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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.

PETITIONERS' OPENING BRIEF

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I. INTRODUCTION

The Constitution forbids states from prosecuting indigent defendants without providing them counsel. Like many states, Washington assigns both the duty to prosecute crimes and the duty to provide indigent defense to counties, and it provides counties broad taxing authority to fund these functions. The State thus ensures that county officials are fully accountable for the costs of the criminal justice policies they pursue.

Plaintiffs Colleen Davison (as legal guardian for the minor K.B.) and Gary Murrell contend that Washington's approach is unconstitutional. They cite evidence that a single county in Washington, Grays Harbor County, systemically fails to provide a constitutionally sufficient defense to indigent juveniles. But rather than sue Grays Harbor County, Plaintiffs sued the State of Washington and the Washington State Office of Public Defense, insisting that the State has an undefined duty to ensure by unspecified means that Grays Harbor County provides adequate indigent juvenile defense.

The basic legal truism that a plaintiff can obtain relief only by suing the entity that caused harm applies here. Plaintiffs' claim fails because the State assigned by law the duty to provide indigent defense to counties, and has given counties the tools to fulfill that duty. Plaintiffs' cause of action, if any, lies against Grays Harbor County, not the State.

II. ASSIGNMENT OF ERROR

The Thurston County Superior Court erred in entering its order of December 14, 2018, denying the State's motion for summary judgment. In particular, the court erred in concluding that a lawsuit may be permitted *against the State* for violating indigent juveniles' right to counsel when the State has assigned that duty to counties and has provided counties sufficient means to perform this function in a constitutional manner.

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

May the State of Washington be held responsible for violating the constitutional rights of indigent juvenile defendants in one county where the State has statutorily assigned the responsibility of providing indigent defense to counties and has given counties the authorities necessary to perform that function in a constitutional manner?

IV. STATEMENT OF THE CASE

Davison commenced this class action in Thurston County Superior Court, challenging the constitutional adequacy of indigent juvenile defense services provided by Grays Harbor County. CP 33-61. At the time, K.B. was an 11 year-old indigent juvenile facing a charge in juvenile court. The juvenile court assigned a public defender to represent her. Colleen Davison is K.B.'s grandmother and adoptive mother. CP 38. With Ms. Davison and

K.B. as class representatives, the superior court certified a plaintiff class comprising:

> All indigent persons who have or will have juvenile offender cases pending in pretrial status in Grays Harbor County Juvenile Court since April 3, 2017, and who have the constitutional right to appointment of counsel.

CP 558.[1]

Davison alleges that Grays Harbor County systemically fails to provide constitutionally adequate indigent juvenile defense services. CP 34-35. Davison named only the State and OPD as defendants, omitting the entity they allege actually fails to provide constitutionally adequate indigent juvenile defense, Grays Harbor County. CP 39.

Davison initially alleged three causes of action, one of which the trial court dismissed at an early stage. The dismissed count alleged that OPD is authorized by state law to remedy the failure of Grays Harbor County to satisfy constitutional standards, but has failed to do so despite knowing of the problem. CP 59. The trial court dismissed that cause of action as lacking any basis in law. CP 122-24; VRP 19: 2-14, Nov. 3, 2017 (2017 VRP). The remaining counts allege the State is itself required to provide

[1] The First Amended Complaint describes Plaintiff Gary Murrell as a Grays Harbor County resident and state and local taxpayer. Murrell participates only as a taxpayer, does not claim to be a member of the class, and makes no allegations regarding the adequacy of representation of any individual. CP 39.

constitutionally adequate indigent juvenile defense services under the federal and state constitutions, respectively. CP 58-59.

The parties filed cross motions for summary judgment. Davison's motion argued that the State has both a constitutional and a statutory duty to remedy any deficient juvenile public defense system provided by a county. CP 130. Davison submitted argument and evidence relating to the nature of the tasks necessary to provide constitutionally adequate public defense and to their contention that Grays Harbor County systemically fails to do so. CP 130-61; CP 575-1220.[2]

The State, in contrast, argued this case should be dismissed on summary judgment because Davison sued the wrong party and the State has committed no constitutional violation. CP 164-82. The State argued that public defense services are by law county functions and that the State has provided counties sufficient taxing authority to adequately fund public defense. *See, e.g.*, CP 168-171; CP 484-88; CP 504-07. The State supported its motion with declarations addressing Grays Harbor County's ability to provide constitutionally sufficient indigent juvenile defense. CP 183-315.

