes. TEX. CONST. art. V, § 8.

Confirming this broad grant of jurisdiction, Texas courts have upheld district court jurisdiction to hear challenges to criminal procedures. For instance, in *Reyna v. City of Weslaco*, 944 S.W.2d 657 (Tex. App. — Corpus Christi 1997, no pet.), the appeals court reversed a grant of summary judgment in favor of defendants in a § 1983 suit for prospective equitable relief. Misdemeanor criminal defendants had brought suit

challenging the constitutionality of a county court's practice of denying defendants immediate access to complaints filed against them. The *Reyna* court found that the trial court had jurisdiction and that the plaintiffs established the case was justiciable.

Appellants rely entirely on *State v. Morales*, 869 S.W.2d 941 (Tex. 1994), for their argument that the district court does not have jurisdiction to hear this case, but neither the legal analysis nor the facts of *Morales* are applicable here. In *Morales*, the Texas Supreme Court vacated a lower court declaration pronouncing a *penal statute* against sodomy unconstitutional under the Texas constitution. 869 S.W.2d at 949. The Court held that civil courts may not “*enjoin the enforcement of*, or issue a declaratory judgment *determining the constitutionality of* [a penal statute].” *Id.* at 942 (emphasis added).

In contrast to *Morales*, Appellees here do not seek to enjoin the enforcement of, or to obtain a declaration determining the constitutionality of, any Texas statute, let alone a penal statute. Appellees seek relief from *procedures* that violate the Texas Code of Criminal Procedure and constitutional rights. Appellees do not challenge the penal laws under which they are charged or seek to enjoin their prosecutions – they simply wish to have the charges against them adjudicated in a manner that comports with the Constitution and Texas law.<sup>8</sup>

Courts across the country routinely hold that Plaintiffs asserting Sixth Amendment violations on behalf of themselves and/or a class of pre-conviction criminal defendants state a cause of action under § 1983 and may obtain prospective injunctive and

declaratory relief. The following is a summary of a number of cases that Appellees cited in their brief below (CR 163-267; 311-473):

**Federal cases:**

- ***Stinson v. Fulton County Board of Commissioners***: (N.D. Ga. Sept. 15, 1994 and Nov. 29, 1994). A class of pre-conviction indigent defendants brought Sixth Amendment claims for systemic prospective relief pursuant to § 1983. The court found that these and other allegations stated a claim, denied defendants’ motion to dismiss, and certified the class. *Id.* at 4.
- ***Luckey v. Harris***, 860 F.2d 1012 (11th Cir. 1988), *vacated on abstention grounds sub. nom., Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992).<sup>9</sup> In *Luckey*, a class of indigent persons who presently were or would be charged with criminal offenses in the future brought Sixth Amendment claims under § 1983 seeking prospective reforms in the indigent defense system in Fulton County, Georgia. 860 F.2d at 1013. The trial court held that plaintiffs’ Sixth Amendment claims brought under § 1983 stated a claim upon which systemic equitable relief could be granted, *id.* at 1018, although the case eventually was dismissed on abstention grounds.
- ***Trombley v. County of Cascade***, No. CV-87-114-AF, 1989 WL 79848 (9th Cir. 1989). A class composed of “persons who have been, presently are, or may in the future be represented by the Cascade County Public Defenders” brought Sixth Amendment claims under § 1983 seeking systemic prospective relief. *See* Compl. ¶ 8, *Trombley v. County of Cascade*, No. CV-87-114-GF (D. Mont. filed May 28, 1987). After the Court of Appeals for the Ninth Circuit reversed the district court’s decision to abstain, *see Trombley v. County of Cascade*, 879 F.2d 866 (9th Cir. 1989), the parties agreed to a consent decree altering the county’s indigent defense practices.
- ***Johnson v. Zurz***, 596 F. Supp. 39 (N.D. Ohio 1984). Plaintiff indigent child support obligor brought suit against defendant state court judge seeking

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<sup>8</sup> Moreover, the *Morales* court recognized that civil courts have jurisdiction to enjoin policies used to enforce a penal statute, and that such an injunction “may be granted to protect personal as well as property rights.” *Morales*, 869 S.W.2d at 946, discussing *Passel v. Fort Worth Ind. School Dist.*, 440 S.W.2d 61 (Tex. 1969).

<sup>9</sup> The term “abstention refers to judicially created rules whereby federal courts may not decide some matters before them even though all jurisdictional and justiciability requirements are met.” CHEMERINSKY, FEDERAL JURISDICTION at 761. Abstention thus applies only to federal courts and was created for “the protection of states in the system of federalism.” *Id.* at 762. *See also* BLACK’S LAW DICTIONARY (Bryan A. Gardner ed., Pocket Edition 1996), at 3 (abstention is “[a] federal court’s relinquishment of jurisdiction when necessary to avoid needless conflict with a state’s administration of its own affairs”). There are no federalism concerns here, of course, because Plaintiffs have sued in state court.

prospective relief under § 1983 for failure to appoint counsel in contempt proceedings. The court certified a class and enjoined the state court from denying counsel to indigent people facing imprisonment.

- ***Tucker v. City of Montgomery Bd. of Comm'rs***, 410 F. Supp. 494 (M.D. Ala. 1976) (three judge court). In *Tucker*, the plaintiffs represented a class of indigent defendants against whom criminal charges in state court were pending, and who desired but were not furnished appointed counsel. *Id.* at 507. They brought suit pursuant to § 1983, seeking prospective relief enjoining the state court judge from following practices that violated plaintiffs' right to counsel. *Id.* at 500, 507. The district court granted the injunction, holding that plaintiffs' Sixth Amendment rights had been violated. *Id.* at 508.
- ***Wallace v. Kern***, 392 F. Supp. 834 (E.D.N.Y 1973) *rev'd on abstention grounds*, 481 F.2d 621 (2d Cir. 1973). A class of felony defendants who were, or in the future would be, incarcerated in the county detention facility pending indictment, trial, or sentence brought Sixth Amendment claims under § 1983 for systemic prospective relief. 392 F. Supp. at 835. Although *Wallace*, like *Luckey*, ultimately was reversed on federal abstention grounds, the trial court found that pre-conviction, prospective claims asserting Sixth Amendment violations could be addressed on a class-wide basis. *Id.*

#### State Cases:

- ***Lavallee v. Justices in the Hampden Superior Court***, 812 N.E.2d 895 (Mass. 2004). Indigent criminal defendants who had no attorneys to represent them filed suit, alleging that the low rate of compensation authorized for court-appointed private counsel had resulted in an attorney shortage and seeking a declaration that trial judges could order that assigned counsel be compensated at a rate higher than that authorized by the legislature. The Massachusetts Supreme Court found that plaintiffs had stated a claim for relief and had no adequate remedy at law, and entered an injunction against the defendants.
- ***Best v. Grant County***, No. 042-001890 (Wash. Sup. Ct. August 26, 2004). A class of indigent defendants brought an action for prospective equitable relief under § 1983 for Sixth Amendment violations. The court certified a class and held that indigent pretrial defendants facing criminal prosecution without a lawyer show both irreparable harm and no adequate remedy at law. *Id.* at 7.
- ***White v. Martz***, CDV-2002-133 (Montana First Judicial District Court, July 24, 2002). A class composed of all indigent persons who had criminal cases pending in specified counties and who sought or might seek court-appointed counsel brought Sixth Amendment claims seeking systemic equitable relief under § 1983.

