No. 96766-1

SUPREME COURT OF THE STATE OF WASHINGTON

COLLEEN DAVISON, legal guardian for K.B., a minor, on behalf of themselves and others similarly situated and GARY MURRELL,
Respondents,

v.

STATE OF WASHINGTON and WASHINGTON STATE OFFICE OF PUBLIC DEFENSE,

Petitioners.

ANSWER TO STATEMENT OF GROUNDS FOR DIRECT REVIEW

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INTRODUCTION

The right to counsel is fundamental, is essential to a fair trial, and is made an obligation of the States by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342-45, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Children must be fully protected by this right:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare to submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.

In re Gault, 387 U.S. 1, 36-37, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (citation omitted); *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010).

Respondents, Plaintiffs below, are a certified class of children who have or will have juvenile offender cases pending in Grays Harbor County ("the County") Juvenile Court, and who have the constitutional right to appointment of counsel. These are children who have been or will be the repeated victims of the County's unconstitutional juvenile public defense system and the State's persistent failure to act, despite its knowledge of these systemic failures and the resulting harm.

Respondents agree with the State that the subject matter of the proceeding involves a fundamental and urgent issue of broad public import that requires prompt and ultimate determination by this Court. RAP

4.2(a)(4). Respondents write separately to underscore the importance and urgency of this matter by illuminating the extraordinary harm that juveniles in the County continue to suffer while this litigation is ongoing, and to clarify both the issues presented and the relevant legal background.

ISSUE PRESENTED FOR REVIEW

> Does the State of Washington or the Washington State Office of Public Defense have a duty to act whenever it knows of a systematic failure by a county to provide constitutionally adequate defense to juveniles charged with offenses in juvenile court.[1]

COUNTERSTATEMENT OF THE CASE

Though the parties and the superior court are in agreement that direct review of this constitutional issue of first impression is appropriate, Respondents provide the following statement for additional context and information relevant to the parties' dispute. The State did not present evidence contesting these facts at summary judgment.

A. Course of Proceedings

This lawsuit alleges that Petitioners, the Office of Public Defense ("OPD") and the State (collectively the "State"), are aware that (i) juvenile public defense services in Grays Harbor County operate well-below the constitutional minimum, (ii) children in the County are suffering serious, ongoing harm as a result of these constitutional violations, and (iii) despite

[1] As discussed in Respondents' Answer to Motion for Discretionary Review, this proposed issue statement issue slightly differs from the statement advanced by the Petitioners but is consistent with the superior court's framing of the issue.

their knowledge of the unconstitutional system in the County, the State has failed to act to remedy it (and indeed believes itself powerless to act). The suit has been pending since April 2017. Pet. App. C. The superior court granted class certification in October 2017 and the parties participated in more than 15 months of discovery, including written discovery and depositions of the State and Grays Harbor County.[2]

The parties filed competing motions for summary judgment and supplemental briefing to address the superior court's questions. *See* Resp. Appx. A, D, G-N. Following this extensive briefing schedule and oral argument, the superior court denied the State's Motion for Summary Judgment in which the State argued that it could not be liable for the condition of public defense services in Grays Harbor County so long as the county has adequate taxing authority, ruling as follows:

> It is clear that the state has delegated operational responsibility for juvenile defense to the counties, but the state cannot delegate its ultimate constitutional obligation. I am moved by the authorities from other jurisdictions that I believe are sufficiently similar to the facts at bar to believe

[2] Respondents do not understand the State's assertion that the Thurston County Superior Court's Order was based on "limited discovery." Discovery was open for more than 15 months and involved the depositions Grays Harbor County, the Grays Harbor lead juvenile defense attorney, and three employees of OPD. The parties also exchanged written discovery and participated in extensive e-discovery. The discovery cut-off (Dec. 4) had passed at the time of the December 14 summary judgment hearing, though the parties had requested by stipulation a limited extension of the discovery cutoff. The State did not complain that it did not have sufficient discovery to resist Plaintiffs' motion for total summary judgment, and the State did not raise a CR 56(f) argument in its Opposition to Plaintiff's Motion for Summary Judgment. *See* Resp. App. G. The State chose not to contest the factual record submitted on summary judgment.