[2] The declarations and related materials that Davison submitted in support of summary judgment appear in the record pursuant to Davison's Cross-Designation of Clerk's Papers. CP 1221-22. Those materials are irrelevant to the narrow issue that the trial court certified for review, and therefore may be disregarded for purposes of this proceeding. *See* VRP 27:10-30:6, Dec. 14, 2108 (2018 VRP) (trial court's oral ruling and certification for interlocutory review).

The State also argued that the question of whether Grays Harbor County does or does not provide constitutionally sufficient indigent defense services was not properly before the court without Grays Harbor County being joined as a party. CP 356-62; CP 417-21; *see also* CP 86-89; CP 118-20.

The superior court denied the State's motion for summary judgment and declined to rule on Davison's motion, while certifying its ruling as meriting interlocutory review. CP 511-13. The trial court observed the contrast between the issues that the two sides addressed. The court observed that Davison's motion focused on the merits of whether the services in Grays Harbor County failed to meet constitutional standards, but the State focused on whether a lawsuit against the state was the appropriate vehicle to address the merits. VRP 4:9-5:1, Dec. 14, 2018 (2018 VRP). Given that contrast, the trial court narrowed the issue for argument:

> Which means that the one issue that I want to hear oral argument about is whether or not under any set of facts or circumstances in Washington State a lawsuit of this nature may be permitted, that is one for alleged systemic and significant violations of the right to counsel in juvenile defense may be brought against the state only without also suing or instead suing the county. That is the issue of the day that I need to hear oral argument on.

2018 VRP 5:2-9. The court's oral ruling was similarly limited. Without addressing Davison's factual contentions regarding indigent juvenile

defense in Grays Harbor County,[3] the court addressed only the question of whether a lawsuit against the state is available as a vehicle for seeking relief:

> 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. . . . [T]his 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.

2018 VRP 28:6-17.

Based upon the superior court's certification that interlocutory review is appropriate under RAP 2.3(b)(4), the State sought direct discretionary review. CP 514-15. This Court granted that review.

V. SUMMARY OF ARGUMENT

State law assigns to counties the functions of prosecuting crimes providing indigent defense, and provides counties broad taxing authority to fund these functions. While OPD provides assistance to county public defenders, the Legislature has assigned no state agency any oversight or

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[3] The court explained the scope of its ruling:

> In this instance I think it is cleanest to say that I am ruling on the state's motion for summary judgment and reserving or mooting—whichever way I would go, I'm not touching upon the plaintiffs' motion for summary judgment at this time.

2018 VRP at 27:16-20.

control of the manner in which counties provide indigent juvenile defense. The narrow question before the Court is whether the State can be held responsible for violating the Constitution if a single county allegedly fails to provide constitutionally sufficient indigent juvenile defense. The State's decision to provide such service locally is presumptively valid, and so a claim against the State could only arise if it is impossible for the county to perform its duties. The State accepts that the State could become responsible if it had denied Grays Harbor County the means to perform its statutory duty of providing indigent juvenile defense. But Davison concedes that Grays Harbor County faces no such incapability.

Washington's criminal justice system operates locally. Counties and cities provide local law enforcement, and counties provide prosecutors, court clerks, court staff, and physical facilities to resolve criminal cases. The level of indigent juvenile defense is directly determined by local decisions regarding law enforcement. Filing charges in juvenile court necessitates providing public defense services, just as it requires law enforcement, prosecutors, and court staff. Assigning responsibility for all of these functions to the same entity ensures that local governments make charging and other decisions based on their full costs.

Parties bringing a case may sue only the entity that caused their alleged harm. Plaintiffs therefore must sue the party that violates a rule of

law. This black-letter principle requires that Davison proceed against Grays Harbor County, not against the State.

For these reasons, this Court should reverse the superior court and remand for further proceedings consistent with this conclusion.

VI. ARGUMENT

A. Standard of Review

This Court engages in the same inquiry as the trial court when reviewing a summary judgment order, and reviews all questions of law de novo. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005). Summary judgment is appropriate when there are no disputes of material fact and the moving party is entitled to judgment as a matter of law. CR 56.

B. The Constitutional Violation Plaintiffs Allege Is by Grays Harbor County, Not the State

This case begins with a simple proposition, which the State wholly supports: "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." *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). The same is true of indigent juveniles charged in juvenile court. *State v. Weber*, 127 Wn. App. 879, 890, 112 P.3d 1287 (2005). But *Gideon* nowhere proclaims a constitutional mandate to provide indigent defense services in any particular manner. Nor

does the U.S. Constitution provide any additional clarity on how indigent defense must be funded or administered. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defen[s]e." U.S. Const. amend. VI.

