Docket No. 13-16781

In the

United States Court of Appeals

for the

Ninth Circuit

JOHN FARROW, et al.,

Plaintiffs-Appellants,

v.

ROBIN LIPETZKY,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Northern District of California, No. 12-cv-06495-JCS · Honorable Joseph C. Spero

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates.

NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous briefs as *amicus curiae* each year, in the United States Supreme Court and other courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has

[1] No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity, other than the *amici* and their counsel, made any monetary contribution that was intended to or did fund the preparation or submission of this brief.

a particular interest in this case because of its significant ramifications for indigent criminal defendants in California.

California Attorneys for Criminal Justice (CACJ) is a nonprofit California corporation. According to Article IV of its bylaws, CACJ was formed to achieve certain objectives including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law." CACJ is administered by a Board of Governors consisting of criminal defense lawyers practicing within the State of California. The organization has approximately 1,700 members, primarily criminal defense lawyers practicing before federal and state courts. These lawyers are employed throughout California both in the public and private sectors. CACJ is the National Association of Criminal Defense Lawyers' largest affiliate in California. CACJ has appeared in this Court, often together with NACDL, on matters of importance to its membership.

This brief is filed with the consent of counsel for the plaintiffs-appellants, Christopher Martin, and counsel for the defendant-appellee, D. Cameron Baker, Deputy County Counsel, Contra Costa County.

ARGUMENT

I. INTRODUCTION

The District Court held that indigent defendants are not entitled to appointed counsel at their first appearance before a California magistrate. This holding is plainly inconsistent with the United States Supreme Court's Sixth Amendment jurisprudence, which has established over many decades that a criminal defendant has the right to have counsel present at any critical stage of the proceedings against him. U.S. CONST. amend. VI.

When first taken before the magistrate, a defendant in California can enter a plea; he can request bail or release on his own recognizance; he can demur to the accusatory pleading; he can request discovery. All of these rights, and more, may be lost if he proceeds without advice of counsel. On the other hand, if the defendant chooses to wait for appointed counsel, he is subjected to a period of incarceration that may be completely unnecessary and unjustified, and his speedy trial rights are compromised. It is contrary to the Sixth Amendment principles set out by the Supreme Court beginning with *Gideon v. Wainwright*, 372 U.S. 335 (1963), to force defendants to navigate these "complex legal technicalities" on their own. *See United States v. Ash*, 413 U.S. 300, 307 (1973). *Amici curiae* National Association of Criminal Defense Lawyers and California Attorneys for

Criminal Justice urge this Court to reverse the dismissal of plaintiffs' complaint, and allow plaintiffs to proceed on their important Sixth Amendment claims.

II. A CRIMINAL DEFENDANT HAS A FUNDAMENTAL CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL AT ANY "CRITICAL STAGE" OF THE PROCEEDINGS AGAINST HIM

The right to the assistance of counsel in criminal proceedings is a fundamental right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). The United States Supreme Court has held that the right to counsel "is indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, 430 U.S. 387, 398 (1977). The Court has stated what it terms an "obvious truth":

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Gideon, 372 U.S. at 344. Indeed, over 80 years ago, the Court recognized that a criminal defendant requires the "guiding hand of counsel" at every stage of the proceedings:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is

> unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge . . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Powell v. Alabama, 287 U.S. 45, 69 (1932); *see also United States v. Ash*, 413 U.S. 300, 307-08 (1973) (purpose of Sixth Amendment is "to assure that the 'guiding hand of counsel' is available to those in need of its assistance"). "[T]he right to be represented by counsel is among the most fundamental of rights. . . . [because] it is through counsel that all other rights of the accused are protected." *Penson v. Ohio*, 488 U.S. 75, 84 (1988).

