

KERRY HECKMAN, et. al.,	§	
on behalf of themselves and	§	IN THE DISTRICT COURT OF
all other persons similarly situated,	§	WILLIAMSON COUNTY, TEXAS
	§	
Plaintiffs,	§	277th JUDICIAL DISTRICT
	§	
v.	§	
	§	
WILLIAMSON COUNTY, et. al.,	§	
	§	
Defendants.	§	

**PLAINTIFFS’ OPPOSITION TO DEFENDANTS’ PLEAS TO THE JURISDICTION,  
SPECIAL EXCEPTIONS, REQUEST FOR SANCTIONS, AND SUPPLEMENTAL  
PLEAS TO THE JURISDICTION**

Plaintiffs Oppose Defendants’ Pleas to the Jurisdiction, Special Exceptions, and Request for Sanctions, filed June 28, 2006 (Defs.’ Answer), and Supplemental Pleas to the Jurisdiction, filed July 31, 2006, and would show the Court:

**SUMMARY**

In determining whether it has jurisdiction, a court must “construe the pleadings in favor of the plaintiff and look to the pleader’s intent.” Texas Ass’n of Business v. Texas Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993). Plaintiffs’ 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.

Plaintiffs have standing to bring their claims on behalf of themselves and the prospective class. Numerous cases cited throughout this brief have found jurisdiction and standing in lawsuits involving plaintiffs in precisely the same posture as Plaintiffs in this case: arrestees whose criminal cases have not been adjudicated and who are challenging systemic violations of their pre-trial rights. Indeed, denying standing to Plaintiffs would permit systemic violations of

constitutional rights and render the Sixth Amendment to the Constitution merely hortatory. This Court has the power to correct the great wrong Defendants are perpetrating on scores of misdemeanor defendants each week.

In the first two sections of this brief, Plaintiffs provide further support for what Plaintiffs' Second Amended Class Action Petition shows on its face: this Court's jurisdiction and Plaintiffs' standing to bring their claims. Cases from Texas, the Supreme Court, the Fifth Circuit, and other state and federal courts demonstrate that courts routinely find similar cases to be within their jurisdiction and justiciable.<sup>1</sup> As the cases discussed in Section A also show, there is no requirement that Plaintiffs bring their claims in their criminal cases. On the contrary, courts routinely hear and decide civil cases concerning the procedural rights of pre-trial arrestees. Courts take jurisdiction over these claims because the issues Plaintiffs raise – systematic Sixth Amendment violations – may *not* be raised in a criminal case. Plaintiffs allege both a violation of their rights and irreparable harm, and thus establish that this Court has jurisdiction to grant Plaintiffs equitable relief. Plaintiffs respond to the remainder of Defendants' "justiciability" pleas by showing that Plaintiffs specifically are entitled to seek equitable relief pursuant to the Fair Defense Act, and that Defendants' strange claim of "judicial activism" is without merit.

In Section B, Plaintiffs establish that they have standing and their claims are not moot. Plaintiffs' claims are precisely the type of "inherently transitory claims" to which the Supreme Court has applied the well-established relation back doctrine, holding that standing for class representatives with such claims should "relate back" to the date of filing the petition and motion

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<sup>1</sup> Justiciability refers to the "suitability of a dispute for court review." BLACK'S LAW DICTIONARY 357 (Pocket Edition 1996) . As such, "justiciability" covers standing, ripeness, and mootness inquiries. *Id.* See also ERWIN CHEMERINSKY, FEDERAL JURISDICTION 43 (4th ed. 2003). When Defendants refer to "justiciability" they apparently mean subject matter jurisdiction, a court's "jurisdiction over the nature of the case and the type of relief sought." BLACK'S LAW DICTIONARY 352. See also Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 553-554 (Tex. 2000) (distinguishing standing and jurisdiction).

for class certification. Plaintiffs' pleadings further establish their standing to bring a challenge to Defendants' practice of closing court to Plaintiffs' families and members of the public, which deprives Plaintiffs of their constitutional right to a public trial.

In section C, Plaintiffs demonstrate that their detailed Second Amended Class Action Petition easily satisfies the pleading requirements of Texas law and that Defendants' Special Exceptions lack merit.

In section D, Plaintiffs urge that the Court deny Defendants' specious sanctions motion.

In section E, Plaintiffs demonstrate that Defendants' Supplemental Pleas to the Jurisdiction are without merit.

### **PROCEDURAL HISTORY**

On June 12, 2006, Plaintiffs filed their Original Class Action Petition (Original Petition) and a Motion for Class Certification. On June 28, 2006, Defendants filed their Answer. On July 14, 2006, Plaintiffs filed a Motion to Recuse or Disqualify. On July 18, 2006, Plaintiffs filed a First Amended Class Action Petition, adding additional named plaintiffs. On July 21, 2006, Plaintiffs filed a Second Amended Class Action Petition, again adding additional named plaintiffs. On July 25, 2006, Defendants filed an Opposition to Plaintiffs' Motion to Recuse. On July 31, 2006, Defendants filed Supplemental Pleas to the Jurisdiction. On August 7, 2006, after a hearing on the Motion to Recuse, Judge Anderson recused himself. On August 14, 2006, the Honorable Joseph H. Hart was appointed to hear this case.

### **FACTUAL BACKGROUND**

Plaintiffs originally named three people as individual plaintiffs and prospective class representatives: Kerry Heckman, Monica Maisenbacher, and Sylvia Peterson. The First

Amended Petition, filed July 18, 2006, added Elveda Vieira and Tammy Newberry. Plaintiffs' Second Amended Petition added Kelsey Stempko and Jessica Stempko.

As further detailed in the Second Amended Class Action Petition, each Plaintiff was arrested in Williamson County and charged with a misdemeanor offense punishable by incarceration. Each Plaintiff is indigent and cannot afford to hire an attorney.

No Plaintiff was given an opportunity to request court-appointed counsel at his or her initial magistrature hearing.

Plaintiffs Heckman, Maisenbacher, and Peterson have made their first appearance in the Williamson County Courts at Law. During Plaintiffs' first court appearances in Williamson County, court officials encouraged Plaintiffs to plead guilty or no contest without consulting an attorney, and encouraged them to speak to prosecutors without the aid of an attorney.

Despite the fact that they were not properly advised of their right to a court-appointed attorney, Plaintiffs Heckman, Maisenbacher, and Peterson each requested a court-appointed attorney and presented information to the court demonstrating that they could not afford to hire an attorney. The court denied their requests for counsel at their first appearance hearings.

Plaintiffs Elveda Vieira, Tammy Newberry, and Kelsey Stempko were arrested in Williamson County and charged with misdemeanor offenses that carry a possible penalty of imprisonment. At their magistrature hearings, they were not given accurate and intelligible information about their right to counsel, how to request appointed counsel, or the standard for determining if they were eligible for appointed counsel. Plaintiffs Vieira, Newberry, and Kelsey Stempko have not been allowed to submit written requests for appointed counsel and were not appointed counsel by the magistrate. Plaintiffs Vieira, Newberry, and Kelsey Stempko have had their first appearances re-set by the Court.

## ARGUMENT

### A. PLAINTIFFS' CLAIMS ARE COGNIZABLE.

#### **1. Plaintiffs Have Alleged All Elements Required to Establish the Court's Jurisdiction to Grant Plaintiffs' Request for Equitable Relief.**

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. Texas Natural Res. Conservation Comm'n v. White, 46 S.W.3d 864, 868 (Tex. 2001); Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 554-55 (Tex. 2000). Plaintiffs' pleadings demonstrate unequivocally that this Court has jurisdiction.

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 Dist.] 1989, no writ). Numerous cases discussed below demonstrate that Plaintiffs have made both showings required to establish the Court's equitable jurisdiction over their claims.

*a. Courts Routinely Find that Claims by Pre-trial Arrestees Challenging the Constitutionality of Specific Criminal Procedures State a Cause of Action for which Relief May Be Granted.*

Federal and state courts routinely hold that plaintiffs asserting Sixth Amendment violations on behalf of themselves and/or a class of pre-conviction criminal defendants can state a cause of action under § 1983 and seek prospective injunctive and declaratory relief. See, e.g., Reyna v. City of Weslaco, 944 S.W.2d 657 (Tex. App.—Corpus Christi 1997, no pet.); 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>2</sup>; Tucker v. City of Montgomery Bd. of Comm'rs, 410

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<sup>2</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

F.Supp. 494 (M.D. Ala. 1976) (three judge court); cf. Mississippi v. Quitman County, 807 So.2d 401 (Miss. 2001) (denying motion to dismiss county's claim that state's failure to bear indigent defense costs results in constitutionally inadequate representation of indigents); New York Lawyers' Ass'n v. State of New York, 727 N.Y.S.2d 851, 860 (N.Y. App. Term 2001) (denying motion to dismiss prospective relief claims alleging that low appointed counsel fees result in constitutionally inadequate representation of indigents); Zarabia v. Bradshaw, 912 P.2d 5 (Ariz. 1996) (holding, in part, that appointment of counsel without regard to relevant experience and skills is unlawful and ordering future appointments of qualified attorneys); Johnson v. Zurz, 596 F. Supp. 39 (N.D. Ohio 1984) (finding standing for indigent defendants facing contempt charges).

In Luckey, a class of indigent persons who presently were or would be charged with criminal offenses in the future brought Sixth Amendment claims seeking prospective reforms in the indigent defense system in Fulton County, Georgia. 860 F.2d at 1013. The complaint alleged that indigent defense counsel were appointed late, could not adequately investigate the charges against their clients, had to hurry their cases to trial unprepared or resolve them through guilty pleas, and lacked investigative and expert resources, resulting in systemic ineffective representation. Id. at 1013, 1018. Although the case ultimately was dismissed on federal abstention grounds, the court held that plaintiffs' pre-trial Sixth Amendment claims stated a claim upon which systemic prospective relief could be granted. Id. at 1018.

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federalism.” Id. at 762. There are no federalism concerns here, of course, because Plaintiffs have sued in state court. Defendants' reliance on Younger v. Harris, 401 U.S. 37 (1971) is misplaced because the Younger court abstained on federalism grounds. Samuels v. Mackell, 401 U.S. 66, 69 (1971), stands for the proposition that declaratory relief is unavailable where injunctive relief would require an inappropriate exercise of federal jurisdiction. As with Younger, the holding of Samuels, which deals only with federal jurisdiction, is inapposite to this case.