The state trial court found the plaintiffs' allegations stated a claim under the Sixth Amendment and that plaintiffs had standing to seek injunctive relief, and denied defendants' motion to dismiss.

- ***Mississippi v. Quitman County***, 807 So.2d 401 (Miss. 2001). A county brought a civil suit alleging that the state breached its duties under Mississippi law by forcing the county to fund representation of indigent criminal defendants. The Mississippi Supreme court affirmed the trial court's denial of the state's motion to dismiss.
- ***New York Lawyers' Ass'n v. State of New York***, 727 N.Y.S.2d 851 (N.Y. App. Term 2001). Plaintiff Lawyer's Association sought injunctive and declaratory relief pursuant to § 1983 on allegations that that low appointed counsel fees resulted in constitutionally inadequate representation of indigents. The court denied defendants' motion to dismiss on all but tortious interference with contract claims.
- ***Doyle v. Allegheny County Salary Board***, No. GD96-13606 (Pa. Ct. Common Pleas March 19, 1998). A class of pre-conviction public defender clients brought Sixth Amendment claims pursuant to § 1983 seeking prospective equitable relief. The court denied defendants' motion for summary judgment, resulting in the parties' entering a consent decree addressing the alleged systemic deficiencies.
- ***Zarabia v. Bradshaw***, 912 P.2d 5 (Ariz. 1996). In a challenge seeking equitable relief, civil lawyers without criminal law experience challenged their appointment as counsel for indigent defendants. The Arizona Supreme Court held, in part, that appointment of counsel without regard to relevant experience and skills is unlawful and ordered defendants to implement changes to insure future appointments of qualified attorneys.
- ***Rivera v. Rowland***, No. CV 650545629S, 1996 WL 636475 (Conn. Super. Ct. 1996). A class of pre-conviction public defender clients brought Sixth Amendment claims for systemic equitable relief pursuant to § 1983. 1996 WL 636475, at \*7. The court held that plaintiffs' claims were sufficient to survive defendants' motion to dismiss. 1996 WL 636475, at \*1.

The above case law clearly shows that Appellees have stated a claim on which relief can be granted and that the district court has jurisdiction over those claims.

Because Appellees demonstrate the district court's jurisdiction over this case, the trial court's ruling should be upheld.

**B. Equitable Relief Will Not Create Inconsistent Rulings Because the Proposed Relief Relates to Pretrial Procedures, Not the Merits or Validity of the Criminal Charges.**

Appellants argue that adjudication on the merits of Appellees' claims would create a "circus" caused by conflicting outcomes in this litigation and in Appellees' and class members' underlying criminal cases. (Appellants' Br. at 19.) To reach this conclusion, Appellants must willfully misread the Appellees' petition as well as Texas law.

Appellees seek systemic relief on a number of issues, including the provision of inadequate and inaccurate information about the right to an attorney, delay and denial of the right to counsel for qualified indigent misdemeanor defendants, and denial of the right to a public trial. (*See generally* CR at 155 -160.) Correcting these *pre-conviction* procedures will not result in conflicting outcomes for the simple reason that the results of this case will impact only *how* cases are processed in Williamson County, not the merits of any criminal charge against any particular misdemeanor defendant.

Appellants claim that indigency determinations are especially likely to create inconsistent determinations, but this is a red herring. (Appellants' Br. at 18-19.) Appellees' requested relief does not require the district court to review the finances of proposed class members, but instead seeks systemic relief. Appellees are *not* asking for an order that would require appointment of counsel to any particular misdemeanor defendant, but merely request relief requiring that Williamson County adhere to the Constitution, state law, and its own eligibility standards for appointing counsel.

In a Rule 42(b)(2) class action such as this case, the court can take judicial notice of the continuous stream of indigent defendants in the Williamson County courts at law

because “it is certain that other persons similarly situated will” suffer “under the allegedly unconstitutional procedures.” *Gerstein v. Pugh*, 420 U.S. 103, 111 n.11, 43 L. Ed. 2d 54, 63 n.11 (1975). The proposed class representatives have been found indigent by judicial officers in Williamson County and thus have standing based on Appellants’ own determinations, and the trial court need make no further indigency inquiries.<sup>10</sup>

In addition, Appellants’ argument that indigency determinations are purely discretionary seriously misconstrues the judicial role in indigency determinations in Williamson County courts. (Appellants’ Br. at 19.) Since the passage of the Fair Defense Act in 2001, Texas law has required that counties adopt standards for determining indigency. TEX. CODE CRIM. PROC. art. 26.04(l). Appellants’ own indigent defense plan creates a bright-line indigency standard at 125% of the federal poverty guidelines. *See* Report of Williamson County, Texas Concerning Indigent Defense (CR 530-537). *Rosales v. State*, 748 S.W.2d 451 (Tex. Crim. App. 1988) (Appellants’ Br. at 19), is inapposite because it predates both the Fair Defense Act and the County’s adoption of a bright-line test for indigency. While judges retain discretion to find indigent a defendant whose resources exceed the County’s bright-line test, Appellants’ own plan, which they must follow or violate Texas law, requires them to appoint counsel to indigent defendants at or below 125% of the federal poverty guidelines. Equitable relief requiring Appellants to fairly apply their adopted indigency standard does not

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<sup>10</sup> As Appellants admit, five named class representatives have been found indigent by the Williamson County courts at law. (Appellants’ Br. at 10-13.) Elveda Viera was found indigent by a Williamson County Justice of the Peace in June 2006 (CR at 130), and her claim to indigency for purposes of appointment of counsel in her misdemeanor case remains pending at the time of submission of this appeal. (Appellants’ Br. at 12.)

impermissibly interfere with Appellants' retained judicial discretion and is consistent with state law.

Another reason that conflicting determinations are not an issue here is that civil and criminal courts consider different issues when looking at criminal procedures: Appellees here seek a prospective determination of their rights, which is available regardless of the prejudice delay or denial of counsel creates in the underlying criminal case. In contrast, a criminal appeal generally corrects only prejudicial errors.

Commenting on this distinction, the Eleventh Circuit upheld the right to seek prospective equitable relief in the Sixth Amendment context and wrote that “[w]hether an accused has been prejudiced by the denial of a right is an issue that relates to relief – whether the defendant is entitled to have his or her conviction overturned – rather than to the question of whether such a right exists and can be protected prospectively.” *Luckey*, 860 F.2d at 1017.

The Fifth Circuit similarly upheld the “distinction between a pre-trial declaration of a right . . . and a post-conviction appeal for reversal on the basis [of a denial of pre-trial right]” as “a pragmatic and sensible distinction.” *Pugh v. Rainwater*, 483 F.2d 778, 787 (5th Cir. 1973) *aff’d in part sub nom. Gerstein v. Pugh*, 43 L. Ed. 2d. 54 ((allowing pretrial detainees to challenge procedures for determining probable cause to hold them in jail). Because the “presence of counsel to represent individuals who appear in court and face incarceration is a vital element in preserving due process,” *Zurz*, 596 F. Supp. at 45, preserving the due process rights of indigent defendants in Williamson County requires prospective relief not available in a criminal appeal. If, on appeal, a court were to find no

prejudice as a result of actions such as delay in appointing counsel or provision of inaccurate and inadequate information, that determination would in no way conflict with a civil court's determination that Appellants' actions are unconstitutional.