Because of the essential part that lawyers play in the fair administration of justice, the right to counsel attaches as soon as judicial proceedings are initiated. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 212 (2008); *see also Brewer*, 430 U.S. at 398. The Supreme Court has made very clear that Sixth Amendment rights come into play at the time of a defendant's "initial appearance before a judicial officer." *Rothgery*, 554 U.S. at 199. If the defendant is informed of the charges against him and a judicial officer addresses the conditions of pretrial release, then that defendant is entitled to counsel; at that point, "the State's relationship with the defendant has become solidly adversarial." *Id*. at 202. Barring some later change in circumstances, the defendant "is headed for trial and

needs to get a lawyer working, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Id*. at 210.

Once the right to counsel attaches, the defendant is entitled to the presence of counsel (including appointed counsel if the defendant is indigent) at any "critical stage" of the proceedings. *Id*. at 212. "[T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *United States v. Wade*, 388 U.S. 218, 226 (1967). Thus, the court is required to "scrutinize *any* pretrial confrontation of the accused to . . . analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." *Id*. at 227 (emphasis original). "[W]hat makes a stage critical is what shows the need for counsel's presence." *Rothgery*, 554 U.S. at 212. In conducting the required scrutiny, the court focuses on "whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Ash*, 413 U.S. at 313. The right to have counsel present applies whenever counsel can provide assistance by acting "as a spokesman for, or advisor to, the accused." *Id*. at 312.

As is apparent from this test, the right to counsel does not apply only at trial: "The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be

presumed to make critical decisions without counsel's advice." *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012). For example, where the defendant must enter a plea, the lawyer can advise on available defenses. *Ash*, 413 U.S. at 312 (citing *Hamilton v. Alabama*, 368 U.S. 52 (1961), and *White v. Maryland*, 373 U.S. 59 (1963)). Where a lineup is being conducted, the lawyer can help to spot and prevent abuse. *Wade*, 388 U.S. at 236-37. Where the defendant is being questioned informally, the lawyer can advise him of his Fifth Amendment rights and ensure that incriminating statements are not elicited without his knowledge. *Massiah v. United States*, 377 U.S. 201, 206 (1964). Moreover, the right to counsel applies to "misdemeanor and petty" offenses just as it does to felonies. *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972).

The question raised here is whether criminal defendants in California are entitled to have appointed counsel present at the time of their first appearance before a magistrate – a proceeding in which substantive rights are implicated, a guilty plea may be entered, and the defendant's liberty is at stake. *Amici curiae* believe that question must be answered in the affirmative. As the American Bar Association has recognized for decades, representation at the first appearance before a judicial officer is essential to protect the defendant's rights, reduce the incidence of unnecessary and unjustified incarceration, and promote the efficient administration of criminal justice. *See* American Bar Association, *Standards for*

Criminal Justice, Providing Defense Services 5-6.1 ("Counsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when formal charges are filed, whichever occurs earliest.").[2] That position is consistent with the Supreme Court's Sixth Amendment jurisprudence, and contrary to the erroneous conclusion reached by the District Court below.

III. THE DEFENDANT'S FIRST APPEARANCE BEFORE A MAGISTRATE CAN RESULT IN SUBSTANTIAL PREJUDICE TO THE DEFENDANT'S RIGHTS

An individual arrested for a crime in California, whether with or without a warrant, must be taken before a magistrate "without unnecessary delay," and in cases where the arrest is made pursuant to a warrant, within 48 hours. *See* CAL. CONST. art. I, § 14; Cal. Penal Code §§ 821, 825(a), 847(a), 849(a), 859. The purpose of this initial appearance is for arraignment on the complaint, thus "trigger[ing] adversary proceedings in a forum which provides a defendant with an opportunity to defend against the charges." *Stanley v. Justice Court*, 55 Cal. App. 3d 244, 251 (1976); *see also People v. Powell*, 67 Cal. 2d 32, 60 (1967) ("The principal purposes of the requirement of prompt arraignment are to prevent secret police interrogation, to place the issue of probable cause for the arrest before a judicial officer, to provide the defendant with full advice as to his rights and an

[2] Available at http://www.americanbar.org/publications/ criminal_justice_section_archive/ crimjust_standards_defsvcs_toc.html.

opportunity to have counsel appointed, and to enable him to apply for bail or for habeas corpus when necessary.").