Similarly, in Tucker, the plaintiffs represented a class of indigent defendants against whom criminal charges in state court were pending. 410 F. Supp. at 507. Plaintiffs desired but were not furnished appointed counsel. Id. They brought suit pursuant to 42 U.S.C. §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 the plaintiffs' Sixth Amendment rights had been violated. Id. at 508. The claims in Luckey and Tucker are extremely similar to those raised in this case.

Numerous other courts have recognized that prospective relief is available to criminal defendants asserting violations of their right to counsel in ongoing criminal proceedings. For example:

- ***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. The injunction provided that no defendant entitled to court-appointed counsel could be required to wait more than forty-five days for counsel to file an appearance, and proceedings in which a defendant could not participate meaningfully through counsel would not be allowed to proceed.
- ***White v. Martz***, CDV-2002-133 (Montana First Judicial District Court, July 24, 2002) (attached as Exh. A). 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 prospective relief. The class alleged that the defendant state and county officials had failed to adequately fund and supervise county indigent defense programs, thus depriving indigents of effective representation by counsel in violation of the Sixth Amendment. The state trial court found that these and other allegations stated a claim under the Sixth Amendment and that plaintiffs had standing to seek injunctive relief, and denied defendants' motion to dismiss.
- ***Doyle v. Allegheny County Salary Board***, No. GD96-13606 (Pa. Ct. Common Pleas March 19, 1998) (order and complaint attached as Exh. B). A class of pre-conviction public defender clients brought Sixth Amendment claims of inadequate representation seeking systemic prospective relief. Compl., Doyle (Mar. 19, 1998). Plaintiffs alleged

that overwhelming caseloads, lack of necessary resources, and lack of training and oversight resulted in a range of deficiencies in the representation provided to them by attorneys employed by the Allegheny County Public Defender's Office. The court denied defendants' motion for summary judgment, resulting in the parties' entering a consent decree to address the systemic deficiencies in the system.

- **Rivera v. Rowland**, No. CV 650545629S, 1996 WL 636475 (Conn. Super. Ct. 1996) (attached as Exh. C). A class of pre-conviction public defender clients brought Sixth Amendment claims for systemic prospective relief. 1996 WL 636475, at \*7. Plaintiffs alleged that lack of funding and supervision over the provision of indigent defense services by attorneys with the Connecticut Public Defender's Office resulted in systemic deficiencies, including high caseloads, lack of investigatory and expert resources, lack of policies and procedures, and low rates of compensation for certain attorneys. The court held that plaintiffs' claims were sufficient to survive defendants' motion to dismiss. 1996 WL 636475, at \*1.
- **Stinson v. Fulton County Board of Commissioners**, No. 1: (N.D. Ga. Sept. 15, 1994 and Nov. 29, 1994) (attached as Exh. D). A class of pre-conviction indigent defendants brought Sixth Amendment claims for systemic prospective relief, alleging that the county indigent defense program was so "underfunded and inadequately supervised . . . that attorney's [sic] in the system could not provide a cohesive or adequate defense for indigent defendants." Slip. op. (Sept. 15, 1994) at 3. Plaintiffs also alleged that they were unable to meet and confer with their attorneys in a meaningful way, rendering appointment of counsel a mere formality. The court found that these and other allegations stated a claim under the Sixth Amendment, denied defendants' motion to dismiss, and certified the class. *Id.* at 4.
- **Trombley v. County of Cascade**, No. CV-87-114-AF, 1989 WL 79848 (9th Cir. 1989) (attached as Exh. E). 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 seeking systemic prospective relief. *See* Compl. ¶ 8, Trombley v. County of Cascade, No. CV-87-114-GF (D. Mont. filed May 28, 1987) (attached as Exh. F). 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 district court allowed the lawsuit to proceed. The parties subsequently agreed to a consent decree that included the implementation of national practice standards and guidelines, procedures for training and supervision, policies regarding caseload limits, and creation of support staff positions. *See* Judgment, Trombley (No. CV-87-114-GF) (attached as Exh. G).
- **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 for systemic prospective relief. 392 F. Supp. at 835. Plaintiffs alleged that New York's Legal Aid Society attorneys were underfunded and labored under high caseloads, resulting in attorneys too overburdened to provide adequate

representation. Id. Although Wallace, like Luckey, was ultimately 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.

Decisions from Corpus Christi to Connecticut, from Montana to Massachusetts, and from Alabama and Georgia to New York, all demonstrate that Plaintiffs have stated a cause of action for which relief can be granted. Courts have repeatedly found that they have jurisdiction over claims such as those raised in this case, and, accordingly, Defendants' Pleas to the Jurisdiction should be denied.

*b. Plaintiffs Have Suffered and Continue to Suffer Irreparable Harm that Cannot be Remedied in their Individual Criminal Proceedings.*

"Probable injury includes elements of imminent harm, irreparable injury, and no adequate remedy at law." Surko, 782 S.W.2d at 225. Defendants' failure to appoint counsel has caused and/or will imminently cause Plaintiffs irreparable harm, and Plaintiffs have no adequate remedy at law.

Defendants' unconstitutional procedures have violated and/or will imminently violate Plaintiffs' Sixth Amendment rights and have caused them and threaten to cause them irreparable harm. The allegation that a pre-trial 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 (attached as Exh. O). In this pre-trial 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. See also United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 165 L. Ed. 2d 409, 2006 Lexis 5165 at \*12 (where Sixth Amendment rights denied "[n]o additional showing of prejudice is required to make the violation

‘complete’”); 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.”); Brewer v. West Irondequoit Cent. School Dist., 212 F3d 738, 744-745(2nd Cir. 2000); Henry v. Greenville Airport Comm’n, 284 F.2d 631, 633 (4th Cir. 1960) (“The District Court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right.”).

Despite this principle, Defendants allege that Plaintiffs have an adequate remedy at law because Plaintiffs’ claims may be adjudicated within ongoing criminal proceedings. This argument is entirely meritless. Plaintiffs allege that the procedures followed by Defendants in Plaintiffs’ pending criminal proceedings violate their constitutional right to counsel and their due process rights. The harm to Plaintiffs caused by Defendants’ conduct “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. Thus, “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.<sup>3</sup>

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. 39 (D. Ohio 1984) (finding standing and granting class certification for class of indigent people facing incarceration for failure to pay child support). Plaintiffs allege that Defendants’ procedures violate their constitutional right to counsel, and thus that their criminal proceedings fail to

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<sup>3</sup> See also Luckey v. Harris, 860 F.2d at 1017 (denying defendants’ claim that right to counsel issues must be litigated in the underlying criminal case and holding 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.”)

comport with due process requirements. Plaintiffs can not be compelled to litigate their claims, unrepresented by counsel, in the unfair forum Defendants' County Courts at Law provide. Indeed, forcing Plaintiffs to litigate their claims regarding Defendants' procedures in the context of their criminal proceedings would serve only to insulate those procedures from review. Cf. American Ass'n of Cosmetology Schools v. Riley, 170 F.3d 1250, 1260 (9th Cir. 1999) ("federal courts universally dispense with the exhaustion requirement in situations where the very administrative procedure under attack is the one that the agency says must be exhausted").

Defendants' contention that Plaintiffs' only remedy is within their criminal case would burden Plaintiffs and make it nearly impossible for them to vindicate their rights. For instance, the vast majority of misdemeanor criminal defendants in Williamson County plead guilty without the assistance of counsel, and those who have pled guilty have extremely limited rights to appeal their convictions in order to contest unfair procedures, including procedures that deny them access to counsel. Chavez v. State, 183 S.W.3d 675, 680 (Tex. Crim. App. 2006) (TEX. R. APP. P. § 25.2(a)(2) "provides that a defendant may appeal only matters that were raised by written motion filed and ruled on before trial or after getting the trial court's permission to appeal. Thus, if a jurisdictional issue were raised by written motion filed and ruled on before trial, or the trial court granted permission to appeal such an issue, a defendant who plea-bargained would have a right to appeal that issue, provided the appeal is properly perfected pursuant to Rule 25.2(b)."). Even assuming that these defendants, untutored in the law, could identify constitutional errors in their criminal cases, appellate rules will prevent them from obtaining relief on appeal if they do not properly follow the strict rules for appealing error. The remedies that Defendants claim are available to Plaintiffs in their criminal cases are not adequate, but instead are illusory.

Furthermore, Defendants' insistence that the pending criminal proceedings provide a forum for adjudication of Plaintiffs' claims is erroneous because Plaintiffs seek system-wide relief that they cannot obtain through individual criminal proceedings. "Where the state imposes systemic barriers to effective representation, prospective injunctive relief without individualized proof is necessary and appropriate." Nicholson v. Williams, 203 F.Supp.2d 153, 240 (E.D.N.Y. 2002) (vacated on other grounds, 116 Fed. Appx. 313 (2nd Cir. 2004)). See also Kinney A. ex rel. Winn v. Perdue, 356 F.Supp.2d 1353, 1362 (N.D. Ga. 2005) (in a class action seeking only prospective relief to redress institutional deficiencies in the provision of counsel "class members need only meet the traditional requirements for the application of equitable relief, namely a likelihood of substantial and irreparable injury if relief is not granted, and the inadequacy of remedies at law."); Simeon v. Hardin, 451 S.E.2d 858, 865 (N.C. 1994) (allowing systemic civil rights challenge to procedures in criminal cases, holding that "issues raised by plaintiffs could not be authoritatively settled in their individual criminal cases") (internal citations omitted); LaVallee, 812 N.E. at 911 (allowing systemic challenge, reasoning that individual criminal defendants should not bear the burden of challenging the system-wide failure to provide counsel); Best, No. 042-001890 (Wash. Sup. Ct. August 26, 2004 (certifying class of indigent defendants "who have or will have a criminal felony cases" in county and who sought declaratory and injunctive relief). (Exh. O) Plaintiffs seek systemic remedies only available through a § 1983 class action suit. Forcing Plaintiffs to seek vindication of their right to counsel only in their individual criminal case unconstitutionally burdens that right. See, e.g., Gerstein v. Pugh, 420 U.S. 103 (1975) (although probable cause determination was eventually made in each individual case, the Supreme Court recognized that systematic delay in determination was a

constitutional harm that created civil cause of action to challenge practices); County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (same).