Finally, a critical and ultimately dispositive issue is that this is a § 1983 action and, as such, is subject to the Supremacy Clause. A cause of action under § 1983 exists “independent of any other legal or administrative relief that may be available as a matter of federal or state law” and rights under § 1983 “are judicially enforceable *in the first instance.*” *Felder v. Casey*, 487 U.S. 131, 148, 101 L. Ed. 2d 123, 144 (1988) (internal punctuation and citation omitted, emphasis in original). The limited risk that a plaintiff would be granted standing while the Williamson County courts at law would deny that person an appointed attorney (assuming the County follows the proper rules and procedures), is insufficient to deny a forum for Appellees' grievances. Appellants' position, if correct, would amount to Texas immunizing itself from § 1983 suits: Texas civil courts would be closed by *Morales*, federal courts closed by *Younger* abstention, and Texas criminal courts constitutionally bereft of jurisdiction to hear § 1983 suits. Appellants effectively are asking this Court to create a state rule purporting to deny Texas criminal defendants a forum in which to bring § 1983 claims challenging unconstitutional pretrial procedures despite the fact that federal and state courts across the country have recognized the right to seek equitable relief for such claims. (*See pp. 17-19, above.*) This outcome would be at odds with the Supremacy Clause. *Felder*, 101 L. Ed. 2d at 138.

**C. This Court Has Jurisdiction To Issue the Declaratory Relief Requested by Appellees.**

In addition to their argument that the Court generally does not have jurisdiction to grant Appellees' claims for equitable relief, Appellants also specifically claim that the court does not have jurisdiction to grant a declaratory judgment in the case. Texas statutes and case law, however, clearly demonstrate that the trial court has jurisdiction to hear Appellees' claims and the power to issue the declaratory relief Appellees request.

The Texas Uniform Declaratory Judgments Act provides that "courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." TEX. CIV. PRAC. & REM. CODE ANN. § 37.003 (2005). Texas courts construe the Act liberally and "Texas district courts have broad powers to render declaratory judgment when the judgment will end a controversy or serve a useful purpose." *Harkins v. Crews*, 907 S.W.2d 51, 56 (Tex. App.—San Antonio 1995, writ denied) (citing *Public Util. Comm'n v. City of Austin*, 728 S.W.2d 907, 910 (Tex. App.—Austin 1987, writ ref'd n.r.e.)).

"Suits for declaratory judgments are available on a wide variety of substantive issues and are to be liberally construed." *Duncan Land & Exploration v. Littlepage*, 984 S.W.2d 318, 334 (Texas App.—Fort Worth 1998, pet. denied). Declaratory judgment is appropriate where there is "uncertainty or insecurity as to the rights, legal relations or status of parties and when declaratory relief will settle the dispute and put an end to the controversy," *id.*, and thus the district court has the power to grant Appellees' request for declaratory judgment. Appellants deny Appellees' allegations and continue to violate the

Sixth Amendment rights of Appellees and the proposed class, and thus a grant of declaratory judgment will clarify Appellees' rights to adequate and accurate information about the right to counsel, appointment of counsel if qualified, and to a public trial, and thus "settle the dispute, and put an end to the controversy." *Id.*

**ISSUE TWO: APPEAL AND HABEAS ARE NOT ADEQUATE REMEDIES FOR THE DENIAL OF APPELLANTS' SIXTH AMENDMENT RIGHTS.**

Earlier in this brief, Appellees quoted the Supreme Court's holding that in "our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." *Gideon*, 372 U.S. at 343, 9 L. Ed. 2d at 805. *Gideon* began as a pro se case – Gideon was forced to represent himself because the trial court would not appoint him a lawyer. Famously, Gideon's case went to the Supreme Court, where his right to appointed counsel was affirmed. It is symptomatic of the Appellants' failure to understand, and respect, the right to counsel that they invert *Gideon*'s meaning. Rather than view Gideon's appeal to the Supreme Court as exceptional, Appellants seek to make pro se appeals vindicating an already existing right to counsel the norm in Williamson County.<sup>11</sup> Appellants' position is at odds with the very rationale for the right to counsel: it violates Due Process to make individuals risk their liberty in order to vindicate a pretrial procedural right, particularly when the underlying criminal proceedings do not afford Due Process. The case for correcting the Williamson County indigent defense

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<sup>11</sup> Of course, Appellants' reliance on *Gideon* as an example of a successful pro se appeal is misplaced. The Supreme Court appointed an attorney – the future Justice Abe Fortas – to represent Mr. Gideon before the Supreme Court.

system could not be made more forcefully than by Appellants' attempt to turn *Gideon* on its head.

Appellants' suggestion that Sixth Amendment issues are best dealt with on appeal misreads the case law, violates Due Process, offers indigent defendants insufficient relief in their individual cases, and does nothing to address the systemic failure of Williamson County's indigent defense practices. It also violates the U.S. Constitution, the Texas Constitution, and the Fair Defense Act.

Even successful pro se indigent appellants likely would be rewarded only with a remand and an attorney to challenge a charge for which they already had completed the term of imprisonment or probation. Moreover, appeal offers no relief for the delay in appointment, no relief for Appellants' provision of inadequate and inaccurate and information about the right to counsel, and no relief for Appellants' denial of the right to a public trial.

Finally, Appellants' position offers no systemic relief for the members of the proposed class. As the Supreme Court has noted, having brought a class action, Appellees' now have a stake in seeing the case through to completion and obtaining relief that would benefit all indigent misdemeanor defendants in Williamson County. *Gerstein*, 420 U.S. at 111, n.11, L. Ed. 2d at 63, n.11.

**A. Appellees Are Entitled to Equitable Relief Because They Have No Adequate Remedy Within Their Criminal Case.**

Appellants argue that indigent defendants in Williamson County and the proposed class have an adequate remedy at law through appeal or habeas writs in their criminal

cases. (Appellants' Br. at 19-22.) These alternatives are not adequate, however, because they force Appellees to suffer irreparable harm while they attempt to vindicate their rights. As one court recently stated, a class of criminal defendants denied the right to counsel has no adequate remedy at law and the harm class members suffer "cannot be remedied in the normal course of trial and appeal because an essential component of the normal course, the assistance of counsel, is precisely what is missing here." *Lavallee*, 812 N.E.2d at 907. There is no adequate remedy at law because "the loss of opportunity to confer with counsel to prepare a defense is one that cannot be adequately addressed on appeal after an uncounselled conviction." *Id.*

The lack of an adequate remedy at law here is closely tied to irreparable harm. Indigent defendants have a right to counsel that can be vindicated prospectively in a civil action. The allegation that a pretrial defendant "is facing criminal prosecution without an effective lawyer at his side certainly raises the prospect of serious and immediate injury or threatened injury." *Best v. Grant County*, No. 042-001890 (Wash. Sup. Ct. August 26, 2004) at 7. In this pretrial context, "[h]arm is not limited to locking innocent people up. The accused is prejudiced if he or she is forced to plead guilty rather than run the risk of going to trial . . . or when the accused must evaluate the pros and cons of a plea offer without competent counsel to explain the plea and its consequences . . ." *Id.* at 8. And, a pro se appeal is unlikely to succeed, because, as the Supreme Court recently wrote, "[n]avigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals . . . who have little

education, learning disabilities, and mental impairments.” *Halbert v. Michigan*, 125 S. Ct. 2582, 162 L. Ed. 2d 552, 558 (2005).