The defendant may, but does not necessarily have to, enter a plea at this appearance. *See* Cal. Penal Code § 988. It is this possibility of bifurcation of the proceedings that, apparently, led the District Court to conclude – wrongly – that the Sixth Amendment does not require the presence of appointed counsel if no plea is entered and the proceeding is continued. *See Farrow v. Lipetzky,* Case No. 12-cv-06495-JCS, 2013 WL 4042276, *13 (N.D. Cal. Aug. 7, 2013). But in fact this appearance before the magistrate, which is governed by a myriad of statutory provisions and court-imposed mandates – none of which was addressed by the District Court – includes a number of substantive functions, and carries with it significant ramifications for the rights of the defendant. *See* Elena Condes, *Arraignment, in* CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE § 6.1 at 128 (CEB 2013) ("An arraignment is a court hearing at which an individual accused of a public offense – an infraction, or a misdemeanor, or a felony – is informed of the nature of the charge or charges, given a copy of the accusatory pleading, and given an opportunity to enter a plea. It is the defendant's first court appearance.") (citations omitted).[3]

[3] For a more detailed account of the complexities of the arraignment, *see generally* Condes, *supra*, at 128-47.

The magistrate is required by statute to inform the defendant of the charges against him, and of his right to be represented by counsel and to have counsel appointed for him. Cal. Penal Code §§ 858, 859. According to the allegations of the Complaint, if the defendant indicates that he does want counsel appointed, the proceedings are adjourned until counsel can be provided. This delay can last close to two weeks, perhaps longer in some cases. *E.g.*, First Amended Complaint ("FAC") ¶¶ 29, 38.

At this point, the defendant's rights already have suffered "substantial prejudice." *Wade*, 388 U.S. at 227. A criminal defendant is entitled to bail as a matter of right. CAL. CONST. art. I § 12; Cal. Penal Code § 1271. Bail can be requested at the initial appearance before the magistrate. Cal. Penal Code §§ 1268, 1269a. The defendant can also ask the magistrate to set bail in an amount lower than that provided for in the preset bail schedule. Cal. Penal Code § 1269c.[4] Without counsel, the defendant may not be aware of these rights, and may as a result be subjected to jail time that he could have avoided. The defendant can also ask to be released on his own recognizance, or request diversion in certain types of cases – thus avoiding both jail and the need to post bail. Cal. Penal Code §§ 1000 *et seq*., 1269c, 1318 *et seq*. But again, without advice of counsel, the defendant

[4] Conversely, the prosecutor can request a bail enhancement from the magistrate. Cal. Penal Code § 1269c.

may be ignorant of his right to make such requests, and may as a result be unnecessarily deprived of his liberty.

Moreover, the defendant may decide to waive counsel and enter a plea immediately. *See Faretta v. California*, 422 U.S. 806, 834 (1975) (criminal defendant has constitutional right to self-representation, even though "[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts"). In light of the wait for appointed counsel, it is reasonable to assume that many defendants choose to do so – without obtaining any legal advice – in order to avoid spending time behind bars. But if he does choose to do so, the defendant may end up waiving a number of substantive rights that he is never even aware he has. By way of example:

- The rules for entering a plea are quite complex, and carry significant implications for subsequent proceedings. *See* Cal. Penal Code § 1016 ("A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged . . . . A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged."). A defendant who enters a plea without advice of counsel runs the risk of making

some admission that could deprive him of his right even to contest the charges against him.