Plaintiffs have referred to an overwhelming number of cases demonstrating that this Court has jurisdiction over Plaintiffs' equitable claims – again and again, in courts across the country and from the Supreme Court to trial courts throughout the states, courts allow pre-trial arrestees to bring systemic challenges to allegedly unconstitutional procedures. (See § A.1.a, above (collecting cases).) In contrast to this extensive case law, Defendants point to three seemingly random cases for the proposition that Plaintiffs must raise their claims in their criminal case. Defendants' cases are not on point and fail to raise even slightest doubt about the propriety of this litigation.

Covarrubia v. Butler, 502 S.W.2d 229 (Tex. App.—San Antonio 1973, writ ref'd n.r.e.) (Answer, ¶ 1.03) does not call in to question this Court's jurisdiction, and highlights the Defendants' repeated conflation of challenges to unconstitutional procedures, at issue here, and challenges to penal statutes, which are not part of this case. In Covarrubia, the plaintiff 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 the penal statute prohibiting disorderly conduct against him on the basis that the statute was overbroad and vague. Id. The court denied the plaintiff's request for an injunction, noting that the “opportunity to raise constitutional claims in the pending criminal proceeding and subsequent appeal will be presumed to present an adequate opportunity for the protection of the asserted federal rights.” Id. at 231. In this case, Plaintiffs will not have an adequate opportunity to raise their claims in their pending proceedings, in part because they do not have lawyers to help them shape their challenge. Moreover, unlike the plaintiff in Covarrubia, Plaintiffs do not in this action attack the legality of

the charges against them or seek to enjoin their criminal proceedings, but rather challenge specific pre-trial procedure that render those proceedings unconstitutional.

Because Plaintiffs are not challenging a penal statute, Defendants' reliance on State v. Morales is similarly misplaced. (Answer, ¶ 3.39.) In Morales, the Supreme Court of Texas vacated a lower court declaration pronouncing a criminal statute against sodomy unconstitutional. 869 S.W.2d 941, 949 (Tex. 1994). The court stated, "neither this court nor the courts below, have jurisdiction to enjoin the enforcement of, or issue a declaratory judgment determining the constitutionality of [the penal statute]." 869 S.W.2d at 942. Plaintiffs here are challenging Defendants' unconstitutional and illegal practices in the pre-trial handling of their criminal cases, which is a question of criminal procedure and not of the constitutionality or other merits of the penal charges against them. Texas courts have jurisdiction over claims that challenge the constitutionality of criminal procedures followed in the courts. See, e.g., Reyna v. City of Weslaco, 944 S.W.2d 657 (Tex. App. — Corpus Christi 1997, no pet.) (reversing grant of summary judgment in favor of defendants in § 1983 suit for declaratory and injunctive relief brought by criminal defendants challenging the constitutionality of court's practice of denying defendants immediate access to complaints filed against them).

Finally, Defendants cite to Perry v. Del Rio, 66 S.W.3d 239 (Tex. 2001),<sup>4</sup> for the proposition that because criminal proceedings are pending, Plaintiffs' claims are not ripe because they could challenge the unconstitutional procedures in their criminal case. (Answer, ¶ 1.10.) Perry v. Del Rio is inapposite, dealing with a very different type of challenge and focusing on issues not presented in this case. In Perry, the Court granted mandamus relief to determine which of two courts should proceed to trial on claims that Congressional districts in Texas

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<sup>4</sup> Defendants' cite to Perry v. Cotera, but Plaintiffs could find no reported decision by that name; the case reported at 66 S.W.3d 239 includes Cotera as a second respondent.

should be reapportioned. The relevance of Perry to this case unclear. Unlike Perry, two courts do not have the opportunity to adjudicate Plaintiffs' § 1983 claims. Only this court, which has jurisdiction over Plaintiffs' §1983 suit, can grant Plaintiffs relief, and Plaintiffs, who have or are under imminent threat of suffering a violation of their constitutional rights, advance claims ripe for adjudication.

While Plaintiffs point to numerous cases brought by pre-trial arrestees to support their position, Defendants' three citations do not even address challenges to criminal procedures. The lack of case law supporting Defendants is unsurprising because Defendants' position is illogical. Courts allow systemic challenges to criminal procedures because forcing defendants to risk their liberty in a flawed process would be unfair and would violate the criminal defendants' right to due process. Courts may ask a criminal defendant to put his or her liberty at risk while challenging a possibly unconstitutional penal law, but this is premised on the availability of due process in the relevant criminal proceedings. The contrast with a challenge to an infirm penal statute is instructive. If a criminal defendant has an attorney and fair criminal proceedings that comport with the requirements of due process, those proceedings will enable the court to discover and discard unconstitutional penal statutes. See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003) (declaring unconstitutional the penal statute at issue in Morales). Without a lawyer and fair procedures, however, criminal defendants are unable to challenge unconstitutional and unlawful criminal procedures in their criminal cases, creating an unacceptable risk that those procedures will continue to irreparably harm both current and future criminal defendants. Obtaining systemic equitable relief through a civil challenge such as this one is the only way to secure an adequate remedy for the civil rights violations alleged in this case.

*c. This Court Has Jurisdiction To Issue Declaratory Relief Requested by Plaintiffs.*

In addition to their argument that the Court generally does not have jurisdiction to grant Plaintiffs' claims for equitable relief, Defendants also specifically claim that the court does not have jurisdiction to grant a declaratory judgment in the case.<sup>5</sup> However, Texas statutes and case law clearly demonstrate that this Court has jurisdiction to hear Plaintiffs' claims and the power to issue the relief Plaintiffs request, including declaratory relief.<sup>6</sup>

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 (Vernon 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 this court has the power to grant Plaintiffs' request for declaratory judgment. A grant of declaratory judgment in

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<sup>5</sup> Although Defendants raise this issue as a Special Exception rather than in their Pleas to the Jurisdiction, (Answer, ¶¶ 3.36 – 3.39), we address it in this section since, like the Pleas to the Jurisdiction, it goes to the Court's authority to grant the relief requested by Plaintiffs.

<sup>6</sup> It is undisputed that this Court may hear cases brought pursuant to 42 U.S.C. § 1983.

Plaintiffs' favor will clarify Plaintiffs' rights, "settle the dispute, and put an end to the controversy." Id.

The few limits Texas courts have placed on courts' broad powers to issue declaratory relief are inapplicable to this case. The one case Defendants point to, Texas Liquor Control Bd. v. Canyon Creek Land Corp., 456 S.W.2d 891, 895 (Tex. 1970) (Answer, ¶ 3.38), is distinguishable on its facts.<sup>7</sup> In Texas Liquor, the plaintiffs sought declaratory relief from the Liquor Control Board's interpretation of a statute regulating the possession of alcoholic beverages. The Texas Liquor plaintiffs were involved in ongoing administrative, forfeiture and criminal proceedings for alleged violations of various statutes governing the possession of liquor. The court refused to grant declaratory judgment.

As with the Covarrubia and Morales cases, Defendants again conflate challenges to penal statutes, not at issue here, with the challenge to a systemic deprivation of procedural rights that Plaintiffs allege. Plaintiffs here are not challenging a penal statute; in contrast, the Texas Liquor court wrote that "[i]t should be emphasized at the outset that we are dealing with a penal statute. The civil courts are not powerless to interpret the same, but its meaning and validity should ordinarily be determined by courts exercising criminal jurisdiction." 456 S.W.2d at 894. The court then went on to note that there was no allegation that the statute was unconstitutional. Id. Thus the facts and posture of Texas Liquor distinguish this case in three ways. First, here Plaintiffs urge a very urgent constitutional claim. Second, Plaintiffs here are not challenging a penal statute. Third, the Texas Liquor court emphasized that the plaintiffs there would have an administrative hearing to argue their interpretation of the statute – thus emphasizing the

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<sup>7</sup> Defendants also cite to Bonham State Bank v. Beadle, 907 S.W.2d 465, 467 (Tex. 1995). Bonham examines whether a declaratory judgment proceeding is appropriate for obtaining an offset of two prior judgments, id., an issue unrelated to the concerns here.

administrative rather than criminal court as the alternative forum. Id. at 894-895.<sup>8</sup>

It is worth emphasizing again that Plaintiffs are *not* challenging any of the penal statutes under which they are charged, but rather the procedures utilized in adjudicating their criminal case. Moreover, Plaintiffs cannot raise their claim of systemic violation of their constitutional rights in an administrative context, as the plaintiffs in Texas Liquor could. Nor can Plaintiffs effectively raise these systemic claims in the context of individual criminal prosecutions. (See § A.1.b.)

**2. Plaintiffs are Entitled to Seek Equitable Relief Pursuant to the Texas Fair Defense Act.**

Defendants’ violations of the Texas Fair Defense Act (FDA) create a valid cause of action for Plaintiffs here. The provisions of the FDA under which Plaintiffs make their claims are codified in the Code of Criminal Procedure. See, e.g., 77th Leg., R.S., ch. 906, 2001 Tex. Gen. Laws 906, 2 (amending TEX. CODE CRIM. PROC. ANN. art. 1.051). As part of the Code of Criminal Procedure, the relevant portions of the FDA may be raised by criminal defendants and their attorneys – and adjudicated by judges – in many contexts. For example, the Code of Criminal Procedure prescribes and defines numerous duties to be performed with a precision and certainty that leave nothing to the exercise of discretion or judgment. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 1.051 (“In a county with a population of 250,000 or more, the court or the courts’ designee shall appoint counsel as required by this subsection as soon as possible, but not later than the end of the first working day after the date on which the court or the courts’ designee

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<sup>8</sup> Again, there was no challenge to the procedures of the administrative hearing, but a challenge to the penal statute being heard in the administrative hearing. Compare American Ass’n of Cosmetology Schools, 170 F.3d at 1260 (“federal courts universally dispense with the exhaustion requirement in situations where the very administrative procedure under attack is the one that the agency says must be exhausted”). Texas Liquor also is distinguishable because the same parties appeared in the administrative and criminal cases. Here, in contrast, the parties are different – the state brings a criminal complaint, while Plaintiffs’ have sued Williamson County and individuals in their official capacity. Because different parties appear in this case and the underlying criminal prosecutions, the situation here is distinguishable from Texas Liquor.

receives the defendant's request for appointment of counsel.” (emphasis added). When these “ministerial duties” created by the FDA and codified in the Code of Criminal Procedure are violated, mandamus is appropriate. See, e.g., Bennett v. Paxson, 932 S.W.2d 81 (Tex. App. — El Paso 1996, no writ) (holding that trial court’s failure to provide an indigent defendant with a transcript of the voir dire portion of the criminal trial at county expense involved a ministerial, as opposed to a discretionary, duty, for purposes of determining whether the defendant was entitled to a writ of mandamus ordering the trial court to provide such transcript, where the Court of Criminal Appeals had clearly set forth a specific rule leaving no judicial discretion on the matter to the trial court).