The vacuity of Appellants proposed solution of pro se appeals is exposed by the Appellants’ list of cases “wherein denial of the appointment of counsel was challenged by a *pro se* indigent defendant.” (Appellants’ Br. at 22, tab 11.) Of course, some individual defendants might proceed pro se and ultimately vindicate their rights, as Mr. Gideon did, but it is “pragmatic and sensible,” *Pugh*, 483 F.2d at 787, to provide prospective equitable relief and safeguard pretrial arrestees’ rights so that the ordeal suffered by individuals such as Gideon need not be repeated endlessly. Rather than “pragmatic and sensible,” Appellants’ position is outrageous: Appellants contend that they may violate constitutional rights at will and let the appellate courts sort out the results as indigent individuals navigate the “perilous endeavor” of a pro se appeal. In addition to being an unprecedented abdication of judicial responsibility by the Williamson County courts at law, Appellants’ proposal would clog the appeals court’s docket, waste resources by requiring numerous remands for hearings and new trials, and discourage public confidence in the criminal justice system.

While the Appellants trumpet successful pro se appeals, the cases in Appellants’ chart actually demonstrate the importance of counsel. For example, in *Morey v. State*, 744 S.W.2d 668, 669 (Tex. App.—San Antonio, 1988, no writ), the Court emphasized the importance of the right to counsel. Indeed, Morey was successful because he *was*

*represented at trial and on appeal.*<sup>12</sup> While the “trial court found appellant was indigent and appointed the appellant’s attorney to represent him at trial,” Morey was denied counsel for his appeal as of right. *Id.* Morey’s “trial attorney briefed his case” for appeal, however, “on the expectation that the trial court would be found by this court to have erred in denying the appellant’s indigency status.” *Id.* Based on the lawyer’s appellate brief, the court granted the criminal defendant’s motion to quash. *Id.* at 670. The court remanded for a renewed indigency hearing regarding counsel for the appeal, but not before emphasizing both the value of an attorney’s aid on appeal and the indigent defendants’ right to counsel: “Indigents are denied equal protection of law if their one appeal of right is prosecuted without the benefit of legal counsel.” *Id.* at 669, citing *Douglas v. California*, 372 U.S. 353, 355, 9 L. Ed. 2d 811 (1963).

Rather than supporting Appellants, the *Morey* case makes clear that indigent defendants have a right to counsel, that they are much more likely to succeed on appeal with an attorney, and that trial courts are in error when they deny an attorney to those who “show the lack of the financial resources which would allow the retention of a competent criminal lawyer at the particular time one is needed.” *Id.* at 670.

The other cases Appellants cite in their chart (Appellants’ Br. at tab 11) also fail to support Appellants’ belief in the efficacy of pro se appeals:

- In *State v. Frank*, 803 So.2d 1 (LA 2001), the defendant was represented by counsel at trial and on appeal. The case was remanded for hearing on whether the capital murder defendant was entitled to state-funded expert assistance in the mitigation phase of her trial.

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<sup>12</sup> Indeed, the first page of the opinion notes the defendants Morey had assistance of Joe Mike Egan, Jr. as counsel on appeal.

- *In re Stuart*, 646 N.W.2d 520 (Minn. 2002), was a mandamus petition brought by public defender who wished to be relieved of appointment to a client that the public defender believed not to be indigent.
- In *Perryman v. State*, 519 S.W. 2d 438, 439 (Tex. Crim. App. 1975), the defendant had appointed counsel at trial.
- The very first page of the opinion in *State v. Richter*, 378 N.W.2d 487 (Neb. 1985), notes that the criminal defendant was represented on appeal by “Philip M. Kelly of Winner, Nichols, Douglas and Kelly.”
- Similarly, the first page of the opinion in *Commonwealth v. Dunkel*, 660 A.2d 1347 (Penn. Superior Court 1995), notes that the criminal defendant was represented on appeal by Hugh C. Clark.

These cases highlight the need for (and the right to) counsel on appeal – but, beyond that issue, none of them take the brazen and, in the post-*Gideon* world, unprecedented view that a county may deny the right to trial counsel on the expectation that the appeals courts will provide sufficient relief through pro se appeals.

**B. Appellees’ Claims Are Appropriately Filed in State Court In Accord With The Younger Abstention Doctrine.**

Appellants’ reliance on *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669 (1971) is misplaced because *Younger*’s holding is based on prudential concerns about federalism. This case was brought in state court directly in response to the concerns, expressed in *Younger* and subsequent cases discussing *Younger* abstention, for respecting state sovereignty and the role of state courts.

In order to insure standing to bring their § 1983 claims, plaintiffs should have a live criminal case at the time their civil case is filed. *Tarrant County Comm’rs Court v. Markham*, 779 S.W.2d 872, 876 (Tex. App.—Fort Worth 1989, writ denied). Where, as

here, civil plaintiffs have an ongoing state criminal proceeding, *Younger* abstention weighs against federal jurisdiction, even over § 1983 cases. *See, e.g., Luckey II*, 936 F.2d 673. Thus, the preferred forum for vindicating the rights of indigent misdemeanor defendants in Williamson County through a § 1983 action is state district court.

Appellants reliance on *Younger* is ironic, because in the trial court they complained that Appellees' failure to file in federal court was forum shopping.<sup>13</sup> Appellants could have removed this case to a federal forum. 28 U.S.C § 1441. Appellants' choice to remove this case would constitute a waiver of abstention allowing the federal court to hear this matter. *See Ohio Bureau of Employment Serv. v. Hodory*, 431 U.S. 471, 479-480, 52 L. Ed. 2d 513, 551 (1977). Although removal generally must occur within 30 days of filing, 28 U.S.C. § 1446, Appellees offered to waive any objection to removal. (CR at 198.)

Appellants may not use *Younger* as both a sword and a shield. Having invoked *Younger* to shield the case from federal jurisdiction, the Appellants would now invoke the doctrine as a sword to sever this case from all judicial fora. As discussed above, however, the Supremacy Clause requires that some court hear § 1983 cases; *Younger* is designed to "avoid needless conflict with a state's administration of its own affairs," BLACK'S LAW DICTIONARY (Bryan A. Gardner ed., Pocket Edition 1996) at 3, not to shield state actors from liability for constitutional torts.

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<sup>13</sup> CR at 211. The irony is only increased by Appellants' reference to the *Tesmer* Court's remark regarding forum shopping. (Appellants' Brief at 21.) With that remark, the Supreme Court was commenting on the attorney-plaintiffs' attempted use of third party standing to bypass *Younger* abstention and bring suit in federal court rather than in state court. (543 U.S. at 133, 169 L. Ed. 2d at 528.) The decision to raise a constitutional challenge in a §

Rather than helping their case, Appellants' reliance on *Covarrubia v. Butler*, 502 S.W.2d 229 (Tex. App.—San Antonio 1973, writ ref'd n.r.e.), highlights their confusion regarding the federal nature of *Younger* abstention, as well as their repeated conflation of challenges to unconstitutional procedures, at issue here, and challenges to penal statutes, which are not part of this case. The *Covarrubia* court did not abstain from exercising its jurisdiction on *Younger* grounds, but rather explicitly recognized that the *Younger* precedent is based on federalism concerns before it proceeded to discuss how a statement in a *Younger* concurrence regarding adequacy of remedy still may have some relevance to a state court's consideration of whether equitable relief was appropriate. The alternate remedy available to the plaintiff in *Covarrubia* is easily distinguishable from the alternate remedies available to Appellees. *Covarrubia* (represented by counsel) was a defendant in a pending criminal prosecution for disorderly conduct. *Id.* at 230. He brought suit against various state officials to *enjoin enforcement* of a *penal statute* prohibiting disorderly conduct on the basis that the statute was overbroad and vague. *Id.* The court held that under the facts of that case the criminal courts provided an adequate remedy that precluded equitable relief, emphasizing that it would take as much time for the plaintiff to obtain equitable relief as it would take him to raise his constitutional challenge as a defense in his criminal trial. Furthermore, if *Covarrubia's* constitutional defense proved successful, he never would be convicted of the offense or face a criminal sentence.