- A defendant charged in a felony complaint has a statutory right to demur to the complaint – but only up until the time a plea is entered. Cal. Penal Code § 1004 (defendant "may demur to the accusatory pleading at any time *prior to the entry of a plea*") (emphasis added); *see In re Geer*, 108 Cal. App. 3d 1002, 1006 (1980). The California Court of Appeal has recognized (in a different context) the "unfairness of compelling a defendant who has a legitimate demurrable claim to wait . . . before pursuing it." *In re Geer*, 108 Cal. App. 3d at 1007. Yet a defendant who does not have counsel may unknowingly waive his right to demur by entering a plea, or if he does request counsel, may have to suffer the "unfairness" of waiting for an uncertain period of time before he is appointed counsel who can assess the complaint and pursue any "legitimate demurrable claim" the defendant may have.

- A defendant can request informal discovery at the first appearance, or file a motion to return property or suppress evidence as a result of an illegal search or seizure. *See* Cal. Penal Code §§ 1054 *et seq.*, 1538.5. He can also request appointment of a psychotherapist to evaluate a possible plea or defense based on mental condition. *See* Cal. Evid. Code § 1017. An unrepresented defendant

presumably would not know to do any of these things, and would waive these rights by entering a plea immediately without advice from an attorney.

- If a defendant is charged with prior convictions, and enters a plea, he will be asked whether the allegation of prior convictions is true; a refusal to answer is treated as a denial. Cal. Penal Code § 1025. An unrepresented defendant is unlikely to perceive the consequences of refusing to answer.

On the other hand, a continuance of the proceedings in order to await the appointment of counsel – even apart from the prospect of a possibly unnecessary period of incarceration – also substantially prejudices the defendant's rights. Again, by way of example:

- The prosecutor may amend a felony complaint without leave of court only up until the time a plea is entered. Cal. Penal Code § 1009; *see People v. Superior Court (Alvarado)*, 207 Cal. App. 3d 464, 472 (1989). Any delay in entering a plea, occasioned by the defendant having to wait for appointed counsel, allows the state additional time in which to add charges against the defendant. *See* FAC ¶ 42.

- The preliminary hearing must occur within ten days of arraignment or entry of a plea, whichever occurs later. Cal. Penal Code § 859b. Delay in entering a plea in order to wait for the appointment of counsel means that that clock does

not even start to run for some period of time – which could well, in and of itself, exceed ten days. *See* FAC ¶ 29.

- California's speedy trial requirement protects against unwarranted prolonged imprisonment by mandating that the defendant be brought to trial within 60 days of arraignment on an indictment or information. Cal. Penal Code § 1382; *see People v. Martinez*, 22 Cal. 4th 750, 768 (2000). In misdemeanor cases, the speedy trial clock starts to run from the time of arraignment or entry of a plea, whichever is later. Cal. Penal Code § 1382. In any event, delay in arraignment or entry of a plea clearly prejudices any criminal defendant, because either the clock is not running, or it is running and there is no lawyer working on the case. *See Rothgery*, 554 U.S. at 210 (noting the need to "get a lawyer working").

- Delay in obtaining counsel may also prejudice the defendant by sacrificing the ability to obtain or preserve evidence (*e.g.*, by interviewing witnesses or photographing the crime scene or any physical injuries).

IV. CALIFORNIA'S INITIAL APPEARANCE IS A "CRITICAL STAGE" REQUIRING THE PRESENCE OF APPOINTED COUNSEL

The Supreme Court has held that the Sixth Amendment test for a "critical stage" of criminal proceedings requiring the presence of counsel is "whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *Ash*, 413 U.S. at 313. As outlined above, there can be little doubt that a criminal defendant in California requires aid in coping with the demands of a

first appearance before a magistrate. Indeed, the proceeding is rife with pitfalls for the unwary and unrepresented defendant.

This Court has established a three-factor test for determining whether a particular event constitutes a critical stage of a proceeding. "If (1) 'failure to pursue strategies or remedies results in a loss of significant rights,' (2) 'skilled counsel would be useful in helping the accused understand the legal confrontation,' *or* (3) 'the proceeding tests the merits of the accused's case,' then the proceeding is a critical stage triggering the right to counsel." *Lopez-Valenzuela v. County of Maricopa*, 719 F.3d 1054, 1069 (9th Cir. 2013) (citations omitted, emphasis added).