> that this kind of suit may proceed even in the absence of a "cannot" situation, which is what the state has articulated as the standard here. I believe that the standard that should apply in this type of case is a knowing systemic violation and that the type of relief that is -- has been requested by the plaintiffs in this case would be appropriate if the facts bore it out. I'm not going to go on at any additional length beyond that because I believe my endorsing the plaintiffs' arguments and the arguments and opinions by other jurisdictions is sufficient to identify the basis for this ruling.
>
> I will additionally note that there is nothing squarely on point in this jurisdiction that answers the question before me today, and thus I am in a position where the standard is in effect what do I believe a higher court of this state would do in these circumstances, and I am doing what I believe a higher court in this state would do in these circumstances based primarily on what appears to be the majority view of other jurisdictions.

Pet. App. B at 28-29.

Though it rejected the defenses in the State's Motion for Summary Judgment, the superior court did not rule on Plaintiffs' Motion for Summary Judgment, instead holding it in abeyance. The superior court then certified the issue presented on summary judgment for immediate review. *See* Pet. App. A.

B. Legal Framework of Washington's Public Defense System

The right to counsel is guaranteed by both the U.S. Constitution, Washington's State Constitution, and by Washington statute. U.S. CONST. amend. VI; WASH. CONST. ART. I, § 22; RCW 10.101.005. Crucially, the constitutional right to counsel is not a limitation on what the State can do

to its citizens, but rather a demand that the State act to protect its citizens from facing alone the drastic consequences of prosecution. *See, e.g.*, *Avery v. Alabama*, 308 U.S. 444, 446, 60 S. Ct. 321, 84 L. Ed. 377 (1940) (the "guarantee . . . cannot be satisfied by mere formal appointment"); *United States v. Cronic*, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (the right includes requiring "the prosecution's case to survive the crucible of meaningful adversarial testing"); *A.N.J.*, 168 Wn.2d at 98 ("not just an appointment of counsel, but also effective assistance of counsel"). Thus, the right to counsel is a positive constitutional right. Jenna MacNaughton, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 762 (2001) (positive rights, including the right to counsel, "require some affirmative act by the government to fulfill them"); *see also McCleary v. State*, 173 Wn.2d 477, 519, 269 P.3d 227 (2012) (discussing positive constitutional rights).

Washington law permits counties to provide public defense services and requires that the counties adopt standards for the delivery of public defense services.[3] RCW 36.26.020; RCW 10.101.030. In 1996, the

[3] Neither party is aware of any express statutory delegation of public defense services and responsibility from the State to the counties. *See generally* Resp. App. K, L. The Legislature has delegated some funding responsibilities for indigent juvenile defense services to the counties and counties do, in fact, provide most of the day-to-day public defense services in juvenile court. But neither this delegation nor the counties' ability to levy taxes in support of this funding mandate purport to absolve the State of its constitutional obligations.

Legislature created the Office of Public Defense to "implement the constitutional and statutory guarantee of counsel and to ensure effective and efficient delivery of indigent defense services funded by the state of Washington." RCW 2.70.005. The OPD's duties include verifying county eligibility for state funding and ensuring that a county has "a legal representation plan that addresses the factors in RCW 10.101.030." *See* RCW 10.101.060(1), (2). In 2008, the Legislature amended RCW 2.70 and included two relevant provisions: the requirement that OPD (i) "[a]dminister all state-funded services [including] . . . [t]rial court criminal indigent defense, as provided in 10.101 RCW;" and (ii) provide "oversight and technical assistance to ensure the effective and efficient delivery of services in the office's program areas." Laws of 2008, ch. 313, § 4.

Under this statutory scheme, the counties provide the majority of the day to day services and the State, through the OPD as well as the publication of standards and other materials, provides oversight, guidance, and technical assistance.[4] Counties are directed to these state standards in creating their own standards for the provision of public defense services. RCW 10.101.030.

[4] The parties vigorously dispute the scope of OPD's authority.

C. Grays Harbor County's Indigent Defense System

The undisputed evidence presented at summary judgment shows that the County's public defense system fails to function to provide a minimal constitutionally adequate level of defense.