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1983 case filed in state court rather than in a state court criminal action does not constitute forum shopping because both cases are filed in the same forum: state court.

In contrast to Covarrubia, indigent defendants in Williamson County are not seeking to enjoin prosecutions against them. Furthermore, they will not have an adequate opportunity to raise their claims before the trial court in their pending criminal proceedings precisely due to Appellants' challenged policy and practice of denying the assistance of counsel, an essential element of due process, to indigent defendants. *See, e.g., Lavalley*, 812 N.E.2d at 240. Forcing criminal defendants to pursue relief on appeal or in habeas for the unconstitutional denial of a trial right would take much longer than would the award of equitable relief in this case, would force Appellees to suffer a deprivation of liberty before relief would be available, and is an inadequate remedy at law.

**C. The Supreme Court's Decision in Tesmer Does Not Hold That Pro Se Criminal Appeals Afford An Adequate Remedy for Denial of the Right to Counsel at Trial.**

Appellants argue that the *Tesmer* case is “directly on point,” (Br. at 21, emphasis in original) but Appellants' reading of the case is not credible. The second sentence of the *Tesmer* decision announces that the “only challengers before us are two attorneys who seek to invoke the right of hypothetical indigents” and the Court then holds that “the attorneys lack standing and therefore [the Court] does not reach the question of the procedure's constitutionality.” *Kowalski v. Tesmer*, 543 U.S. 125, 127, 160 L. Ed. 2d 519, 524 (2004). *Tesmer* did not present, nor did the Court reach, the issue of whether indigent defendants themselves could pursue Sixth Amendment claims in a § 1983

action.<sup>14</sup> Thus, *Tesmer* is a very different case from the case at bar: *Tesmer* is about third party standing, not about indigent defendants' ability to obtain, on their own behalf, equitable relief for Sixth Amendment violations.

In the very same term that the Supreme Court decided *Tesmer*, the Court reviewed the same Michigan statute that the attorney-plaintiffs had sought to challenge in *Tesmer*, and in *Halbert v. Michigan*, 125 S. Ct. 2582, 2586, 165 L. Ed. 2d 552 (2005), the Supreme Court found the statute unconstitutional and upheld the right of indigent defendants to appointed counsel on every appeal as of right.

Because *Tesmer* was decided on standing grounds, its statements about pro se appeals, relied on by Appellants, are dicta. In contrast, the *Halbert* court, in examining the constitutionality of Michigan's law, relied on the difficulty of "[n]avigating the appellate process without a lawyer's assistance," calling it "a perilous endeavor for a layperson," 165 L. Ed. 2d at 567, serious enough to warrant Sixth Amendment Protection.

Moreover, *Tesmer*'s dicta regarding the adequacy of pro se appeals must be viewed in the context of the facts presented by that case: The challenged Michigan statute did not strip indigent criminal defendants of their right to counsel in the trial court, nor did it even deny all indigent defendants the right to counsel on appeal. The statute only limited the right to counsel on appeal after a guilty plea. It is safe to say that what is at issue in this case would shock both the *Tesmer* and *Halbert* courts: the denial of counsel

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<sup>14</sup> The indigent defendants were dismissed in the lower court on *Younger* grounds. 543 U.S. at 128, 160 L. Ed. 2d at 525.

to indigent defendants in *trial court proceedings*.<sup>15</sup> Unlike the indigent criminal defendants at issue in *Tesmer* and *Halbert*, the Appellees and the proposed class have not been convicted and thus retain the presumption of innocence. Unlike *Tesmer* and *Halbert*, here, a knowing and voluntary waiver of rights before the trial court is impossible because of Appellants’ policy and practice of giving inadequate and inaccurate information about the right to counsel. The issue here is not third party standing or the ability of states to limit appeal rights after entry of a guilty plea, but instead the systematic denial of a fundamental pretrial right to defendants who have not been convicted of a crime and who are seeking to vindicate their own rights.

**ISSUE THREE: APPELLEES HAVE SUFFERED AND CONTINUE TO SUFFER IRREPARABLE HARM.**

The United States Supreme Court recently reiterated its holding that when there is a showing that Sixth Amendment rights are denied “[n]o additional showing of prejudice is required to make the violation ‘complete.’” *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 165 L. Ed. 2d 409, 2006 Lexis 5165 at \*12. Here, Appellees have pleaded facts establishing a violation of the Sixth Amendment and other constitutional rights of indigent defendants in Williamson County. The alleged facts plead a “complete” and irreparable constitutional harm, and establish that equitable relief is appropriate here.

A party seeking equitable relief must show two things: first, that it has a cause of action for which it may be granted relief, and second, probable injury. *Surko Enterprises, Inc. v. Borg Warner Acceptance Corp.*, 782 S.W.2d 223, 225 (Tex. App.—Houston [1st

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<sup>15</sup> See *Halbert*, 162 L. Ed. 2d at 575 (Thomas, J. dissenting) (noting Michigan court rules “require trial counsel” and

Dist.] 1989, no writ). “Probable injury includes elements of imminent harm, irreparable injury, and no adequate remedy at law.” *Surko*, 782 S.W.2d at 225. Appellants’ failure to appoint counsel has caused and/or will imminently cause Appellees’ irreparable harm for which there is no adequate remedy at law.

**A. Appellees and the Class Have Suffered and Are in Imminent Danger of Suffering Irreparable Harm.**

The allegation that a pretrial defendant “is facing criminal prosecution without an effective lawyer at his side certainly raises the prospect of serious and immediate injury or threatened injury.” *Best*, No. 042-001890 (Wash. Sup. Ct. August 26, 2004) at 7. This harm includes unnecessary loss of liberty, the inability to consult with counsel when evaluating plea offers, and coerced decisions to plead guilty rather than risk trial without the assistance of counsel. *Id.* at 8. *See also Elrod v. Burns*, 427 U.S. 347, 373-74, 49 L. Ed. 2d 547, 565-566 (1976) (harm to constitutional right is irreparable harm); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (same); 11A CHARLES ALAN WRIGHT, ET. AL., FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2006) (“When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.”).

Williamson County has filed an information against each of the Plaintiffs in this case. (CR 452-460.) The Sixth Amendment guarantees that in “all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” U.S. CONST., amend. VI. In *Kirby v. Illinois*, the Supreme Court fashioned

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that trial counsel “present to the trial court any potential appellate issues”) (internal citations omitted).

a bright-line rule: the right to counsel attaches as of “the initiation of criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, *information*, or arraignment.” 406 U.S. 682, 689, 32 L. Ed. 2d. 411, 417 (1972) (emphasis added). Williamson County’s filing of an information against each Appellee in the underlying criminal prosecutions and the fact that each Appellee either was denied counsel and/or attempted to request counsel and would have done so in the absence of Appellants’ unconstitutional practices means that, under Supreme Court precedent, Plaintiffs’ Sixth Amendment right to counsel has attached and Plaintiffs’ claims regarding denial of counsel are ripe. In the context of the right to counsel, “unreasonable interference with the accused person’s ability to consult counsel is itself an impairment of the right.” *Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001). Denial of access to counsel for consultation is not subject to prejudice analysis. *Id.* at 186, citing *Perry v. Leeke*, 488 U.S. 272, 278-80, 102 L. Ed. 2d 624, 632-634 (1989).

