

1 HONORABLE RONALD B. LEIGHTON  
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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT TACOMA

9 MOLLY GIBBS, WILLIAM W.  
10 HAMILTON, LINDA K. JANSEN, and  
11 THOMAS W. JOHNSON,

12 Plaintiffs,

13 v.

14 CITY OF TACOMA and PIERCE  
15 COUNTY,

16 Defendants.  
17

Case No. C09-5310-RBL

ORDER ON SUMMARY JUDGMENT  
[Dkt. #20]

18 THIS MATTER is before the court on Defendants' Motion for Partial Summary  
19 Judgment [Dkt. #20]. The case arises from the March 11, 2007 arrest and detainment of 23  
20 protestors participating in a political demonstration near the Port of Tacoma. Plaintiffs are four  
21 of the protestors, Molly Gibbs, William Hamilton, Linda Jansen, and Thomas Johnson.  
22 Plaintiffs intentionally got arrested for disobeying an officer's lawful orders, intending to make  
23 a political statement out of the arrests. They were detained for about twelve hours before being  
24 released. Only one Plaintiff was eventually charged with a crime.

25 Plaintiffs sue for violations of their First, Fifth, Sixth, and Fourteenth<sup>1</sup> Amendment  
26 rights, claiming in part that they were unlawfully denied access to their attorney while detained.

27 <sup>1</sup> Plaintiffs' Fifth Amendment due process claim is invalid, as the Fifth Amendment Due Process Clause  
28 only applies to the federal government. *See, e.g., Bingue v. Prunchak*, 512 F.3d 1169, 1174 (9<sup>th</sup> Cir. 2008). It is  
therefore assumed that Plaintiffs bring their due process claim against the city and county under the Fourteenth  
Amendment.

1 Defendants City of Tacoma and Pierce County seek summary dismissal of Plaintiffs'  
2 Fifth and Sixth Amendment claims, arguing that they did not violate Plaintiffs' constitutional  
3 right against self incrimination, their right to due process, or their right to counsel.

4 For the reasons that follow, Defendants' Motion for Partial Summary Judgment is  
5 GRANTED and Plaintiffs' Fifth and Sixth Amendment claims, along with their Fourteenth  
6 Amendment due process claim, are DISMISSED with prejudice.

### 7 I. FACTS

8 At roughly 3:30 p.m. on March 11, 2007, Tacoma Police Department ("TPD") agents  
9 arrested 23 people, including Plaintiffs, at a protest demonstration near the Port of Tacoma in  
10 Pierce County. The demonstrators were protesting the Army's use of the port for shipping  
11 military equipment to Iraq and Afghanistan. Plaintiffs intentionally got arrested as a political  
12 statement by climbing over barricades enclosing the designated protest area. Upon arrest they  
13 were advised of their right to remain silent and of their right to have counsel present during any  
14 custodial interrogation. Plaintiffs did not waive these rights. The police did not subject any  
15 Plaintiff to a custodial interrogation, and none made incriminating statements.

16 Plaintiffs and the other arrestees were detained in a Pierce Transit bus and eventually  
17 transported to the TPD headquarters. The arrestees retained possession of their cell phones  
18 while on the bus and while initially detained at headquarters. While at headquarters, Plaintiff  
19 Hamilton received a call on his cell phone from Plaintiffs' attorney, Legrand Jones<sup>2</sup>. After he  
20 spoke to Jones, Hamilton allowed Plaintiff Johnson to use the cell phone to call his wife.

21 TPD agents took possession of the arrestees' personal items, including cell phones,  
22 before transporting them to the Pierce County Jail, where they were booked. At the jail, the  
23 arrestees were allowed access to jail telephones, which Hamilton used to once again speak with  
24 Jones, and which Gibbs used to call her husband.

25 At approximately 3:00 a.m. on March 12, 2007, Plaintiffs and the other arrestees were  
26 released from jail on their personal recognizance. Plaintiffs then met with their attorney, Jones,  
27 who had been waiting for them outside the jail.

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28 <sup>2</sup>Plaintiffs indicate that Jones had been retained as legal counsel for all four of them prior to the arrest.  
[See Dkt. #1, Complaint].

1 Plaintiffs requested to speak with their attorney throughout the roughly twelve hour  
2 detainment. These requests were denied by TPD officials. Jones requested to speak with his  
3 clients, but his request was also denied.

4 Gibbs, Johnson, and Jansen were not charged with any crime. On March 14, 2007,  
5 Hamilton was charged with a misdemeanor violation of RCW 46.61.015, "Obedience to police  
6 officers, flaggers, or firefighters," as adopted by Tacoma Municipal Code 11.05. [See Dkt. #1,  
7 Complaint]. He appeared before the Tacoma Municipal Court on March 15, 2007. This charge  
8 was later dismissed.