In Washington, choices as to how to provide a particular service are a matter of legislative discretion. *See City of Hoquiam v. Grays Harbor Cty.*, 24 Wn.2d 533, 538, 166 P.2d 461 (1946) (Legislature has the constitutional power to determine the authority of counties); *see also Wash. State Farm Bur. Fed'n v. Gregoire*, 162 Wn.2d 284, 300-01, 174 P.3d 1142 (2007) (the Legislature possesses the plenary authority to set policy as it chooses, except as constitutionally limited); *see also* Const. art. XI, § 4 (tasking the Legislature with developing a system of county government).

As detailed in Part C, below, public defense is a function of local government, not the State. The State has provided for indigent juvenile defense, and has created statutes through which counties provide those services, just as other elements of the criminal justice system are provided through counties.

It therefore follows, as detailed in Part D, below, that the State bears responsibility for constitutional failings in the provision of indigent juvenile defense only if the State's delegation of the function to counties is itself deficient. That is to say, no claim can arise against the State unless Grays

Harbor County is *incapable*—and not merely unwilling—to provide constitutionally sufficient juvenile defense. But Davison effectively concedes that the State has provided sufficient authority to counties to provide adequate and even "superior" indigent defense. CP 57-58; CP 400, 407. Accordingly, no relief can be granted against the State in this case.

While Davison has presented extensive evidence about the alleged inadequacies of indigent juvenile defense in Grays Harbor County none of that evidence is relevant to the real question presented here: whether the State is liable for the County's alleged failings. The State offered no argument before the trial court in response to Davison's evidence about indigent juvenile defense in Grays Harbor County because the duty to provide those services is assigned by law to Grays Harbor County and not to the State. The same would be true if this case proceeds further on remand before the superior court, where any decision would not bind Grays Harbor County. *City of Seattle v. Fontanilla*, 128 Wn.2d 492, 502, 909 P.2d 1294, 1300 (1996) (an entity is not bound by a judgment unless made a party by service of process). Accordingly, the sufficiency of indigent juvenile defense in Grays Harbor County is not before this Court, and any argument or evidence concerning it is irrelevant to the narrow question presented.

Ultimately, as detailed further below, Davison's remedy if indigent juvenile defense is truly inadequate in Grays Harbor County is to sue the

party causing her alleged harm, Grays Harbor County. For Davison to argue otherwise is to argue that state statutes don't matter, and courts may freely shift duties from counties to the state. States possess plenary authority to divide functions between state and local government as they choose, including indigent public defense services. *Remick v. Utah*, No. 2:16-cv-00789-DN-DBP, 2018 WL 1472484, at *16 (D. Utah, Mar. 23, 2018) (unpublished). So long as the State gives counties the responsibility and authority to provide constitutionally adequate indigent juvenile defense, the State has not violated the rights of indigent defendants.

C. Public Defense in Washington is a Local, Not State, Function

1. State law assigns to counties the function of providing counsel for indigent juveniles

Under state law, counties, not the State, are obligated to provide indigent juvenile defense. RCW 36.26.020, RCW 10.101.020, RCW 10.101.030, RCW 43.10.230(3), CrR 3.1(d), Grays Harbor County Superior Court LCrR 3.1(d)(4)(a). This has been so for well over a century.

A 1909 act provided:

> Whenever a defendant shall be arraigned upon the charge that he has committed any felony, and shall request the court to appoint counsel to assist in his defense, and shall by his own oath or such other proof as may be required satisfy the court that he is unable, by reason of poverty, to procure counsel, the court shall appoint counsel, not exceeding two, for such defendant, *to be paid upon its order by the county in which such proceeding is had*, compensation not

> exceeding ten dollars per day for each counsel, for the number of days such counsel is actually employed in court upon the trial.

Laws of 1909, ch. 249, § 53 (emphasis added).

Shortly after *Gideon*, the Legislature adopted an additional act to further guide counties. Laws of 1969, ch. 94 (enacting statutes now codified in RCW 36.26); CP 310-13; *see also* Op. Att'y Gen. 6, at 5 (1977) (reciting the historical fact that public defense was a county function long before *Gideon*). The 1969 act requires counties to provide public defense services either on their own, through a local public defense office or by contract, or through multi-jurisdictional public defense districts.[4] Op. Att'y Gen. 6, at 5 (1977). RCW 36.26.020. Under any of these approaches, the county, and not the State, fixes the compensation of public defenders and staff, and provides office space, furniture, equipment, and supplies. RCW 36.32.060. Counties, further, adopt "standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office." RCW 10.101.030; *see also In re Disciplinary Proceeding Against Michels*, 150 Wn.2d 159, 174, 75 P.3d 950 (2003) (citing RCW 10.101.030 for the proposition that "[e]ach county or city