Second, entry of a plea before the court and plea negotiations with the prosecutor both are critical stages requiring assistance of counsel. *White v. Maryland*, 373 U.S. 59, 60, 10 L. Ed. 2d 193, 194 (1963) (citing *Hamilton v. Alabama*, 368 U.S. 52, 55, 7 L. Ed. 2d 114, 116-177 (1961)); *Brady v. United States*, 397 U.S. 742, 748, 25 L. Ed. 2d 747, 756 (1970). Appellants encourage all misdemeanor defendants who are charged with a crime that carries the possibility of imprisonment to enter a plea of guilty or no contest and then plea bargain without the assistance of an attorney, and Appellants do so without properly advising indigent defendants of their right to court-appointed counsel. (CR 143-152.)

Thus, Appellants' argument that Appellees have no right to counsel and that their claims are not ripe fails because Appellees are in imminent danger of being denied counsel at a critical stage in their criminal cases. *See, e.g., Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298, 60 L. Ed. 2d 895, 906 (1979) (one "does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.") (citing *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 67 L. Ed. 1117, 1130-1131 (1923)); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143, 42 L. Ed. 2d 320, 353 (1974); and *Pierce v. Society of Sisters*, 268 U.S. 510, 526, 69 L. Ed. 1070 (1925)).

In addition, Appellees claim that the Williamson County magistrate did not inform them of their right to counsel, did not provide any information about how to apply for counsel, did not provide forms to request counsel, and did not inform Appellees about state or county standards for determining eligibility for appointed counsel, and that the magistrate filled out paperwork saying Appellees did not want an appointed lawyer without consulting Appellees. These claims are ripe because Plaintiffs have already suffered these harms. (*See, e.g.* CR 128-132.) These actions constitute a completed violation of the Fair Defense Act, *see* TEX. CODE CRIM. PROC. ANN. art. 15.17, and make any subsequent waiver of the right to counsel suspect, *Brady*, 397 U.S. at 748, 25 L. Ed. 2d at 756 (waiver of rights must be made "competently and knowingly"); *Iowa v. Tovar*, 541 U.S. 77, 81, 158 L. Ed. 2d 209, 215 (2004) (same), even if adversary judicial proceedings had not commenced at the time magistrate warnings were given.

## **B. Appellees' Claims Are Justiciable Under The Constitutional Principles Of Standing And Mootness.**

State and federal precedent firmly establish that named plaintiffs retain their class action standing where, as here, the claims presented are “so inherently transitory that the trial court will not even have enough time to rule on a motion for class certification before the proposed representative’s individual interest expires.” *County of Riverside v. McLaughlin*, 500 U.S. 44, 52, 114 L. Ed. 2d 49, 60 (1991) (quoting *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 399, 63 L. Ed. 2d 479, 492 (1980)).<sup>16</sup> Although Appellants contend that the post-filing appointment of counsel to some Appellees, and the eventual disposition of these cases, render their individual claims moot, under state and federal law their *class* claims remain live<sup>17</sup> and they have standing to represent the class. *See, e.g., Reyna*, 944 S.W.2d at 662 (holding that litigation should go forward where “adjudication . . . would vindicate the rights denied [to plaintiffs] and alter the

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<sup>16</sup> Appellants interrupted the hearing on class certification in order to interpose this appeal, although the legal issues of jurisdiction and standing are inextricably connected in this case. *See, e.g.* CR Supp. at 8-9 (explaining the importance of hearing class certification and jurisdiction claims together); Appellants’ Br. at 8 (Appellants prevented hearing class certification issues prior to this appeal); RR 2 at 1, 47-48 (noting that hearing was for class certification as well as pleas to the jurisdiction).

<sup>17</sup> In *United States Parole Comm’n v. Geraghty*, the U.S. Supreme Court upheld class claims by prisoners whose individual claims were moot, observing that:

[T]he fact that a named plaintiff’s substantive claims are mooted due to an occurrence other than a judgment on the merits does not mean that all the other issues in the case are mooted. A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class.

445 U.S. at 402, 63 L. Ed. 2d at 494.

unconstitutional” policies and practices challenged by plaintiffs, even if the individual claims of the named class representatives have become moot).<sup>18</sup>

Both state and federal courts have clearly identified an exception to the doctrine of mootness precisely for cases such as the one here, where the plaintiff’s claims are inherently transitory. In the class action context, the “relation back” doctrine allows a class to be certified “despite the loss of [the named plaintiff’s] personal stake in the outcome of the litigation.” *Geraghty*, 445 U.S. at 398. In cases where, as here, the controversy is, by nature, so short-lived that it becomes moot as to the named plaintiff before the trial court can rule on a class certification motion, courts employ the relation back doctrine to prevent the case from escaping review by finding that named plaintiffs’ standing “relates back” to the date of the filing of the lawsuit. *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1047 (5th Cir. Unit A July 1981).

The Supreme Court has consistently applied the relation back doctrine to inherently transitory claims similar to those raised in this lawsuit, and specifically has done so in cases involving alleged violations of pretrial rights in the criminal justice system. In *County of Riverside v. McLaughlin*, both the majority and the dissent reached the merits despite appellee’s claim that criminal defendants did not have standing because each named plaintiff’s individual case was moot before the class was certified. 500 U.S. 44, 114 L. Ed. 2d. 49 (1991). As the Court explained:

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<sup>18</sup> While the case law on standing in class actions has been more extensively developed in federal courts, Texas courts generally have followed federal standing jurisprudence. *See, e.g., M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 708-09 (Tex. 2001) (discussing class action standing and noting that at least five Texas courts of appeals, including the Third, have found the United States’ “Supreme Court’s standing jurisprudence persuasive, if not controlling.”); *Tarrant County Comm’rs Court v. Markham*, 779 S.W.2d 872, 876 (Tex. App.—Fort Worth

In factually similar cases we have held that “the termination of a class representative’s claim does not moot the claims of the unnamed members of the class.” That the class was not certified until after the named plaintiffs’ claims had become moot does not deprive us of jurisdiction. We recognized in *Gerstein* that “some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative’s individual interest expires.” In such cases, the “relation back” doctrine is properly invoked to preserve the merits of the case for judicial resolution.

*Id.*, 500 U.S. at 51-52, 114 L. Ed. 2d at 60 (internal citations omitted); *see also*, *Gerstein*, 420 U.S. 103, 43 L. Ed. 2d 54; *Swisher v. Brady*, 438 U.S. 204, 57 L. Ed. 2d 49 (1977).

Texas courts have consistently followed federal law and applied the relation back doctrine in state court. After observing that, in a typical class action, the named plaintiffs’ individual claims must remain live throughout the course of litigation, the *Markham* court recognized that:

A plaintiff may continue litigation once it is commenced despite the loss of his or her personal stake in the outcome of the litigation if it is demonstrated that the claim will likely arise again and otherwise evade review. This exception has been aptly titled the ‘relation back doctrine.’ *The doctrine has been used to allow the continuation of a class action suit where the named representative initially had a personal stake in the litigation at the time of filing the suit, but lost the personal stake during the course of the litigation.*

*Markham*, 779 S.W.2d at 876 (internal citations omitted) (emphasis added). *See also* *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 709 (Tex. 2001) (noting the *Geraghty* exception to the general rule of standing); *TCI Cablevision of Dallas v. Owens*, 8 S.W.3d 837, 848 (Tex. App.—Beaumont 2000, pet. disp’d by agr.) (applying the relation back doctrine).