Claims under the FDA also may be brought in pre-trial motions, TEX. CODE CRIM. PROC. ANN. art. 26.05(d) (allowing appointed counsel to make pre-trial ex parte confidential request for advance payment for investigators and for mental health and other experts), as well as on direct appeal, see, e.g., Kirk v. State, 2006 Tex. App. LEXIS 6060, 8-12 (Tex. App. — Fort Worth 2006) (July 13, 2006)(no pet. h.) (reaching the merits of a claim under TEX. CODE CRIM. PROC. ANN. art. 26.052(e)) (attached as Exh. H). Claims under the FDA as codified in the Code of Criminal Procedure are justiciable in all of these contexts, and, similarly, there is no bar to judges’ granting equitable relief in a civil suit raising FDA claims.

As discussed above, numerous causes of action are available to private parties under the FDA, and Defendants’ contention that the Task Force on Indigent Defense is solely responsible for its enforcement is wholly inaccurate. The Texas Government Code section cited as support by Defendants, § 71.060, does not purport to grant the Task Force exclusive enforcement authority over FDA, but simply gives the Task Force authority to “develop policies and standards” that supplement statutory provisions of FDA. See, e.g., 1 TAC § 174.1(1) (adopting

minimum standard of six hours per year of continuing legal education for court-appointed attorneys). Nothing in § 71.060 suggests that the Legislature intended to strip the courts of their broad power to grant injunctive and declaratory relief. (See section A.1.c., above, discussing injunctive and declaratory relief.) The Task Force does not have exclusive enforcement authority with respect to the FDA, and Plaintiffs have stated a valid cause of action based on Defendants' violation of the FDA as codified in the Code of Criminal Procedure.

### **3. Plaintiffs Are Not Asking the Court to Engage in Judicial Activism.**

Plaintiffs seek injunctive and declaratory relief from Defendants' violations of their *existing* right to counsel under the FDA and the Constitutions of the State of Texas and the United States, and are not asking the court to enact legislation or enforce statutory language vetoed by the governor. The rights enumerated in the FDA and state and federal constitutions and interpreted by the state and federal courts exist independently of any additional codification that the Legislature may propose or adopt, and these rights are not subject to gubernatorial veto. Plaintiffs' claims, far from being in some way precluded by a failed statutory amendment, are valid under existing statutory and constitutional law independently of whatever that amendment would have required of Defendants had it been signed into law. By basing their requests for relief on well-established and clearly stated state and federal grounds, Plaintiffs ask the court to engage not in judicial activism, but in adjudication.

Further, despite Defendants' assertion to the contrary, the vast majority of Plaintiffs' claims for relief bear no resemblance to the provisions of Tex. HB 3152, 79th Legislature, R.S. (2005).<sup>9</sup> Plaintiffs' Requested Relief E, which seems to be the basis for Defendants' contention, is readily distinguishable from the terms of the bill vetoed by Governor Perry in 2005. While

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<sup>9</sup> Available at: <http://www.capitol.state.tx.us/tlo/79R/billtext/HB03152F.HTM>; see also Plaintiffs' Original Pet. at 31-33; 2nd Amend. Pet. at 37-40.

Subsection (a-2) of HB 3152 would have prevented courts from directing or encouraging defendants in “a criminal case” to communicate with prosecutors until they were advised of their rights and had an opportunity to obtain counsel, Requested Relief E, in contrast, is founded on the rights granted by the FDA and the state and federal constitutions, and would apply only to those cases in which the Supreme Court has held that the state is required to provide counsel to indigent defendants – those involving charges “for which a punishment of imprisonment is possible.” (See e.g. Pls.’ 2nd Amend. Pet. ¶¶ 127, 129 (asking for relief only for Plaintiffs and class members who are accused of crimes for which there is a possibility of imprisonment)); see also Alabama v. Shelton, 535 U.S. 654, 657 (2002); Argersinger v. Hamlin, 407 U.S. 25, 32 (1972); TEX. CODE CRIM. PROC. ANN. art. 1.051(c) (Vernon 2005). Governor Perry cited this important distinction in his veto statement, noting that HB 3152 would apply “to all criminal cases – even those punishable only by a fine, such as a traffic offense.” Veto Message of Gov. Perry, HB 3152, 79th Leg., R.S. (June 17, 2005). (Attached as Exh. I.) Plaintiffs’ Requested Relief E, along with Plaintiffs’ twelve other enumerated claims for injunctive and declaratory relief, does not seek to judicially enact HB 3152, but to enjoin Defendants’ ongoing violation of Plaintiffs’ firmly established statutory and constitutional right to counsel.

**B. PLAINTIFFS’ CLAIMS ARE JUSTICIABLE UNDER THE CONSTITUTIONAL PRINCIPLES OF STANDING, RIPENESS, AND MOOTNESS.**

The extensive list of cases cited in § A.1.a, above, demonstrates not only that this Court has jurisdiction, but that courts routinely find that pre-trial arrestees, such as Plaintiffs, have standing to seek systemic relief in the civil courts for violations of the right to counsel that are occurring in ongoing criminal proceedings.

**1. State and Federal Law Allow Plaintiffs Whose Individual Claims Have Been Mooted to Represent the Class.**

*a. Defendants' Claims about Standing Only Apply to Three of the Named Plaintiffs.*

Plaintiffs dispute all of Defendants' allegations regarding standing. In addition, Plaintiffs have filed First and Second Amended Petitions that together have added four additional named Plaintiffs as proposed class representatives, and these additional Plaintiffs have not received court-appointed attorneys. Because these newly named Plaintiffs continue to suffer ongoing irreparable harm as a result of Defendants' illegal conduct, Defendants' assertion that this litigation should be dismissed because Plaintiffs's claims are moot should be denied.

*b. Plaintiffs Have Standing to Represent the Class under the Relation Back Doctrine Because Their Claims Are Inherently Transitory.*

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 (1991) (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 399 (1980)). Although Defendants contend that the post-filing appointment of counsel to Plaintiffs Heckman, Maisenbacher, and Peterson, as well as Mr. Heckman's plea of no contest and the dismissal of the charges against Ms. Maisenbacher, render their individual claims moot, under state and federal law their *class* claims remain live<sup>10</sup> and they have standing to represent the class. See,

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<sup>10</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 (1980).

e.g., Reyna, 944 S.W.2d at 662 (litigation should go forward where “adjudication ... would vindicate the rights denied [to plaintiffs] and alter the unconstitutional” policies and practices challenged by plaintiffs, even if the individual claims of the named class representatives have become moot).<sup>11</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 Plaintiffs’ claims are inherently transitory. Normally, if, during the course of individual litigation, a plaintiff’s grievance has been rectified or if a plaintiff no longer is subject to defendant’s challenged conduct, the plaintiff’s claim will be deemed moot and the action dismissed. In the class action context, however, 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 pre-trial rights in the criminal justice system. In County of

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<sup>11</sup> While the case law on standing in class actions has been more extensively developed in federal courts, Texas courts have generally 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 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. Both parties rely almost exclusively on this federal common law. As a result, we rely on these federal decisions to reach our conclusion.”).

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. As the Court explained:

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. at 51-52 (1991) (internal citations omitted); see also, Gerstein v. Pugh, 420 U.S. 103 (1975), Swisher v. Brady, 438 U.S. 204 (1977).

Texas courts have consistently followed federal law and applied the relation back doctrine in state court. The Markham court neatly summed up the state of Texas law on the application of the relation back doctrine. After observing that in a typical class action, the named plaintiffs' individual claims must remain live throughout the course of litigation, the court recognized that “an exception to this general rule” exists:

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. dism'd by agr.) (applying the relation back doctrine).

Plaintiffs' 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. Plaintiffs, 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. No more than a few weeks after magistration, Plaintiffs and members of the prospective class make their first appearance in the Williamson County Courts at Law. For Plaintiffs who, having been misinformed by Defendants as to their right to counsel, elect to plead guilty at the First Appearance, less than an hour can separate Defendants' misinformation and the guilty plea.<sup>12</sup> For plaintiffs who request counsel and have that request unconstitutionally denied by Defendants, the time window is somewhat larger, but still brief. Although no thorough statistical analysis exists of Williamson County misdemeanor cases, a recent study of the two-year period prior to the implementation of a public defender system in Hidalgo County showed that *even when counsel was appointed* for a misdemeanor defendant facing jail time, the average time from the defendant's first appearance before a judge to the final disposition of his case was a scant 34 days.<sup>13</sup>

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

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12 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. Exh. J at 2.

13 Robert L. Spangenberg, et al. INITIAL INTERIM REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE: AN ANALYSIS OF THE NEWLY ESTABLISHED BEXAR AND HIDALGO PUBLIC DEFENDER OFFICES, 38 (May 11, 2006), full report available at <http://www.courts.state.tx.us/oca/tfid/Final%20Revised%20Version%20Initial%20Interim%20Report.pdf> (last viewed July 15, 2006) (relevant parts attached as Exh. K.).

review altogether. In Gerstein, which dealt with a challenge to pre-trial 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 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. (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 Plaintiff'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 named Plaintiffs will be repeatedly suffered by other members of the putative class whose individual claims would similarly evade review due to their transitory nature. See also County of Riverside, 500 U.S. 44; Swisher v. Brady, 438 U.S. at 213 (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 of exceptions to masters' proposals 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 (1975))). Because Plaintiffs' claims are inherently transitory, the relation back doctrine applies and their 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 Plaintiffs allege in their Original Class Action Petition that, at the moment they filed their claim, they were not represented by an attorney and were thus “suffering a direct and current injury as a result” of Defendants’ 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.<sup>14</sup> Therefore, applying the relation back doctrine to their inherently transitory claim in accordance with state and federal standing jurisprudence, all named Plaintiffs have standing to represent the class despite the mootness of some Plaintiffs’ individual claims.