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[4] The use of a public defender district "is one particular, legislatively authorized, 'tool' by which those counties desiring to do so may discharge their statutory and constitutional responsibilities in this regard." Op. Att'y Gen. 6, at 5 (1977); *see also* RCW 36.26.900 (public defender districts are not the exclusive means by which counties provide public defense).

operating a criminal court holds the responsibility of adopting certain standards for the delivery of public defense services, with the most basic right being that counsel shall be provided.").[5]

The Legislature repealed the original 1909 statute assigning public defense functions to counties in 1984, as part of a bill that repealed statutes that had been superseded by court rule. Laws of 1984, ch. 76, § 20. This did not change the nature of public defense as a county function. When the legislature enacted chapter 36.26 in 1969, RCW 10.01.110 read substantially as it had in 1909, requiring counties to pay for public defense. Laws of 1965, ch. 133, § 1 (amending RCW 10.01.110 to the form in which it remained in 1969). The statutes described above make sense only in light of the acceptance of public defense as a county function. Longstanding practice, as well as current statutory language, indicate that the law requires counties to provide indigent juvenile defense at county expense. *See In re Welfare of J.D.*, 112 Wn.2d 164, 170, 769 P.2d 291 (1989) (holding counties responsible for providing the costs of appointed counsel and guardian ad litem services in juvenile dependency and termination actions, before

[5] Trial courts are also authorized to appoint counsel other than the public defender for good cause, but "the county in which the offense is alleged to have been committed shall pay, such attorney reasonable compensation and reimbursement for any expenses . . . ." RCW 36.26.090. And a small minority of cases are prosecuted by the Attorney General, and only in those cases might the state pay defense costs associated with the prosecution, if an agreement with the local jurisdiction so provides. RCW 43.10.230.

statutory transition to OPD of responsibility for providing counsel for parents in such actions).

The court rule that superseded RCW 10.01.110 did not alter the prior legislative choice, dating to 1909, that counties must provide public defense. "Unless waived, a lawyer shall be provided to any person who is financially unable to obtain one without causing substantial hardship to the person or to the person's family." CrR 3.1(d)(1). Public defense costs are paid by "the court, or a person or agency to which the administration of the program may have been delegated by local court rule[.]" CrR 3.1(f)(2). The applicable local court rule in Grays Harbor County assigns that role to the county court administrator. Grays Harbor County Superior Court LCrR 3.1(d)(4)(a).

What is true for adult criminal indigent defense is true for indigent juvenile defense as well. JuCR 9.2(d) (requiring the court to appoint counsel for a juvenile). The statute governing the determination of indigency for purposes of the right to counsel applies in the same way to "criminal, *juvenile*, involuntary commitment, and dependency cases, and any other case where the right to counsel attaches." RCW 10.101.020(1) (emphasis added); *see also* RCW 10.101.050 (providing supplemental state funding for improvement of public defense "for both juveniles and adults."). Thus,

state law assigns to Grays Harbor the function of providing counsel for indigent juveniles just as it does for adults.

2. The Office of Public Defense assists public defenders, but lacks statutory authority to direct the manner in which counties provide public defense

Davison recognizes "OPD is a highly competent and well-run agency dedicated to improving public defense in Washington." CP 36. Davison claims, in part, that suing the State can be a method of improving the quality of public defense in Grays Harbor County based on the notion that OPD is empowered by statute to compel Grays Harbor County to change its ways. CP 95-99; CP 155-61. This claim is without statutory foundation.

OPD is an independent agency of the judicial branch. RCW 2.70.005. OPD provides services relating to indigent legal services in several contexts. RCW 2.70.020. With regard to trial court criminal indigent defense, OPD performs those functions ascribed to it in RCW 10.101. RCW 2.70.020(1)(a). OPD's role under RCW 10.101 is limited to the provision of supplemental funding to counties and cities through a grant program. RCW 10.101.070 (counties); .080 (cities). OPD also acts as a resource to local programs by providing "oversight and technical assistance to ensure the effective and efficient delivery of services in [OPD's] program areas[.]" RCW 2.70.020(4).

This limited role in trial court criminal indigent defense stands in sharp contrast to the direct responsibility the Legislature has assigned to OPD for other services. RCW 2.70.020(1)(b) (appellate indigent defense), .020(1)(c) (representation of parents in dependency and termination actions), .020(1)(f) (representation of respondents in petitions for commitment as sexually violent predators (SVP)). By statute, OPD can exercise supervisory authority under the terms of contracts with attorneys who provide appellate representation, parents' representation, and SVP representation comparable to the role of counties with regard to trial court public defense. These differences in statutory approach suggest a limited role for OPD relating to trial court indigent defense. *See Simpson Inv. Co. v. Dep't of Rev.*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (the use of different terms in the same statute indicate a difference in meaning).