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1989, writ denied) (“Much of our state’s common law regarding standing in class action suits has been taken from our sister courts in the federal system. . . . we rely on these federal decisions to reach our conclusion.”).

Appellees' claims, which depend on them having a misdemeanor case pending in Williamson County, are by nature extremely short-lived and clearly fall within the class of inherently transitory claims to which federal and state courts apply the relation back doctrine. Appellees, as well as the class of individuals they seek to represent, are taken before a magistrate within 48 hours of arrest and provided incomplete and/or misleading information about their right to appointed counsel. A few weeks after magistration, Appellees and members of the prospective class make their first appearance in the Williamson County courts at law. For Appellees and class members who, having been misinformed by Appellants' as to their right to counsel, elect to plead guilty at the First Appearance, less than an hour can separate Appellants' misinformation and the guilty plea.<sup>19</sup> For indigent defendants who request counsel and have that request unconstitutionally denied by Appellants, the time window is somewhat larger, but still brief.

The Supreme Court has found claims with nearly identical time limits to those here to be inherently transitory, and thus applied the relation back doctrine to prevent them from escaping review altogether. In *Gerstein*, which dealt with a challenge to pretrial custody, the Court noted that:

[t]he length of pretrial custody cannot be ascertained at the outset, and it may be ended at any time by release on recognizance, *dismissal of the charges, or a guilty plea, as well as by acquittal or conviction after trial*. It is by no means certain that any given individual, named as plaintiff, would

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<sup>19</sup> Williamson County's web site urges that misdemeanor criminal defendants to "be prepared to [pay] at least some portion of their fine and court costs" on the day of the first appearance, demonstrating that the Defendants expect most cases to be adjudicated on the day of the First Appearance Docket. (CR at 436.)

be in pretrial custody long enough for a district judge to certify the class. Moreover, in this case the constant existence of a class of persons suffering the deprivation is certain.

420 U.S. at 111 n.11, 43 L. Ed. 2d at 63, n.11 (emphasis added).

With the exception of release on recognizance, all of the potential mooting events making plaintiffs' claims inherently transitory in *Gerstein* also may moot any named Appellee's claims in the instant case: dismissal, plea bargain, and trial verdict. Further, as in *Gerstein*, the constant existence of new misdemeanor defendants in Williamson County means that harms suffered by the Appellees will be suffered repeatedly by other members of the putative class whose individual claims similarly would evade review due to their transitory nature. *See also County of Riverside*, 500 U.S. 44, 114 L. Ed. 2d 49; *Swisher v. Brady*, 438 U.S. at 213, 57 L. Ed. 2d at 713 (reaching the merits of a class action double jeopardy challenge to state juvenile court proceedings despite the mootness of the named plaintiffs' individual claims and noting that "the rapidity of judicial review . . . creates mootness questions with respect to named plaintiffs, and even perhaps with respect to a series of intervening plaintiffs appearing thereafter, 'before the district court can reasonably be expected to rule on a certification motion.'") (quoting *Sosna v. Iowa*, 419 U.S. 393, 402 n.11, 42 L. Ed. 2d. 532, 542 n.11 (1975)). Because the claims here are inherently transitory, the relation back doctrine applies and Appellees' standing for class action purposes should be evaluated as of the date of the initial filing of the lawsuit (filed jointly with the motion for class certification on June 12, 2006). *See Markham*, 779 S.W.2d at 876 ("plaintiff must have a personal stake in the litigation *at the time of filing suit.*") (emphasis added).

Since Appellees allege that, at the moment they filed their claims, they were not represented by an attorney in their pending criminal cases and thus were “suffering a direct and current injury as a result” of Appellants’ wrongful denial of their request for counsel, their “injury was at that moment capable of being redressed through injunctive relief.” *County of Riverside*, 500 U.S. at 51, 114 L. Ed. 2d. at 59. Therefore, applying the relation back doctrine to their inherently transitory claims in accordance with state and federal standing jurisprudence, all named Appellees have standing to represent the class despite the subsequent mootness of some Appellees’ individual claims.

**C. Appellants Cannot Moot the Putative Class Action by “Picking Off” the Named Appellees.**

Courts have consistently held that allowing defendants to preempt class certification by mooting the individual claims of the named plaintiffs “would be contrary to sound judicial administration” and “obviously would frustrate the objectives of class actions” by forcing “multiple plaintiffs to bring separate actions, which effectively could be ‘picked off’” one at time. *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339, 62 L. Ed. 2d 427, 440 (1980). Here, Appellants argue that because some named Appellees have had their underlying claims resolved, or because the named Appellants have recused themselves from their cases, Appellees have no standing to pursue their class action claims. (Appellants’ Br. at 22-23) The case law clearly establishes that Appellants’ actions are insufficient to deprive the trial court of jurisdiction to hear the class claims presented in this case, or the Appellees of their standing to represent the class.

In *Zeidman*, 651 F.2d at 1050, as here, defendants sought to have a class action dismissed after rendering the named plaintiffs' claims moot. The *Zeidman* court, however, concluded "that a suit brought as a class action should not be dismissed for mootness upon tender to the named plaintiffs of their personal claims, at least when, as here, there is pending before the district court a timely filed and diligently pursued motion for class certification." *Id.* at 1051; *see also Mayo v. Hartford Life Ins. Co.*, 214 F.R.D. 465, 468 (S.D. Tex. 2002) (aff'd, remanded by, certificate for question declined at *Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400 (5th Cir. 2004)) (internal citations omitted) ("While a particular class representative's personal interest in a case may cease through mootness or defendant's efforts to 'buy out' the class representative, the class representative still retains an interest in pursuing the class action.")

Thus, as a matter of precedent and sound judicial policy, Appellants must not be allowed to escape a hearing on the merits of their policy of violating indigent defendants' right to counsel: to do so "would mean that [Williamson County] could avoid judicial scrutiny of its procedures by the simple expedient of granting [counsel] to plaintiffs who seek, but have not yet obtained, class certification," *Zeidman*, 651 F.2d at 1051 (quoting *White v. Mathews*, 559 F.2d 852, 857 (2d Cir. 1977)), while continuing to violate the rights of indigent defendants who are not named as individual plaintiffs in this lawsuit.

#### **ISSUE FOUR: APPELLEES HAVE STANDING TO BRING THEIR OPEN COURT CHALLENGE.**

Appellees have standing to bring suit for Appellants' violation of Appellees' right to an open and public trial. Appellants' unlawful exclusion of members of the public

from Appellees' criminal proceedings has violated Appellees' constitutional rights. While Appellants now deny the practice, (RR 2 at 30), the Williamson County web site baldly states that there is a policy, practice, and custom of excluding members of the public from criminal proceedings.<sup>20</sup> Appellees allege that Appellants' practice of prohibiting members of the public, including family members of criminal defendants, from attending the proceedings has harmed Appellees. (CR at 147, 157.)