*c. Defendants Cannot Moot the Putative Class Action by “Picking Off” the Named Plaintiffs By Providing Attorneys Prior to Class Certification.*

Courts have consistently held that to allow 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 (1980). Here, Defendants have reversed their initial decisions and awarded Plaintiffs Heckman, Maisenbacher, and Peterson counsel after this lawsuit was filed, and now contend that those Plaintiffs have no standing to pursue their class action claims. Ans. ¶ 1.07. The case law clearly establishes that Defendants’ newfound respect for Plaintiffs’ right to counsel is insufficient to deprive this Court of jurisdiction to hear the class claims presented in this case, nor the named Plaintiffs of their standing to represent the class.

As the Fifth Circuit observed, “a decision on class certification could, by tender to successive named plaintiffs,” be made just as difficult to reach before the expiration of the

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<sup>14</sup> More precisely, Plaintiffs Heckman, Maisenbacher and Peterson made claims on behalf of themselves and the proposed class at the time of the filing of the Original Petition. All Plaintiffs made claims on behalf of themselves and the proposed class at the time of the filing of the Second Amended Petition.

individual claims of the named plaintiffs as when the claims of the named plaintiffs are inherently transitory, as in Gerstein and Swisher. Zeidman, 651 F.2d at 1050. In Zeidman, 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, Defendants must not be allowed to escape a hearing on the merits of their policy of violating indigent defendants' rights 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)).

*d. Defendants' Voluntary Cessation of their Unconstitutional Practices Does Not Moot the Class Action.*

Defendants' belated grant of counsel to the named Plaintiffs here cannot moot Plaintiffs' claims. To the extent that Defendants' claim a changed practice and policy, at least in part and toward those who have publicly stated their opposition to the Defendants' unconstitutional and

illegal practices, 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 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 Envtl. 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, Defendants 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. See also Hernandez v. Cremer, 913 F.2d 230 (5th Cir. 1990); Pederson v. Louisiana State Univ., 213 F.3d 858, 873 (5th Cir. 2000).

## **2. Representation by Civil Counsel Does not Strip Plaintiffs of Standing.**

Even a cursory glance at the case law reveals that Plaintiffs are not barred from raising a civil claim for denial of criminal counsel simply by virtue of finding a lawyer to represent them in their civil case. Accepting Defendants' logic would mean that all plaintiffs seeking prospective equitable relief for a violation of their right to criminal counsel would have to do so pro se. Fortunately for such plaintiffs, however, Defendants' contention cannot be sustained. In

Halbert v. Michigan, 125 S. Ct. 2582 (2005), the Supreme Court held that petitioner Antonio Halbert had standing to successfully challenge a state law limiting criminal defendants' access to appointed appellate counsel despite the fact that his case was argued not pro se, but by an attorney. A quote from Kowalski v. Tesmer, 543 U.S. 125 (2004), which involved a challenge to the same Michigan law as in Halbert, is the lone authority Defendants' cite for their position that Plaintiffs' representation by counsel in this lawsuit somehow strips them of standing to pursue the lawsuit. Defendants' reliance on Tesmer is misguided, however, as the issue in Tesmer was third-party standing, i.e., whether an attorney, as a named party, has standing to seek relief on behalf of non-party indigent defendants allegedly denied the right to counsel. 543 U.S. at 127. The Tesmer Court held that the plaintiff-attorney did not have standing to assert those claims on behalf of third parties. Id. In contrast, when the Michigan law came up for review again in Halbert, with an affected indigent defendant as the named plaintiff, the plaintiffs' standing to challenge the law was never an issue.<sup>15</sup>

Further, federal and state courts frequently have heard right-to-counsel claims brought by pre-trial arrestees represented by attorneys in their civil proceedings. The courts in these cases *did not* hold that the attorneys involved themselves should have provided effective representation in their clients' criminal cases, rather than challenge defective indigent defense systems in the civil courts. See § A.1.a, above (collecting cases). Plaintiffs' representation by counsel in the case at bar does not affect their standing to raise an ongoing denial of counsel claim.

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<sup>15</sup> Unlike the case at bar, Tesmer involved no class claims. There were over 7000 Class A and B misdemeanor cases filed in Williamson County in recent years, and it is, at the least, unrealistic to suggest that Plaintiffs' two attorneys could represent 3500 defendants each. National recommended Federal caseload standards, in contrast, limit attorneys representing indigent defendants to 400 misdemeanor cases per year. National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts (1973), Standard 13.12 (attached as Exh. L).

#### **4. Plaintiffs have Standing to Bring their Open Court Challenge.**

Plaintiffs have standing to bring suit for Defendants' violation of Plaintiffs' right to an open and public trial. Defendants' unlawful exclusion of members of the public from Plaintiffs' criminal proceedings has violated Plaintiffs' constitutional rights.<sup>16</sup> In their Second Amended Class Action Petition, Plaintiffs allege that Defendants' practice of prohibiting members of the public, including family members of criminal defendants, from attending the proceedings has harmed Plaintiffs. Pls.' 2nd Amend. Pet., ¶¶ 97, 132-133

Plaintiff Kelsey Stempko is a minor against whom criminal charges are pending. Plaintiff Kelsey Stempko desires to have her mother accompany her at her First Appearance. Pls.' 2nd Amend. Pet., ¶ 50. Plaintiff Kelsey Stempko has a reasonable belief that she will suffer imminent harm because Defendants' practice of routinely excluding all members of the public, including family members, from the proceedings will prevent her mother from observing her proceedings. Plaintiff 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. Id., ¶ 41. Plaintiff Vieira believes that she will suffer imminent harm based on Defendants' routine practice of denying members of the public access to court proceedings. Id.

Plaintiffs' claims are representative of the claims of the proposed class of Williamson County misdemeanor defendants. 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. See, e.g., Affidavit of Vicki Rahmoune (excluded from criminal proceedings against her son, Brodrick, who has special needs, is on medication, and meets with a counselor

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<sup>16</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. Exh. J.

on a biweekly basis); Affidavit of Brodrick Simmons (family and friends excluded); Affidavit of Cicretia Lusk (excluded from proceedings against Brodrick, a family friend); Affidavit of Lorie Flores (forced to have strangers and court personnel look after her child because she was not permitted to bring the child into the courtroom during her proceedings) (all attached as Exh. M).

The right to a public trial is clearly provided by the federal and Texas constitutions.<sup>17</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 (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 (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) (“Defendants have the right to a speedy and public trial, and the constitutional requirement that court proceedings occur in the county seat is a fundamental way to keep our most formal adversarial process open and public.”) (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. Thus, Plaintiffs have standing to allege violations of this Sixth Amendment right. Plaintiffs also have standing to allege violations of TEX. CODE CRIM. PROC. ANN. art. 1.24 (Vernon 2005) (“The proceedings and trials in all courts shall be public.”). As

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<sup>17</sup> The cases cited by Defendants in their Answer, ¶¶ 3.34 and 3.35, do not address the question of public trials. Mowbary v. Avery, 76 S.W.3d 663, 677 (Tex. App.—Corpus Christi 2002, pet. denied) (challenge over life insurance proceeds); Aguilar v. Chastain, 923 S.W.2d 740, 744 (Tex. App.—Tyler 1996, pet. denied) (pro se challenge to actions of prison officers); Duddlestein v. Highland Ins., 110 S.W.3d 85, 96-97 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (worker’s compensation).

one Texas court held regarding art. 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 part, reversed in part on other grounds by Tamminen v. State, 653 S.W.2d 799 (Tex. Crim. App. 1983)). Plaintiffs have standing to challenge Defendants’ practice of closing the Williamson County Courts at Law to Plaintiffs’ family members and friends, as well as members of the general public.

**C. DEFENDANTS’ SPECIAL EXCEPTIONS ARE WITHOUT MERIT.**

Defendants have specially excepted to nearly all of Plaintiffs’ Second Amended Petition, attempting to find fault with the Petition’s detailed allegations of their activities. (Answer, ¶¶ 3.01-3.39.) These Special Exceptions are without merit and must be denied.

Defendants specially excepted to the Petition on the ground that it does not provide sufficiently specific detail regarding the allegations against Defendants. (Answer ¶¶ 3.01 et. seq.) These Special Exceptions fail because Defendants mistake the standard for pleadings; Texas follows the “fair notice” standard for pleadings, which asks only whether the opposing party can discern from the pleading the nature and basic issues of the controversy and what evidence will be relevant. See TEX. R. CIV. P. 45(b), 47(a). Texas courts do not require a plaintiff to detail every bit of evidence that supports his claims in his petition. Paramount Pipe & Sup. Co. v. Muhr, 749 S.W.2d 491, 494-95 (Tex. 1988). When ruling on special exceptions, “[e]very fact will be supplied that can reasonably be inferred from what is specifically stated” and a “petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim. The purpose of this rule is to give the opposing party information sufficient to enable him to prepare a defense.” Roark v. Allen, 633 S.W.2d 804, 809-810 (internal punctuation and citations omitted). The detailed allegations in Plaintiffs’ Second Amended

Petition more than meet this standard, and, as a result, the Court should deny Defendants' Special Exceptions in their entirety.<sup>18</sup>

The Court should deny each of the Special Exceptions asserted by Defendants for the following reasons:

¶ 3.01. Contrary to the statement in ¶ 3.01, Plaintiffs clearly and unambiguously requested Level III Discovery in the first numbered paragraph of Plaintiffs' Original Petition, as required by Texas Rule of Civil Procedure 190.1. (See Orig. Pet. ¶ 1, 2nd. Amend. Pet., ¶ 1.)

¶ 3.02. Defendants have specially excepted to Plaintiffs' opening paragraph, which provides nothing more than a Summary of the Action for the Court's and parties' convenience. Furthermore, though the violations and causes of action that are alleged against Defendants are detailed in the remainder of the Petition, Plaintiffs' Summary of the Action (not a numbered paragraph) clearly spells out Defendants' violations of law and the facts that support Plaintiffs' contentions. Accordingly, Defendants' general claim of lack of notice is without merit and this special exception should be denied.