While OPD provides supplemental funding to counties, and may fulfill an advisory role for local public defense programs, OPD may not direct Grays Harbor County to improve the quality of its public defense services, the focus of this lawsuit. The trial court agreed. 2017 VRP 19:2-14; 2018 VRP 3:25-4:2.

3. The State has good reasons to provide public defense through the same level of government that makes related criminal justice policy decisions

The legislative decision to provide public defense services through

the same local governments that investigate and prosecute most crimes, and that operate the courts that adjudicate them, reflects the interrelationship among functions within the criminal justice system. The criminal justice system is operated locally, in part by constitutional mandate. *See* Const. art. XI, § 5 (establishing the offices of sheriff, county clerk, and prosecuting attorney as county offices). The constitution envisions a system under which local officials, accountable to local voters, will make many policy choices about law enforcement. Public defense functions are a direct consequence of those local choices. It therefore makes sense that state law treats public defense as a component of a single comprehensive criminal justice system established and provided for the most part at the local level.

County commissioners and prosecutors make judgments about the level and extent of law enforcement they want and need based on local conditions and policy. The scope of local law enforcement affects the scope of arrests for the county jail or juvenile detention. Those arrests, and the exercise of charging discretion by the locally-elected prosecutor, determine the number of deputy prosecutors needed. This in turn affects the size and staffing of local courts and clerks' offices. And—critically here—the volume of juvenile offenses the prosecutor charges directly determines the scope of indigent juvenile services required. To carve out public defense of juveniles as a single component provided by the State would, as this Court

expressed it, "camouflage" the true costs involved in important public policy decisions. *State v. Howard*, 106 Wn.2d 39, 44, 722 P.2d 783 (1985). The State interest in requiring counties to comprehensively provide for the level of law enforcement desired locally supports the Legislative decision to assign public defense services to counties.

D. Davison Cannot Seek Relief Against the State Without First Demonstrating That the State Denies Grays Harbor County the Means to Meet Its Obligation to Provide Indigent Juvenile Defense

1. The State is not responsible for a county's failure to fulfill county duties

The Washington Constitution treats counties and cities as separate political subdivisions of the State. Const. art. XI, §§ 4, 10. This "home rule" principle "seeks to increase government accountability by limiting state-level interference in local affairs." *Watson v. City of Seattle*, 189 Wn.2d 149, 166-67, 401 P.3d 1 (2017) (citing Hugh Spitzer, *"Home Rule" vs. "Dillon's Rule" for Washington Cities*, 38 Seattle U. L. Rev. 809 (2015)). Counties and cities exercise their own authority, accountable to their voters and to general state law. Const. art. XI, § 11. Local governments making local decisions are not subject to the directives of state agencies, except where provided by statute. *See, e.g.*, *Mun. of Metro. Seattle v. O'Brien*, 86 Wn.2d 339, 345, 544 P.2d 729 (1976) (whether to levy a tax was a local decision).

Counties are responsible for performing functions that the Legislature statutorily assigns to them, as it has with public defense. "Counties are considered separate political subdivisions with particular powers conferred by constitution and statute." *Mochizuki v. King Cty.*, 15 Wn. App. 296, 298, 548 P.2d 578 (1976). Local entities are separate from the State, established partly to assist the State in performing public functions, but also to regulate their own local affairs. *See Columbia Irrig. Dist. v. Benton Cty.*, 149 Wash. 234, 235, 270 P. 813 (1928) (discussing municipal corporations). Even where a state agency develops rules on a particular subject, a county remains responsible for fulfilling its own statutory duties. *Whatcom Cty. v. Hirst*, 186 Wn.2d 648, 681, 381 P.3d 1 (2016) (county remained responsible for determining the availability of water for building projects, even though the Department of Ecology had rules related to the topic); *see also In re Kittitas Cty. for a Declaratory Order*, ___ Wn. App. 2d ___, 438 P.3d 1199, 1202 (Apr. 11, 2019), *petition for review pending*, Washington Supreme Court No. 97191-9 (county remained responsible for enforcing its own zoning ordinances despite state laws regulating the industry involved).