For instance, Elveda Vieira has been charged with a misdemeanor offense punishable by imprisonment. She is unfamiliar with her rights, suffers from a disability, and desires to have a member of the public at her appearance in the Williamson County courts at law. (CR 131.) Vieira believes that she will suffer imminent harm based on Defendants' routine practice of denying members of the public access to court proceedings. *Id.*

Appellees' claims are representative of the claims of the proposed class of Williamson County misdemeanor defendants. In addition to the named Appellees, numerous criminal defendants' proceedings have been closed to family, friends, and members of the public in violation of the Sixth Amendment's guarantee of a public trial.<sup>21</sup>

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<sup>20</sup> Williamson County's web site contains an admission that Defendants have a policy, practice, and custom of excluding members of the public from criminal proceedings. ("No children, spouses, parents, or friends." CR at 436) When Appellees' checked the web site prior to submitting this brief, Appellants' had changed their written policy in response to this suit. As is explained further below, this voluntary cessation of illegal practices does not allow the Appellants' to escape the jurisdiction of the district court.

<sup>21</sup> *See, e.g.*, CR at 446 - 450 (detailing court closings of friends and family by Williamson County).

The right to a public trial is clearly provided by the federal and Texas constitutions.<sup>22</sup> The “Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial...” *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 382, 61 L. Ed. 2d 608, 623 (1979). The Supreme Court has explained the basis for Plaintiffs’ standing to bring this claim: “The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.” *Waller v. Georgia*, 467 U.S. 39, 46, 81 L. Ed. 2d 31, 38 (1984) (citations, internal quotations, and alterations omitted); *see also Rovinsky v. McKaskle*, 722 F.2d 197, 199 (5th Cir. 1984); *State v. Stine*, 908 S.W.2d 429 (Tex. Cr. App. 1995) (criminal defendants have a right to a public trial), citing TEX. CONST. art. I, § 10; TEX. CODE CRIM. PROC. ANN. arts. 1.05, 1.24.

The Sixth Amendment guarantee of the right to a public trial is personal to accused. *Gannett*, 443 U.S. 368, 61 L. Ed. 2d. 608. Thus, Appellees have standing to allege violations of this Sixth Amendment right. Appellees also have standing to allege violations of TEX. CODE CRIM. PROC. ANN. art. 1.24 (2005) (“The proceedings and trials in all courts shall be public.”). As one Texas court held regarding article 1.24, “[t]he statute ... may be enforced by a criminal defendant, the public, and the press.”

*Tamminen v. State*, 644 S.W.2d 209, 217 (Tex. App.—San Antonio 1982) (affirmed in

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<sup>22</sup> Appellants obliquely argue that, because Texas law on public trials is codified in the Code of Criminal Procedure, there is no civil jurisdiction over Appellees’ claims. (Appellants’ Br. at 24). Texas case law shows otherwise. For instance, expunction, TEX. CODE OF CRIM. PROC. art 55.01 et. seq., is “a civil matter.” *McCarroll v. Texas Dept. of Public Safety*, 86 S.W.3d 376 (Tex. App.—Fort Worth 2002, no pet.). Even if Appellants were correct, the district court would retain jurisdiction over Appellees’ constitutional claims.

part, reversed in part on other grounds by *Tamminen v. State*, 653 S.W.2d 799 (Tex. Crim. App. 1983)). Appellees have standing to challenge Appellants' practice of closing the Williamson County courts at law to family members and friends, as well as members of the general public.

In an attempt to counter this overwhelming precedent, Appellants also advance the proposition that Appellees must demonstrate the courts at law are closed to every member of the public. (Appellants' Br. at 24.) Appellants' position is contrary to law. The sole case Appellants cite, *Williams v. State*, 2005 Tex. App. LEXIS 4245 (Tex. App.—Dallas, June 2, 2005, pet ref'd) (not designated for publication) does not stand for Appellants' proposition. The appellant in *Williams* argued that "his right to a public trial was violated when the court held trial in a jury room." *Williams*, at \*3. In rejecting Williams' argument, the Court of Appeals did *not* hold that the trial court's decision to conduct proceedings in a jury room was justified because the trial was only partially closed to the public. Instead, the Court of Appeals held that the use of a jury room was permissible given four additional facts contained in the record: (1) "appellant's trial was conducted in a jury room because the courtroom was being used for a jury trial, and the trial judge was 'running a double docket'"; (2) "[a]ppellant did not object to the use of the jury room"; (3) "there [was] no evidence the jury room was not 'public'"; and (4) "at least one member of the public was present in the jury room during trial." *Id.* Contrary to Appellants' contention, the Court of Appeals did not hold that the fourth fact – the presence of at least one member of the public during the trial – would have been sufficient on its own to vindicate the appellant's right to a public trial. In fact, the Court

did not provide any sort of rule that could be applied outside the case's peculiar facts. Instead, the Court simply held that "[u]nder these circumstances . . . appellant's right to a public trial was not violated when the trial court conducted its proceedings in a jury room." *Id.*

The *Williams* decision thus describes a set of circumstances in which a trial court may permissibly hold criminal proceedings in a jury room. Notably, these circumstances include a lack of evidence that the jury room is not "public." *Williams* did not deal with a situation where, as here, the courts are closed as a matter of policy, without any finding of special circumstances.

Moreover, Texas courts elsewhere have made clear that a criminal defendant's right to a public trial can be violated by a partial closure of his or her proceedings. As one court explained, a "party seeking a partial closure" must show a "substantial reason" for the closure. *Lerma v. State*, 172 S.W.3d 219, 229 (Tex. App. — Corpus Christi, 2005, pet ref'd).<sup>23</sup>

To the extent that Appellants' claim a changed practice and policy from the written policy in the record of this case, this new practice is no more than an attempt at voluntary cessation, and courts routinely find that such voluntary cessation does not moot plaintiffs' claims. As the Fifth Circuit has held, it "is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power

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<sup>23</sup> Appellants have offered no reason for their closure of the courts other than their own decision to schedule over a hundred cases for each First Appearance Docket so that each county court at law judge only need preside over a docket approximately once every three weeks. (RR 2 at 30, 42-43). Judicial convenience and routine scheduling issues do not constitute "substantial reasons" permitting closure of the courts.

to determine the legality of the practice.” *Gates v. Cook*, 376 F.3d 323, 337 (5th Cir. 2004). If courts lacked jurisdiction after a voluntary change of policy, they “would be compelled to leave [a] defendant free to return to his old ways.” *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). Thus, “the standard for determining whether a case has been mooted” by the defendant’s voluntary conduct “is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.” *Id.*

Here, Appellants have made no showing that they have changed their ways, at least with respect to the prospective class, and certainly are far from making it “absolutely clear” that their unconstitutional actions “could not reasonably be expected to recur.” *Gates*, 376 F.3d at 337. Appellants’ unconstitutional closing of their courts to the public is a live issue in this case.

### **RELIEF REQUESTED**

Appellees respectfully request that this Court affirm the trial court’s ruling and remand this case to the district court for adjudication on the merits. Appellees also respectfully request attorneys’ fees and costs for the appeal, and all such other and further relief as the Court may deem just and proper.

December 14, 2006

Respectfully submitted,

By: \_\_\_\_\_  
Harry Williams IV

Andrea Marsh  
Texas Bar No. 24039033  
Harry Williams IV  
Texas Bar No. 24053551  
510 South Congress Avenue, Suite 208  
Austin, TX 78704  
Telephone (512) 637-5220  
Facsimile (512) 637-5224  
TEXAS FAIR DEFENSE PROJECT  
ATTORNEYS FOR PLAINTIFFS

## **CERTIFICATE OF SERVICE**

I certify that a copy of Appellee's Brief on the Merits and Appendix was delivered by U.S. Mail to Stephen C. Ackley, 405 South Martin Luther King Street, Box 7, Georgetown, Texas, 78626, telephone number 512.943.1111, attorney for all Appellants, on December 14, 2006.

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Harry Williams IV, SBOT # 24053551