The record evidence, provided for the Court's convenience in the Appendix to this Answer, demonstrates the seriousness of the situation as well as the urgent need for attention. After extensive court observation and review of documentary evidence, including public defense files, Respondents' expert Simmie Ann Baer concluded that the County's juvenile public defense system "does not act as counsel" for children being prosecuted and fails to provide even minimally effective representation at every critical stage.[5] Resp. App. C at 9-10. The record also details specific deficiencies in the County's system, including but not limited to:

- Juvenile defense contracts awarded in the sole discretion of the main juvenile court judge, which compromises the independence of the contract public defender;

[5] *Compare with Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1131-32 (W.D. Wash. 2013) ("[t]he attorney represents the client in name only . . . having no idea what the client's goals are, whether there are any defenses or mitigating circumstances that require investigation, or whether special considerations regarding immigration status, mental or physical conditions, or criminal history exist. Such perfunctory 'representation' does not satisfy the Sixth Amendment.").

- No system of attorney evaluation or monitoring as required by state statute;
- A lack of individualized investigation of children's' cases and consequent failure to mount defenses or arguments for reduced charges;
- Defense counsel's systemic failure to challenge bail, to challenge ongoing detention and probation violation charges, or to provide advocacy at sentencing;
- Pervasive lack of defense motions to suppress statements to police by a public defender who admitted at deposition that she was unfamiliar with U.S. Supreme Court case holding that a 13-year-old child's age and disabilities are legally relevant to the admissibility of statements to police;
- A pervasive failure of the public defender to stand with and speak for clients, instead leaving the child to face the judge's questioning alone.

Further details and information about specific cases and harms visited on children are available in Respondents' Appendix A pp. 2-16, Appendix C.

The State is admittedly aware of the deficiencies in the County's juvenile defense system, including at least that children: (1) are routinely

held in detention on bail amounts that are not challenged; (2) receive inadequate confidential communication with their attorneys; (3) receive inadequate advisement of rights, options, and consequences from the public defender; (4) fail to receive adequate investigation of the facts, release options, and sentencing options; (5) fail to have their rights protected through objections; motions, trials, and the use of expert witnesses; (6) fail to have their rights protected when interrogated by the court; and (7) plea guilty without adequate consideration of the legal defenses that are present. OPD has received numerous complaints about these issues and its staff has personally witnessed these deficiencies in their own observations of juvenile court.

The Office of Public Defense has also known of these serious, systemic deficiencies in the County's juvenile public defense system for years. OPD Director Moore testified that it knows that the County does not satisfy—or even provide for—the statutory standards for evaluation, supervision, and monitoring of county public defense systems. Resp. App. B at 67. County Resolution 2008-160 provides that judges "alone" select the public defense contracts and the only oversight of juvenile public defense is the judge's courtroom observations. Resp. App. B at 483. OPD employees testified that they aware of these policies and that they constitute systemic problems. *Id.* App. B at 64-65; 109-110. OPD further

testified that it has never even suggested that the County make any changes. *Id.* at 68:9.

D. Grays Harbor County's Unconstitutional Juvenile Public Defense System is Harming Children

The County's systemic failures result in an unconstitutional juvenile public defense system that is harming children. These examples are taken from the uncontested evidence of record.[6]

In April 2016, OPD learned that a 16-year old boy, M.D., was serving 120 days for probation violations in the County's juvenile detention center. Resp. App. B at 68:13-70:13; 131:7-137:1. The sentence was illegal, as it was four times the length permitted by RCW 13.40.200. M.D.'s appointed public defender did not object to the sentence or seek M.D.'s release from the illegal sentence, not even after OPD told the public defender that the sentence was illegal. *See id.*; Resp. App. B at 217-220. Eventually, the **prosecutor** filed a motion conceding that the sentence violated Washington law and requesting M.D.'s release. Resp. App. B at 221-27.

In November 2017, 13-year old J.C. was charged with Unlawful Inhalation of Toxic Fumes. Resp. App. C. at 610. The child was notably small and had no criminal history; his diversion was terminated not for

[6] This section contains only a few examples of the egregious deficiencies in Grays Harbor County. A more comprehensive list is contained at Resp. App. A; C.

criminal conduct but for acting out in school. Resp. App. B. at 307. J.C.'s public defender sat at a table behind J.C. while he stood alone before the court and faced judicial questioning. Resp. App. C at 610. His public defender did not intervene or otherwise object, and never challenged the admissibility of J.C.'s statements to the police.[7] *Id.*

At J.C.'s November 30 pretrial hearing, which was more than three weeks after a public defender was appointed, J.C.'s public defender stated that she had not yet met with him and requested a one-week continuance. Resp. App. B at 309. The court granted the continuance and ordered J.C. to be taken into custody and held at the detention center until he changed his behavior, setting bail at $2,500. Id. at 307; App. C. at 610. The public defender finally met with J.C. on December 6, nearly a month following appointment and after J.C. had been incarcerated for nearly a week. App. B. at 330. The following day, J.C. pled guilty and was sentenced to 21 days in detention, with credit for time served. *Id.* at 330, 332.