9 Plaintiffs filed their Complaint for Violations of Civil Rights [Dkt. #1] on May 27,  
10 2009, seeking damages under 42 U.S.C. § 1983 for violations of their constitutional rights  
11 under the First, Fifth, Sixth, and Fourteenth Amendments. On April 30, 2010, this court granted  
12 stipulations dismissing Plaintiffs' various Sixth Amendment claims, except for that based on  
13 their right to counsel. [Dkt. #s15-18]. On June 10, 2010, Defendants moved for Partial  
14 Summary Judgment [Dkt. #20], seeking dismissal of Plaintiffs' Fifth Amendment claims and  
15 their remaining Sixth Amendment right to counsel claim.

## 16 **II. DISCUSSION**

### 17 **A. Summary Judgment Standard**

18 Summary judgment is appropriate when, viewing the facts in the light most favorable to  
19 the nonmoving party, there is no genuine issue of material fact which would preclude summary  
20 judgment as a matter of law. Once the moving party has satisfied its burden, it is entitled to  
21 summary judgment if the non-moving party fails to present, by affidavits, depositions, answers  
22 to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for  
23 trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of  
24 evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp.*  
25 *v. Square D Co.*, 68 F.3d 1216, 1221 (9<sup>th</sup> Cir. 1995). Factual disputes whose resolution would  
26 not affect the outcome of the suit are irrelevant to the consideration of a motion for summary  
27 judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In other words,  
28 "summary judgment should be granted where the nonmoving party fails to offer evidence from

1 which a reasonable [fact finder] could return a [decision] in its favor.” *Triton Energy*, 68 F.3d  
2 at 1220.

3 The material facts are undisputed. The only issue is whether Defendants’ denial of  
4 Plaintiffs’ requests to meet with their attorney while detained violated their Fifth, Sixth, or  
5 Fourteenth Amendment rights as a matter of law. This is a legal question amenable to  
6 resolution by summary judgment.

7 **B. Municipality Liability**

8 In order to set forth a claim against a municipality under 42 U.S.C. § 1983, a plaintiff  
9 must show that the defendant’s employees or agents acted pursuant to an official custom,  
10 pattern or policy that permits deliberate indifference to, or violates, the plaintiff’s civil rights;  
11 or that the entity ratified the unlawful conduct. *See Monell v. Department of Social Servs.*, 436  
12 U.S. 658, 690-91 (1978); *Larez v. City of Los Angeles*, 946 F.2d 630, 646-47 (9<sup>th</sup> Cir. 1991).

13 Consistent with the *Monell* standard for municipality liability, the Ninth Circuit has held  
14 that a plaintiff bringing a § 1983 claim against a local government body for failure to act to  
15 preserve constitutional rights<sup>3</sup> must satisfy four elements:

16 (1) that he possessed a constitutional right of which he was deprived; (2) that the  
17 municipality had a policy; (3) that this policy “amounts to deliberate indifference”  
18 to the plaintiff’s constitutional right; and (4) that the policy is the “moving force  
19 behind the constitutional violation.”

20 *Oviatt By and Through Waugh v. Pearce*, 954 F.2d 1470, 1474 (9<sup>th</sup> Cir. 1992) (*citing also City*  
21 *of Canton, OH v. Harris*, 489 U.S. 378, 389-91 (1989)). Each element serves as a threshold  
22 requirement to get to the next, and all four must be satisfied for the claim to succeed. If the first  
23 element is not satisfied, i.e. if the plaintiff has not been deprived of any constitutional right as a  
24 matter of law, then discussion of the defendant’s policies and any relation between those  
25 policies and the alleged constitutional deprivation is unnecessary.

26 Plaintiffs here point to Defendant Pierce County’s policy of barring professional  
27 visitors, such as attorneys, from meeting with inmates in county jails between 9:55 p.m. and

28 <sup>3</sup> The Defendants’ alleged failure to act was the failure to provide Plaintiffs access to their attorney, which  
presumably would have preserved their Fifth, Sixth, and/or Fourteenth Amendment rights.

1 8:00 a.m. They claim that this policy may reasonably be inferred to have caused, or at least  
2 contributed to, violations of their constitutional rights. [See Dkt. #22, Response]. Under *Oviatt*,  
3 if it is shown that Plaintiffs were not deprived of their constitutional rights as a matter of law,  
4 then discussion of the relation between Defendant's policy and the alleged violations is  
5 unnecessary, and any claims based on those violations may be dismissed.

6 **C. Right Against Self-Incrimination (Fifth Amendment)**

7 Plaintiffs' Fifth Amendment claim is based on the Defendants denying access to their  
8 attorney, which raises issues of self-incrimination and due process.