Given that the State has assigned the duty to provide public defense to counties and has provided them the means to fund that service, as detailed below, the State cannot be held liable to the Grays Harbor County's alleged

failings. A "person aggrieved by the application of a legal rule does not sue the rule *maker*—Congress, the President, the United States, a state, a state's legislature, the judge who announced the principle of common law. He sues the person whose acts hurt him." *Quinones v. City of Evanston, Ill.*, 58 F.3d 275, 277 (7th Cir. 1995). Lawsuits typically resolve disputes brought by one party against the party or parties alleged to have caused harm. *See id.*; *see also Options for Cmty. Growth, Inc. v. Wisc. Dep't of Health & Family Servs.*, No. 03-cv-1275, 2006 WL 2645185, at *3 (E.D. Wisc. Sept. 14, 2006) (unpublished) (state was not responsible for the actions taken by a city to comply with a state rule).

As in *Quinones*, naming the State in this case avails Davison of nothing, since Davison could be granted full relief through an action brought solely against the party that allegedly caused the harm—Grays Harbor County. *See, e.g.*, *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1132-33 (W.D. Wash. 2013) (discussing municipal responsibility for indigent defense in municipal misdemeanor cases). After all, if a county fails to provide constitutionally adequate indigent juvenile defense, that failure will most obviously constitute "the direct and predictable result of the deliberate choices of [local] officials charged with the administration of the public defense system." *Id.* at 1132.

Indeed, without the participation of Grays Harbor County, it will be impossible for Davison to prove that the county's indigent juvenile defense services are systemically deficient. Even when Plaintiffs offer evidence in support of their factual claims, in the absence of the entity whose actions are at issue Davison cannot prove their claims so as to bind anybody. *See Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 351, 144 P.3d 276 (2006) (discussing the burden of presenting evidence on summary judgment).

In a case with parallels to this one, a federal court denied relief against the Commonwealth of Pennsylvania on the basis that commonwealth officials knew or should have known that local officials had violated the plaintiff's constitutional rights and that the officials had the authority to prevent those violations. *Conroy v. City of Philadelphia*, 421 F. Supp. 2d 879, 882 (E.D. Pa. 2006) (challenging the city's application of a test for police officers conducted pursuant to a state rule). The court rejected the argument that the Commonwealth, rather than the city, was responsible for any harm to the plaintiff because the state did not so control the city's action as to become responsible for it. *Id.* at 883.

A suit by a federal agency against the State of Illinois met the same fate. The federal Equal Employment Opportunity Commission sued the State of Illinois alleging that teachers had been discriminated against based

on age. The federal court termed this "a curious suit" because "[t]he teachers were not employed by the state, but by local school districts." *Equal Emp't Opportunity Comm'n v. Illinois*, 69 F.3d 167, 168, (7th Cir. 1995). The court observed that the suit could have yielded complete relief if the agency had sued the employing school district. *Id.* But because the suit proceeded only against the State, which had done nothing more than fail to repeal a statute after it was preempted by federal law, no relief was available. *Id.* at 168-69. Nor did the State so extensively control the actions of the local government in that case as to become responsible for those actions. *Id.* at 171. Similarly here, the state law makes indigent juvenile defense a county function, and the State provides counties with the means of performing that function, but the State in no way dictates the specific actions a county might take to do so. *See, e.g.*, Op. Att'y Gen. 6, at 5 (1977) (discussing the multiple ways in which counties may discharge their public defense duties).

In a further example, plaintiffs obtained no relief when they sued the Governor of Illinois in an attempt to enforce a state open government law against a state commission that was not under the Governor's direction because it was part of the legislative branch. *Illinois Press Ass'n v. Ryan*, 195 Ill.2d 63, 743 N.E.2d 568, 569 (Ill. 2001). The court in that case reasoned that since the Governor had no control over the commission at issue, there was no actual controversy between the parties. *Id.* at 569-70;

see also Sherman v. Township High Sch. Dist. 214, 404 Ill. App. 3d 1101, 937 N.E.2d 286, 296-97 (Ct. App. 2010) (state board did not have a sufficient role in causing the alleged harm to bear responsibility for local action); *and see* CP 180 (arguing below that Davison lacks standing for much the same reason).

Similarly, the State of Indiana was not held responsible for the conduct of a local court in providing an interpreter for a deaf individual merely on the basis that the Indiana Supreme Court had promulgated a rule on providing interpreters. *Prakel v. Indiana*, 100 F. Supp. 3d 661, 674 (S.D. Ind. 2015). Once again, "[a] person aggrieved by the application of a legal rule does not sue the rule *maker* . . . . He sues the persons whose acts hurt him." *Id.* (quoting *Quinones*, 58 F.3d at 277). Since the state actors had no role in dictating the specific actions of the local officials, the state was not responsible for the injury the local officials allegedly had caused. *Id.* at 675. Davison's claims here fail for the same reasons.