Even this brief description of the arraignment makes clear that at least the first and second alternative tests of *Lopez-Valenzuela* are satisfied here. The defendant certainly faces the risk of losing significant rights. Most obviously, an unrepresented defendant may forfeit the right to immediate release on bail or on his own recognizance, thus resulting in unnecessary jail time. The Supreme Court has held, "Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that *any amount of actual jail time has Sixth Amendment significance*." *Glover v. United States*, 531 U.S. 198, 203 (2001) (emphasis added); *see also Argersinger*, 407 U.S. at 37 ("the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may

well result in quite serious repercussions affecting his career and his reputation") (citation omitted).

In light of this precedent, it is abundantly clear that this is a critical stage of the proceedings. A defendant who has the benefit of counsel's advice and advocacy is in a far better position than an unrepresented defendant to present reasoned and knowledgeable arguments to the magistrate why a decrease from the bail schedule is warranted, or an increase is not. Research demonstrates that "[a]bsent counsel, an accused is more likely to suffer the serious consequences of pretrial incarceration beyond personal liberty, namely economic and social losses . . . . A defender's courtroom presence helps balance a playing field that otherwise leans heavily in favor of the unopposed government prosecutor, while also serving as a counterweight to an intimidating legal process." Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 387 (2011); *see also DeWolfe v. Richmond*, 76 A.3d 1019, 1024 (Md. 2013) ("[u]nrepresented suspects are more likely to have more perfunctory hearings, less likely to be released on recognizance, more likely to have higher and unaffordable bail, and more likely to serve longer detentions or to pay the expense of a bail bondsman's non-refundable 10% fee to regain their freedom").

For these reasons, courts have held that a proceeding that involves the setting of bail is a critical stage requiring the presence of counsel. For example,

the New York Court of Appeal held that arraignment was a critical stage because, among other things, defendants' liberty interests were "regularly adjudicated with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents." *Hurrell-Harring v. State*, 930 N.E.2d 217, 223 (N.Y. 2010) (citations omitted). In holding that the due process component of the Maryland Declaration of Rights requires state-furnished counsel at initial appearances before District Court Commissioners where bail is set, the Court of Appeals of Maryland observed:

> [T]he failure of a Commissioner to consider all the facts relevant to a bail determination can have devastating effects on the arrested individuals. Not only do the arrested individuals face health and safety risks posed by prison stays, but the arrested individuals may be functionally illiterate and unable to read materials related to the charges. Additionally, they may be employed in low wage jobs which could be easily lost because of incarceration. Moreover, studies show that the bail amounts are often improperly affected by race.

DeWolfe, 76 A.3d at 1023.

As in New York and Maryland, the first appearance before a judicial officer in California involves determination of the conditions of pretrial release. If the defendant happens to be aware of his rights – or if he is advised by counsel to do so – he can request release on bail or his own recognizance, or ask that bail be reduced. But if he does not, and asks for counsel, he can end up spending up to

two weeks in jail without any determination of his eligibility for release. This simply is unacceptable as a matter of Constitutional law. In terms of the standard applied in *Lopez-Valenzuela*, the failure of an unrepresented defendant to request bail or release when first brought before the magistrate can "result[] in a loss of significant rights," 719 F.3d at 1069 – namely, the right to be free from unnecessary incarceration.