¶ 3.03. Defendants' Special Exception to Plaintiffs' Original Class Action Petition, ¶¶ 50-55 (2nd Amend. Pet. at ¶¶ 77-83) contends that these paragraphs do not provide fair notice of what is alleged to occur during the magistrate proceedings. A Special Exception that objects that Plaintiffs' pleadings do not set out enough factual details is invalid. Roark, 633 S.W.2d at 810 (plaintiff not required to plead exactly how doctor caused harm and general allegation was sufficient to "to give Dr. Matthews fair notice that he would have to defend against a claim involving the manner in which he delivered the child.").

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<sup>18</sup> It also is important to note that, when a court rules on special exceptions, it must accept as true all material factual allegations and all factual statements reasonably inferred from the allegations in the pleading being challenged. Sorokolit v. Rhodes, 889 S.W.2d 239, 240 (Tex. 1994).

This Special Exception must be denied because the paragraphs provide fair notice, indeed significant detail, regarding the alleged violations of Plaintiffs' rights that occur at magistrate proceedings, including the magistrate's failure to ask whether any misdemeanor defendants want appointed counsel (Orig. Pet. ¶ 80; 2nd Amend. Pet. ¶ 108), the failure to inform Plaintiffs and all misdemeanor defendants of the financial standard for eligibility for appointed counsel (Orig. Pet. ¶ 81; 2nd Amend. Pet. ¶ 109), and the active discouragement of Plaintiffs and other misdemeanor defendants from seeking appointed counsel if their family or friends are able to collect funds to post bond (Orig. Pet. ¶ 82; 2nd Amend. Pet. ¶110). See generally TEX. R. CIV. P. 45(b), 47(a). (See also 2nd Amend. Pet. ¶ 13 (Maisenbacher's magistration); ¶ 19 (Peterson); ¶ 29 (Newberry); ¶38 (Vieira); ¶ 45 (Kelsey Stempko).)

¶ 3.04. Defendants' Special Exception to Plaintiffs' Original Class Action Petition, ¶¶ 56-82 (2nd Amend. Pet. at ¶¶ 84-95) contends that these paragraphs do not provide fair notice of what is alleged to occur during the first appearance proceedings. A Special Exception that objects that Plaintiffs' pleadings do not set out enough factual details is invalid. Roark, 633 S.W.2d at 810.

The Court should deny this Special Exception because the challenged paragraphs provide fair notice, indeed significant detail, regarding the alleged violations of Plaintiffs' rights that occur at the first appearance proceedings in Williamson County, including the prosecutors' discussions regarding the merits of individual cases with jailed, unrepresented persons, often as these persons are shackled to other defendants, before such persons have a chance to enter a plea or request appointed counsel (Orig. Pet. ¶ 60-61; 2nd Amend. Pet. ¶ 88-89); the requirement that unrepresented persons released on bond either plead guilty or no contest to even speak with prosecutors (Orig. Pet. ¶ 75; 2nd Amend. Pet. ¶ 103); the failure to inform such individuals of the

elements of the crimes with which they are being charged (Orig. Pet. ¶ 78, 2nd Amend. Pet. ¶ 106); misleading comments made to Plaintiffs and others about the requirement that indigent persons pay court costs and failure to explain that the accused persons will not have to reimburse the state for appointed counsel if they cannot afford to do so (Orig. Pet. ¶ 75; 2nd Amend. Pet. ¶ 103); and the failure to inform Plaintiffs and all misdemeanor defendants of the financial standard for eligibility for appointed counsel (Orig. Pet. ¶ 76; 2nd Amend. Pet. ¶ 104). See TEX. R. CIV. P. 45(b), 47(a). (See also 2nd Amend. Pet. ¶¶ 5-8 (Heckman); ¶¶ 14-15 (Maisenbacher); ¶¶ 22-24 (Peterson).)

¶ 3.05. Defendants' Special Exception to Plaintiffs' Original Class Action Petition, ¶¶ 83-88 (2nd Amend. Pet. ¶¶ 111-116) contends that these paragraphs do not provide fair notice of why each plaintiff was denied their right to counsel. A Special Exception that objects that Plaintiffs' pleadings do not set out enough factual details is invalid. Roark, 633 S.W.2d at 810. The Court should deny this Special Exception because the challenged paragraphs provide fair notice, indeed significant detail, regarding the alleged violations of how each Plaintiff was denied the right to counsel. See TEX. R. CIV. P. 45(b), 47(a). (See also 2nd Amend. Pet. ¶¶ 3-9 (Heckman); ¶¶ 11-16 (Maisenbacher); ¶¶ 17-25 (Peterson).)

Finally, Defendants' reference to their Answer, ¶ 1.07, is unavailing. As explained in § B.1, above, Plaintiffs have standing to bring this class action regardless of the alleged mootness of their individual claims.

¶ 3.06. Defendants' Special Exception to Plaintiffs' Original Class Action Petition, ¶ 89 (2nd. Amend. Pet. at ¶ 117) should be denied for the same reasons detailed in § A.1.b, above (detailing that a remedy for the harm to Plaintiffs is unavailable in criminal proceeding).

¶ 3.07. Defendants further specially except to Plaintiffs' Original Class Action Petition, ¶ 89 (2nd Amend. Pet. at ¶ 117) on the basis that Plaintiffs have allegedly failed to identify irreparable harm sufficient to justify injunctive relief. This Special Exception must be denied, however, because the violation of a person's constitutional rights is *per se* irreparable harm that subjects the violator to injunctive relief. See Elrod v. Burns, 427 U.S. 347, 373-74 (1976); Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. 1981); Mitchell v. Cuomo, 748 F.2d 804, 806 (2nd Cir. 1984). (See also § A.1.b, above (detailing irreparable harm suffered by Plaintiffs and ripeness of Plaintiffs' claims).)

¶ 3.08. Defendants' Special Exception to Plaintiffs' Original Class Action Petition, ¶ 91 (2nd. Amend. Pet. at ¶ 119) should be denied, as the Plaintiffs have clearly stated that they seek to represent all persons accused of a misdemeanor crime in Williamson County. (2nd Amend. Pet. at ¶ 118.) The Court may take judicial notice that the number of such individuals is so numerous as to make joinder of all of them impracticable. Defendants' attempt to assert otherwise, or to claim that they have not received fair notice regarding the number of such persons, is shotgun pleading and should be disregarded by the Court.

The paragraph Defendants cite as giving inadequate notice is facially valid and gives adequate notice of Plaintiffs' claims. Plaintiffs give adequate notice in their pleadings and, moreover, filed a Motion for Class Certification at the same time as their Original Class Action Petition, and this Special Exception is better addressed in the context of the class certification motion.

¶ 3.09. Defendants specially except to Plaintiffs' Original Class Action Petition, ¶ 92 (2nd Amend. Pet. at ¶ 120) on the grounds that it purportedly does not give fair notice of the questions of law and fact that are common to the class. The Court should deny Defendants'

Special Exception 3.09 because it is without merit. The paragraph Defendants cite as giving inadequate notice is facially valid and gives adequate notice of Plaintiffs' claims. Plaintiffs give adequate notice in their pleadings and, moreover, filed a Motion for Class Certification at the same time as their Original Class Action Petition, and this Special Exception is better addressed in the context of the class certification motion.

¶ 3.10. The Court should deny Defendants' Special Exception 3.10 because it is without merit. Defendants allege that they are without notice of Plaintiffs' claims and why the claims are typical of the claims of the purported class. (Orig. Pet. ¶ 93; 2nd Amend. Pet., ¶ 121.) The paragraph Defendants cite as giving inadequate notice is facially valid and gives adequate notice of Plaintiffs' claims. Plaintiffs give adequate notice in their pleadings and, moreover, filed a Motion for Class Certification at the same time as their Original Class Action Petition, and this Special Exception is better addressed in the context of the class certification motion.

¶ 3.11. The Court should deny Defendants' Special Exception 3.11 because it is without merit. Defendants allege that they are without notice of how Plaintiffs are harmed. (Orig. Pet. ¶ 93, 2nd Amend. Pet., ¶ 121.) The paragraph Defendants cite as giving inadequate notice is facially valid and gives adequate notice of Plaintiffs' claims. Plaintiffs give adequate notice in their pleadings and, moreover, filed a Motion for Class Certification at the same time as their Original Class Action Petition, and this Special Exception is better addressed in the context of the class certification motion.

¶ 3.12. The Court should deny Defendants' Special Exception 3.12 because it is without merit. Defendants allege that they are without notice of Plaintiffs' counsels' competence to prosecute this class action. (Orig. Pet. ¶ 94, 2nd Amend. Pet., ¶ 122.) The paragraph Defendants cite as giving inadequate notice is facially valid and gives adequate notice of Plaintiffs' claims.

Plaintiffs give adequate notice in their pleadings and, moreover, filed a Motion for Class Certification at the same time as their Original Class Action Petition, and this Special Exception is better addressed in the context of the class certification motion.

¶ 3.13. The Court should deny Defendants' Special Exception 3.13 because it is without merit. Defendants allege that they are without notice of how Plaintiffs will fairly and adequately protect the interests of the class. (Orig. Pet. ¶ 94, 2nd Amend. Pet., ¶ 122.) The paragraph Defendants cite as giving inadequate notice is facially valid and gives adequate notice of Plaintiffs' claims. Plaintiffs give adequate notice in their pleadings and, moreover, filed a Motion for Class Certification at the same time as their Original Class Action Petition, and this Special Exception is better addressed in the context of the class certification motion. (See also § A.1.b, above (addressing inadequacy of redress in criminal proceedings; and § B.1, above (discussing case law that supports standing as class representative for plaintiff whose individual claim is allegedly moot).)

¶ 3.14. The Court should deny Defendants' Special Exception 3.14 because it is without merit. Defendants allege that they are without notice of which acts are generally applicable to Plaintiffs and the proposed class. (Orig. Pet. ¶ 95, 2nd Amend. Pet., ¶ 123.) The paragraph Defendants cite as giving inadequate notice is facially valid and gives adequate notice of Plaintiffs' claims. Plaintiffs give adequate notice in their pleadings and, moreover, filed a Motion for Class Certification at the same time as their Original Class Action Petition, and this Special Exception is better addressed in the context of the class certification motion.