On January 31, 2017, 11-year-old K.B. was incarcerated in the County juvenile detention center for felony assault, with bail set at $10,000. App. B. at 281-82. The public defender did not object to the bail amount. Because K.B. was 11 years old, she was presumed incapable of

[7] As discussed at page 8, J.C.'s public defender was unaware of United States Supreme Court precedent holding that a 13-year-old child's age and disabilities are legally relevant to the admissibility of statements to police.

committing a crime; the County was required to present evidence of K.B.'s capacity through a hearing within 14 days of K.B.'s appearance. *See* RCW 9A.04.050. Yet no capacity hearing was timely held and the legal violation was not timely raised. *See* Resp. App. B at 277-79. Indeed, K.B.'s public defender did not investigate any possible defenses while K.B. was incarcerated. Nor did the public defender seek K.B.'s release on that basis—or any other—during K.B.'s detention, despite the public defender receiving documents that mental health professionals had been called in numerous times due to K.B.'s suicidal threats or attempts. *See, e.g.*, Resp. App. B at 285-93. K.B. was not released until April 20, 2017—79 days after her arrest—after a crisis center worker reported that the detention center's treatment of K.B. amounted to child abuse. *Id.* at 301-04.

The Office of Public Defense was specifically aware of Plaintiff K.B.'s situation. In March 2017, K.B.'s grandmother Colleen Davison (also a named Plaintiff), mailed the Office of Public Defense a 21-page letter. Resp. App. B at 239-60. Ms. Davison's letter detailed how her 11-year-old granddaughter, who had no prior criminal history, had been incarcerated since January 31 and was continuing to be harmed by the public defense system in Grays Harbor County. *Id.* The letter further described how the public defender failed to communicate with her young

client, failed to investigate the facts or build a defense or a case for release, ignored documents showing the child's prior trauma from parental abuse, as well as ongoing problems in school and with medication and mental health, and instead facilitated attempts to coerce K.B. to plead guilty. *See id.*; *see also* Resp. App. B at 295-96.

The harms suffered while this litigation is pending are not limited to the evidence submitted in support of summary judgment. Respondents are continuing to monitor the situation in Grays Harbor County's juvenile public defense system and are aware of no information suggesting that the situation has improved since the parties' briefing was perfected.

STATEMENT OF GROUNDS FOR DIRECT REVIEW

In light of the serious, ongoing harms discussed above, Respondents join the State's Statement of Grounds for Direct Review pursuant to RAP 4.2(a)(4). Respondents agree that "[i]t is fundamental 'that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."' Statement at 9-10 (quoting *Gideon*, 372 U.S. at 344). The situation in Grays Harbor County is systemic and egregious, and the "fundamental and urgent" constitutional issue presented "requires prompt and ultimate determination." Respondents further agree that this litigation is "of broad public import;" it will affect the interests of

every county in this state, as well as the children residing in Washington that rely on the State to protect their constitutional right to counsel. At present, the State unambiguously believes that it can and must do nothing in the face of a constitutional violation.

As fully explained in Respondents' Answer to the State's Motion for Discretionary Review, this case presents an important, constitutional issue of first impression to this Court. Direct review of this superior court-certified question is appropriate at this stage and apt to drive the resolution of this litigation.

CONCLUSION

This case presents an urgent issue of broad public import, and the ongoing harm to class members due to the County's systemic problems and the State's obtuse inaction demonstrate the need for prompt and ultimate determination. Respondents join the Petitioners and respectfully request that this Court grant direct review.

Dated this 15th day of February, 2019, at Seattle, Washington.

By: */s/ Theresa H. Wang*

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 15th day of February, 2019, I caused a true and correct copy of the foregoing document, "ANSWER TO STATEMENT OF GROUNDS FOR DIRECT REVIEW," to be delivered via electronic notification to the following counsel of record:

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February 15, 2019 - 1:10 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Colleen Davison, et al. v. State of Washington, et al.
Superior Court Case Number:	17-2-01968-0

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