2. Cases from other states do not support a state duty to remedy a county's alleged deficiencies

Davison relies upon a few cases from other jurisdictions for the proposition that the State cannot delegate responsibility for indigent juvenile defense. None of these cases consider in detail the source of any alleged duty upon the State to step in when indigent juvenile defense is

lawfully a county function and when the State provides counties with the means to provide that service. None of the cases on which Davison relies consider the arguments presented in the prior section above. Those cases therefore lack persuasive value because they simply note, without analysis, that *Gideon* obligated the states to provide public defense. *See, e.g.*, *Tucker v. Idaho*, 162 Idaho 11, 394 P.3d 54, 64 (2017); *Duncan v. Michigan*, 284 Mich. App. 246, 261, 774 N.W.2d 89 (2009), *vacated by* 486 Mich. 1071, 784 N.W.2d 51 (2010), *reinstated by* 488 Mich. 957, 866 N.W.2d 407 (2010), *reconsideration denied* 488 Mich. 1011, 791 N.W.2d 713 (2010); *Hurrell-Harring v. New York*, 15 N.Y.3d 8, 26, 930 N.E.2d 217, 904 N.Y.S.2d 296 (Ct. App. 2010). And none of those cases examined Washington's statutes and court rules or the policy reasons behind them.

It is not sufficient merely to recite the proposition that the responsibility to provide public defense is assigned initially to the State. The State's plenary authority to divide functions between the State and its political subdivisions is a policy judgment that the Legislature is free to make, so long as doing so provides a constitutionally adequate service. *See Hoquiam*, 24 Wn.2d at 538; *Farm Bureau*, 162 Wn.2d at 290. A federal court sitting in Utah agreed, concluding that while *Gideon* mandates public defense services for indigents, it does not micromanage the structure by which it is provided. *Remick*, 2018 WL 1472484, at * 16 (unpublished).

The strongest case from Davison's perspective provides inadequate support for the notion that the State is responsible for Grays Harbor County's alleged failure to provide adequate public defense services, even if the county is capable of satisfying constitutional standards. The Idaho court in *Tucker* concluded, without analysis, that the State cannot delegate public defense duties to counties. *Tucker*, 162 Idaho at 21. The Idaho court likened public defense to public education, relying on a case about school funding. *Id.* (citing *Osmunson v. State*, 135 Idaho 292, 17 P.3d 236, 240 (2000)). But the court in *Osmunson* acknowledged that the legislature can reasonably assign responsibility to a local entity in the first instance. *Osmunson*, 135 Idaho at 296. The Idaho court required that parties challenging the sufficiency of local funding first exhaust remedies with the responsible local entity. *Id.* The state would become responsible, on the Idaho court's reasoning, only "[i]f the court determines that the available resources are insufficient to provide constitutionally required services[.]" *Id.*

A Michigan case that Davison cited below similarly fails to support the notion that the entity charged by law with the role of providing public defense need not be a party to a case challenging the sufficiency of that very service. *Duncan*, 284 Mich. App. at 303. The confusing history of *Duncan* and its multiple appeals and changes make it unpersuasive in Washington.

Still, the *Duncan* opinion that Davison cited below explained that a plaintiff hoping to hold the State responsible for deficiencies in public defense provided at the local level must prove not only that such deficiencies are widespread and systemic, but also must show a causal connection to the State itself. *Id. Duncan* accordingly provides no authority for Davison's proposition that a suit against the State can be a vehicle for addressing allegedly deficient service by the absent Grays Harbor County unless Davison can first establish a causal connection to some action of the State. *Id.* Davison posits no such causal connection.

Both the Idaho and the Michigan courts thus effectively endorsed the State's position in this case: the State may assign public defense functions to counties as it does with other components of the criminal justice system, and the State becomes responsible for those services only if it fails to provide the counties with the means to fulfill the assigned responsibilities.

Furthermore, cases from other states turned on broad challenges to the system of paying for public defense in those states, and not merely to the services of a specific, absent, county. *Tucker*, 162 Idaho at 15-16 (describing the challenge as relating to Idaho's statewide system); *Hurrell-Harring*, 15 N.Y.3d at 15 (challenge related to services provided by multiple counties); *Duncan*, 284 Mich. App. at 253 (challenging indigent

defense in multiple counties). In contrast, this case is limited to the allegation that nonparty Grays Harbor County systemically fails to provide sufficient defense services for indigent juveniles. CP 33. Davison left Grays Harbor County out of this lawsuit even though it directly involves Grays Harbor County and could ultimately affect obligations on Grays Harbor County.