¶ 3.15. The Court should deny Defendants' Special Exception 3.15 because it is without merit. Defendants allege that they are without notice of the common questions of law and fact that exist for all members of the class. (Orig. Pet. ¶ 96, 2nd Amend. Pet., ¶ 124.) The paragraph

Defendants cite as giving inadequate notice is facially valid and gives adequate notice of Plaintiffs' claims. Plaintiffs give adequate notice in their pleadings and, moreover, filed a Motion for Class Certification at the same time as their Original Class Action Petition, and this Special Exception is better addressed in the context of the class certification motion.

¶ 3.16. The Court should deny Defendants' Special Exception 3.16 because it is without merit. Defendants allege that they are without notice of the common questions of law and fact that predominate over any questions solely affecting individual members of the proposed class. (Orig. Pet. ¶ 96, 2nd Amend. Pet., ¶ 124.) The paragraph Defendants cite as giving inadequate notice is facially valid and gives adequate notice of Plaintiffs' claims. Plaintiffs give adequate notice in their pleadings and, moreover, filed a Motion for Class Certification at the same time as their Original Class Action Petition, and this Special Exception is better addressed in the context of the class certification motion.

¶ 3.17. The court should deny Defendants' Special Exception 3.17 because it is without merit. Defendants allege that they are without notice of why a class action is superior to having each class member raise their constitutional challenges in their underlying criminal case. (Orig. Pet. ¶ 96, 2nd Amend. Pet., ¶ 124.) The paragraph Defendants cite as giving inadequate notice is facially valid and gives adequate notice of Plaintiffs' claims. Plaintiffs give adequate notice in their pleadings and, moreover, filed a Motion for Class Certification at the same time as their Original Class Action Petition, and this Special Exception is better addressed in the context of the class certification motion. (See also § A.1.b., above (addressing inadequacy of redress in criminal proceedings).)

¶ 3.18. The Court should deny Defendants' Special Exception ¶ 3.18 because it is without merit. A Special Exception that objects that Plaintiffs' pleadings do not set out enough factual details is invalid. Roark, 633 S.W.2d at 810. Here, Plaintiffs state that Defendants

through a custom and practice of deliberately failing to inform accused persons of their right to counsel, providing inaccurate information to accused persons about their ability to qualify for appointed counsel, failing to provide counsel to indigent defendants who have requested such counsel, failing to adequately inform accused persons of the charges against them, and permitting Williamson County prosecutors to confront uncounseled accused persons regarding the merits of their cases without allowing them to request appointment of counsel. Moreover, by refusing to allow persons accused of crime to discuss their cases with a prosecutor unless such persons enter pleas of guilty or no contest, Defendants also have deprived and conspired to deprive persons accused of crime of the right to self-representation in violation of Article I, Section 10 of the Texas Constitution.

(Amend. Pet. ¶ 127 (Orig. Pet. ¶ 99).) The information in this paragraph is clearly sufficient to put Defendants on notice of the nature of the claims against them. Defendants' Special Exception ¶ 3.18 should be denied.

¶ 3.19. The Court should deny Defendants' Special Exception 3.19 because it is without merit. When a defendant objects that the plaintiff did not plead a complete cause of action, the defendant must list the specific elements the plaintiff omitted. Spencer v. City of Seagoville, 700 S.W.2d 953, 957 (Tex. App.—Tyler 1968, no writ). Defendants fail to specify the specific elements Plaintiffs omitted, and thus this special exception should be denied.

In addition, a Special Exception that objects that Plaintiffs' pleadings do not set out enough factual details is invalid. Roark, 633 S.W.2d at 810. As described in the response to Defendants Special Exception 3.18, above, the paragraph Defendants except to is exceptionally detailed and gives Defendants fair notice of Plaintiffs' claims, including the damages caused to Plaintiffs by Defendants' ongoing constitutional violations. (See also § A.1.b, above (detailing harm to Plaintiffs).)

¶ 3.30. The Court should deny Defendants’ Special Exception 3.30 because it is without merit. Defendants’ citation to Heck v. Humphrey, 512 U.S. 477 (1994) is unavailing. Heck applies only to post-conviction suits and does not apply to the pre-conviction injunctive and declaratory relief sought by Plaintiffs. See e.g. 512 U.S. at 487 (“We hold that, in order to recover damages ... caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove the conviction or sentence has been reversed on direct appeal ...”). The Heck court specifically refused to hold that state remedies be exhausted prior to hearing a § 1983 challenge. Id. at 488. Plaintiffs, who have not been convicted of the crimes with which they have been charged, do not seek relief equivalent to habeas relief, as the prospective relief requested by Plaintiffs would not render their subsequent convictions or sentences invalid. (See also § A.1.b, above (lack of adequate remedy at law for Plaintiffs’ claims; and § A.1.a, above, (propriety of pre-conviction class actions seeking injunctive and declaratory relief).)

¶ 3.31. The Court should deny Defendants’ Special Exception 3.31 because it is without merit. A Special Exception that objects that Plaintiffs’ pleadings do not set out enough factual details is invalid. Roark, 633 S.W.2d at 810. To support a civil rights conspiracy claim, a plaintiff must allege facts that suggest: 1) the existence of a conspiracy involving state action and 2) an actual deprivation of constitutional rights. Cinel v. Connick, 15 F.3d 1338, 1343 (5th Cir. 1994), (quoting Adickes v. ShH. Kress & Co., 398 U.S. 144 (1970)). The existence of a conspiracy can be proven by circumstantial evidence. Mack v. Newton, 737 F.2d 1343, 1350 (5th Cir. 1984).

Plaintiffs have alleged the existence of a conspiracy and actual deprivations of constitutional rights. (See § A, above, and 2nd. Amend. Pet. at ¶¶ 127, 129.)

It is axiomatic that it is difficult to prove a conspiracy prior to discovery. Plaintiffs already have begun the process of seeking discovery to prove their conspiracy allegations. (Pls.' Interrogatories, served July 14, 2006.) A motion for summary judgment, not a special exception, is the proper place to address the adequacy of a conspiracy charge. Defendants may not impose a heightened pleading requirement on this § 1983 action. Cinel, 15 F.3d at 1341-1342.

Moreover, there is already circumstantial evidence of a conspiracy. The judges of the county courts, statutory county courts, and district courts trying criminal cases in each county are required to adopt and publish written countywide procedures for the timely and fair appointment of counsel to indigent defendants. TEX. CODE CRIM. PROC. art. 26.04(a) (Vernon 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 written countywide indigent defense procedures, the 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>19</sup>

Judges Brooks, Higginbotham, and Wright, all participated in the creation and/or approval of the Williamson County rules on indigent defense. The joint creation of unconstitutional policies and practices, as alleged by Plaintiffs, fits squarely in case law on a well-pleaded conspiracy by demonstrating the possibility of an agreement to violate Plaintiffs’

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<sup>19</sup> Available at <http://tfid.tamu.edu/CountyDocuments/Williamson/2002%20Williamson%20Plan.pdf> (beginning on page 8 of 35). The statutory county court and district court judges amended those procedures on July 23, 2003, and it is this version of the local rules that currently control the provision of indigent defense services in Williamson County. Available at <http://tfid.tamu.edu/CountyDocuments/Williamson/2003%20Williamson%20District%20and%20County%20Amended%20Plan.pdf>. Minor amendments to the attorney qualification requirements and the fee schedule contained in the July 23, 2003, version of the local rules were made in 2004 and 2005, respectively, but otherwise the July 23, 2003, version remains intact. The 2004 and 2005 amendments are available at [http://tfid.tamu.edu/Public/Default.asp?county\\_id=246](http://tfid.tamu.edu/Public/Default.asp?county_id=246).

rights. Cinel, 15 F.3d at 1343. Defendant Eastes also is a likely participant in the creation and adoption of the unconstitutional policies and practices, as his policies and practices, including failure to inform defendants of their Sixth Amendment rights, track the other Defendants' unconstitutional practices. (See Orig. Pet., ¶¶ 50-55, 2nd Amend. Pet. ¶¶ 77-83.) Defendant Doerfler is Williamson County's designated Program Director on their indigent defense grants, 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. (See also 2nd Amend. Pet., ¶ 70.) As the person coordinating indigent defense practices in Williamson County, Defendant Doerfler is likely to have been part of the meetings at which his co-conspirators devised the unconstitutional policies and practices on indigent defense in the Williamson County Courts at Law and as the "day-to-day" supervisor of Williamson County's indigent defense program approves and/or participates in the on-going conspiracy to violate Plaintiffs' rights.

¶ 3.32 This Court should deny Defendants' Special Exception 3.32 because it is without merit. A Special Exception that objects that Plaintiffs' pleadings do not set out enough factual details is invalid. Roark, 633 S.W.2d at 810. Here, Plaintiffs state that Defendants

through a custom and practice of deliberately failing to inform accused persons of their right to counsel, providing inaccurate information to accused persons about their ability to qualify for appointed counsel, failing to provide counsel to indigent defendants who have requested such counsel, failing to adequately inform accused persons of the charges against them, and permitting Williamson County prosecutors to confront uncounseled accused persons regarding the merits of their cases without allowing them to request appointment of counsel. Moreover, by refusing to allow persons accused of crime to discuss their cases with a prosecutor unless such persons enter pleas of guilty or no contest, Defendants also have deprived and conspired to deprive persons accused of crime of the right to self-representation in violation of Article I, Section 10 of the Texas Constitution.

(Amend. Pet. ¶ 129.) The information in this paragraph is clearly sufficient to put Defendants on notice of the nature of the claims against them. Defendants' Special Exception ¶ 3.32 should be denied.

¶ 3.33. This Court should deny Defendants' Special Exception 3.33 because it is without merit. Defendants' ¶ 3.33 is really a plea to the jurisdiction, and also without merit as such a plea. Plaintiffs' respond to this Special Exception in § A.2, above (detailing cause of action under the Fair Defense Act).

¶ 3.34. This Court should deny Defendants' Special Exception 3.34 because it is without merit. Defendants' ¶ 3.34 is really a plea to the jurisdiction, and also without merit as such a plea. Plaintiffs' respond to this Special Exception in § B.4, above (detailing Plaintiffs' cause of action for denial of right to a public trial).

¶ 3.35. This Court should deny Defendants' Special Exception 3.35 because it is without merit. Defendants' ¶ 3.35 is really a plea to the jurisdiction, and also without merit as such a plea. Plaintiffs' respond to this Special Exception in § B.4, above (detailing Plaintiffs' standing to bring claims for denial of public trial).