9 Under the Fifth Amendment right to be free from self incrimination, an arrestee must be  
10 warned of his right to remain silent, that anything he does say can be used as evidence against  
11 him, and that he has the right to the assistance of counsel during any custodial interrogation.  
12 *Miranda v. Arizona*, 384 U.S. 436, 471 (1966). This is meant to ensure that arrestees are not  
13 unfairly prone to hastily and unknowingly making statements that will later be used against  
14 them. *See Id.* It is undisputed that Plaintiffs here were advised of their *Miranda* rights upon  
15 arrest, were not subject to custodial interrogation, and made no incriminating statements. Thus,  
16 regardless of any denied access to an attorney during their subsequent detainment, Defendants  
17 did not violate Plaintiffs' Fifth Amendment right to be free from self-incrimination.  
18 Defendants' motion for summary dismissal of the self-incrimination claim is therefore  
19 GRANTED.

20 **D. Right to Due Process (Fifth & Fourteenth Amendments) and Right to  
21 Counsel (Sixth Amendment)**

22 Plaintiffs allege that the Defendants violated their Fifth Amendment right to due process  
23 and Sixth Amendment right to counsel by denying access to their attorney during the  
24 detainment. [See Dkt. #22, Response]. However, the Fifth Amendment Due Process Clause is  
25 inapplicable here, as it only applies to the federal government. *Bingue*, 512 F.3d at 1174. The  
26 Fourteenth Amendment Due Process clause mirrors that of the Fifth Amendment, but applies to  
27 the States. *Id.* Therefore, Plaintiffs' Fifth Amendment due process claim fails, but will be  
28 evaluated on its merits as an alleged violation of their Fourteenth Amendment right to due  
process.

1 The Due Process Clause of the Fourteenth Amendment protects individuals from  
2 deprivation of liberty or property by the government without due process of the law. If there is  
3 no deprivation of a liberty or property interest, the court need not assess the process due. This  
4 creates a two-part analysis, the first of which serves as a threshold requirement:

5 We examine procedural due process questions in two steps: the first asks whether  
6 there exists a liberty or property interest which has been interfered with by the  
7 State, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571, 92 S.Ct.  
8 2701, 2706, 33 L.Ed.2d 548 (1972); the second examines whether the procedures  
9 attendant upon that deprivation were constitutionally sufficient, *Hewitt v. Helms*,  
10 459 U.S., at 472, 103 S.Ct., at 871.

11 *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

### 12 **1. Right to be Free from Punishment**

13 Attempting to show deprivation of a constitutionally protected liberty interest, Plaintiffs  
14 point to cases involving the Fourteenth Amendment due process right to be free from  
15 punishment prior to an adjudication of guilt. *See Clouthier v. County of Contra Costa*, 591 F.3d  
16 1232, 1241 (9<sup>th</sup> Cir. 2010) (holding that restrictions on a criminally charged pre-trial detainee  
17 which evince a punitive purpose or intent constitute punishment in violation of the detainee's  
18 Fourteenth Amendment rights). In making their claim, Plaintiffs imply that denial of in-person<sup>4</sup>  
19 and on-demand access to an attorney for detained arrestees who have yet to be charged with a  
20 crime constitutes "punishment" in the constitutional sense. [*See* Dkt. #22, Plaintiffs' Response].  
21 Plaintiffs cite no authority supporting this notion, and provide no evidence that the TPD agents  
22 had punitive intent in denying their requests. The court can find no such authority or evidence,  
23 and is unwilling to broaden the right to be free from pre-adjudication punishment to inherently  
24 encompass a right to counsel.

### 25 **2. Right to Counsel**

26 Plaintiffs also point to cases involving the Fourteenth Amendment due process right to  
27 access counsel and the courts. Similarly, their Sixth Amendment claim is based on Defendants'  
28 alleged violation of their constitutional right to counsel.

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<sup>4</sup> Plaintiffs did have access to their attorney, via telephone.

1           The due process cases cited by Plaintiffs address the rights of individuals who are  
2 incarcerated pursuant to a criminal conviction. *See Ching v. Lewis*, 895 F.2d 608, 609 (9<sup>th</sup> Cir.  
3 1990) (holding that a convicted criminal incarcerated in state prison has, as part of his  
4 Fourteenth Amendment right to access the courts, the right of contact visitation with his  
5 attorney). Plaintiffs, on the other hand, were detained arrestees who had not yet been charged  
6 with any crime, let alone convicted. The Supreme Court has held that an individual does not  
7 obtain a right to counsel under the Sixth or Fourteenth Amendment until the commencement of  
8 adversary judicial proceedings against him:

9           In a line of constitutional cases in this Court stemming back to the Court's  
10 landmark opinion in *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, it  
11 has been firmly established that a person's Sixth and Fourteenth Amendment right  
12 to counsel attaches only at or after the time that adversary judicial proceedings  
13 have been initiated against him.