Moreover, defendants have the ability to enter pleas before the magistrate. There can be no doubt that the presence of counsel would be "useful" in helping defendants to understand their options. *Id*. Recognizing the central role of plea bargains in the administration of our criminal justice system, the Supreme Court has held that "criminal defendants require effective counsel during plea negotiations. 'Anything less . . . might deny a defendant "effective representation by counsel at the only stage when legal aid and advice would help him."'" *Missouri v. Frye*, 132 S. Ct. 1399, 1407-08 (2012) (quoting *Massiah*, 377 U.S. at 204); *see also Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) ("the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel"); *Argersinger*, 407 U.S. at 34 (counsel is needed at entry of guilty plea "so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution"); *Hamilton v. Alabama*, 368 U.S. 52, 55

(1961) ("Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently."). The consequences of entering a guilty plea can be severe and, even beyond the possibility of incarceration, can result in the loss of significant rights. *See generally* John P. Gross, *What Matters More: A Day in Jail or a Criminal Conviction?*, 22 WM. & MARY BILL RTS. J. 55, 80-86 (2013) (detailing some of the "state-imposed barriers to the exercise of certain rights or privileges as a result of a conviction").

It is an insufficient, and tautological, response to say that the arraignment is not a critical stage if all of its substantive components are simply delayed. *See Farrow*, *supra*, at *13 ("nothing happened at the initial appearance to make it a critical stage of the proceedings"). This approach ignores the fact that defendants are suffering additional, and perhaps unnecessary, jail time – time which in itself carries Sixth Amendment implications. *Glover*, 531 U.S. at 203. It ignores the fact that defendants may not, without the assistance of counsel, be aware that they can request release on bail or their own recognizance. It ignores the fact that defendants can, and often do, avoid the additional jail time by waiving their right to counsel and entering guilty pleas without any advice from counsel – pleas that can dramatically affect the future course of their lives. It ignores the fact the defendants' rights to a prompt preliminary hearing and speedy trial are compromised by any delay in entering a plea. It ignores the myriad of other

"significant rights" that can be lost, and the opportunities for counsel to help defendants understand the nature of the "legal confrontation" in which they are necessary participants.[5]

In these respects, the California proceeding is distinguishable from the initial appearance in Arizona that this Court held is not a critical stage. *Lopez-Valenzuela*, 719 F.3d at 1070. The *Lopez-Valenzuela* Court emphasized that the Arizona proceeding is "purely administrative" in nature: no plea is entered, and there is no opportunity to argue law or evidence. *Id*. at 1069. There is no "strategy or remedy" that an unrepresented defendant can fail to pursue, and there is no need for counsel to advise a defendant who is merely being asked "routine questions." *Id*. This stands in contrast to the California proceeding, where pleas can be entered, pretrial release can be sacrificed, and significant rights can be compromised or waived altogether in the absence of counsel's advice.

The function of counsel in criminal proceedings is to serve "as a guide through complex legal technicalities." *Ash*, 413 U.S. at 307. The "complex legal

[5] It is worth noting that this action was dismissed on the pleadings pursuant to Federal Rule of Civil Procedure 12(b)(6). "A complaint must not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *E.g., Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011). At a minimum, these plaintiffs should be allowed to proceed on their Sixth Amendment claim and take discovery to determine the extent to which significant rights are being lost or defendants would find the assistance of skilled counsel useful at their initial appearances. *See Lopez-Valenzuela*, 719 F.3d at 1069.

technicalities" involved when a criminal defendant in California appears for the first time before a judicial officer leave no doubt that that appearance constitutes a critical stage of the proceedings against him, and that appointed counsel must be available at that time for an indigent defendant who desires representation.

CONCLUSION

For the reasons discussed above, *amici curiae* National Association of Criminal Defense Lawyers and California Attorneys for Criminal Justice respectfully urges this Court to reverse the District Court, reinstate plaintiffs' claims, and allow this important lawsuit to go forward.

Dated: January 17, 2014 Respectfully submitted,

/s/ Gia L. Cincone

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CERTIFICATE OF COMPLIANCE

I, Gia L. Cincone, hereby certify that the total word count in the brief is 5,042 words in Times New Roman, 14-point type, and that it complies with the type-volume limitation of Federal Rule of Appellate Procedure, Rule 32(a)(7)(B)(iii).

Dated: January 17, 2014 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore
Senior Appellate Paralegal
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