¶ 3.36. This Court should deny Defendants' Special Exception 3.36 because it is without merit. Defendants' ¶ 3.36 is really a plea to the jurisdiction, and also without merit as such a plea. Plaintiffs' respond to this Special Exception in § A.1.c, above (explaining court's jurisdiction over declaratory relief sought). (See generally § A (detailing existence of this Court's jurisdiction).)

¶ 3.37. This Court should deny Defendants' Special Exception 3.37 because it is without merit. Defendants' ¶ 3.37 is really a plea to the jurisdiction, and also without merit as such a plea. Plaintiffs' respond to this Special Exception in § A.1.c, above (explaining court's

jurisdiction over declaratory relief sought). (See generally § A (detailing existence of this Court's jurisdiction).)

¶ 3.38. This Court should deny Defendants' Special Exception 3.38 because it is without merit. Defendants' ¶ 3.38 is really a plea to the jurisdiction, and also without merit as such a plea. Plaintiffs' respond to this Special Exception in § A.1.c, above (explaining court's jurisdiction over declaratory relief sought). (See generally § A (detailing existence of this Court's jurisdiction).)

¶ 3.39. This Court should deny Defendants' Special Exception 3.39 because it is without merit. Defendants' ¶ 3.39 is really a plea to the jurisdiction, and also without merit as such a plea. Plaintiffs' respond to this Special Exception in § A.1.c, above (explaining court's jurisdiction over declaratory relief sought). (See generally § A (detailing existence of this Court's jurisdiction).)

**D. DEFENDANTS SANCTIONS MOTION IS WITHOUT MERIT AND SHOULD BE DENIED.**

Plaintiffs filed a long and detailed Original Class Action Petition, laying out in great detail the factual bases for Plaintiffs' allegations. As this brief plainly demonstrates, there is overwhelming support in the case law for Plaintiffs' allegations as well. Given the powerful factual and legal bases for Plaintiffs' claims, sanctions are not appropriate. See TEX. R. CIV. P. 13 (noting that "Courts shall presume that pleadings, motions, and other papers are filed in good faith" and that "[n]o sanctions under this rule may be imposed except for good cause ... "Groundless" for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.").

If, despite the factual and legal support Plaintiffs have shown, the Court does not deny Defendants' motion for sanctions at this time, Plaintiffs respectfully move the Court for a more

definite statement from the Defendants as to the factual and legal grounds for their motion for sanctions, and further move the Court for the opportunity to reply to Defendants' allegations through separate briefing and for a separate hearing on the motion for sanctions.

**E. DEFENDANTS' SUPPLEMENTAL PLEAS TO THE JURISDICTION RAISE NO ISSUES THAT DEPRIVE THIS COURT OF JURISDICTION.**

Defendants' Supplemental Pleas to the Jurisdiction, filed on July 31, 2006 (Supplemental Pleas), repeat the meritless claims in Defendants' Answer. Because the Supplemental Pleas are largely cumulative, Plaintiffs deal with them briefly as follows:

In paragraph 2.01 of the Supplemental Pleas, Defendants argue that Plaintiff Heckman's claims are moot because his criminal case is now complete, and in paragraph 2.02, Defendants argue that Plaintiff Maisenbacher's claims are moot because her charges were dismissed.

Defendants Supplemental Pleas, ¶¶ 2.01 and 2.02, fail for the same reasons that their similar arguments in the Answer fail: the inherently transitory nature of the claims in this case place them squarely in the category of claims that the Supreme Court, the Fifth Circuit, and Texas courts have found justiciable regardless of the status of the underlying criminal charge, and Plaintiffs Heckman and Maisenbacher have standing to act as class representatives even if their individual claims are moot. (See § B, above.)

In paragraph 3.01 of the Supplemental Pleas, Defendants argue that Plaintiffs Newberry, Vieira, and Kelsey Stempko do not have ripe claims because they have not made their first appearance.

Defendants' Supplemental Pleas, ¶ 3.01, fails for the same reasons that their similar arguments in the Answer fail: courts allow prospective systemic challenges to criminal procedures because, among other reasons, forcing defendants to risk their liberty in a flawed

process without the guidance of counsel would be unfair and would violate the criminal defendants' right to due process. (See §§ A.1.a, b, above.)

In paragraph 3.02 of the Supplemental Pleas, Defendants argue that Plaintiffs' claims are not ripe because Plaintiffs' Sixth Amendment right to counsel has not attached.<sup>20</sup>

Defendants' Supplemental Pleas, ¶ 3.02, fails for several reasons. First, Williamson County has filed an information against each of the Plaintiffs in this case. (See Exh. N (records indicating information "filed" date for Plaintiffs).) 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 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 (1972) (emphasis added). Williamson County's filing of informations against Plaintiffs in the underlying criminal prosecutions and the fact that Plaintiffs Newberry, Vieira, and Kelsey Stempko each have attempted to request counsel and would have done so in the absence if Defendants' unconstitutional practices means that, under Supreme Court precedent, Plaintiffs' Sixth Amendment right to counsel has attached and Plaintiffs' claims of denial of counsel are ripe.

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<sup>20</sup> Defendants also argue that none of the Plaintiffs have reached a critical stage in their criminal case, and thus it may be useful to distinguish these concepts. As the Supreme Court has emphasized, the "adversary judicial proceedings" and "critical stage" inquiries are separate. Michigan v. Jackson, 475 U.S. 625, 630 n.3 (1986). The "initiation of adversary judicial proceedings" marks the point at which the Sixth Amendment right to counsel attaches. Brewer v. Williams, 430 U.S. 387, 398 (1977). The failure to appoint counsel after the right attaches and after counsel has been requested is a violation of the Sixth Amendment. See Maine v. Moulton, 474 U.S. 159, 170 (1985) ("Once the right to counsel has attached and been asserted, the State must of course honor it.").

Separately, there are "critical stages" throughout a criminal prosecution that cannot go forward unless a defendant has counsel or has knowingly and intelligently waived the Sixth Amendment right to counsel. For example, as discussed in the main text, entry of a guilty plea before the court, White v. Maryland, 373 U.S. 59, 60 (1963) (citing Hamilton v. Alabama, 368 U.S. 52, 55 (1961)), and plea negotiations with the prosecutor, Brady v. United States, 397 U.S. 742, 748 (1970), both are critical stages. But, as the Supreme Court has stressed, a defendant is entitled to the assistance of a lawyer not only at critical stages, but at all times after the initiation of adversary judicial proceedings. Kirby v. Illinois, 406 U.S. 682, 688 n.6 (1972) (quoting Powell v. Alabama, 298 U.S. 45, 57 (1936)).

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 (1963) (citing Hamilton v. Alabama, 368 U.S. 52, 55 (1961)); Brady v. United States, 397 U.S. 742, 748 (1970). Defendants 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 at their First Appearance or Jail Call Docket, and Defendants do so without properly advising indigent defendants of their right to court-appointed counsel. (Pls.' 2nd Amend. Pet. ¶¶ 84-95, 97-110). Thus, Defendants' argument that Plaintiffs have no right to counsel and that their claims are not ripe also fails because Plaintiffs are in imminent danger of being denied counsel at a critical stage in their criminal case. See e.g., Babbitt v. UFW Nat'l Union, 442 U.S. 289, 298 (U.S. 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 (1923); Regional Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974); and Pierce v. Society of Sisters, 268 U.S. 510, 526 (1925)).

In addition, Plaintiffs 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 Plaintiffs about state or county standards for determining eligibility for appointed counsel, and that the magistrate filled out paperwork saying Plaintiff did not want an appointed lawyer without consulting Plaintiffs. These claims are ripe because Plaintiffs have already suffered these harms. (See, e.g. Pls.' 2nd Amend. Pet., ¶¶ 29-30 (Newberry); ¶¶ 38-39 (Vieira); ¶¶ 45-46 (Kelsey Stempko).) These actions constitute a completed violation of the FDA, 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 (1970) (waiver of rights must be made “competently and knowingly”); Iowa v. Tovar, 541 U.S. 77, 81 (2004 (same), even if adversary judicial proceedings have not commenced at the time magistrate warnings are given. Compare Nehman v. State, 721 S.W.2d 319, 323 n.2 (Tex. Crim. App. 1986) (“since charges were filed against appellant, adversarial judicial proceedings had been initiated at the time of appellant’s Art. 15.17 ‘warning hearing.’”) with Rothgery v. Gillespie County, 413 F. Supp. 2d 806, 808, 815 (W.D. Tex. 2006), appeal docketed, No. 06-50267 (5th Cir. February 27, 2006) (holding that appearance before a magistrate for determination of probable cause and article 15.17 hearings does not commence adversary judicial proceedings).

In paragraph 3.03 of the Supplemental Pleas, Defendants argue that Jessica Stempko’s injury – denial of her right to attend the trial of her child – is not ripe.

Defendants’ Supplemental Pleas, ¶ 3.03, fails because Defendants have a written, public policy preventing members of the public, family members and friends from attending sessions of the Williamson County Courts at Law. (Exh. J (web site explaining policy of excluding the public).) Even in the absence of this written policy, Williamson County maintains a practice of excluding members of the public, and specifically the family members of defendants, from the Williamson County courts. (See affidavits collected above in Exh. N.)

In paragraph 4.01 of the Supplemental Pleas, Defendants reiterate their claims regarding jurisdiction in their Answer. These claims fail for the reasons demonstrated above. (See §§ A, B, and E, above.)

Because Defendants’ Supplemental Pleas offer no argument or authority that deprives this Court of jurisdiction, and because Defendants’ Supplemental Pleas are cumulative of

Defendants' meritless Pleas to the Jurisdiction in their Answer, Defendants' Supplemental Pleas should be denied.

**Conclusion**

For the above stated reasons, Plaintiffs respectfully request the Court deny Defendants Pleas to Jurisdiction, Special Exceptions, and Motion for Sanctions.

Dated: August 24, 2006

Respectfully submitted,

TEXAS FAIR DEFENSE PROJECT

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ATTORNEYS FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I certify that a copy of Plaintiffs' Opposition To Defendants' Pleas To The Jurisdiction, Special Exceptions, Request For Sanctions, And Supplemental Pleas To The Jurisdiction was delivered by hand to Stephen C. Ackley, attorney for all Defendants, on August 24, 2006.

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Harry Williams IV