14           This is not to say that a defendant in a criminal case has a constitutional right to  
15 counsel only at the trial itself. The Powell case makes clear that the right attaches  
16 at the time of arraignment, and the Court has recently held that it exists also at the  
17 time of a preliminary hearing. But the point is that, while members of the Court  
18 have differed as to existence of the right to counsel in the contexts of some of the  
19 above cases, all of those cases have involved points of time at or after the  
20 initiation of adversary judicial criminal proceedings-whether by way of formal  
21 charge, preliminary hearing, indictment, information, or arraignment.

22           *Kirby v. Ill.*, 406 U.S. 682, 687 (1972) (internal citations omitted). This standard has since  
23 been upheld, and Plaintiffs admit that the Sixth Amendment right to counsel attaches at a  
24 criminal defendant's first appearance before a judicial officer. [*See* Dkt. #22, Plaintiffs'  
25 Response; Dkt. #20, Defendants' Motion for Partial Summary Judgment (*citing Rothgery v.*  
26 *Gillespie County, Tex.*, 128 S.Ct. 2578, 2581 (2008))].

27           The Fourth Amendment provides a check against indefinite detainment of an arrestee by  
28 requiring a judicial determination of probable cause for the arrest within the first 48 hours of  
detainment. *See County of Riverside v. McLaughlon*, 500 U.S. 44, 56 (1991).

          It is undisputed that Plaintiffs were released from their twelve hour detainment prior to  
any appearance in court and before any judicial proceedings were initiated against them. Only

1 one of the four Plaintiffs, Hamilton, was subsequently charged with a misdemeanor crime, and  
2 he was the only Plaintiff to appear in court. The charge was filed on March 14, 2007, and in  
3 turn Hamilton's constitutional right to counsel attached on that day. He later testified that he  
4 had no problem gaining access to his attorney after being released from jail on March 12, 2007.  
5 [See Masumoto Dec., Dkt. #21, at Ex. D]. Because judicial proceedings were not initiated  
6 against the other three Plaintiffs, their constitutional right to counsel never attached.  
7 Accordingly, Defendants' denial of Plaintiffs' access to their attorney during the detention  
8 did not violate their Fourteenth or Sixth Amendment right to counsel.

### 9 **3. Right to Substantive Due Process**

10 "Where a particular Amendment 'provides an explicit textual source of constitutional  
11 protection' against a particular sort of government behavior, 'that Amendment, not the more  
12 generalized notion of "substantive due process," must be the guide for analyzing these  
13 claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (quoting *Graham v. Connor*, 490 U.S.  
14 386, 395 (1989)). The Fifth, Sixth, and Fourteenth Amendments govern Plaintiffs' right to  
15 counsel, and they serve as explicit textual sources of constitutional protection from  
16 governmental denial of access to counsel. Further, to violate one's right to substantive due  
17 process, government officials must exercise "the most egregious official conduct," such that  
18 their actions "shock the conscience." *City of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).  
19 Denying Plaintiffs in-person access to their attorney, when they did not yet have a right to  
20 counsel and had access to telephones, can hardly be considered egregious conduct that shocks  
21 the conscience.

22 Even when viewed in the light most favorable to the Plaintiffs, the evidence does not  
23 support Plaintiffs' claim that their Fifth Amendment right to be free from self-incrimination,  
24 their Fourteenth Amendment right to due process, or their Sixth Amendment right to counsel  
25 were violated. Therefore, Plaintiffs' Fifth and Sixth Amendment claims, along with their  
26 Fourteenth Amendment due process claim, fail as a matter of law. Defendants' motion for  
27 summary dismissal of these claims is GRANTED.

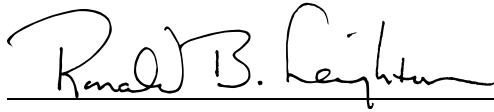


1 **CONCLUSION**

2 Defendants' Motion for Partial Summary Judgment [Dkt. #20] is GRANTED, and  
3 Plaintiffs' Fifth and Sixth Amendment claims are DISMISSED with prejudice. Plaintiffs'  
4 Fourteenth Amendment due process claim is DISMISSED with prejudice. Plaintiffs' remaining  
5 claims are not addressed by this order.

6 **IT IS SO ORDERED.**

7 Dated this 28<sup>th</sup> day of July, 2010.

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12 RONALD B. LEIGHTON  
13 UNITED STATES DISTRICT JUDGE  
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