Another out-of-state case supports the conclusion that Davison cannot look directly to the State for relief of a problem caused by a county. *See State v. Quitman Cty.*, 807 So.2d 401, 407-08 (Miss. 2001). In that case, a county argued that it simply could not afford to provide adequate public defense services. *Id.* The court reasoned that the state would bear the burden of providing public defense services only if the county *could not* provide those services. It remanded for a factual determination as to the county's capability of providing the services. *Id.* at 408. Following the same line of reasoning, the State in this case could bear secondary responsibility for providing indigent juvenile defense only if Davison first proved Grays Harbor County incapable of doing so. Davison failed to prove Grays Harbor County's inability to provide constitutionally adequate indigent juvenile defense under the mechanisms codified in state statutes.

3. The State does not deny responsibility if it were to fail to provide counties with the means to perform constitutionally mandated functions

a. Davison concedes that Grays Harbor County has the resources necessary to provide constitutionally adequate indigent juvenile defense

Davison acknowledged in the First Amended Complaint that the resources the State makes available to counties are sufficient for the counties to provide constitutionally adequate, "or superior," public defense. CP 57. Some counties—operating under the same state statutes as does Grays Harbor County—even provide what Davison describes as "stellar service." CP 58. Nor does Davison challenge the propriety of the Legislature's choice to assign public defense as a county function. CP 400. Davison concedes that Grays Harbor County "likely could but is simply not providing the 'assistance of counsel' for juveniles."[6] CP 407.

Davison has thus conceded the very facts that might, under other circumstances, have supported an argument that Grays Harbor County is incapable of providing constitutionally adequate indigent juvenile defense. This concession is fatal to Davison's case.

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[6] The quoted sentence continues, " . . . and the State well knows that." CP 407. What the State knows or does not know is irrelevant to the question of whether the State bears any legal duty to step in regarding a function that state law assigns to another entity, unless the State's delegation is ineffective because of a lack of resources for the county to fulfill its function.

b. State law provides counties with the means to provide public defense

State law provides local governments with sources of revenue to perform the functions assigned to them by law. CP 186-263. Even if Davison had not conceded that the resources available to counties are sufficient for them to provide "superior" or "stellar" indigent juvenile defense, CP 57-58, the record contains no indication that Grays Harbor County is unable to fulfill its assigned role. The state has authorized the following revenue sources counties could use to pay for public defense: general property taxes (RCW 84.52.043(1)); criminal justice property tax levy (RCW 84.52.135);[7] retail sales and use tax (RCW 82.14.030); retail sales and use tax for criminal justice (RCW 82.14.340); retail sales and use tax for juvenile detention facility (RCW 82.14.350);[8] retail sales tax for public safety (RCW 82.14.450);[9] and gambling excise tax (RCW 9.46.110). In sum, the State has provided counties with broad taxing authority, from which the county has the means to fulfill the functions assigned to it by law, including public defense.

OPD also administers a grant program that distributes state funds to cities and counties to supplement public defense. OPD "shall disburse

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[7] Grays Harbor County has not levied this tax. *See* CP 265-97.
[8] Grays Harbor County has not levied this tax. *See* CP 265-97.
[9] Grays Harbor County has not levied this tax. *See* CP 265-97.

appropriated funds to counties and cities for the purpose of improving the quality of public defense services." RCW 10.101.050. State law establishes a system for OPD to distribute specified state funds to cities and counties. RCW 10.101.070 (counties), .080 (cities). Grays Harbor County receives grant funding under this program. CP 315. "In order to receive funds, each applying county or city must require that attorneys providing public defense services attend training provided by [OPD] at least once per calendar year." RCW 10.101.050. Counties and cities must report expenditures for public defense to OPD, "including per attorney caseloads, and shall provide a copy of each current public defense contract to [OPD] with its application." *Id.* OPD must distribute the state funds according to a statutory formula, with ninety percent of the state-appropriated funds going to counties and ten percent to cities. RCW 10.101.070, .080. State law prohibits OPD from providing direct representation to clients, leaving that a local function. RCW 2.70.020(7).

All of these statutory revenue sources provide counties with the means to provide constitutionally adequate – even "stellar"—public defense, and Plaintiffs have failed to establish otherwise. Plaintiffs have thus failed to show that the State, as opposed to the County, is liable for violating their constitutional rights.

VII. CONCLUSION

This Court should reverse the decision of the superior court and hold that no challenge to a single county's provision of indigent juvenile defense may lie against the State unless the state law leaves the county incapable of—and not merely unwilling to—provide constitutionally adequate service.

RESPECTFULLY SUBMITTED this 21st day of June 2019.

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